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February 26, 2020

To: The Honorable Delores G. Kelley
Chair, Finance Committee

From: Patricia F. O'Connor, Health Education and Advocacy Unit

Re: Senate Bill 623 (Health Insurance - Out-of-Pocket Maximums and Cost-Sharing Requirements - Calculation): Support

The Office of the Attorney General's Health Education and Advocacy Unit (HEAU) supports Senate Bill 623 which would require carriers to apply the value of manufacturer drug coupons to a deductible; other cost-sharing requirements; and out-of-pocket (OOP) maximums, subject to federal laws which are in flux. 'Copay accumulator programs' that prohibit such credits had been implemented by some Maryland carriers in recent years to the detriment of consumers, and the bill would prohibit the programs.

The HEAU has received complaints about copay accumulator programs from consumers requiring brand drugs to treat AIDS, HIV and other chronic conditions, where there is no medically equivalent generic that is suitable or available. These consumers have been unable to afford the brand drugs without the drug coupons and the deductible credits, leaving them the choice of doing without life-sustaining drugs or taking on crippling medical debt.

HHS's Final Notice of Benefit and Payment Parameters for 2020 ("the 2020 Final Rule") issued on April 25, 2019, added section (h) to 45 CFR § 156.130 (Cost-sharing requirements):

(h) *Use of drug manufacturer coupons.* For plan years beginning on or after January 1, 2020:

(1) Notwithstanding any other provision of this section, and to the extent consistent with state law, amounts paid toward cost sharing using any form

of direct support offered by drug manufacturers to enrollees to reduce or eliminate immediate out-of-pocket costs for specific prescription brand drugs that have an available and medically appropriate generic equivalent are not required to be counted toward the annual limitation on cost sharing (as defined in paragraph (a) of this section).

84 Federal Register 80 at 17567-8; <https://www.govinfo.gov/content/pkg/FR-2019-04-25/pdf/2019-08017.pdf>

In its response to comments about proposed 45 CFR § 156.130(h) asserting that “the final language should expressly provide that these limitations on coverage only apply to the extent consistent with state law,” the Centers for Medicare and Medicaid Services (CMS) stated:

In response to comments, we clarify that the ability to exclude amounts paid toward cost sharing using any form of direct support offered by drug manufacturers to insured patients to reduce or eliminate immediate out-of-pocket costs for specific prescription brand drugs that have a generic equivalent from being counted toward the annual limitation on cost sharing is subject to applicable state law. **This means that states can require that such amounts be counted toward the annual limit on cost sharing. We are modifying the final regulation text to state this explicitly.**

(Emphasis added). 84 Federal Register 80 at 17546.

States are free to legislate in this area, subject to evolving federal regulations that may have future preemptive effect. We believe consumers require the protections offered by the bill now, particularly when no generics are available, and are hopeful the federal laws and regulations will be sorted out in a manner favorable to Maryland consumers.¹ The proposed 2021 payment rule is expected later this fall and is expected to clarify ambiguity about compliance with the 2020 Final Rule and IRS rules for high deductible health plans (HDHPs). See “HHS Walks Back New Policy On Drug Coupons,” Katie Keith, Health Affairs Blog (8/28/19), <https://www.healthaffairs.org/do/10.1377/hblog20190828.555588/full/>

For these reasons, we ask the Committee for a favorable report.

cc: Senator Benson, Sponsor
Members of the Finance Committee

¹ We acknowledge the federal regulation’s balance between cost control and patient access achieved by treating drug coupons for brand drugs *without* available and medically appropriate generics differently than coupons for brand drugs with such generics.