



May 23, 2023

Andrew N. Mais
Commissioner
Connecticut Insurance Department
153 Market Street, 7th Floor
Hartford, CT 06103
Via Electronic Communication

Re: CT Union Workers Are Losing ACA Protections as a Result of PrudentRx's Program

Dear Commissioner Mais:

Aimed Alliance is a non-profit health policy organization whose mission is to protect and enhance the rights of health care consumers and providers. Aimed Alliance recently learned that a Connecticut health plan is partnering with PrudentRx to define specialty medications as non-essential health benefits (non-EHB) under the Patient Protection and Affordable Care Act (ACA). Therefore, we are writing to discuss:

- (1) How Connecticut Union workers are being impacted by non-EHB programs; and**
- (2) How non-EHB programs are inconsistent with Connecticut's benchmark plan and the ACA.**

Considering the Connecticut Insurance Commissioner has primary authority to implement and ensure compliance with the ACA, we are requesting a meeting with Commissioner Mais' office to further discuss our concerns.

I. Background on Copay Accumulators and Non-EHB Programs.

The ACA was passed in 2010 with the goal of making health care more affordable for Americans.¹ To that end, the ACA created annual limits on cost-sharing and required health plans to cover 10 essential health benefits (EHBs).² The ACA further requires that all cost-sharing paid for an EHB must count towards an individual's annual limit on cost-sharing.³ One of the 10 EHBs is prescription drugs.⁴

Despite the intent of the ACA, the cost of prescription drugs for many individuals with chronic conditions can still be expensive.⁵ Thus, to afford their prescriptions and meet their cost-sharing requirements, some consumers rely on third-party assistance programs such as manufacturer copay assistance or charitable assistance programs.⁶ Typically, third-party assistance counts toward both the individual's copay at the pharmacy counter and their annual limit on cost-

¹ HHS, *About the Affordable Care Act*, <https://www.hhs.gov/healthcare/about-the-aca/index.html>.

² CMS, *Information on Essential Health Benefits (EHB) Benchmark Plans*, <https://www.cms.gov/ccio/resources/data-resources/ehb>; 42 U.S.C. § 18022.

³ CMS, *Frequently Asked Questions on Essential Health Benefits Bulletin*, p. 4 <https://perma.cc/HCH7-6AYA>.

⁴ 42 U.S.C. § 18022

⁵ Georgetown University, *Prescription Drugs*, <https://hpi.georgetown.edu/rxdrugs/>.

⁶ ACSCAN, *Survey: More than 80 Percent of Cancer Patients and Survivors Say Copay Assistance Programs Help Them Afford Their Prescription Drugs*, <https://www.fightcancer.org/releases/survey-more-80-percent-cancer-patients-and-survivors-say-copay-assistance-programs-help-0>.



sharing. However, some health plans have implemented copay accumulator programs to capitalize on this third-party assistance. Under a copay accumulator program, the health plan will accept the third-party assistance on behalf of an individual, but it will not count towards an individual’s annual limit on cost-sharing.

Copay accumulators result in consumers unnecessarily paying more out-of-pocket to meet their health care needs. The below graphic from *The AIDS Institute 2023 Report on Copay Accumulators* demonstrates how consumers enrolled in a copay accumulator program pay nearly three times more for health care compared to consumers not enrolled in a copay accumulator program.⁷



Two million Connecticut residents, approximately 57 percent of Connecticut’s population, have one or more chronic conditions.⁸ Consumers living with chronic conditions may have increased health care expenses due to a variety of considerations, such as the cost of available treatments, frequency of provider visits, and other costs that consumers without chronic conditions do not incur. For example, a 2015 study analyzing commercial health insurance claims found that

⁷ The AIDS Institute, *Discriminatory Copay Policies Undermine Coverage for People with Chronic Illness*, <https://aidsinstitute.net/documents/TAI-Report-Copay-Accumulator-Adjustment-Programs-2023.pdf>

⁸ Connecticut State Department of Public Health, *Chronic Disease Prevention and Health Promotion*, <https://portal.ct.gov/dph/Health-Education-Management--Surveillance/Chronic-Disease-Prevention-and-Health-Promotion#:~:text=More%20than%20two%20million%20Connecticut,%2C%20diabetes%2C%20and%20heart%20disease.>



individuals living with at least two chronic conditions had mean annual health care spending of over \$12,000. This is nearly double the 2015 annual limit on cost sharing for individuals (\$6,350).⁹ Thus, copay assistance can provide much needed financial relief for individuals and families already incurring high health care costs.

Recently, health plans have started partnering with third-party companies to further capitalize on copay assistance. Under these arrangements, a health plan states that specialty medications are non-EHB.¹⁰ To receive coverage for a non-EHB medication through the plan, individuals must enroll in the third-party company's program.¹¹ Individuals are notified that if they enroll in the third-party program, they can receive specialty medications for a low copayment,¹² which the third-party program attains by enrolling individuals in manufacturer copay assistance programs.¹³ The health plan will accept the maximum amount of copay assistance available, but it is not counted towards the consumer's annual limits on cost-sharing, essentially operating as a copay accumulator.¹⁴ If individuals do not enroll in the third-party program, they must pay a 30 to 70 percent coinsurance. Further, because the specialty medications have been defined as non-EHBs, any payments by consumers will not count towards their annual limits on cost-sharing.¹⁵

Under this coercive scheme, consumers are forced to enroll in the third-party program or be expected to pay an unlimited coinsurance to access their medications. By permitting health plans to define specialty medications as a non-EHB, the ACA's core EHB protections are eroded at the expense of Connecticut health care consumers.

II. The EHB Scheme Violates the ACA and Its Implementing Regulations.

Non-EHB programs claim that they are not required to categorize specialty drugs as an EHB because (1) plans are only required to cover the minimum number of drugs in a class or category, deeming everything else a non-EHB; and (2) specialty drugs can be excluded from the definition of prescription drugs as an EHB. This interpretation violates the ACA and its implementing regulations because employer-sponsored health plans that choose to offer prescription drugs must comply with the ACA's annual limits on cost-sharing.

A. Covered prescription drugs are EHBs and must count toward annual cost-sharing limits.

⁹ Cothier Hajat, et al., *Clustering and Healthcare Costs With Multiple Chronic Conditions in a US Study*, 8 FRONTIERS IN PUBLIC HEALTH 1 (2021), <https://doi.org/10.3389/fpubh.2020.607528>.

¹⁰ PrudentRx, *The PrudentRx Copay Program Frequently Asked Questions*, https://www.caremark.com/portal/asset/TRS_PrudentRx_Member_FAQ.pdf.

¹¹ PrudentRx, *The PrudentRx Copay Program Frequently Asked Questions*, https://www.caremark.com/portal/asset/TRS_PrudentRx_Member_FAQ.pdf.

¹² PrudentRx, *The PrudentRx Copay Program Frequently Asked Questions*, https://www.caremark.com/portal/asset/TRS_PrudentRx_Member_FAQ.pdf.

¹³ SEBAC, *SEBAC 2022 Agreement Between State of Connecticut and State Employees Bargaining Agent Coalition (SEBAC)*, <https://www.ccsu.edu/suoaf/2022-SEBAC-Agreement.pdf>.

¹⁴ PrudentRx, *The PrudentRx Copay Program Frequently Asked Questions*, https://www.caremark.com/portal/asset/TRS_PrudentRx_Member_FAQ.pdf.

¹⁵ PrudentRx, *The PrudentRx Copay Program Frequently Asked Questions*, https://www.caremark.com/portal/asset/TRS_PrudentRx_Member_FAQ.pdf.



Under the ACA, all EHBs, including prescription drugs, are subject to the annual limits on cost-sharing, unless an exception exists.¹⁶ Cost-sharing includes deductibles, coinsurance, copayments, and similar charges.¹⁷ Employer-based plans are not required to offer EHBs; however, if an employer-sponsored plan chooses to cover an EHB, the EHB coverage must comply with ACA requirements.¹⁸

ACA regulations state that a health plan provides the EHB for prescription drugs only if it “covers **at least the greater** of (1) one drug in every USP category and class; or (2) the same number of prescription drugs in each category and class as the benchmark plan.”¹⁹ By using the “at least the greater” language, the regulation sets the **minimum** standard of what a plan must cover to offer prescription drugs as an EHB, rather than the upper limit.

This interpretation is consistent with other provisions within the same regulation. For example, the regulation provides that a health plan must offer appropriate means for an individual to request and receive appropriate clinical prescriptions that are not covered under the general plan (i.e., an exception request).²⁰ The exception provision states that the plan “must treat the excepted drug(s) as an essential health benefit, including by counting any **cost-sharing toward the plan’s annual limit on cost-sharing**. . . .”²¹ It would be inconsistent to categorize excepted drugs as an EHB, but consider other drugs covered by the plan a non-EHBs. Similarly, the regulation further specifies that health plans are authorized to charge different cost-sharing amounts for obtaining covered drugs at a retail pharmacy, but “**all cost sharing will count toward the plan’s annual limitation on cost sharing**,” affirming that all covered drugs, and drugs that are medically necessary, are to be treated as an EHB for the purpose of calculating the annual cost sharing limitation.²²

HHS has confirmed that this interpretation applies to small and individual group plans. In the Notice of Benefit and Payment Parameters for 2016 (“NBPP 2016”), HHS stated that “plans are permitted to go beyond the number of drugs offered by the benchmark without exceeding EHB. Therefore, if the plan is covering drugs beyond the number of drugs covered by the benchmark, **all of these drugs are EHB and must count towards the annual limitation on cost sharing**.”²³ This position was reaffirmed by HHS in the NBPP 2020.²⁴

PrudentRx and other non-EHB programs misconstrue the “at least the greater” language to only require the minimum number of drugs in a class or category to be EHBs. They use this

¹⁶ CMS, *Frequently Asked Questions on Essential Health Benefits Bulletin*, <https://perma.cc/HCH7-6AYA> at p. 4.

¹⁷ 42 U.S.C. § 18022(c)(3)(A).

¹⁸ CMS, *Frequently Asked Questions on Essential Health Benefits Bulletin*, <https://perma.cc/HCH7-6AYA>

¹⁹ 42 C.F.R. § 156.122 (emphasis added).

²⁰ 42 C.F.R. § 156.122.

²¹ 42 C.F.R. § 156.122 (emphasis added).

²² 42 C.F.R. § 156.122 (emphasis added).

²³ 80 Fed. Reg. 10,817 (February 27, 2015) (emphasis added).

²⁴ 84 Fed. Reg. 17,543 (April 25, 2019).



interpretation to justify considering the remainder of medications as non-EHBs.²⁵ This interpretation is incorrect and fails to recognize that the ACA regulations explicitly specifies a manner in which non-benchmark and non-formulary medications are considered EHBs. Ultimately, employer-sponsored health plans using non-EHB programs, like PrudentRx, are providing voluntary coverage of prescription drugs. As such, all covered drugs offered by these plans must be considered EHBs and subject to the ACA’s protections such as the annual limit on cost-sharing.

B. Employer-sponsored plans can define an EHB so long as the definition complies with pre-established definitions, guidance, statutes, and regulations.

Non-EHB programs allege that “specialty medications” under their programs do not fit within the existing 10 categories of EHBs. According to PrudentRx, “[b]ecause certain specialty medication do not qualify as ‘essential health benefits’ []... member cost share payments for these medications, whether made *by you* or a manufacturer copay assistance program, do not count towards the Plan’s maximum OOP (MOOP).”²⁶

However, “prescription drugs” is one of the ten categories of EHBs.²⁷ While the ACA does not define the term “prescription drugs,” the ACA regulation governing prescription drugs as an EHB refers to “FDA-approved drugs.”²⁸ The FDA defines a “prescription drug” as “any human drug required by Federal law or regulation to be dispensed only by a prescription. . . .”²⁹ The plain meaning of the word “prescription drug” is a “drug that can be obtained only by means of a [health care practitioner’s] prescription.”³⁰ As such, all drugs that are obtained by a prescription are part of the definition of a “prescription drug” as an EHB.

The ACA regulations only mention one class or category of drugs that health plans may exclude as an EHB—drugs intended for abortion.³¹ Each of the specialty medications listed in PrudentRx’s drug list requires a prescription to be dispensed or administered, and none of the medications appear to be for abortion.³² Therefore, all of the specialty medications subject to PrudentRx’s program fit within the EHB category of “prescription drugs.”

²⁵ Meghan Pasicznyk, *Copay Assistance Strategies Reduce Financial Burdens for Plans and Patients*, <https://perma.cc/WW6N-LC2F>.

²⁶ PrudentRx, PrudentRx Frequently Asked Questions, <https://membershealthplannj.com/wp-content/uploads/2020/11/Member-FAQ-PrudentRx-Copay-Program.pdf>; See also Express Scripts, <https://perma.cc/6WVC-UKTB> (emphasis added).

²⁷ 42 U.S.C. § 18022(b)(1)(F); 42 C.F.R. § 156.122.

²⁸ 42 C.F.R. § 156.122(a). This regulation states that in order for prescription drugs to be considered an EHB, the plan must use a pharmacy and therapeutic (P&T) committee that meets certain standards. These standards include a review of new and existing FDA-approved drugs. As such, the term “prescription drugs” likely refers to FDA-approved drugs.

²⁹ 21 C.F.R. § 205.3(e).

³⁰ Merriam-Webster, *prescription drug*, <https://www.merriam-webster.com/dictionary/prescription%20drug>.

³¹ 42 C.F.R. § 156.122(b).

³² See, e.g., PrudentRx, *Specialty Drug List March 2023*,

<https://www.pcsb.org/cms/lib/FL01903687/Centricity/domain/200/health%20insurance/PrudentRX%20Drug%20List%20March%202023.pdf>



In 2011, HHS issued guidance clarifying that under the ACA, large group health plans and self-insured health plans are not required to offer EHBs.³³ However, if large group health plans and self-insured plans did choose to offer an EHB, ACA limits on cost-sharing apply, and plans were only permitted to modify the definition of EHB in a manner “that is authorized by the Secretary of HHS.”³⁴

In 2014, HHS, the Department of Labor, and the Department of Treasury issued a joint clarification on how large group health plans and self-insured health plans could cover prescription drugs.³⁵ This clarification created limited circumstances under which a prescription drug can be excluded from the definition of an EHB. Specifically, the Departments stated that a plan could exclude the cost of name brand prescription drugs from counting towards the out-of-pocket maximum “in circumstances in which a generic [is] available and medically appropriate (as determined by the individual’s personal physician)”.³⁶ Plan structures of PrudentRx and similar companies do not meet this exception, as nearly all the prescription drugs they exclude from their definitions of EHB do not have generic versions. Thus, by carving out specialty drugs from the definition of an EHB, PrudentRx and similar programs are not using an EHB definition that has not been authorized by HHS.

III. A Non-EHB Plan is Currently Being Used by Unions in Connecticut.

In 2022, the State Employee Bargaining Agent Coalition (SEBAC) finalized its health plan coverage negotiations with the Lamont Administration.³⁷ SEBAC is composed of 35 local Connecticut bargaining unions, including employers from the judicial branch, higher education, and the criminal justice system.³⁸ Under the agreement, SEBAC agreed to partner with PrudentRx to “save [money for] members who are on specialty drugs.”

PrudentRx is a non-EHB program that defines specialty medications as non-EHBs to avoid ACA consumer protections.³⁹ When an individual enrolls in PrudentRx’s program, the enrollee is required to pay a small copay and a “small one-time cash payment” to receive their specialty medication.⁴⁰ Once enrolled in PrudentRx’s program, the health plan accepts third-party financial assistance on behalf of an enrollee, but, because the medication is defined as a non-EHB, any cost

³³ CMS, *Frequently Asked Questions on Essential Health Benefits Bulletin*, <https://perma.cc/HCH7-6AYA>; CCIIO, *Essential Health Benefits Bulletin 2011*, p.3, <https://perma.cc/38RW-GVE3>.

³⁴ *Id.* (emphasis added); CMS, *Frequently Asked Questions on Essential Health Benefits Bulletin*, <https://perma.cc/HCH7-6AYA> (stating that self-insured and large group plans “are permitted to impose non-dollar limits, consistent with other guidance, on EHB as long as they comply with other applicable statutory provisions.” (emphasis added)); CMS, *Frequently Asked Questions on Essential Health Benefits Bulletin*, p.4, <https://perma.cc/HCH7-6AYA>.

³⁵ CMS, *FAQs About Affordable Care Act Implementation (Part XIX)*, https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs19#ftn8.

³⁶ *Id.*

³⁷ SEBAC, *All 35 Local Bargaining Tables Reach Tentative Agreements; Next Step: Ratification Votes*, <https://www.ctstateemployees.org/news-interest/all-35-local-bargaining-tables-reach>.

³⁸ SEBAC, *All 35 Local Bargaining Tables Reach Tentative Agreements; Next Step: Ratification Votes*, <https://www.ctstateemployees.org/news-interest/all-35-local-bargaining-tables-reach>.

³⁹ PrudentRx, *The PrudentRx Copay Program Frequently Asked Questions*, https://membershealthplannj.com/wp-content/uploads/2020/11/Member-FAQ_PrudentRx-Copay-Program.pdf.

⁴⁰ SEBAC Contract, https://aftct.org/sites/aftct.org/files/sebac_tas_booklet.pdf.



paid for the medication by a third-party or an enrollee does not count towards the deductible or annual limit on cost sharing.⁴¹

If an individual does not enroll in the PrudentRx program, they are required to pay a substantial coinsurance that does not count towards their annual limits on cost-sharing.⁴² Although PrudentRx alleges its program is “completely voluntary” and that consumers will not incur a penalty for not enrolling, the inherent nature of PrudentRx’s program structure results in this simply being untrue.⁴³ By defining specialty medications as a non-EHBs, PrudentRx places consumers in a dangerous “catch-22” situation in which they must either (1) enroll and be denied the full benefit of copay assistance; or (2) not enroll, and pay a high coinsurance that will not count towards their deductibles or annual limits on cost-sharing. For consumers, this is a no-win situation; those who enroll in PrudentRx will be required to pay more than necessary to meet their annual limits on cost-sharing and those who do not to enroll will be required to pay excessive costs to receive their specialty medications.

These programs can be particularly harmful to health care consumers who are required to switch health plans midyear. Copay assistance is limited and subject to an annual cap. Thus, once copay assistance is exhausted, consumers can no longer rely on the assistance, but remain responsible for meeting copays, deductibles, and annual limits on cost-sharing. Further, when consumers switch plans mid-year and their copay assistance has already been exhausted, they will be responsible for the full cost of their treatment without being able to rely on third-party financial support. As a result, some health care consumers may be required to forego treatment, ration medications, or skip doses – all of which can increase consumers’ long-term health care costs.⁴⁴

IV. Commissioner Mais Has the Authority to Clarify That Specialty Medications are EHB and Non-formulary Specialty Drugs are Considered EHB When Deemed Medically Necessary.

Commissioner Mais has primary authority to regulate employer sponsored health plans that partner with PrudentRx under the Public Health Service Act (PHS Act).

While the ACA is a federal law, Title XXVII of the PHS Act intended for states to have the primary enforcement authority to ensure compliance with the marketplace reforms in the group and individual markets.⁴⁵ If a state fails to enforce ACA protections, or elects not to enforce the ACA’s market reforms, the Centers for Medicare and Medicaid Services (CMS) has secondary authority to enforce the ACA and its requirements.⁴⁶ Thus, the Connecticut Insurance Commissioner has authority to clarify and require that large group plans must consider all

⁴¹ *SEBAC Contract*, https://aftct.org/sites/aftct.org/files/sebac_tas_booklet.pdf.

⁴² PrudentRx, *The PrudentRx Copay Program Frequently Asked Questions*, https://membershealthplannj.com/wp-content/uploads/2020/11/Member-FAQ_PrudentRx-Copay-Program.pdf.

⁴³ UCONN AAUP, *SEBAC Prudent Rx*, <https://uconnaaup.org/sebac-prudent-rx/>.

⁴⁴ AMA, *8 reasons patients don’t take their medications*, <https://www.ama-assn.org/delivering-care/patient-support-advocacy/8-reasons-patients-dont-take-their-medications>.

⁴⁵ CMS, *Compliance and Enforcement*, <https://www.cms.gov/cciio/programs-and-initiatives/health-insurance-market-reforms/compliance>.

⁴⁶ CMS, *Compliance and Enforcement*, <https://www.cms.gov/cciio/programs-and-initiatives/health-insurance-market-reforms/compliance>; Patient Protection and Affordable Care Act of 2010, 42 U.S.C. §§ 18031 (b)-(d)..



medically necessary prescription drugs, including specialty drugs, as an EHB under the “prescription drug” category.⁴⁷

PrudentRx also violates Connecticut General Statute Title 38a, Chapter 700(c) Sec. 38(a)-476(a)⁴⁸ which prohibits plans from discriminating against individuals with pre-existing conditions, such as a chronic condition.⁴⁹ A pre-existing condition is considered any condition an individual has prior to new health care coverage beginning.⁵⁰ Discrimination occurs when a group of individuals receives a lesser benefit solely because of their condition.⁵¹ Specialty drugs, which are specifically targeted by these programs, are high-cost prescription drugs that are used to treat complex chronic conditions.⁵² Thus, these programs discriminate against individuals with chronic conditions by requiring individuals with chronic conditions to pay more to meet their health care costs than consumers without chronic conditions.

Lastly, SEBAC’s and PrudentRx’s definition of prescription drugs is also inconsistent with Connecticut’s benchmark plan. Connecticut’s EHB-benchmark plan includes specialty drugs as an EHB.⁵³ As such, SEBAC and PrudentRx’s decision to exclude specialty drugs from the definition of an EHB contradicts Connecticut’s benchmark plan.

By clarifying that the definition of an EHB includes specialty drugs that are deemed medically necessary; that the Connecticut EHB-benchmark plan is a minimum and not a maximum for EHB coverage; and that plans cannot adversely structure specialty medication coverage to the detriment of consumers with chronic conditions, Commissioner Mais can help eliminate these coercive programs that are negatively impacting thousands of Connecticut health care consumers and union workers.

V. Conclusion

For the reasons provided above, Aimed Alliance requests a meeting with Commissioner Mais to discuss our understanding of the ACA’s EHB requirements and Connecticut law; how PrudentRx’s program is impacting Connecticut health care consumers; and how Commissioner Mais might focus his efforts to protect consumers from these schemes.

Sincerely,

Ashira Vantrees
Counsel

⁴⁷ 42 U.S.C. § 18022(b).

⁴⁸ Connecticut General Statute Title 38a, Chapter 700(c) Sec. 38(a)-476(a). https://www.cga.ct.gov/current/pub/chap_700c.htm#sec_38a-471

⁴⁹ Public Health Service Act, Section 2704, Prohibition of Preexisting Condition Exclusions or Other Discrimination Based on Health Status.

⁵⁰ Pre-existing condition, <https://www.healthcare.gov/glossary/pre-existing-condition/#:~:text=A%20health%20problem%2C%20like%20asthma,condition%20or%20charge%20you%20more.>

⁵¹ Brandon M. Togioka, Derek Duvivier, & Emily Young, *Diversity and Discrimination in Healthcare*, <https://www.ncbi.nlm.nih.gov/books/NBK568721/#:~:text=A%20group%20may%20be%20discriminated,language%2C%20or%20location%20of%20residence.>

⁵² What is a specialty drug?, <https://www.healthinsurance.org/glossary/specialty-drug/>.

⁵³ State of Connecticut Insurance Department, *Connecticut 2017 EHB Benchmark Plan*.