U.S. HOUSE ENERGY AND COMMERCE
OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE
"Examining State Efforts to Improve Transparency of Health Care Costs for Consumers."
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Statement for the Record
The American Pharmacists Association

The American Pharmacists Association (APhA) appreciates the opportunity to submit the following Statement for the Record to the U.S. House of Representatives Committee on Energy and Commerce *Subcommittee on Oversight and Investigations* hearing entitled "Examining State Efforts to Improve Transparency of Health Care Costs for Consumers".

APhA appreciates the Subcommittee looking into the pharmacy benefit managers' (PBMs) policies that negatively impact patients, such as pharmacy direct and indirect remuneration (DIR) fees and "gag clauses." Recently, a lack of transparency and oversight in PBM practices has led several states to implement PBM licensure/registration (28 states and Washington, D.C.), fair pharmacy audits (11), or generic drug pricing legislation (2) to try to level the playing field for pharmacies and patients.[1]

DIR Fees/ Clawbacks

APhA has long had policy supporting the pharmaceutical industry's adoption of a "transparent pricing" system which would eliminate hidden discounts, free goods, and other subtle economic devices,[2] like rebates between manufacturers and PBMs. As recognized by CMS, certain PBM practices, can result in higher prices at point-of-sale and consequently, higher beneficiary co-pays. DIR fees were originally designed to capture rebates and other mechanisms not included at the point-of-sale.[3] However, DIR fees by PBMs are now being used beyond their original purpose to retroactively adjust pharmacies' payment months after the sale, sometimes below the price paid by the pharmacy. As stated by CMS in the November 2017 proposed Medicare Part D rule, "[b]etween 2010 and 2015, the amount of all forms of price concessions received by Part D sponsors and their PBMs increased nearly 24 percent per year, about twice as fast as total Part D gross drug costs, according to the cost and price concession data Part D sponsors submitted to CMS for payment purposes." CMS also affirmed that when price concessions between pharmacies and Medicare Part D plan sponsors or their PBMs (e.g., DIR fees) "…are not reflected in the price of a drug at the point of sale, beneficiaries might see lower

[1] NCPA. A Patchwork of PBM Regulation. Last Updated: June 2018. Available at: http://www.ncpa.co/pdf/pbm-regulation-by-state-2018.pdf
[2] APhA. House of Delegates. Current Adopted Policy Statements 1963-2017 (JAPhA NS8:362 July 1968) (JAPhA NS44(5):551 September/October 2004) (Reviewed 2006)(Reviewed 2011)(Reviewed 2016). Available at: https://www.pharmacist.com/sites/default/files/files/16898%20CURRENT%20ADOPTED%20POLICY%20MANUAL%20-%20FINAL.pdf
[3] *See*, CMS. Medicare Program; Contract Year 2019 Policy and Technical Changes to the Medicare Advantage, Medicare Cost Plan, Medicare Fee-for-Service, the Medicare Prescription Drug Benefit Programs, and the PACE Program. Final Rule. 83 FR 16440. April 16, 2018. Available at: https://www.federalregister.gov/documents/2018/04/16/2018-07179/medicare-program-contract-year-2019-policy-and-technical-changes-to-the-medicare-advantage-medicare

premiums, but they do not benefit through a reduction in the amount they must pay in cost-sharing, and thus, end up paying a larger share of the actual cost of a drug." CMS goes on to acknowledge that "[n]umerous research studies further suggest that the higher cost-sharing that results can impede beneficiary access to necessary medications, which leads to poorer health outcomes and higher medical care costs for beneficiaries and Medicare."[4]

PBM DIR fees and "clawbacks" mask the real price of medications, increase the price patients pay, and interfere with pharmacists' ability to provide patient care. APhA is encouraged by recent testimony by HHS before the U.S. Senate Appropriations[5] and House Education and Workforce[6] Committees requesting the HHS Inspector General investigate PBMs' harmful use of DIR fees. Moreover, APhA supports CMS's intention to require price concessions between pharmacies and plan sponsors or their PBMs (e.g., DIR fees and/or similar policies/terminology, such as "true up" practices) be reflected in the negotiated price made available at the time a medication is dispensed at the point-of-sale. This policy, according to CMS estimates, would significantly reduce net beneficiary costs by $10.4 billion[7] and give community pharmacies greater predictability regarding reimbursement rates.

Gag Clauses

Between 2016 and July 5, 2018, at least 24 states enacted laws and at least 40 state legislatures considered prohibiting "gag clauses" in PBM contracts that restrict pharmacists from informing patients when medication may be less expensive if purchased at the cash price, rather than through their insurance plan.[8] APhA supports CMS's recent action,[9] as well as recently introduced federal legislation,[10] to prohibit PBMs' use of "gag clauses" in Medicare Part D program contracts to improve patients' access to more affordable and cost-effective medicines. APhA also supports additional federal legislation that would expand this prohibition to exchange and group health plans.[11] For years, pharmacists have been frustrated by their inability to help their patients who they knew were struggling with high co-payments. In addition, prohibitions of "gag clauses" will make the drug pricing system more transparent.

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[4] *See*, CMS. Medicare Program; Contract Year 2019 Policy and Technical Changes to the Medicare Advantage, Medicare Cost Plan, Medicare Fee-for-Service, the Medicare Prescription Drug Benefit Programs, and the PACE Program. Draft Rule. 82 FR 56336. November 28, 2017. Available at: https://www.federalregister.gov/documents/2017/11/28/2017-25068/medicare-program-contract-year-2019-policy-and-technical-changes-to-the-medicare-advantage-medicare

[5] Azar, Alex. Response to Senator James Lankford. Senate Appropriations Committee. Subcommittee on Labor, Health and Human Services, Education, and Related Agencies. "Review of the FY2019 Budget Request for U.S. Dept. of Health & Human Services." May 10, 2018. Available at: https://www.appropriations.senate.gov/hearings/review-of-the-fy2019-budget-request-for-us-dept-of-health-and-human-services

[6] Azar, Alex. Response to Chair Virginia Foxx. U.S. House Education and Workforce Committee. "Examining the Policies and Priorities of the U.S. Department of Health and Human Services." June 6, 2018. Available at: https://www.youtube.com/watch?v=Yv_jS5KGjKU&feature=youtu.be

[7] Ibid. *See*, TABLE 11: 2019 - 2028 POINT-OF-SALE PHARMACY PRICE CONCESSIONS IMPACTS. Page 338.

[8] Couchi, Richard. States Regulating Pharmaceutical Benefit Managers Prohibiting PBM 'Gag Clauses' That Restrict Pharmacists From Disclosing Price Options | Recent State Legislation 2017- 2018. NCSL. Last updated: June 28, 2018. Available at: http://www.ncsl.org/research/health/pbm-state-legislation.aspx

[9] *See*, Verma, Seema. CMS. Letter to All Part D Sponsors. Subject: Unacceptable Pharmacy Gag Clauses. May 17, 2018. Available at: https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/Other-Content-Types/2018-05-17.pdf

[10] *See*, S. 2553, Know the Lowest Price Act of 2018. Introduced March 14, 2018. Available at: https://www.congress.gov/bill/115th-congress/senate-bill/2553/text?q=%7B%22search%22%3A%5B%22S.+2553%22%5D%7D&r=1

[11] *See*, S. 2554, Patient Right to Know Drug Prices Act. Introduced March 14, 2018. Available at: https://www.congress.gov/bill/115th-congress/senate-bill/2554/text?q=%7B%22search%22%3A%5B%22S.+2554%22%5D%7D&r=1

Pharmacies' Access to Prescription Drug Networks

APhA also recommends states look at adopting policies similar to ones implemented by CMS which increase transparency and patient access to the pharmacy of their choice in insurance plans under their purview; such as:

- Any Willing Pharmacy (AWP): Revising the definition of mail order pharmacy and retail pharmacy to allow patients to continue getting their prescription drugs from their community pharmacy.
- PBM Credentialing: Prohibiting payers or PBMs from requiring onerous pharmacy accreditation and credentialing requirements that go beyond state laws.

APhA would like to thank the Committee for continuing to work with APhA and other pharmacy stakeholders to increase transparency of PBM practices for pharmacies and patients. APhA looks forward to being part of future discussions on this topic. Please feel free to use APhA as a resource for Congress as we are happy to be of assistance in any way possible.