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Re: Seeking Further Clarification on Remedies for Express Scripts, Inc.’s “Bonus Pool Fees” that Violate CMS’ Medicare Part D Final Rule

Dear Directors Duran and Shapiro:

The National Community Pharmacists Association (NCPA) is writing, on behalf of our independent pharmacy members, seeking clarity on the remedy for community pharmacies for Express Script’s “Bonus Pool Fees,” which CMS has affirmed are in violation of CMS’ Medicare Program; Contract Year 2023 Policy and Technical Changes to the Medicare Advantage and Medicare Prescription Drug Benefit Programs; Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency Final Rule (Final Rule).¹

NCPA represents America’s community pharmacists, including 19,400 independent community pharmacies. Almost half of all community pharmacies provide long-term care services and play a critical role in ensuring patients have immediate access to medications in both community and long-term care (LTC) settings. Together, our members represent a \$94 billion healthcare marketplace, employ 230,000 individuals, and provide an expanding set of healthcare services to millions of patients every day. Our members are small business owners who are among America’s most accessible healthcare providers. NCPA submits these comments on behalf of concerns we have received from independent and LTC pharmacies.

¹ See <https://www.govinfo.gov/content/pkg/FR-2022-05-09/pdf/2022-09375.pdf>.

On January 8, 2024, NCPA first notified CMS of ESI’s “bonus pool fees,” additional in-network per claim fees not being applied at point of sale that were in violation of the Final Rule. On April 11, [NCPA sent a letter](#) to ESI, copying CMS, putting both ESI and CMS on notice that these per claim fees are pharmacy price concessions and therefore should be assessed at the point of sale, rather than be assessed in the aggregate on pharmacies’ remittance advices, as they are currently being handled since January 1, 2024. These price concessions amount to millions of dollars that have been assessed since January 1, all to enrich ESI, while our members wait to see if they will earn any of their money back later in the year.

NCPA followed this letter up with [a letter to CMS](#) on May 21 again alerting CMS of the “bonus pool fees” and that they violated the Final Rule.

Under the Final Rule, CMS redefined “negotiated price” as follows:

§ 423.100 Definitions.

* * * * *

Negotiated price means the price for a covered Part D drug that— (1) The Part D sponsor (or other intermediary contracting organization) and the network dispensing pharmacy or other network dispensing provider have negotiated as the lowest possible reimbursement such network entity will receive, in total, for a particular drug; (2) Meets all of the following: (i) Includes all price concessions (as defined in this section) from network pharmacies or other network providers; (ii) Includes any dispensing fees; and (iii) Excludes additional contingent amounts, such as incentive fees, if these amounts increase prices; and (3) Is reduced by non-pharmacy price concessions and other direct or indirect remuneration that the Part D sponsor passes through to Part D enrollees at the point of sale.²

CMS also defined pharmacy price concessions as:

§ 423.100 Definitions.

* * * * *

Price concession means any form of discount, direct or indirect subsidy, or rebate received by the Part D sponsor or its intermediary contracting organization from any source that serves to decrease the costs incurred under the Part D plan by the Part D sponsor. Examples of price concessions include but are not limited to: Discounts, chargebacks, rebates, cash discounts, free goods contingent on a purchase agreement, coupons, free or reduced price services, and goods in kind.³

² *Id.*, at 27899.

³ *Id.*

In its May 21 letter to CMS, NCPA again stated that that these per claim fees are pharmacy price concessions and therefore should be assessed at the point of sale as part of negotiated price under the final rule, rather than be assessed in the aggregate on pharmacies' remittance advices after point of sale, as they are currently being handled since January 1, 2024.

In follow up to that letter, on May 29, CMS held a call with NCPA's Regional Chain Advisory Group, which is comprised of over 15 regional chains, representing over 700 pharmacies in over 20 states. NCPA again informed CMS of ESI's bonus pool fees, and sought clarity from CMS if these fees were violating the Final Rule.

On the May 29 call, CMS stated that:

- ESI's bonus pool fees are outside the scope of allowable action under the Final Rule;
- CMS is working with ESI to have a remedy for this violation "soon;"
- ESI will communicate with pharmacies and will return "all" funds that have been withheld since January 1;
- ESI will manually reissue funds withheld;
- ESI will let pharmacies know directly in the "coming weeks" about remedies;
- Pharmacies will receive "no less" than what they have already contributed to the pool;
- When NCPA asked CMS if ESI will stop collecting the bonus pool fees moving forward, CMS replied that ESI states this is difficult to do but ESI will fix their systems;
- CMS has not seen the pending communication from ESI to pharmacies;
- When NCPA stated that CMS needs to put out a public statement outlining this issue, CMS did not answer if they will or not.

NCPA thanks CMS for spending time to discuss the ESI bonus pool fee on our May 29 call. That said, NCPA still has outstanding questions, and requests clarity from CMS on the following points:

- **When will pharmacies get paid back?**
- **How will they get paid back?**
- **Given that CMS has recognized that the ESI bonus pool fees violate the Final Rule, and that ESI has communicated that it has problems fixing its system, will ESI stop collecting bonus pool fees going forward?**

ESI has shown with its actions on the bonus pool fee, including its current system that allegedly makes it difficult to stop collecting bonus pool fees, that ESI did not take steps to comply with the Final Rule.

NCPA and its members eagerly await prompt relief from ESI's bonus pool fees. According to NCPA's [new survey](#) conducted in February 2024, when asked which PBM is causing the most financial stress in the Medicare Part D program, almost half of respondents identified Express Scripts. Of the "big three" PBMs, Cigna-ESI was mentioned as being the most problematic of all

PBMs in Medicare, 50 percent more often than the runner-up. Pharmacy owner-members frequently cite Cigna-ESI's draconian contract terms — particularly on brand name prescriptions — when talking about whether they will be able to keep their business open. In fact, one alarming result from the recent survey was *32 percent of all respondents say they are considering closing their doors in 2024 because of the cash crunch in Medicare.* **And, perhaps, most disturbing of all, 93 percent of respondents said they may drop out of Medicare Part D in 2025 if this year's experience continues, which would decimate patient access across the country, especially for senior citizens.**

Medicare Part D makes up 36 percent of the average independent pharmacy's business. Thus, contractual terms that pay pharmacies less than they pay for medications are having a disproportionately negative effect on the solvency of pharmacies. As a result of 2024 terms, pharmacy "deserts" are proliferating in the country, especially in some of the areas where our country's most socially vulnerable populations reside. In 2023, there were over 300 independent pharmacy *net* closures — in other words, *every day* patients have one less independent pharmacy from which to choose. Additionally, there are approximately 2,200 fewer retail pharmacies than there were four years ago — an overall 4 percent decrease of pharmacy choices for patients — and that pattern of pharmacy closures is increasing. Based on the most recent data through February 29, 2024, independent pharmacy net closures continue at approximately one store per day. These closures are expected to escalate. Increased vertical and horizontal consolidation of PBMs and health plans has caused severe inequities to pharmacies and Medicare Part D beneficiaries alike. These are startling developments.

Should you have any questions or concerns, please feel free to contact me at ronna.hauser@ncpa.org or (703) 838-2691, and my colleague Steve Postal, Director of Policy and Regulatory Affairs, at steve.postal@ncpa.org or (703) 600-1178.

Sincerely,



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National Community Pharmacists Association