

Ministry of Health
and Long-Term Care

Drugs and Devices Division

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and Assistant Deputy Minister

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Rebate Order

Ontario Drug Benefit Act, R.S.O. 1990, c. O.10, s. 11.5(12)
Drug Interchangeability and Dispensing Fee Act, R.S.O. 1990, c. P.23, s. 12.1(11)

CWC Pharmacies (Ontario) Ltd.

(the “Operator”)

Date of Decision: February 1, 2019

WHEREAS:

1. At the relevant times, the Operator owned and operated 29 pharmacies in Ontario.
2. The Executive Officer of Ontario Public Drug Programs (the “Executive Officer”), as a delegate of the Minister of Health and Long-Term Care, appointed inspectors under the *Ontario Drug Benefit Act* (ODBA) to assess the Operator’s compliance with certain provisions in the ODBA during the period of April 1, 2013 to December 31, 2016.
3. Pursuant to section 13.1 of the ODBA, the Executive Officer also requested that the Operator provide to her certain information to assess the Operator’s compliance with the ODBA and the *Drug Interchangeability and Dispensing Fee Act* (DIDFA) during the period of April 1, 2013 to December 31, 2016. Inspectors were used to collect the requested information on behalf of the Executive Officer.
4. The Operator complied with all requests for information from inspectors and the Executive Officer during the course of the inspection.

5. Subsection 11.5(3) of the ODBA and subsection 12.1(3) of the DIDFA provide that no operator of a pharmacy shall accept a rebate that has been provided by a manufacturer, either directly or indirectly, for any listed drug product or interchangeable product.
6. Subsection 11.5(15) of the ODBA and subsection 12.1(14) of the DIDFA define a “rebate” to include “currency, a discount, refund, trip, free goods or any other prescribed benefit”. Ordinary commercial term payments that comply with the requirements in subsection 1(11) of Ontario Regulation 201/96 under the ODBA (the “ODBA Regulation”) and subsection 2(3) of Regulation 935 under the DIDFA (the “DIDFA Regulation”) are excluded from the definition of “rebate”.
7. Based on the legislation, the only payments that can be accepted from a manufacturer by a wholesaler, operator of a pharmacy, or companies that own, operate or franchise pharmacies are those described in the legislation as ordinary commercial term payments. All other payments received for any reason are rebates and are prohibited.
8. Based on the facts reported to the Executive Officer by the inspectors, the Executive Officer has reasonable grounds to believe that the Operator accepted rebates in contravention of subsection 11.5(3) of the ODBA and subsection 12.1(3) of the DIDFA (referred to hereinafter collectively as the “Rebate Prohibition”). The Executive Officer’s reasons for belief are summarized in Appendix 1 to the Order.
9. Where the Executive Officer believes, on reasonable grounds, that the operator of a pharmacy has accepted a rebate in contravention of the Rebate Prohibition, the Executive Officer may issue an order requiring the person to pay an amount to the Minister of Finance.

NOW THEREFORE, pursuant to subsection 11.5(12) of the ODBA and subsection 12.1(11) of the DIDFA, the Executive Officer hereby orders that the Operator pay to the Minister of Finance the following amount in respect of rebates accepted in violation of the Rebate Prohibition: **\$7,250,748.00**.

An explanation for the calculation of this amount is set out in Appendix 1 to the Order.

TAKE NOTICE that, if the Operator wishes to submit evidence to the Executive Officer as to its compliance with the Rebate Prohibition or that the amount ordered to be paid in the Order is not correct, the Operator may make a written submission to the Executive Officer which must be delivered to the Ministry no later than **5:00 pm on February 15, 2019**, (the “Response Deadline”) at the following address:

Executive Officer of Ontario Public Drug Programs
Ministry of Health and Long-Term Care
9th Floor, Hepburn Block
80 Grosvenor Street
Toronto, ON M7A 1R3

Pursuant to s. 11.5(13) of the ODBA and s. 12.1(12) of the DIDFA, the Executive Officer will review any evidence submitted by the Operator prior to the Response Deadline and will reconsider the Order based on that evidence. After reconsidering the Order, the Executive Officer may affirm, rescind or vary the Order and shall promptly serve the Operator with notice of the decision.

TAKE NOTICE that, if the Operator chooses not to make a submission to the Executive Officer by the Response Deadline, the Operator must comply with the Order by paying the amount specified above:

- (a) in Canadian dollars;
- (b) by cheque payable to the "Ontario Minister of Finance"; and
- (c) by delivering the cheque to the Executive Officer at the foregoing address no later than the Response Deadline.

TAKE FURTHER NOTICE that:

- (a) if the Operator does not pay the Order amount in accordance with the foregoing requirements before the Response Deadline; or
- (b) in the event that the Operator chooses to make a submission, the Order has been reconsidered and affirmed or varied by the Executive Officer, and the Operator has not complied with the affirmed or varied order within fourteen (14) days of being served with it,

the Executive Officer may issue a further order under the ODBA or the DIDFA requiring the Operator to pay a specified amount.



Suzanne McGurn
Executive Officer of Ontario Public Drug Programs
Assistant Deputy Minister, Drugs and Devices
Ministry of Health and Long-Term Care

Appendix 1 to the Order

Attached to and forming part of the Order issued by the Executive Officer of Ontario Public Drug Programs against CWC Pharmacies (Ontario) Ltd. (the “Operator”) dated February 1, 2019, under the authority of subsection 11.5(12) of the *Ontario Drug Benefit Act* (ODBA) and subsection 12.1(11) of the *Drug Interchangeability and Dispensing Fee Act* (DIDFA).

I. Legislative Framework

1. Subsection 11.5(3) of the ODBA prohibits the operator of a pharmacy in Ontario from accepting rebates from a manufacturer, directly or indirectly, for a drug product designated as a listed drug product on the Formulary, or a drug product that is proposed for designation as a listed drug product. Similarly, subsection 12.1(3) of the DIDFA prohibits the operator of a pharmacy in Ontario from accepting rebates from a manufacturer, directly or indirectly, for a drug product designated as an interchangeable product on the Formulary, or a drug product that is proposed for designation as an interchangeable product. These prohibitions are hereinafter collectively referred to as the “Rebate Prohibition”.
2. The ODBA and the DIDFA define “operator of a pharmacy” as including the holder of a certificate of accreditation for the operation of a pharmacy under section 139 of the *Drug and Pharmacies Regulation Act*.
3. The term “rebate” is defined in the ODBA and the DIDFA to include currency, a discount, refund, trip, free goods or any other prescribed benefit. Ordinary commercial term payments that comply with the requirements in subsection 1(11) of Ontario Regulation 201/96 under the ODBA (the “ODBA Regulation”) and subsection 2(3) of Regulation 935 under the DIDFA (the “DIDFA Regulation”) are excluded from the definition of “rebate”. One of the requirements in the ODBA Regulation and the DIDFA Regulation is that the ordinary commercial term payment must be a volume discount, prompt payment discount or distribution service fee.
4. The Rebate Prohibition is triggered when the operator of a pharmacy accepts a benefit from a manufacturer *for* a listed or interchangeable product. “For” means that the benefit is linked directly or indirectly to listed or interchangeable products sold or offered for sale to the pharmacy.

II. Inspector Findings

5. At the relevant times, CWC Pharmacies (Ontario) Ltd. (the “Operator”) held a certificate of accreditation to operate 29 pharmacies in Ontario.
6. The Ministry’s inspectors examined the Operator’s compliance with the Rebate Prohibition during the period of April 1, 2013 to December 31, 2016. This time

period coincides with the start of the Rebate Prohibition (as it exists today) and the end of the Operator's activities that were the subject of the Ministry's inspection and review.

7. The information gathered by the inspectors under sections 13.1 and 14 of the ODBA consisted of records documenting payments received from generic manufacturers, allocations of those payments to the Operator in respect of the Operator's pharmacies, contracts with generic manufacturers supporting the payments, and the performance of any deliverables under those contracts. The Operator co-operated fully with the inspection and provided the Ministry's inspectors with copies of the relevant records which were supplemented by interviews with senior management and legal counsel.
8. The inspectors found the Operator received proceeds from fee-for-service arrangements entered into with certain generic manufacturers. These fee-for-service arrangements related to two types of advertising/sponsorship initiatives:
 - a. Clinic Advertising – a national program pursuant to which a sponsor could advertise at clinics held at pharmacies, which would include screening clinics, flu shot clinics, and medication review clinics. The sponsor's logo would appear on personalized patient handouts distributed at pharmacy locations and on clinic schedules posted online.
 - b. Sponsorship Advertising – a national program pursuant to which interested parties could advertise with and have their logos appear on or in:
 - i. a health and wellness publication called "The Wellness Connection" magazine;
 - ii. Pharmacy Rx bags;
 - iii. an in-store TV program;
 - iv. a website; and
 - v. dedicated pharmacy emails.
9. These clinic advertising/sponsorship initiatives were suspended as of August 2015 when the legality of payments received in Ontario under the initiatives was questioned. During the course of the inspection, the Operator stated that payments received under the advertising/sponsorship initiatives were used to reduce dispensing fees and drug mark-ups.
10. With respect to the Clinic Advertising initiative, the Ministry found that payments totaling **\$3,965,748** were paid by generic manufacturers and allocated to the Operator in respect of pharmacy clinics to be held at the Operator's pharmacies.
11. These payments are considered by the Ministry to constitute professional allowances that were fully banned under the Rebate Prohibition as of April 1,

2013. While the Operator was of the view, at the time the payments were made, that the payments were not rebates because they pertained to advertising, the Operator has committed not to accept such payments in respect of their Ontario pharmacies in the future to avoid future violations of the Rebate Prohibition.

12. With respect to the Sponsorship Advertising initiative, the Ministry found that **\$3,285,000** was paid by generic manufacturers and allocated to the Operator in respect of certain advertising at Ontario pharmacies. The Executive Officer is of the view that the payments represent currency that was directly or indirectly related to listed or interchangeable products sold or offered for sale to the Operator in violation of the Rebate Prohibition.
13. While the Operator was of the view, at the time the payments were made, that the payments were not rebates because they pertained to advertising, the Operator has committed not to accept such payments in respect of their Ontario pharmacies in the future to avoid future violations of the Rebate Prohibition.
14. Based on the legislation, the only payments that can be accepted from a manufacturer by a wholesaler, operator of a pharmacy, or companies that own, operate or franchise pharmacies are those described in the legislation as ordinary commercial term payments. All other payments received for any reason are rebates and are prohibited.
15. In summary, the Executive Officer has reasonable grounds to believe that the Operator indirectly accepted payments totalling **\$7,250,748.00** from generic manufacturers in violation of the Rebate Prohibition.