



November 7, 2023

The Honorable Ron Wyden
Chairman
Committee on Finance
221 Dirksen Senate Office Building
United States Senate
Washington, D.C. 20510

The Honorable Mike Crapo
Ranking Member
Committee on Finance
239 Dirksen Senate Office Building
United States Senate
Washington, D.C. 20510

RE: FMI Support of the *Better Mental Health Care, Lower-Cost Drugs, and Extenders Act*

Dear Chairman Wyden and Ranking Member Crapo:

On behalf of the food industry, including many thousands of supermarket pharmacies, we at FMI – the Food Industry Association write to express our strong support for the *Better Mental Health Care, Lower-Cost Drugs, and Extenders Act*, which includes crucial drug pricing reforms aimed at addressing several opaque and anticompetitive business practices used by some pharmacy benefit managers (PBMs) in the Medicare and Medicaid markets. These practices have resulted in extremely harmful impacts to supermarket pharmacies, preventing many of our member companies from opening new locations and forcing others out of the pharmacy business altogether. Although the legislation needs changes to have maximum impact, we believe it represents a significant step toward stabilizing the operating environment for pharmacies and promoting transparency, competition, and affordability within the prescription drug supply chain.

Nonetheless, it is crucial to address concerns we have regarding the legislation. First, the 2028 effective date for several of the most pivotal policies is a significant problem, as it does not align with the urgent need for relief among our pharmacy members. Without reform now, PBM practices make it likely that FMI members will be forced to continue leaving the pharmacy business – either by outsourcing their pharmacy operations to the biggest, PBM-affiliated players in the market, or by abandoning pharmacy operations altogether. Supermarket pharmacy closures and abandoned expansions contribute to the overall trend of decreased access to pharmacies and “pharmacy deserts,” with the impact being particularly acute in rural, urban, and underserved communities where closures are more prevalent and detrimental to a community’s access to health care.

It is also important to understand the Centers for Medicare and Medicaid Services' Contract Year 2023 Medicare Part D rule that goes into effect on January 1, 2024, does not currently include any CMS oversight protections for pharmacies or agency enforcement plans over plan/PBM compliance with the rule's requirements. Moreover, in the final rule, CMS itself acknowledged concerns raised by pharmacies that the lowest Part D drug price applied at the point of sale as determined by plans/PBMs could have market consequences for "already struggling pharmacies to decrease services or medication availability, and/or be unable to remain in business..." Therefore, we urge you to accelerate the implementation of these essential reforms to expedite relief to pharmacies facing dire challenges.

Additionally, to provide timely pharmacy protections and ensure oversight of Part D reform implementation, FMI urges:

- The inclusion of legislative language that requires the HHS Secretary in 2024-25 to conduct annual audits of prescription drug plans and Medicare Advantage prescription drug plans to assess:
 - Whether all fees in pharmacy contracts that affect a pharmacy's reimbursement comply with regulatory requirements in that they are represented in the lowest price of the drug at the point-of-sale or accounted for in a plan's bid (e.g., required certification process by plans to CMS);
 - Any growth in administrative fees of any type or upfront payments from pharmacies that are not being applied at the point-of-sale that a plan charges a pharmacy, and what such fees represent;
 - Whether plans are assessing national pharmacy acquisition cost and national dispensing cost survey data when negotiating a pharmacy's "negotiated price" and how closely pharmacy rates are to acquisition and dispensing data by type of pharmacy;
 - If performance measures applied to derive pharmacy concessions are relevant to the drugs dispensed and services provided by the pharmacy;
 - Enrollee access to in-network pharmacies by pharmacy type that are not owned or affiliated by a plan/PBM; and
 - Compliance with requirements regarding the application of pharmacy performance metrics (see below).
- The inclusion of legislative language that requires CMS to oversee and track plan bid estimations of pharmacy DIR. This should require that CMS assess and report to Congress when plans have underestimated prospective DIR and any other pharmacy-related fees during their bid submissions and then retained any overpayments from DIR/other pharmacy fees in excess of their bid estimates during the reconciliation process with Medicare.

Additionally, it is critical to expand the pharmacy reimbursement protections in Medicare to **all** pharmacies that are not owned by or affiliated with a PBM. The seemingly arbitrary limitations contained in the legislation do not provide adequate coverage and protection for the vast majority of pharmacies. Currently, pharmacies, including those operated by FMI's supermarket member companies, are subject to the unfavorable and anticompetitive terms of PBMs' take-it-or-leave-it contracts, which typically include inadequate and unfair reimbursement terms that ultimately result in pharmacies dispensing prescriptions at a financial loss. The ramifications of such terms further threaten the viability of these pharmacies while putting pharmacy access and patient choice at risk. Bearing this in mind, again, it is essential that any protections specific to pharmacy reimbursement or other contract terms be equally applicable to all pharmacies that are not otherwise owned by or affiliated with a plan/PBM.

Furthermore, although the reimbursement protections do not currently apply to FMI members, we are extremely concerned about the precedential effect of the policy as currently written, which only requires pharmacies to be reimbursed for the average acquisition cost of drugs and does not include a professional dispensing fee. Pharmacy reimbursement typically includes both the product cost and a professional dispensing fee, with the dispensing fee calculated to incorporate the costs of a pharmacist's time reviewing the patient's medication history/coverage, filling the containers, performing drug utilization reviews, overhead expenses (rent, heat, etc.), labor expenses, patient counseling, medication therapy management and more to provide quality patient care. Thus, excluding the professional dispensing fee will ensure pharmacies continue operating at a loss.

Additionally, this policy does not align with CMS policy. Case in point, in 2016, CMS required all states to adopt a more transparent reimbursement model under the 2016 Covered Outpatient Drug Final rule, which used actual acquisition cost *and a professional dispensing fee* to balance the need for affordable solutions and adequate reimbursement for actual costs.

FMI is still vetting details of the legislation and working to determine the impact of several additional provisions, but we wanted to flag our most significant initial concerns. Nevertheless, we continue to feel this legislation represents a significant opportunity for supermarket pharmacies. We would therefore like to extend our sincere appreciation to you both, Chairman Wyden and Ranking Member Crapo, for your unwavering commitment to enhancing pharmacy access and choice for patients nationwide, as well as to the committee staff for their hard work. We also look forward to working collaboratively to both address FMI's outstanding concerns and ensure this vital legislation receives full Senate consideration this year.

If you have questions about these comments or would like additional information, please feel free to contact me at pmat@fmi.org or (202) 452-8444.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Matz", is placed over a light gray rectangular background.

Peter Matz

Director, Food and Health Policy