OSPA
OREGON STATE PHARMACY ASSOCIATION

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December 12, 2023

The Honorable Ron Wyden
Committee on Finance
U.S. Senate
219 Dirksen Senate Office Building
Washington, DC 20510-6200

Dear Chair Wyden:

On behalf of the Oregon State Pharmacy Association and the 9,006 licensed pharmacists in our state, I am writing to thank you for your continuing leadership to advance federal legislation across the finish line this year to begin to reign in the harmful business practices of pharmacy benefit managers (PBMs) that continue to close pharmacies in Oregon and deny Oregonians vital access to their trusted, local community pharmacists.

It is encouraging that the Senate Finance Committee also passed the Grassley/Thune/Lankford amendment that requires congressional briefings, every 90 days, with annual reports through plan year 2027 to monitor any changes to PBM contract terms and conditions offered to pharmacies for network or preferred network participation. **However, additional actions are necessary to keep pharmacy doors open in 2024.**

Accordingly, we applaud the news that you have arranged a bipartisan virtual briefing with the Centers for Medicare and Medicaid Services (CMS) on Friday December 15, 2023, to discuss the upcoming DIR "cliff" (double hit to pharmacies of 2023 Direct and Indirect Remuneration (DIR) fees and "lowest possible reimbursement" in 2024) and what CMS plans to do to maintain pharmacy access standards under federal regulations (§ 423.120 Access to covered Part D drugs). **We look forward to receiving direct answers from CMS to the questions that we sent to your staff on October 18, 2023.**

As I stated in our letter, ***"[f]or context in terms of Oregon pharmacy closures, in 2008 we had 681 community pharmacies and in 2022 we only had 499 remaining." "If you just look at the independent pharmacies' closures, in 2008 we had 248 in Oregon and now we were down to only 90 remaining in 2022. We've already lost over 15 more in 2023."***

Senator Grassley, the Iowa Pharmacy Association, and the American Pharmacists Association recently worked with CMS to request a November 6 memorandum that was sent to all Part D plans which stated "[w]e are continuing to strongly encourage Part D plan sponsors to provide payment plans or alternate payment arrangements to pharmacies in advance of the January 1, 2024, effective date. If such an arrangement is offered, Part D sponsors and their PBMs should provide pharmacies with a straightforward means of requesting it…***and CMS will closely monitor plan compliance with pharmacy access standards at § 423.120 to ensure that all Medicare Part D beneficiaries continue to***

have access to pharmacies and medications." **Yet, no current payment plans, or alternative payment arrangements have been announced by Part D sponsors or their PBMs**.

Under § 423.120 **"[a]t least 70 percent of Medicare beneficiaries, on average, in rural areas served by the Part D sponsor [must] live within 15 miles of a network pharmacy that is a retail pharmacy."** It's 90 percent, on average, within 2 miles of a network pharmacy for urban areas and 90 percent, on average, within 5 miles for suburban areas.

With the current underwater reimbursement rates in the PBMs' 2024 contracts and ongoing pharmacy closures in Oregon and across the country, it is not feasible that many of the Part D plans will still be in compliance with § 423.120. If pharmacies continue closing down and many Part D plans are, in fact, noncompliant with § 423.120 then not only will seniors lose access to their necessary pharmacies, they will also lose access to their Part D plans.

We fear the PBMs want to thin down the market of participating pharmacies (mainly independents) as much as they can, force patients to use mail order for their medications (which raises medication and patient safety, waste, and other concerns), and then will lobby CMS and Congress to redefine network adequacy. CMS and Congress should not simply watch community pharmacies continue to close and/or move the goalposts for compliance under § 423.120.

CMS needs to use every lever, (enforcement discretion, etc.) to allow pharmacies additional time to pay off 2023 DIR fees and additional flexibility on January 1, 2024. CMS must hold PBMs/Part D plans accountable that are out of compliance with § 423.120. If anything, Congress likely needs to pass federal legislation with increased penalties for PBMs/Part D plans that are out of compliance and include a federal funding bridge (i.e., a joint effort with the Small Business Administration (SBA) or U.S. Department of Agriculture to leverage their loan authority to assist essential and rural pharmacies survive in 2024).

To assist Part D plan sponsors and vulnerable pharmacies, specifically, CMS should immediately exercise enforcement discretion under agency authority under § 423.505(b)(18)[1] and delay collection of Q4 2023 pharmacy price concessions/DIR fees over calendar year (CY) 2024 to allow Part D plan sponsors and vulnerable pharmacies to address cash flow issues during the first quarter of 2024 (Q1). In addition, if collection is delayed, CMS should also prohibit any punitive actions on a pharmacy based on participation in any voluntary participation in any payment plans, or alternative payment arrangements addressing these cash flow concerns.

[1] Contract Provisions, "[t]o agree to have a standard contract with ***reasonable and relevant*** terms and conditions of participation whereby any willing pharmacy may access the standard contract and participate as a network pharmacy"

OSPA stands with you to protect Oregonians' access to their trusted, local community pharmacists. If you have any questions, we would be happy to speak with you about this issue. Please reach out to me at brian@oregonpharmacy.org to further discuss this issue if needed.

Thank you,

Brian Mayo
Executive Director