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BULLETIN 24-01

To: Tennessee-Licensed Pharmacy Benefit Managers, Pharmacies, and Covered Entities

From: Carter Lawrence, Commissioner Carter Lawrence (Jun 21, 2024 15:14 CDT)

Date: June 18, 2024

Re: Applicability of Tenn. Code Ann. Title 56, Chapter 7, Parts 31 and 32 to Prescription Discount Plans

The Tennessee Department of Commerce and Insurance (the "Department") issues this bulletin to address the applicability of Tenn. Code Ann. Title 56, Chapter 7, Parts 31 and 32 ("Parts 31 and 32") to certain transactions processed by prescription discount plans meeting the definition of Tenn. Code Ann. § 56-17-101(3) and therefore regulated under Tenn. Code Ann. Title 56, Chapter 17 ("Discount Plans").

It is the Department's position that Parts 31 and 32 apply to certain transactions processed by a Discount Plan when a pharmacy benefit manager ("PBM") or a "Covered Entity" as defined by Tenn. Code Ann. § 56-7-3102(1) utilizes a Discount Plan as part of its processing of a claim for a pharmacy benefit or as part of a health coverage benefit provided by a Covered Entity. To further explain, the Department offers the following sample fact patterns illustrating the Department's position:

Example 1

Patient X arrives at a "pharmacy" as defined by Tenn. Code Ann. § 56-7-3102(4) (referred to hereafter as "Tennessee Pharmacy") with a Discount Plan membership card and presents the membership card to the Tennessee Pharmacy staff member. Tennessee Pharmacy submits the transaction to the Discount Plan or to an intermediary that processes the Discount Plan claim on behalf of the Discount Plan. The Discount Plan is not offered as part of, incentivized or promoted by, or in any way connected to the medication and/or device portion of pharmacy benefits coverage provided by a Covered Entity. *Patient X* never presents or in any way attempts to utilize a prescription drug benefit provided by a Covered Entity, Tennessee Pharmacy does not submit a claim under health coverage provided by a

Covered Entity, and Tennessee Pharmacy is paid according to the reimbursement schedule agreed upon between Tennessee Pharmacy and the Discount Plan.

In this example, the transaction is not subject to Parts 31 and 32 since *Patient X* did not use or attempt to use a pharmacy benefit provided under health coverage[1] and because there was no PBM or Covered Entity involved in this transaction.[2]

Example 2

Patient Y arrives at Tennessee Pharmacy to obtain their prescription and presents a card to staff containing *Patient Y*'s information regarding *Patient Y*'s health coverage from a Covered Entity. Tennessee Pharmacy submits the claim to the Covered Entity or the Covered Entity's contracted PBM as a pharmacy benefit claim. As part of processing the claim, and without *Patient Y*'s knowledge, the Covered Entity or PBM subsequently transfers the claim to a Discount Plan and the claim is processed by the Discount Plan. The Discount Plan sends the approved claim back to the Covered Entity or PBM, which then returns the claim to the pharmacy. *Patient Y* pays the cost associated with the Discount Plan rather than the cost-sharing amount required under their health coverage, and that amount is applied to *Patient Y*'s health coverage deductible.

In this example, the transaction is subject to Parts 31 and 32 despite the claim being processed in part by, and paid according to the terms of, the Discount Plan. This is due to a number of factors:

- The claim originated as an attempt by *Patient Y* to utilize their pharmacy benefit provided by a Covered Entity as shown when *Patient Y* presented a health benefit

[1] It is the Department's position that a Discount Plan that is not insurance and that only offers discounts or access to discounts to a member for dental services, vision services, or retail purchases of prescription drugs from licensed pharmacies does not offer "health coverage" as that term is used in Tenn. Code Ann. § 56-7-3102(1). However, if the Discount Plan actually constitutes insurance or otherwise provides health coverage in addition to the described discounts, such Discount Plan would not meet the definition at Tenn. Code Ann. § 56-17-101(3)(A) and would be excluded from qualifying as a Discount Plan pursuant to Tenn. Code Ann. § 56-17-101(3)(B).

[2] Sometimes, the intermediaries processing transactions between Discount Plans and pharmacies as described in Example 1 are also licensed as PBMs because they also administer the medication and/or device portion of pharmacy benefits coverage provided by one or more Covered Entities for other transactions. It is the Department's position that such an intermediary, when processing claims for a Discount Plan not otherwise involving a Covered Entity, is not functioning as a PBM in Example 1 because it is not administering the medication or device portion of pharmacy benefits coverage provided by a Covered Entity as required to meet the definition of a PBM found at Tenn. Code Ann. § 56-7-3102(5). Discount Plans are not Covered Entities because they are not providing health coverage, as set out in Footnote 1, to covered individuals employed or residing in this state as required to meet the definition of a Covered Entity found at Tenn. Code Ann. § 56-7-3102(1), and a Discount Plan must not be insurance to meet the definition at Tenn. Code Ann. § 56-17-101(3).

card, not a Discount Plan membership card, to pharmacy staff. This is in contrast to *Patient X* in Example 1 who only presented a Discount Plan membership card;

- The claim was received and initially processed by the PBM in the same manner as a pharmacy benefit claim, and it was only the Covered Entity's or PBM's internal adjudication that caused the claim to be diverted to a Discount Plan;
- The PBM submitted the claim to the Discount Plan on its own without *Patient Y*'s participation, direction, or knowledge; and
- The cost *Patient Y* paid for the prescription under the Discount Plan was applied to *Patient Y*'s deductible.

It is important to note that Example 2 is not the only situation where Parts 31 and 32 could apply to a transaction involving a Discount Plan, nor is it required that all of the above factors, which are provided only for illustrative purposes, must be present for Parts 31 and 32 to apply to a particular transaction. The main inquiry is whether, depending on the specific requirement(s) in Part 31 or 32 and the specific facts under review, the transaction involves the provision of health coverage by a Covered Entity, thus subjecting the transaction to the requirements relevant to Covered Entities in Parts 31 and 32, or if the transaction constitutes the administration of pharmacy benefits on behalf of a Covered Entity, thus subjecting the transaction to the requirements under Parts 31 and 32 regarding claims adjudicated by PBMs.

This bulletin has been prepared for informational purposes only, and is not intended to provide, and should not be relied on for, legal advice. You should consult your own legal advisors before engaging in any transaction.

Any questions regarding this bulletin should be directed to PBM.Compliance@tn.gov.