

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
 J. Thomas Rosch
 Edith Ramirez
 Julie Brill
 Maureen K. Ohlhausen

In the Matter of

CVS CAREMARK CORPORATION,
a corporation.

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) **DECISION AND ORDER**

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) **DOCKET NO. C-4357**
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The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 41 et seq.;

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the

Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent CVS Caremark Corporation is a Delaware corporation with its principal office or place of business at One CVS Drive, Woonsocket, Rhode Island 02895.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “Respondent” or “CVSC” means CVS Caremark Corporation, a corporation, its successors and assigns and its officers, agents, representatives, and employees.
2. “Medicare Part D prescription drug” means a covered Part D drug, as defined in 42 U.S.C. § 1395w-102(e), that can only be obtained by means of a physician’s or other authorized health practitioner’s prescription and that is dispensed under a Medicare Part D prescription drug plan, as defined below.
3. “Medicare Part D prescription drug plan” means Medicare Part D prescription drug coverage that is offered pursuant to a contract between the Centers for Medicare and Medicaid Services (CMS) and Respondent.
4. “Medicare Part D” means “qualified prescription drug coverage” administered by the United States federal government pursuant to the Medicare Prescription Drug Improvement and Modernization Act (“MMA”), 42 U.S.C. § 1395w *et seq.*
5. “Medicare Part D coverage gap” means the gap that occurs after a Medicare Part D beneficiary passes the initial coverage limit at which point the prescription drug plan does not cover any cost of prescription drugs until the beneficiary’s out of pocket costs reach a statutory threshold, pursuant to the MMA, 42 U.S.C. § 1395w-102(b). The gap is often referred to as the “donut hole.”
6. “Plan Finder” means CMS’ online tool (available at www.medicare.gov/find-a-plan) used by beneficiaries to compare and select from among available Medicare Part D prescription drug plans in their area.
7. “Beneficiary” means any Part D eligible individual as defined in 42 U.S.C. § 1395w-151(a)(4).

8. “Enrollee” means any beneficiary enrolled in the RxAmerica prescription drug plans who was not eligible for a full low-income subsidy as set forth in 42 U.S.C. § 1395w-114(a)(1).
9. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
10. The terms “and” and “or” in this order shall be construed conjunctively or disjunctively respectively as necessary, to make the applicable sentence or phrase inclusive rather than exclusive.

I.

IT IS ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, in connection with the marketing, advertising, promotion, distribution, offer for sale, sale or administration of Medicare Part D prescription drugs and Medicare Part D prescription drug plans, in or affecting commerce, shall not misrepresent, or assist others in misrepresenting, in any manner, expressly or by implication, the price or cost of Medicare Part D prescription drugs or other prices or costs associated with Medicare Part D prescription drug plans.

II.

IT IS FURTHER ORDERED that Respondent shall pay to the Federal Trade Commission the sum of \$5 million. This payment shall be made in the following manner:

- A. This payment shall be made by wire transfer made payable to the Federal Trade Commission, the payment to be made no later than five (5) days after the date that this order becomes final.
- B. In the event of default on any obligation to make payment under this order, interest, computed pursuant to 28 U.S.C. § 1961(a), shall accrue from the date of default to the date of payment.
- C. All funds paid to the Commission pursuant to this order shall be deposited into an account administered by the Commission or its agents to be used for equitable relief, including but not limited to consumer redress, and any attendant expenses for the administration of such equitable relief. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after the redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Respondent’s practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement. Respondent shall have no right to challenge the Commission’s

choice of remedies under this Section. Respondent shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payment under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment.

- D. Respondent relinquishes all dominion, control, and title to the funds paid to the fullest extent permitted by law. Respondent shall make no claim to or demand return of the funds, directly or indirectly, through counsel or otherwise.
- E. Respondent agrees that the facts as alleged in the Complaint filed in this action shall be taken as true without further proof in any bankruptcy case or subsequent civil litigation pursued by the Commission to enforce its rights to any payment or money judgment pursuant to this final order, including but not limited to a nondischargeability complaint in any bankruptcy case. Respondent further stipulates and agrees that the facts alleged in the Complaint establish all elements necessary to sustain an action pursuant to, and that this order shall have collateral estoppel effect for purposes of, Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A).
- F. In accordance with 31 U.S.C. § 7701, Respondent is hereby required, unless it has done so already, to furnish to the Commission its taxpayer identifying numbers, which shall be used for the purposes of collecting and reporting on any delinquent amount arising out of Respondent's relationship with the government.
- G. Proceedings instituted under this Section are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Commission may initiate to enforce this order. Nothing in this order shall have precedential or preclusive effect as to any claim or issue asserted by any third party in any other proceeding.

III.

IT IS FURTHER ORDERED that Respondent shall, no later than thirty (30) days after the date of entry of this order, deliver to the Commission a list in the form of a declaration submitted under penalty of perjury in accordance with 28 U.S.C. § 1746, of (1) all RxAmerica Medicare Part D enrollees who purchased at least one Medicare Part D generic prescription drug from Walgreens or CVS pharmacies, between June 1, 2007 and December 31, 2008.

- A. Respondent shall produce the list electronically in Excel, Access, or SQL and formatted to include (if available) in separate fields for each enrollee the following: (1) First Name, Middle Name, Last Name, Alias-Surname; (2) last known mailing address recorded as Address 1, Address 2, City, State, Zip Code and Country; (3) using a reasonable methodology provided to the Commission the total amount paid by the enrollee for prescription drugs, including but not limited to copayments, coinsurance, deductibles, and Medicare Part D coverage gap

expenses; (4) the total amount the enrollee would have paid if his or her generic prescription drug purchases at CVS Pharmacy or Walgreens had been adjudicated at the RxAmerica MAC price applicable for the day the claim adjudicated instead of at the actual adjudicated price; this amount shall include but not be limited to copayments, coinsurance, deductibles, and Medicare Part D coverage gap expenses; (5) the difference between Subsection (3) and Subsection (4) in enrollee cost sharing amounts, including but not limited to copayments, coinsurance, deductibles, and Medicare Part D coverage gap expenses; and (6) if available, the enrollee's last known Telephone Number(s) and Email address(es). The list shall include identifying row header columns or any other identifying codes along with the supporting code key.

- B. In compiling the information required by Section IIIA, Respondent shall conduct a diligent search of records in its possession, custody, or control, including but not limited to computer files, sales records, invoices, complaints and correspondence. Respondent shall produce the list in an encrypted and secure fashion as directed by the Commission. Along with the list, Respondent shall specify the version of the software program used to create the list and Respondent must declare under penalty of perjury to its best knowledge, information and belief, that the list is true, accurate, and complete. If Commission counsel requests further related information in writing, Respondent shall provide it within fourteen (14) days from the date of the request.

IV.

IT IS FURTHER ORDERED that Respondent shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All submissions to the Centers for Medicare & Medicaid Services containing representations regarding the price or cost of Medicare Part D prescription drugs or other prices or costs associated with Medicare Part D prescription drug plans;
- B. All representations regarding the price or cost of Medicare Part D prescription drugs or other prices or costs associated with Medicare Part D prescription drug plans;
- C. All Medicare Part D prescription drug plan pricing data compiled in accordance with CMS requirements and internal policies and procedures that was relied upon in disseminating representations set forth in Sections IV(A) and IV(B) regarding the price or cost of Medicare Part D prescription drugs or other prices or costs associated with Medicare Part D prescription drug plans;

- D. All pricing data for adjudicated claims and all complaints and any other communications with consumers or with governmental or consumer protection organizations that contradict, qualify, or call into question the representations set forth in Sections IV(A)-IV(C) of this order, or the basis relied upon for such representations; and
- E. All acknowledgments of receipt of this order obtained pursuant to Section V.

V.

IT IS FURTHER ORDERED that Respondent shall deliver copies of the order as directed below:

- A. Respondent shall deliver a copy of this order to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current subsidiaries and personnel within thirty (30) days after service of this order, and to such future subsidiaries and personnel within thirty (30) days after respondent acquires the subsidiary or the person assumes such position or responsibilities.
- B. Respondent must secure a signed and dated statement acknowledging receipt of this order, within thirty (30) days of delivery, from all persons receiving a copy of the order pursuant to this Section.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation(s) about which Respondent learns fewer than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580, with the subject line *In the Matter of CVS Caremark Corp., FTC File No. 112 3210, Docket No. C-4357*. Provided, however, that in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of any such notice is contemporaneously sent to the Commission at Debrief@ftc.gov.

VII.

IT IS FURTHER ORDERED that Respondent within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit an additional true and accurate written report.

VIII.

This order will terminate on May 3, 2032, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. any Section in this order that terminates in fewer than twenty (20) years;
- B. this order's application to any respondent that is not named as a defendant in such complaint; and
- C. this order if such complaint is filed after the order has terminated pursuant to this Section.

Provided, further, that if such complaint is dismissed or a federal court rules that Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order as to Respondent will terminate according to this Section as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Ohlhausen not participating.

Donald S. Clark,
Secretary

SEAL
ISSUED: May 3, 2012