Submitted electronically via: vanessa.duran@cms.hhs.gov and jennifer.shapiro@cms.hhs.gov

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Vanessa S. Duran
Director, Medicare Drug Benefit and C&D Data Group
Centers for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8016
Baltimore, MD 21244

Jennifer Shapiro
Director of the Medicare Plan Payment Group
Centers for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8016
Baltimore, MD 21244

Re: Express Scripts, Inc.'s Medicare Part D Egregious Pharmacy Contracting Practices Threatening Independent Pharmacies, Harming Patient Access and Care and Not in Compliance with CMS Final Rule

Dear Directors Duran and Shapiro:

The National Community Pharmacists Association (NCPA) is writing, on behalf of our independent pharmacy members, to express our serious concerns with ESI Part D contract terms that are leading to pharmacy closures and dire impacts on the patients we serve.

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.

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 3" PBMs, Cigna-ESI was mentioned as being the most problematic of

all PBMs in Medicare, 50% more often than the runner-up. Another of the big 3 PBMs was only mentioned less than 10% of the time.

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, *ninety-three 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.

ESI "Bonus Pool Fees" Not in Compliance with Final Rule

NCPA has heard on good authority from our members that ESI has an additional in-network per claim "bonus pool fee" that is not being applied at point of sale, which NCPA believes is in violation of the 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]

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

> § 423.100 Definitions.
> * * * * *
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> 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

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

> 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]

Clearly, 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. 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 asks that CMS communicate to ESI that it needs to revise its "bonus pool fee" to align with the Final Rule. If CMS does not take immediate action, how will CMS know what ESI is actually doing with the money they are collecting and how will the "promise" that all funds will be redistributed to certain pharmacies be audited by CMS? Our members have zero reassurance that the bonus pool fee funds are completely redistributed to pharmacies. In the meantime, ESI, a Fortune 15 company, is earning interest on the millions of dollars they are holding captive. NCPA requests that CMS immediately address our above concerns before more independent pharmacies close. Once an independent pharmacy closes, it will not re-open, and patients will be harmed as a result.

[2] *Id.*, at 27899.
[3] *Id*.

Should you have any questions or concerns, please feel free to contact me at doug.hoey@ncpa.org or my colleague Ronna Hauser at ronna.hauser@ncpa.org.

Sincerely,

B. Douglas Hoey, Pharmacist, MBA
Chief Executive Officer
National Community Pharmacists Association