



May 7, 2024

Scott Kipper  
Commissioner  
Nevada Department of Insurance

Re: Requirement to Count Copay Assistance Per 2023 District Court Decision

Dear Commissioner Kipper:

Aimed Alliance is a non-profit health policy organization that seeks to protect and enhance the rights of health care consumers and providers. One of the many ways Aimed Alliance achieves its mission, is by actively engaging state regulators to ensure health plans comply with state and federal laws. **With this objective in mind, we are writing to request your office's support in:**

- (1) Enforcing the national ban on copay accumulators in state-regulated health plans; and**
- (2) Ensuring state-regulated health plans are not using the non-essential health benefit designation in ACA health plans.**

#### **I. Prohibit Copay Accumulators by Enforcing the 2020 NBPP**

When patients cannot afford their medications, they may rely on financial assistance from pharmaceutical manufacturers and other third parties to meet their health plan's cost-sharing responsibilities and obtain their prescriptions. Typically, the value of this financial assistance counts toward the health plan's deductible or maximum out-of-pocket limit, unless the health plan has implemented a copay accumulator program.

Copay accumulator programs exclude the value of third-party financial assistance from counting toward the health plan's deductible or maximum out-of-pocket limit. This can lead to patients being forced to switch or discontinue their treatment because they cannot afford their out-of-pocket costs once their financial assistance is exhausted. Patients managing conditions treated by drugs in specialty formulary tiers, which often require greater cost-sharing from the patient, are disproportionately affected by these programs.

Prior to September 2023, the U.S. Department of Health and Human Services (HHS) permitted copay accumulators, giving health plans the option to either (a) accept copay assistance and count this assistance towards an enrollee's deductible and annual out-of-pocket limit; or (b) accept the copay assistance but prohibit the assistance from counting towards an enrollee's deductible and annual out-of-pocket limit.<sup>1</sup> Essentially, HHS allowed both practices of counting and excluding copay assistance.<sup>2</sup>

However, in 2022, three patient advocacy organizations sued HHS, alleging that it was impermissible to allow health plans to accept copay assistance without counting it towards an enrollee's deductible and annual out-of-pocket limit.<sup>3</sup> In response, the United States District Court for the District of Columbia held that HHS improperly permitted health plans to select whether copay assistance should be counted or excluded. Consequently, as explained in the District Court's [September 2023 Decision](#) and its

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<sup>1</sup> *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

[December 2023 Clarification](#), the court struck down the rule permitting health plans to count or exclude copay assistance, and the law reverted to standards set forth in the 2020 Notice of Benefit and Payment Parameters (2020 NBPP) – effective immediately and nationwide.

According to the 2020 NBPP, ***all health plans are required to count copay assistance*** towards a consumer’s annual cost-sharing requirements, unless the copay assistance is used for a brand-name medication that has an available *medically appropriate* generic alternative. The 2020 NBPP applies to all health plans, including health plans regulated by the Nevada Department of Insurance. Despite these regulatory guidelines, a 2024 Report by The AIDS Institute found that Aetna CVS, Anthem Blue Cross Blue Shield, Health Plan of Nevada, Hometown Health Plan, and SelectHealth, Inc. were still implementing copay accumulators in their 2024 plans.<sup>4</sup> As a result, Nevadan consumers face heightened financial burdens to meet their cost-sharing requirements and are at risk of losing access to essential medications due to affordability constraints.

While HHS holds the authority to enforce the national ban on copay accumulators, it has declined to act, citing its intent to engage in new rulemaking to clarify the definition of “cost-sharing.”<sup>5</sup> Despite having had since September 2023 to engage in new rulemaking, HHS has failed to do so. Consequently, health plans have continued to impose copay accumulators on consumers, despite federal law prohibiting these programs in many circumstances.

HHS’s failure to enforce the law does not absolve health plans of their legal obligations. Notably, the Supreme Court of the United States stated in *District of Columbia v. John R. Thompson, Co.*, stated “[t]he failure of the executive branch to enforce a law does not result in its modification or repeal.”<sup>6</sup> As such, the fact that HHS plans on issuing new rulemaking and has not yet taken enforcement action does not mean the law has changed or that health plans are somehow exempt from complying with it. Given the absence of federal action to protect consumers, state insurance commissioners hold the authority and responsibility to intervene and protect health care consumers from these programs.

Given the Nevada Department of Insurance’s authority to enforce the ACA within state-regulated health plans, you have an opportunity to act where HHS has fallen short. In the 2024 plan year alone, nearly 100,000 Nevadans<sup>7</sup> purchased their health insurance from the state-based exchange. Consequently, every one of these individuals, enrolled in an accumulator, would benefit from your Office enforcing the 2020 NBPP ban on copay accumulators. In light of this, Amed Alliance strongly urges your Office to issue a public statement mandating that all health plans regulated by the Nevada Department of Insurance must comply with the 2020 NBPP and refrain from implementing copay accumulators.

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<sup>4</sup> The AIDS Institute, *Unchecked: Copay Accumulator Adjustment Policies in 2024*, <https://aidsinstitute.net/documents/TAI-2024-Report-2.27.pdf>. The Report also found Imperial Health Plan and Molina Healthcare of Nevada were using copay accumulators only for brand name medications with medically appropriate generic equivalents available. This is likely consistent with the 2020 NBPP.

<sup>5</sup> Conditional Motion to Clarify Scope of Courts Order, *HIV and Hepatitis Policy Institute et al., v. U.S. Dep’t of Health and Human Servs. et al.*, (Civil Action No. 1:22-cv-2604).

<sup>6</sup> 346 U.S. 100 (1953).

<sup>7</sup> CMS, *Marketplace 2024 Open Enrollment Period Report: Final National Snapshot*, <https://www.cms.gov/newsroom/fact-sheets/marketplace-2024-open-enrollment-period-report-final-national-snapshot>

## II. Ban the Use of Non-Essential Health Benefits in State-Regulated Plans

In addition to enforcing the 2020 NBPP and its prohibition on copay accumulators, Aired Alliance urges your office to investigate and take necessary actions to prohibit the use of non-essential health benefit (non-EHB) programs within state-regulated health plans.

Building on the concept of copay accumulators, health plans introduced the non-EHB designation, which effectively excludes copay assistance from counting towards an individual's deductible and annual out-of-pocket limit under the justification that certain medications are non-EHBs. Health plans allege that this non-EHB designation allows them to categorize certain covered prescription drugs as non-EHBs under the justification that health plans (1) are only obligated to cover the minimum number of drugs in a class or category, and thus anything beyond can be classified as non-EHB; and (2) have the authority to exclude "specialty drugs" from the EHB definition. Aired Alliance has consistently advocated that both rationales behind the non-EHB designation are inconsistent with federal law.<sup>8</sup>

Recently, HHS confirmed in the 2025 NBPP that its **existing policy**, requires all health plans to classify all prescription drugs covered in excess of the of the state's EHB benchmark as EHBs, thereby subjecting them to the ACA protections and annual limits on cost-sharing.<sup>9</sup> Thus, HHS used the 2025 NBP to codify this protection in upcoming plan years. Alarming, the 2024 AIDS Institute report revealed that Anthem Blue Cross Blue Shield and Health Plan of Nevada appeared to be using a variable copay policy or third-party sourcing of specialty drugs program, which often leverage the non-EHB justifications. Consequently, Aired Alliance strongly urges your office to investigate these programs to determine if any non-EHB program are being used and ensure their removal from all state-regulated plans.

## III. Conclusion

We appreciate your consideration of our letter and would appreciate an opportunity to meet with you and your staff to further discuss this issue. We look forward to your responsive action.

Sincerely,

Ashira Vantrees  
Counsel

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<sup>8</sup> Aired Alliance & CHLPI, *Letter to CCHIO 2021*, <https://airedalliance.org/wp-content/uploads/2023/04/Letter-on-SaveonSP-ACA-Analysis.pdf>; Aired Alliance, *Letter to CT Insurance Commissioner Re: Non-EHB Program (2023)*, <https://airedalliance.org/wp-content/uploads/2023/05/Aired-Alliance-Letter-to-CT-Insurance-Commissioner-Regarding-PrudentRx.pdf>; Aired Alliance, *Essential Health Benefits RFI Response (2023)*, <https://airedalliance.org/wp-content/uploads/2023/02/Aired-Alliance-2023-Comment-on-EHB-RFI-.pdf>; Aired Alliance, *Comment on EHBs to PA Insurance Commissioners*, <https://airedalliance.org/wp-content/uploads/2023/09/Aired-Alliance-Comment-on-PA-EHB-RFI.pdf>.

<sup>9</sup> Centers for Medicare & Medicaid Services, *HHS Notice of Benefit and Payment Parameters for 2025 Final Rule* (Apr. 2, 2024), <https://www.cms.gov/newsroom/fact-sheets/hhs-notice-benefit-and-payment-parameters-2025-final-rule>.