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RE: AN ACT to amend the insurance law, in relation to calculating an insured individual's overall contribution to any out-of-pocket maximum or any cost-sharing requirement

S5299 (Rivera)
A1741 (Gottfried)

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 strongly oppose enactment of this legislation, which would require health plans to apply any third-party payment for out-of-pocket expenses when calculating any out-of-pocket maximum or cost-sharing requirement, and by design, would prohibit the use of "copay accumulators" by health plans. Health plans have been forced to implement "anti-coupon" policies in order to combat the rapidly increasing prices of prescription drugs which in this case is caused by the use of financial incentives by drug manufacturers who offer "coupons" to cover the out of pocket costs of consumers for more expensive brand name medications. This Bill will perpetuate the unscrupulous marketing and data mining practices of big PhRMA who use coupons to steer consumers to more expensive drugs which unnecessarily results in higher prescription drug costs that all New Yorkers will be forced to pay for through increased premiums.

In order to control health care premiums for members, health plans encourage the use of cost efficient, but equally effective, medication by establishing lower co-payments for generic and biosimilar equivalents as the overall cost of these drugs are less expensive than brand name drugs. In counter this rational cost efficiency, drug manufacturers have expanded the use of "couponing", which provides financial incentives to patients to seek higher costing drugs which reduce their out-of-pocket costs (copays). In most cases, coupons are used specifically to incentivize filling expensive brand drugs over available generics. While coupons help patients afford more expensive medications that have a high copayment, they encourage members to use higher priced brand name drugs, which must be paid for by the health plan.[1] When consumers are relieved of copayment obligations, manufacturers are relieved of a market constraint on drug prices. This ultimately translates to higher premiums for all New Yorkers.

While copay coupons may provide an immediate financial benefit to patients, they are systematically used by manufacturers in concert with price increases to cover up their own pricing behavior. Coupons facilitate continual and aggressive price increases by holding the patient harmless at the point-of-sale (pharmacy) and creating the illusion that patients are not paying for medication.[2] However, the cost of the prescription drugs are simply being transferred to the patient's health plan, which in turn requires higher premiums in order to cover the increased costs.

It is important to highlight that federal law prohibits pharmaceutical manufacturers from providing or offering consumers discounts to purchase prescription drugs that are paid for by Medicare or Medicaid.[3] In fact, CMS recently finalized a rule that will allow health plans to implement copay accumulator programs to prevent drug manufacturer coupons from applying to a patient's annual limit on out-of-pocket costs in situations where a generic drug is available. CMS is specifically allowing this practice as it will encourage patients to use generic drugs and lower drug spending. The rule, which went into effect in 2020, is applicable to individual market, small group, large group and self-insured group health plans. Similarly, California has prohibited the use of copay coupons for medications that have a lower-cost generic equivalent. Massachusetts prohibits drug manufacturers from offering copay coupons or other assistance when a generic is available, and will soon prohibit the use of copay coupons entirely.

Thus, it is clear that copay coupons unnecessarily increase prescription drug costs and only provide an immediate, illusory benefit to patients. While the implementation of copay accumulators has likely had a direct impact on a number of New Yorkers in higher out-of-pocket costs, such programs have only been implemented to counter programs that increase the premiums paid by New Yorkers. Any legislation seeking to prohibit the use of copay accumulators should similarly prohibit the use of copay coupons, thereby entirely eliminating a questionable marketing practice by drug manufacturers and a seemingly unfair application of copayments by health plans, neither of which are in the best interest of the patient. Prohibiting one of these practices, but not the other, is also not in the best interest of patients across New York State.

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

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[1] Coupons increase branded sales by 60%, entirely by reducing the sales of lower cost generics. Dafny, *When Discounts Raise Costs: The Effect of Copay Coupons on Generic Utilization*, UCLA Anderson School of Management (October 4, 2016) *available at:* http://www.hbs.edu/faculty/Publication%20Files/DafnyOdySchmitt_CopayCoupons_32601e45-849b-4280-9992-2c3e03bc8cc4.pdf

[2] Drugs without coupons experience real price growth of 7–8 percent per year, while drugs with coupons experience price growth of 12–13 percent per year. *Id.*

[3] The OIG has determined that "coupons constitute remuneration offered to consumers to induce the purchase of specific items." Where remuneration is paid purposefully to induce or reward referrals of items or services payable by a Federal health care program, the anti-kickback statute is violated.

Respectfully submitted,

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