



Via fax and certified mail

June 11, 2014

Scott P. Serota
President & Chief Executive Officer
Blue Cross Blue Shield Association
225 North Michigan Avenue
Chicago, IL 60601

Larry J. Merlo
President & Chief Executive Officer
CVS Caremark Corporation
One CVS Drive
Woonsocket, RI 02895

RE: HIV/AIDS Specialty Medication Mail-Order Program and Drug Tier Changes

Dear Mr. Serota and Mr. Merlo:

We are writing to you on behalf of federal employees enrolled in FEP Blue health plans provided by the Blue Cross Blue Shield Association (“BCBS”), which include drug coverage provided by the CVS Caremark Corporation (“Caremark”). We demand that BCBS and Caremark immediately end the requirement that all federal employees with HIV or AIDS (“HIV/AIDS”) obtain their medications by mail through the BCBS “specialty pharmacy” program, which threatens the health and privacy of HIV/AIDS patients. Attorneys for Consumer Watchdog represent two “John Doe” plaintiffs enrolled in FEP Blue coverage.¹

Recently, Consumer Watchdog attorneys have brought lawsuits against Anthem Blue Cross and United Healthcare regarding those companies’ specialty drug mail-order programs. Both Anthem Blue Cross and United Healthcare have settled those lawsuits by agreeing to allow HIV/AIDS patients to “opt-out” of the mail-order mandate. You can read news coverage of those lawsuits here: <http://tinyurl.com/ojycs8m>

BCBS and Caremark should similarly empower chronically ill patients with the right to choose how to access their life-saving medications. BCBS and Caremark should also end discriminatory drug pricing designed to discourage HIV/AIDS patients from enrolling, or remaining enrolled, in FEP Blue coverage.

¹ Due to the sensitive nature of this action, our clients have chose to remain anonymous.

Background

As you are of course aware, as of January 1, 2014, federal employees enrolled in the FEP Blue program are now required to purchase their specialty medications, including HIV/AIDS medications, by mail-order. FEP Blue enrollees no longer have access to their community pharmacists specializing in HIV/AIDS drugs, on whom they have come to rely to detect life-threatening adverse drug interactions, assure a reliable supply of their medications, and protect their privacy. Instead, these enrollees are left to contend with unreliable and privacy-defeating delivery methods, and ill-informed mail-order phone service personnel, for their life-saving medications. Under the new rules, FEP Blue enrollees who purchase their HIV/AIDS medications from community pharmacies are required to pay the full-price of the drug, easily ranging into the thousands of dollars per medication per month.

Increased Costs

In addition to the health, safety, and privacy threats that shadow all mail-order programs as described below, federal employees now also face increased costs even when they purchase their HIV/AIDS medications through the BCBS/Caremark mail-order program, regardless of whether those drugs are generic or brand name. Under changes adopted as of January 1, 2014, federal employees must pay higher co-pays for their HIV/AIDS drugs as a result of changes to drug-pricing “tiers” that have the effect of discouraging federal employees with HIV/AIDS from enrolling in the FEP Blue plans. This is the same discriminatory activity targeted by an administrative complaint recently reported on by the *New York Times*: <http://tinyurl.com/lvznzmd>

Threats to Health & Privacy

The health and safety threats facing federal employees with HIV/AIDS enrolled in the FEP Blue program are the same as those facing class members in our similar actions against Anthem Blue Cross and United Healthcare. Due to the complex nature of HIV/AIDS drug regimens, patients rely on their community pharmacists who, working directly with patients, monitor potentially life-threatening adverse drug interactions and side effects. Pharmacists specializing in HIV/AIDS medications also provide essential advice and counseling that help patients and families navigate the challenges of living with a chronic and often debilitating condition.

FEP Blue’s mail-order pharmacy replaces these life-saving interactions with an 800 number that places the burden of securing life-sustaining medications on seriously ill patients.

The FEP Blue mail-order program also requires HIV/AIDS patients to call-in *each month* to refill their prescriptions—and work their way through automated voicemail trees, messages and multiple call center staff for prescription renewals. Adding to that is

the stress that patients experience wondering each month if medications will arrive on-time, or if they will be forced to skip doses and risk their health, all the while battling a chronic illness. It is well documented that sustained stress erodes immune system function and hastens the onset of AIDS.

These patients' privacy is also threatened and undermined by the mail-order program. For example, HIV/AIDS specialty medications often are delivered in refrigerated containers. Patients who live in apartment buildings or whose medications are now delivered to their workplace have expressed alarm that their neighbors and co-workers, who do not know that the recipients have HIV/AIDS, will come to suspect that the recipients are seriously ill.

FEP Blue enrollees have also reported to us that under the CVS Caremark mail-order program, if a consumer has medications delivered to his home and he cannot be present to receive the drugs due to job responsibilities, he bears the financial risk if the drugs are stolen. In other words, CVS Caremark will not replace the stolen medications. Making matters worse, Caremark's delivery service does not provide a precise time that the medication will be delivered, only that they will be delivered by the "end of the day." This limitation severely restricts HIV/AIDS patients' mobility and often requires them to take the day off from work to wait for delivery.

Patients face similar privacy threats if they choose to have medications shipped to a CVS store for pick up. FEP Blue enrollees report that having to pick up HIV/AIDS medications from ill-informed pharmacy staff they did not know, and with whom they do not have a long-term relationship, is extremely uncomfortable and exposes them to additional privacy violations. As one of our John Doe clients writes:

Upon arrival at the CVS pharmacy counter, I had to tell the pharmacist that I have a specialty pharmacy package delivered here and I need to pick it up. The lady was pleasant and proceeded to get the UPS Package for me. After she had grabbed the package from under a counter, she placed the UPS box on the counter for all customers and pharmacists to see. She then proceeded to open the package and pulled out the medication that was sealed in a clear plastic bag for anyone to see the contents within. Once the package was already opened she then realized that she is not allowed to open the UPS box and asked if it was ok, a little too late since she already opened the box and took the medication out. I said sure, in total disbelief of what just happened, not fully realizing that she just disregarded the privacy laws and allowed all viewers around the counter to see the contents.

I am truly amazed at the lack of privacy CVS Pharmacy employees take when handling customer's medication. The pharmacists disregarded the sensitive nature of the medication even though on the UPS box it

states in big bold red letters “DO NOT OPEN THIS CONTAINER” 1. Immediately open the pouch located on OUTSIDE of box. 2. Read and follow instructions provided. 3. Give the UNOPENED container to the customer. The pharmacist did not read the instructions nor follow the rules of not opening the box, when it clearly states not too.

Read more about the problems HIV/AIDS patients face with mandatory mail-order programs here: <http://tinyurl.com/ljzppkz>

Discrimination Based on Medical Condition

Not only does the FEP Blue program violate the Constitutionally-protected right of privacy, statutory provisions addressing medical privacy, the Americans with Disabilities Act, and federal and state civil rights laws, it is also at odds with anti-discriminatory provisions of the newly enacted Affordable Care Act (“ACA”).

For example, section 2705 (“§ 2705”) of the ACA, which applies to both self-insured and fully-insured health plans, states that a “group health plan ... *may not* establish rules for eligibility ... or coverage based on any of the following health status-related factors in relation to the individual or a dependent of the individual:

- (1) Health status.
- (2) Medical condition.
- (3) Claims experience.
- (4) Receipt of health care.
- (5) Medical history.
- (6) Genetic information
- (7) Evidence of insurability.
- (8) Disability.
- (9) Any other health status-related factor determined appropriate by the Secretary.”

42 U.S.C. 300gg-4 (emphasis added).

§ 2705 implicates a central goal of the ACA: to end discrimination against those with preexisting conditions. § 2705 specifically prohibits coverage rules based on the listed health status-related factors in determining eligibility for coverage *and* the terms of coverage.

The need for this prohibition is clear. Requiring health plans to offer coverage for patients with a preexisting condition means little if the insurer can charge these patients exorbitant co-pays or only cover care through inconvenient and ineffective mail-order requirements that put the patients’ health and privacy at risk.

BCBS' and Caremark's practices attempt to do just this and are prohibited by § 2705. Patients with HIV/AIDS who are forced into the mail-order drug program face higher co-pays and bear additional costs in time spent navigating phone menus and long hold times, coordinating with multiple pharmacies and pharmacists (for specialty and non-specialty drugs), and experience disruptions in their treatment. These patients also suffer from the loss of privacy at their workplace and neighborhoods where they receive regular, conspicuous deliveries.

BCBS and Caremark, in violation of § 2705, have avoided providing these patients appropriate coverage based on their health status or medical condition requiring treatment with HIV/AIDS medications, leaving them to either bear these high costs of inconvenience, treatment disruption, and loss of privacy, or pay thousands of dollars out of pocket each month to purchase medications at their community pharmacy of choice.

The specialty drug program coverage rule—adopting mail-order delivery and higher co-pays—violates § 2705 in several ways:

(1) Health status or (2) medical condition.

The FEP Blue requirement that HIV/AIDS patients receive medication from a mail-order pharmacy, rather than their community pharmacy, is a coverage rule based on the patients' health status and/or medical condition. A coverage rule that targets medications used exclusively by patients with HIV/AIDS is no different than a rule that is directly based on those patients' medical conditions. By requiring HIV/AIDS patients to access their life-sustaining medications through a mail-order program that threatens their health and privacy, the mail-order requirement operates as a constructive eviction from the FEP Blue program and thus erodes ongoing eligibility to receive medications. Furthermore, new federal employees, or current employees considering changing their health plan options, are impermissibly discouraged from enrolling in FEP Blue plans.

Since § 2705's non-discrimination requirement is not limited to eligibility, but includes terms of coverage, benefit changes that provide qualitatively different coverage for patients with HIV/AIDS are doubly prohibited.

(3) Claims experience.

There is a growing body of literature supporting the notion that health insurers are adopting mail-order programs and changing their tier pricing for specialty medications allegedly because HIV/AIDS patients are more expensive to treat. Such determinations based on expected claims experience of individuals participating in the FEP Blue program is impermissible under § 2705.

(8) Disability

Finally, the U.S. Supreme Court has determined that HIV/AIDS is a “disability.” *Bragdon v. Abbott*, 118 S.Ct. 2196, 2213 (1998). Therefore, coverage and eligibility distinctions resulting from a patients’ HIV status are also prohibited.

Consumers Legal Remedies Act

BCBS’ and Caremark’s conduct also constitutes a violation of the California Consumers Legal Remedies Act (“CLRA”), California Civil Code section 1750, *et seq.*, for all similarly situated consumers put at risk by these practices. Specifically, these practices constitute violations of Civil Code section 1770(a), under, *inter alia*, subdivisions (5), (14), (16), and (19).

In order to avoid potential liability under the CLRA, BCBS and Caremark must undertake all of the following actions to resolve the issues raised by this letter, as well as to satisfy the requirements of Civil Code section 1782(c), and any other applicable similar statutory or common law provisions, whether in tort, warranty, or contract:

- 1) Identify all consumers with HIV/AIDS enrolled in the FEP Blue plans;
- 2) Advise all such persons of their right to a full, complete and timely remedy including a refund of any excess copayments and/or other payments pursuant to the above-described practice, plus reimbursement of any associated expenditures (such as postage, time and telephone calls), interest on all such sums, costs and reasonable attorneys’ fees incurred;
- 3) The remedy requested by the consumers has been, or, in a reasonable time, shall be, given;
- 4) Provide affected persons the right to opt-out of the mail-order program at any time for any reason, with no increase in costs or limitation of benefits.

The “John Doe” FEP Blue enrollees that Consumer Watchdog attorneys represent reserve the right, after thirty (30) days from the date of this letter, to request a court or jury to award damages as permitted by Civil Code section 1782, unless a full and adequate response to this letter is offered by BCBS and Caremark. The relief sought may include damages as provided under Civil Code section 1782, as well as statutory and exemplary damages, plus any other relief as may be appropriate. An individual offer to resolve grievances will not avoid potential suit or liability to all class members, even if accepted individually by our current John Doe clients. Thus, to avoid litigation, it is in

Mr. Serota and Mr. Merlo

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the interest of all parties concerned that you address this problem immediately as set forth above.

This notice also serves to demand, on behalf of our John Doe clients and all others similarly situated, that BCBS and Caremark cure any claims for breach of any agreements for the reasons detailed above. Finally, this notice also serves as a demand for BCBS and Caremark to preserve all relevant documents, whether in hard copy or electronic format, that may be relevant to the claims that are described in this letter.

Thank you for your attention to these important health and privacy issues. Please contact me immediately to further discuss providing FEP Blue enrollees the option to “opt-out” of the mail order requirement and end discriminatory drug-tier pricing.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Flanagan', with a stylized flourish at the end.

Jerry Flanagan
Lead Staff Attorney
(310) 392-2632

cc: President Barack Obama
Katherine Archuleta, Director, Office of Personnel Management