COLORADO DEPARTMENT OF HEALTH CARE POLICY & FINANCING

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Bill Ritter, Jr., Governor • Joan Henneberry, Executive Director

November 24, 2008

The Honorable Moe Keller, Chairman
Joint Budget Committee
200 East 14th Avenue, Third Floor
Denver, CO 80203

Dear Senator Keller:

This letter is in response the Legislative Request for Information number 22 which states:

The Department is requested to submit a report to the Joint Budget Committee on January 2, 2009 regarding potential savings to the Medical Services Premiums line item based on implementing the Deficit Reduction Act of 2005 average manufacture price upper payment limits for pharmacy reimbursement.

The Department is submitting this request early at this time because there are no expected potential savings from this provision in FY 2008-09. The implementation of these provisions of the Deficit Reduction Act is currently delayed by two federal actions.

The attached report includes the Department's savings projection requested under Legislative Request for Information number 22. Questions regarding the attached report can be addressed to Cathy Traugott, Pharmacy Section Manager, at 303-866-2468.

Sincerely,

Joan Henneberry
Executive Director

JH/ct

Cc: Representative Jack Pommer, Vice-Chairman, Joint Budget Committee
Senator Abel Tapia, Joint Budget Committee
Senator Al White, Joint Budget Committee
Representative Mark Ferrandino, Joint Budget Committee
Representative Don Marostica, Joint Budget Committee
Senator Peter Groff, President of the Senate
Senator Ken Gordon, Senate Majority Leader
Senator Andy McElhany, Senate Minority Leader
Representative Andrew Romanoff, Speaker of the House
Representative Alice Madden, House Majority Leader
Representative Mike May, House Minority Leader
John Ziegler, JBC Staff Director
Melodie Beck, JBC Analyst
Todd Saliman, Director, Office of State Planning and Budgeting
Luke Huwar, Budget Analyst, Office of State Planning and Budgeting
Legislative Council Library (4 copies)
State Library (4 copies)
Joan Henneberry, Executive Director
HCPF Executive Director's Office
Sue Williamson, Director, Community and Client Relations Office
Jennifer Evans, Director, Administration and Operations Office
Sandeep Wadhwa, M.D, Director, Medical and CHP+ Program Administration Office
John Bartholomew, Budget and Finance Office Director
Ginny Brown, Legislative Liaison
Lindy Wallace, Project Management Director
Joanne Lindsay, Public Information Officer
HCPF Budget Library, HCPF Budget Division

COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING

REPORT TO THE JOINT BUDGET COMMITTEE

UPDATE ON THE IMPLEMENTATION OF THE AVERAGE MANUFACTURERS PRICE UPPER PAYMENT LIMITS FOR PHARMACY REIMBURSEMENT

NOVEMBER 24, 2008

This report is presented to the Joint Budget Committee (JBC) of the Colorado General Assembly in response to Legislative Request for Information number 22, which states:

> *The Department is requested to submit a report to the Joint Budget Committee on January 2, 2009 regarding potential savings to the Medical Services Premiums line item based on implementing the Deficit Reduction Act of 2005 average manufacture price upper payment limits for pharmacy reimbursement.*

At this time, the Department expects no potential savings from this provision in FY 2008-09 because the implementation of these provisions of the Deficit Reduction Act is currently delayed by two federal actions.

On December 19, 2007, United States District Judge Royce C. Lamberth signed an order for a preliminary injunction to block the final rule the Centers for Medicare and Medicaid Services (CMS) published on pharmacy reimbursement (AMP rule). The injunction is in response to a lawsuit filed by the National Association of Chain Drug Stores and the National Community Pharmacists Association. The court order asserts, among other things, that CMS violated the Administrative Procedure Act by publishing an AMP rule that is not consistent with the statutory definition of "average manufacturer price." Currently, this injunction remains in place and it is unclear when further action will be sought in this case.

Additionally, on July 15, 2008, the U.S. Congress implemented a moratorium on the publication of AMP data until 10/01/2009 (Medicare Improvements for Patients and Providers Act of 2008 P.L.110 275). This provision also authorizes CMS to resume publishing the federal upper limits (FULs) for multiple source drugs using the methodology in 42 CFR 447.332 as in effect on December 31, 2006. Thus, any new or changed FULs will be calculated under the previous methodology through which the Department already was receiving FULs. As a result, there will be no savings based on the Deficit Reduction Act provisions.

In the Long Bill, the Department's appropriation for Medical Services Premiums was reduced by $1,000,000 total funds in FY 2008-09 to account for savings due to the implementation of the new federal regulations. Based on the Joint Budget Committee's staff recommendation, the dispensing fee increase was tied to the implementation of those recommendations: "If savings are insufficient to pay for this rate increase, then the Joint Budget Committee can take action at next year's figure setting to delay or suspend this recommended increase" (Figure Setting, March 11, 2008, page 128). Because the new regulations are currently enjoined and no savings are anticipated, the Department anticipates that the Joint Budget Committee will remove the footnote requirement to increase the dispensing fee and restore the funding removed for the estimated savings.

CMS must approve any increase in dispensing fees. In order for the Department to receive CMS approval, it needs to conduct a cost-of dispensing fee study. However, due to anticipation that the Joint Budget Committee will remove the footnote, the Department will not pursue a study to determine if the cost to dispense medications is more than $4.00 per prescription.

If the Joint Budget Committee intends to retain the requirement to increase the dispensing fee, the Department would require a supplemental appropriation to (1) fund a study to determine the cost to dispense medication, and (2) a specific appropriation to Medical Service Premiums for the cost of increasing the dispensing fee. The Executive Budget Request does not include funding for either of these activities.

Attached is the Dear State Medicaid Director Letter from December 21, 2007, which is CMS's response to the federal court injunction.

ATTACHMENTS

1. **THE CENTERS FOR MEDICARE AND MEDICAID SERVICES DEAR STATE MEDICAID DIRECTOR LETTER ON INJUNCTION ON IMPLEMENTATION OF AMP AND FUL -DECEMBER 21, 2007.**

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-14-26
Baltimore, Maryland 21244-1850

Center for Medicaid and State Operations
Disabled and Elderly Health Programs Group (DEHPG)

December 21, 2007

Dear State Medicaid Directors,

The United States District Court for the District of Columbia has issued a preliminary injunction that enjoins CMS from implementing the final rule with comment concerning Average Manufacturer Prices (AMPs) to the extent that it affects Medicaid reimbursement rates for retail pharmacies under the Medicaid program. The order also enjoins CMS from disclosing AMP data to certain individuals or entities, including States or their representatives. A copy of the Order is attached to this letter.

As a result of this preliminary injunction, CMS will not be posting AMPs or Federal Upper Limits (FULs) on our website in late December 2007 despite the schedule we provided for such postings when the final rule with comment was published on July 17, 2007. Consequently, the schedule for States to implement the new FULs will be delayed until further notice. In addition, CMS is suspending the sending of monthly files of AMPs to States.

The preliminary injunction does not affect the use of AMP as defined in the July 17, 2007 final rule with comment for purposes of the Medicaid drug rebate program. Therefore, drug manufacturers will continue to report AMPs in accordance with the provisions of the July 17, 2007 rule and CMS will continue to issue unit rebate amounts (URAs) to the States based on the quarterly manufacturer submissions.

Sincerely,

Gale P. Arden

Gale P. Arden
Director

Attachment

cc:

CMS Regional Administrators

CMS Associate Regional Administrators
for Medicaid and State Operations

Martha Roherty
Director, Health Policy Unit
American Public Human Services Association

Dennis Smith
Director
Center for Medicaid & State Operations

Bill Lasowski
Center for Medicaid & State Operations

David Hoskins
Office of General Council

Winnie Pizzano
Office of External Affairs

Susan McNally
Office of Legislation

Laura Caliguiri
Office of the Secretary

Deirdre Duzor
Director, Division of Pharmacy
Disabled & Elderly Health Programs Group

Larry Reed
Technical Director, Division of Pharmacy
Disabled & Elderly Health Programs Group