

## CVS/Aetna: State Regulators Urged to Investigate CVS Caremark Reimbursement Cuts, Solicitation Letters, as Part of Aetna Review

### State Regulatory Update

Independent pharmacists are urging state insurance regulators - as part of their reviews of the CVS/Aetna merger - to examine CVS Health's recent move to slash smaller rivals' prescription reimbursements and then offer to buy their stores.

The reimbursement cuts, some of which involved drugs used to treat digestive illnesses and other chronic conditions, occurred around October 25—five weeks before the December 3 Aetna deal announcement, a dozen independent pharmacists said. The cuts affected pharmacies in a number of states, including Florida, Kansas, Maryland, Ohio, Washington, and Wisconsin.

The cuts were both sudden and steep: one pharmacy went from earning \$41.63 for selling Metronidazole—an antibiotic used to treat bacterial infections—to losing \$72.27 per sale of the treatment. In another case, CVS-owned Caremark, the second-largest U.S. pharmacy benefit manager, paid just over 5 percent of the \$2,237.08 a pharmacy spent on Budesonide, a steroid used to treat Crohn's disease and ulcerative colitis.

"The reimbursement rates in question are established using aggregate information from wholesalers, third party sources and marketplace intelligence and are subject to change frequently," a CVS spokesperson said, as part of a longer statement included below.

**Pharmacists allege "squeeze and buy."** The independent pharmacists said in the weeks following the drastic reimbursement cuts, CVS faxed and e-mailed these same pharmacies solicitation letters asking if they were interested in selling their businesses to the chain, the nation's second largest.

"In our fourth quarter, the reimbursements from CVS Caremark were shockingly low," explained one independent pharmacist affected by the reimbursement cuts. "We don't even know if we'll survive 2018," the pharmacist added. "These are crooked games," said another independent pharmacist. "These are tactics and practices to squeeze [independent pharmacists] out of the market."

Two sources present at the exchange also said that during a meeting with a Maryland state insurance regulator and independent pharmacy representatives around the time of the cuts, a CVS lobbyist assured the regulator that the reimbursement cuts were simply a computer glitch.

**Independent pharmacists urge state regulators to investigate as part of CVS/Aetna probe.** CVS Health's recent actions demonstrate the vertically-integrated firm's strategy for bankrupting its smaller rivals, the independent pharmacists said. They believe that this power will only grow if CVS acquires the nation's third largest health insurer, which could provide the company greater leverage to foreclose independent competitors and establish dominance in the retail pharmacy space.

A move by state regulators to investigate the CVS reimbursement cuts and solicitation letters could impact what are likely to be already extensive reviews of the proposed Aetna merger. At the very least, CVS's actions present a public relations distraction just as the pharmacy chain prepares to present its case to federal and state authorities.

Although state insurance regulators typically retain broad merger review authority, they have typically focused primarily on acquirer solvency. However, if independent pharmacists present a strong case that CVS Caremark is already acting in an anticompetitive manner, it could affect state regulators'—or DOJ antitrust enforcers'—willingness to permit the company to vertically integrate further up the health care supply chain.

Whether the reimbursement cuts and other independent pharmacy issues are enough to convince the insurance regulators to ultimately take a hard line on the deal is another question. Although insurance regulators have recently shown interest in developing legislation to rein in some questionable PBM practices, their jurisdiction over PBMs such as Caremark is not clear cut. “If PBMs misbehave, it will be on the insurer who contracted their business,” said Wisconsin Deputy Commissioner of Insurance, J.P. Wieske.

### **A Closer Look at CVS Health's Alleged “Squeeze and Buy” Tactics**

**CVS as business partner and competitor.** Caremark, as one of nation's three dominant PBMs, exercises substantial power over independent pharmacists' businesses through reimbursements.

“As the largest third party payer, [Caremark] really controls the fate of our pharmacies to some extent,” explained one independent pharmacist. “When they dropped payments a few months ago, one drug that costs us \$1000, they were suddenly paying us \$25 on a \$1100 claim. That's obviously unsustainable for any business.”

Simultaneously, CVS retail pharmacy is a competitor to the independent pharmacists. “It's an interesting business because you, as an independent pharmacy owner, are actually paid by your competitor,” said one independent pharmacy representative, who requested anonymity for fear of reprisal from CVS. “Plus, your competitor has access to all of your patient records,” he added.

**CVS Caremark can arbitrarily set prices through MAC lists and other fees.** PBMs like CVS Caremark determine reimbursements paid to pharmacies for drugs through Maximum Allowable Cost (or MAC) lists: PBM-generated lists which set a maximum amount the PBM will reimburse the pharmacies for certain drugs, particularly generics. MAC lists are different for every pharmacy, even those within the same neighborhood or even next door.

By using MAC pricing, PBMs avoid setting contracted reimbursement rates—meaning such reimbursement cuts are within the bounds of the contracts the pharmacies have signed with CVS Caremark-administered plans.

MAC pricing is intended to promote competitive pricing by incentivizing pharmacies to purchase the least costly generic drugs available in the market. However, MAC lists allow PBMs to arbitrarily determine reimbursements to pharmacies, as a PBM can change its MAC prices for any drug on its MAC lists at any time, and can change the drugs included or excluded on its lists.

Due to this lack of transparency, pharmacists often do not know how much money they will make on a sale until the moment they ring up the purchase. “They can put any drug on the list, meaning they can avoid paying us a contracted reimbursement rate,” said one Maryland pharmacist affected by the October reimbursement cuts.

Most importantly, PBMs are not required to disclose the reimbursements they pay to pharmacies, so there is no way to determine PBMs' profit spreads from these drugs. This also means it is impossible to tell whether PBMs are actually passing savings back to payers.

**CVS letter seeks to acquire independent pharmacies.** In the weeks after the October 25 reimbursement cuts, CVS sent [solicitation letters](#) to many of the affected independent pharmacists, urging the pharmacists to consider a sale to CVS. In one letter, Shane Stockton, a CVS Regional Director of Acquisitions, writes that as a pharmacist himself he knows “what independents are experiencing right now: declining reimbursements, increasing costs, a more complex regulatory environment.”

“Mounting challenges like these make selling your store to CVS Pharmacy® an attractive and practical option,” the letter continues.

The letter goes on to assure the small business owners that CVS will take care of their patients, will stay in the same location, will bring on as many employees as possible, and that the representative will work with the owner to “make the acquisition process easy.”

**Reimbursement cuts and letters suggest “squeeze and buy” approach.** To be sure, prospecting letters are nothing new, and CVS has long attempted to buy out independent pharmacies. “It has been going on forever,” said one independent pharmacy representative. “They’re a business partner, privy to all your information—then they’ll turn around and use that information to say—hey, if you’re looking to sell, here we are.”

But the timing of the drastic reimbursement cuts and prospecting letters suggests a “squeeze and buy” approach, said independent pharmacists and industry experts. “They’re underpaying us and forcing customers out of our pharmacies—and of course paying themselves, at CVS, much more on a different contract, mind you—and it’s working to put many of our stores out of business,” said one pharmacist.

Ultimately, what is at stake is service and patient choice, said another independent pharmacist. “There are 22,000 independent pharmacists [in the U.S.] and 10,000 CVS stores,” he explained. “CVS is saying you can’t go to Bob or Joe’s pharmacy, you need to go to ours. Patients would get the best care by having the most choice, so patients are the ones being hurt here. And try calling your local CVS, and then try calling your independent pharmacist. I bet you can guess where you’ll get the better service.”

**In meeting, CVS represented reimbursement cuts as a “computer glitch.”** Around the time of the first reimbursement cuts, Maryland Pharmacists Association executive director Aliyah Horton and other independent pharmacy representatives were present at a meeting with CVS lobbyists and representatives of the Maryland Insurance Administration.

At the meeting, the CVS lobbyists assured the Maryland insurance regulator that the reimbursement cuts were a computer glitch, according to Horton and another independent pharmacy representative who confirmed the exchange. Later, however, CVS apologized to the independent pharmacy representatives and retracted their comment about the computer glitch.

**CVS comment.** A CVS spokesperson declined to comment on the computer glitch claim. In a statement, the spokesperson said:

“CVS Caremark is focused on providing our pharmacy benefit management clients with opportunities to improve health outcomes for their members, while also managing costs. We reimburse our participating network pharmacies, including the many independent pharmacies that are valued participants in our network, at competitive rates that balance the need to fairly compensate pharmacies while providing a cost-effective benefit for our clients.

In fact, we typically have more than 20,000 independent pharmacies included in a preferred network chosen by a benefit plan.

The reimbursement rates in question are established using aggregate information from wholesalers, third party sources and marketplace intelligence and are subject to change frequently. Wholesalers do not provide PBMs with access to individual pharmacies' acquisition costs at a drug level. We have a well-established appeals process for network pharmacies regarding reimbursement, and our responses to those appeals comply with all applicable laws.

CVS Caremark remains committed to providing our PBM clients and their members with a broad network of pharmacies that includes local, independent pharmacies. Our PBM business and network management is completely unrelated to our CVS Pharmacy retail business' acquisition program, and we maintain stringent firewall protections between our retail and PBM businesses.”