

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244-1850



MEDICARE PARTS C AND D OVERSIGHT AND ENFORCEMENT GROUP

September 8, 2016

Mr. Michael Looney
Chief Executive Officer
Express Scripts Medicare™
One Express Way
St. Louis, MO 63121

Re: Notice of Imposition of Civil Money Penalty for Prescription Drug Plan Contract
Numbers: S5660 and S5983

Dear Mr. Looney:

Pursuant to 42 C.F.R. § 423.752(c)(1) and § 423.760(b), the Centers for Medicare & Medicaid Services (CMS) is providing notice to Express Scripts Medicare™ (Express Scripts) that CMS has made a determination to impose a civil money penalty (CMP) in the amount of **\$5,325** for Prescription Drug Plan (PDP) Contract Numbers: S5660 and S5983.

CMS has determined that Express Scripts failed to provide timely benefit information to its enrollees in the Contract Year (CY) 2016 Annual Notice of Change (ANOC) document.

Summary of Noncompliance

Express Scripts reported to CMS that 213 of its non-dually eligible enrollees did not receive the CY 2016 ANOC documents timely. A plan year benefit comparison of 2015 to 2016 showed a number of plan benefit changes in 2016, including increased monthly plan premium, copayment, coinsurance, and deductible amounts.

Express Scripts initially mailed all of the ANOC documents timely, but a system error populated incomplete addresses for a large number of enrollees and the undeliverable ANOCs were returned to Express Scripts in November 2015. As a result, Express Scripts re-mailed the ANOCs to affected enrollees on November 25, 2015. Enrollees who received ANOCs after that date were provided with a much shorter period of time to consider their Medicare health care and prescription drug options than is required during the Annual Election Period (AEP). As a result of the delay, the affected enrollees were not able to make fully informed decisions about their Medicare plan options for the 2016 plan benefit year.

Relevant Disclosure and Information Dissemination Requirements

Pursuant to 42 C.F.R. § 423.128(a)(3), Sponsors are required to ensure that enrollees receive clear and accurate ANOC and Evidence of Coverage (EOC) documents at least 15 days before the AEP. For the 2016 plan year, Sponsors were required to deliver ANOC/EOC documents to enrollees by September 30, 2016. The ANOC and EOC provide vital information to Medicare beneficiaries about their plans, and allow beneficiaries to make informed choices concerning Medicare health care and prescription drug options for the upcoming plan year. Since 2009, CMS has repeatedly stressed the importance of providing the ANOC/EOC documents to enrollees timely, and noted that Sponsors would be subject to penalties for late mailings.

Violations Related to Disclosure and Information Dissemination Requirements

CMS has determined that Express Scripts violated the disclosure and information dissemination requirements, and the violation had the substantial likelihood of adversely affecting Express Scripts' enrollees. Express Scripts' violation includes:

1. Failure to notify enrollees of changes to their benefits for the 2016 plan year at least 15 days prior to the start of the Medicare AEP. As a result, enrollees were not able to make fully informed decisions about their Medicare coverage for the 2016 plan benefit year. Express Scripts' action violated 42 C.F.R. § 423.128(a)(3) and the marketing guidelines in Chapter 2, Section 60.7 of the Medicare Prescription Drug Benefit Manual (IOM Pub. 100-18).

Basis for Civil Money Penalty

Pursuant to 42 C.F.R. § 423.752(c)(1) and § 423.760(b), CMS has determined that Express Scripts' violation had the substantial likelihood of adversely affecting enrollees and warrants the imposition of a CMP. CMS has also determined that Express Scripts' action resulted in the Sponsor carrying out its contract in a manner that is "inconsistent with the effective and efficient implementation of this part." *See* 42 C.F.R. §423.509(a)(2).

Right to Request a Hearing

Express Scripts may appeal CMS' determination by requesting a hearing in accordance with the procedures outlined in 42 C.F.R. Part 423, Subpart T. Express Scripts must send a written request for a hearing to the Departmental Appeals Board office listed below within 60 calendar days from receipt of this notice (i.e., by November 8, 2016). The request for hearing must identify the specific issues, findings of fact, and conclusions of law with which Express Scripts disagrees. Express Scripts must also specify the basis for each contention that the finding or conclusion of law is incorrect. The request must be sent to:

Civil Remedies Division
Department of Health and Human Services
Departmental Appeals Board
Medicare Appeals Council, MS 6132

330 Independence Ave., S.W.
Cohen Building Room G-644
Washington, D.C. 20201

A copy of the hearing request should also be sent to CMS at the following address:

John A. Scott
Director, Division of Compliance Enforcement
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244
Mail Stop: C1-23-17
Email: John.Scott@cms.hhs.gov

If Express Scripts does not request an appeal in the manner and timeframe described above, the determination by CMS to impose a CMP will become final and the CMP will be due to CMS on November 9, 2016. Express Scripts may choose to have the CMP deducted from a monthly payment, transfer the funds electronically, or mail a check to CMS. Please call or email the enforcement contact indicated in the email notification sent to you in order to notify CMS of your intent to make payment and to receive instructions on making the payment.

Please note that additional violations by Express Scripts may result in CMS taking applicable remedies available under law, including penalties, intermediate sanctions, contract termination, or other enforcement actions as described in 42 C.F.R. Part 423, Subparts K and O.

If Express Scripts has questions about this notice, please call or email the enforcement contact indicated in the email notification sent to you.

Sincerely,

/s/

Gerard J. Mulcahy
Director
Medicare Parts C and D Oversight and Enforcement Group

cc: Reginald Slaten, CMS/ CMHPO/Region II
Rachel Walker, CMS/ CMHPO/Region II
Ericka Davis, CMS/CMHPO/Region II
Kevin Stansbury, CMS/CMS/MOEG/DCE
Stephanie Brown, CMS/CM/MOEG/DCE
John Scott, CMS/CM/MOEG/DCE
Tim Roe, CMS/CM/MCAG/DSCM
Erica Sontag, CMS/CM/MCAG/DSCM