

BEFORE ALLAN L. MCVEY, INSURANCE COMMISSIONER
OF THE STATE OF WEST VIRGINIA

In the Matter of:

CAREMARK, L.L.C.
CAREMARKPCS HEALTH, L.L.C.

Administrative Proceeding No. 24-IC-172004

CONSENT ORDER

In lieu of proceeding with an administrative complaint, the parties hereto have reached a resolution of the matter related to pharmacy reimbursement pursuant to W.Va. Code § 33-51-9(e) (2022) for ERISA plans with a situs outside of West Virginia with members located in West Virginia from January 1, 2023 through the date of entry of this order. The parties desire that a Consent Order be entered accordingly.

Caremark, L.L.C. and CaremarkPCS Health, L.L.C. (“Caremark”), understand and agree that by agreeing to the entry of this Consent Order it waives all rights to an administrative hearing and to judicial review of the conduct addressed in this Consent Order. Further, Caremark understands and agrees that by agreeing to the entry of this Consent Order it also agrees to the administrative action as is reflected in the Consent Order. Finally, the Insurance Commissioner for the State of West Virginia (“Commissioner”) believes the entry of this Consent Order is appropriate and in the public interest.

JURISDICTION

Caremark is a licensed Pharmacy Benefit Manager (“PBM”) in the State of West Virginia and the Commissioner/West Virginia Offices of the Insurance Commissioner (“WVOIC”) has jurisdiction over the subject matter of this action and over Caremark pursuant to W.Va. Code §33-51-1, *et seq.*

W.Va. Code § 33-51-9(e) (2022) states:

A pharmacy benefit manager may not reimburse a pharmacy or pharmacist for a prescription drug or pharmacy service in an amount less than the national average drug acquisition cost for the prescription drug or pharmacy service at the time the drug is administered or dispensed, plus a professional dispensing fee of \$10.49: Provided, That if the national average drug acquisition cost is not available at the time a drug is administered or dispensed, a pharmacy benefit manager may not reimburse in an amount that is less than the wholesale acquisition cost of the drug, as defined in 42 U.S.C. § 1395w-3a(c)(6)(B), plus a professional dispensing fee of \$10.49.

West Virginia law requires that the pricing protocol set forth in the above statute be applied to ERISA plans with members located in West Virginia.

In addition, the West Virginia Code of State Rules provides for penalties against a PBM for failing to comply with the law. W.Va. Code R. § 114-99-8.1 states:

If the Commissioner finds that a licensed PBM has violated any provisions of this rule or Article 51, Chapter 33 of the West Virginia Code that are applicable to the PBM, the Commissioner may, in addition to or in lieu of a licensure suspension or revocation, order the PBM to pay a penalty in a sum not to exceed \$ 10,000 per violation. If the PBM fails to pay the penalty within 30 days after notice of the penalty, the Commissioner may revoke or suspend the license of the PBM. This section shall not affect the right of a PBM to make a written demand for a hearing before the Commissioner pursuant to the provisions of W. Va. Code § 33-2-13.

EFFECT ON THIRD PARTIES

This Consent Order does not vest standing in any third party with respect to the terms hereof, nor create for any person, other than the Commissioner, a right to enforce its terms.

ALLEGED FACTS

The Commissioner received complaints that Caremark was not complying with W.Va. Code § 33-51-9(e) while performing “pharmacy benefits management” for its ERISA plans with a situs outside of West Virginia but with members located in West Virginia. Caremark reimbursed pharmacies less than the amount required by W.Va. Code § 33-51-9(e), being NADAC plus ten dollars and forty-nine cents (\$10.49). Based upon representations made by Caremark, Caremark did not interpret the law to apply to ERISA plans with a situs outside of West Virginia, however Caremark agreed to apply WVOIC’s interpretation of the law with respect to the aforementioned plans beginning January 1, 2023, and continuing to the date of entry of this Order.

Based upon representations from Caremark, the PBM resolved many of the pharmacy payment issues as of December 31, 2023, and many of the claims have already been reimbursed and remediated as of the entry of this consent order (“Group A”). However, Caremark advised that a number of claims were not able to be corrected until an internal software update was completed (“Group B”). Caremark represents that the internal software update for Group B claims was completed on or about June 30, 2024.

AGREED ACTION

By agreeing to and executing this Consent Order, Caremark agrees to and requests the entry of this Consent Order. Caremark acknowledges that the Commissioner could prevail at a hearing against Caremark resulting in a civil penalty not to exceed Ten Thousand Dollars (\$10,000.00) per violation pursuant to W.Va. Code R. § 114-99-8.1. The facts, as stated above and as interpreted by the WVOIC, describe alleged violations lasting for a period of approximately fifty-two (52) weeks with respect to Group A. As previously mentioned, Caremark stated that the issues with Group B were not resolved until June 30, 2024.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation in this matter, Caremark consents and agrees to the following:

- With respect to ERISA plans with a situs outside of West Virginia, but with members in West Virginia, Caremark will review all payments it has made to pharmacies in West Virginia from January 1, 2023, to the present and will identify, to the best of its knowledge, all payments that were made on behalf of ERISA plans with a situs outside of West Virginia, but with members in West Virginia, that were allegedly not in compliance W.Va. Code § 33-51-9(e) (2022).
- Caremark shall report to the Commissioner its findings, including the names of the pharmacy or pharmacist it underpaid; state the amount that Caremark paid the pharmacy or pharmacist; identify the date that it should have implemented the requirements of W.Va. Code § 33-51-9(e) (2022); and state the amount it should have paid had it followed the requirements of W.Va. Code § 33-51-9(e) (2022). The report shall be filed with the Commissioner's PBM Unit within sixty (60) days of the date of entry of this Order.
- Caremark shall pay the identified underpayments to the respective pharmacies or pharmacists, including payment for the amount of any consumer cost share adjustments that occurred when applying the requirements of W.Va. Code § 33-51-9(e) (2022), plus interest within thirty (30) days after filing the above report with the Commissioner. Pursuant to W.Va. Code R. § 114-99-8.5.10, Caremark shall pay interest, at a rate of the U.S. Prime Rate per annum, as calculated from the date the payment to the pharmacy was initially due or should have been made.

- Within 30 days of reimbursing all pharmacies or pharmacists, Caremark shall file a report with the Commissioner's PBM Unit verifying that each pharmacy or pharmacist has been properly paid.
- Caremark shall file a Corrective Action Plan (CAP) with the Commissioner's PBM Unit setting forth its changes to procedures or systems that will ensure that the company is in compliance with W.Va. Code § 33-51-9(e) (2022) with respect to its ERISA plans with a situs outside of West Virginia but with members in West Virginia. The CAP shall be filed within thirty (30) days of the date of entry of this Order.
- Caremark shall file a statement with the Commissioner's PBM Unit verifying that the internal software update, which was designed to resolve the payment and reimbursement issues of Group B, is active and effective. Said statement shall be filed within thirty (30) days of the date of entry of this Order.
- Caremark agrees to the imposition of and payment to the Commissioner of an administrative fine in the amount of One Million Forty Thousand Dollars (\$1,040,000.00), which constitutes \$20,000.00 per week for fifty-two (52) weeks of noncompliance related to Group A, to be paid within 30 days of the entry of this Order. If it is discovered that the Group B internal software update was not implemented on or about June 30, 2024 or that the Group B payment issues were not corrected, the WVOIC reserves the right to take additional action with respect to the Group B claims.

FINAL DISPOSITION

This Consent Order constitutes the final disposition and entire agreement between the parties relating to the matter herein, except for any enforcement actions with respect to the failure to pay the administrative fine or comply with the conditions under this Consent Order as may be necessary, of Administrative Proceeding No. 24-IC-172004.

MISCELLANEOUS PROVISIONS

Jurisdiction of this matter is retained by the Commissioner for enforcement of this Consent Order. Any party hereto may apply to the Commissioner for such further orders and directions as may be necessary or appropriate with respect to the construction and enforcement of this Consent Order. The remedies in this Consent Order are cumulative and in addition to any other remedies the Commissioner may have at law or equity. Subject to Caremark's full payment of the agreed upon administrative fine and complying with the conditions set forth in the above bullet points, the Commissioner releases Caremark from any further enforcement actions against Caremark based on the facts as described in this Order. However, nothing herein shall be construed to prevent the Commissioner from taking any action for conduct not addressed in this Consent Order.

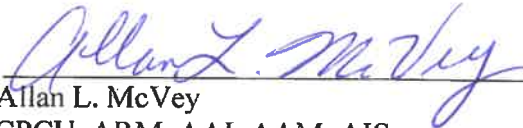
Caremark understands that this Consent Order will be reported to the database maintained by the National Association of Insurance Commissioners (NAIC) and otherwise be made public in accordance with law.

ORDER

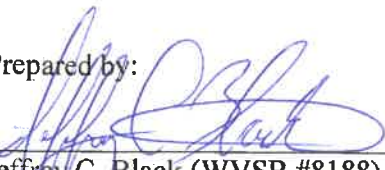
Inasmuch as the Commissioner finds and concludes, based upon the foregoing, that Caremark was not in compliance with W.Va. Code § 33-51-9(e) (2022) with respect to ERISA plans with a situs outside of West Virginia but with members located in West Virginia, it is

ORDERED that a civil penalty in the amount of One Million Forty Thousand Dollars (\$1,040,000.00) be, and the same is, hereby, assessed against Caremark, and that such civil penalty shall be paid within 30 days of the entry of this Consent Order. It is further **ORDERED** that Caremark comply with the terms of the Consent Order as outlined herein.

ENTERED on this 19th day of August 2024.


Allan L. McVey
CPCU, ARM, AAI, AAM, AIS
Insurance Commissioner

Prepared by:


Jeffrey C. Black (WVSB #8188)
Attorney Supervisor, Regulatory Compliance
Legal Division
West Virginia Offices of the Insurance Commissioner
Post Office Box 50540
Charleston, West Virginia 25305-0540

Reviewed and agreed to by:

CAREMARK:

By: Thomas S. Moffatt

Print Name

Title: Vice President & Secretary

Signature: 

Date: August 13, 2024