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May 30, 2017

RE: AN ACT to amend the public health law, in relation to civil penalties for violations concerning the pharmacy benefit manager contract appeals process; and in relation to the process for appeal

S.5623 (Hannon)
A.4717-A (Rosenthal)

MEMORANDUM IN OPPOSITION

Submitted on behalf of the Blue Cross and Blue Shield Plans

The New York State Conference of Blue Cross and Blue Shield Plans opposes the enactment of this legislation as it would increase costs for any health plan that uses a pharmacy benefit manager (PBM) to manage their drug costs or any company that manages a drug benefit, including health exchange plans, managed care plans, and all employer-sponsored health plans. The Bill authorizes the imposition of an excessive penalty by the Attorney General on PBMs that are complying in good faith with the Maximum Allowable Cost (MAC) Appeals Law.¹ The Bill also requires PBMs to provide the name of a specific wholesaler that provided the MAC price to the PBM, further undermining the underlying purpose of the MAC list.

MACs were developed by both public and private payers to increase dispensing of generics and to enhance the competitiveness and efficiency of the generic market, resulting in lower spending on pharmaceutical benefits and reducing the overall cost of prescription drug coverage. In order to reflect the actual cost of generic drugs, MACs are employed by insurers and PBMs as measure to ensure that the “list” price for generics does not exceed the actual acquisition costs incurred by retail pharmacies. Each PBM decides which drugs to include on their MAC list, with the reimbursement level determined based on multiple factors. PBMs update their MAC lists on a regular basis, using various public and proprietary sources, to reflect the pharmacists’ true acquisition costs. The use of the MAC list incentivizes pharmacies to obtain generic drugs at the lowest price possible, rather than allow pharmacies to purchase generics at a higher price, knowing they will be reimbursed for the higher price.

¹ Public Health Law §280-a.

In 2016, legislation went into effect establishing a requirement that PBMs include in their contracts with pharmacies the right to appeal a reimbursement rate within thirty days of their claim submission and establish minimum requirements for the appeal process. This Bill now seeks to amend this recently enacted law to add an “enforcement provision” to ensure PBM compliance. However, the Bill does not simply impose a penalty on a PBM for the failure to include a MAC Appeal process in the contract between the PBM and pharmacy, but rather imposes a penalty of \$5,000 per violation of the requirements for the appeal process. While the need for such a drastic penalty is unclear, authorizing the imposition of such a penalty without an exception for good-faith non-compliance will only result in increased costs incurred by PBMs. The appeal process established under Public Health Law §280-a has widely been viewed as a tool for pharmacies to continuously challenge a PBM’s MAC list, limiting the effectiveness and hindering the purpose of developing MAC lists. With PBMs receiving a substantial volume of appeals, the total amount of penalties could exceed millions of dollars per year. These costs will ultimately be passed onto consumers through insurance premiums as the effectiveness of the MAC list is eroded, generic costs increase for no reason other than higher reimbursement, and overall prescription drug spending increases.

Further, the Bill attempts to add a new requirement to the appeals process that is impossible for PBMs to satisfy. Specifically, the Bill requires PBMs to disclose the wholesaler that provided the MAC price point contained on the PBM’s MAC list. However, the MAC price (or reimbursement level) is determined based on multiple factors, including public and proprietary sources, to reflect the pharmacists’ true acquisition costs. PBMs would be unable to provide pharmacies with the specific wholesaler that provided the MAC price as the price does not always reflect a specific wholesaler’s cost.

The net result of this legislation is to further complicate the MAC Appeals process to the benefit of the pharmacy seeking to obtain higher reimbursement for generics. The imposition of penalties for non-compliance with the an already complicated and difficult to administer appeals process will negatively impact efforts to contain prescription drug spending, resulting in instability and unpredictability for PBMs, and for the health insurers that contract with PBMs to administer their prescription drug benefit. PBMs are projected to save consumers and employers \$1.3 trillion on the cost of their prescription drugs between 2008 and 2017. The imposition of unnecessary penalties and additional appeal requirements will significantly increase administrative costs and diminish the value PBMs currently provide to New York’s employers and consumers.

For the foregoing reasons, the New York State Conference of Blue Cross and Blue Shield Plans strongly opposes enactment of this legislation.

Respectfully submitted,

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