

### **Hugh Chancy's Answer to The Honorable Earl L. "Buddy" Carter**

- 1. In your interactions with Pharmacy Benefit Managers (PBMs), are you able to negotiate with PBMs to have provisions altered or removed from contracts such as non-disparagement clauses? If not, why do you feel required to sign these contracts?**

No, I am not able to negotiate with PBMs to have provisions altered or removed from contracts such as non-disparagement clauses because PBM contracts, especially those with the largest PBMs in the market, are non-negotiable.

Three large companies lead the PBM market: Express Scripts, CVS Caremark, and OptumRx.<sup>1</sup> A recent report from the Council of Economic Advisers found that these PBMs account for 85 percent of the PBM market. More so, these three PBMs cover a significant level of insured lives. Of note, CVS Caremark has recently stated that it covers approximately 34 percent of covered lives.<sup>2</sup> This significant market share from just three PBMs allows them exercise undue market leverage in negotiating contracts with community pharmacies like mine.

The default practice in contracting with these PBMs is that there is no opportunity to red-line these contracts which often include non-negotiable blind price terms, overly broad non-disparagement clauses, and other provisions that disadvantage community pharmacies. In fact, community pharmacies like mine routinely must agree to non-negotiable contracts from these PBMs just to continue to serve my longstanding patients. More so, from a business standpoint, community pharmacies cannot just walk away from most PBM contracts because if we did, we would lose a significant amount of our prescription revenue given the large share of covered lives these PBMs represent. We are in a no-win situation.

PBMs often cite community pharmacies' reliance on a Pharmacy Services Administrative Organization or a PSAO to contract on their behalf to demonstrate a level playing field between PBMs and community pharmacies. In short, PSAOs are no match for the PBMs. In 2013, the Government Accounting Office (GAO) conducted a study on the role and ownership of PSAOs and stated:

In addition, according to some PSAOs that we spoke with, reimbursement rates to pharmacies have decreased over time, and PSAOs and other sources we spoke with reported that PSAOs' ability to negotiate reimbursement rates has also decreased over time. Over half of the PSAOs we spoke with reported having little success in modifying

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<sup>1</sup> Council of Economic Advisers, *Reforming Biopharmaceutical Pricing at Home and Abroad*, Feb. 2018, available at <https://www.whitehouse.gov/wp-content/uploads/2017/11/CEA-Rx-White-Paper-Final2.pdf>.

<sup>2</sup> According to CVS Health, it has 94 million PBM Plan Members. See CVS Health, available at <https://cvshealth.com/about/facts-and-company-information>. The Pharmaceutical Care Management Association testified that PBMs administer drug plans for more than 266 million Americans. See Testimony of Mark Merritt, Pharmaceutical Care Management Association, United States House of Representatives Energy and Commerce Committee, Subcommittee on Health, *Examining the Drug Supply Chain*, Dec. 13, 2017.

certain contract terms because of negotiations. This may be due to PBMs' use of standard contract terms and the dominant market share of the largest PBMs. Many PBM contracts contain standard terms and conditions that are largely nonnegotiable. According to one PSAO, this may be particularly true for national contracts, in which third-party payers or their PBMs have set contract terms for all pharmacies across the country that opt into the third-party payers, or its PBM's network. For example, a national contract exists for some federal government programs, such as TRICARE. In addition, several sources told us that the increasing consolidation of entities in the PBM market has resulted in a few PBMs having large market shares, which has diminished the ability of PSAOs to negotiate with them, particularly over reimbursement rates.<sup>3</sup>

In conclusion, I am not able to negotiate with PBMs to have provisions altered or removed from contracts such as non-disparagement clauses. I must sign these contracts to serve my patients and to keep my small business open.

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<sup>3</sup> See United States Government Accountability Office, Report to the Ranking, Member, Committee on Energy and Commerce, House of Representatives, *Prescription Drugs: The Number, Role, and Ownership of Pharmacy Services Administrative Organizations*, Jan. 2013, available at <https://www.gao.gov/assets/660/651631.pdf>.