



Steven C. Anderson, FASAE, CAE, IOM

President & Chief Executive Officer

June 9, 2021

The Honorable Kimberly Reynolds
Governor of Iowa
Iowa State Capitol
1007 East Grand Avenue
Des Moines, IA 50319

RE: Line-Item Veto Request of Provisions that Discriminate Against Iowa's Retail Pharmacies

Dear Governor Reynolds:

On behalf of the National Association of Chain Drug Stores (NACDS), the Iowa Retail Federation (IRF), and our member pharmacies operating in Iowa, we are writing to request that you exercise your line-item veto authority granted under the Iowa Constitution for language in section 31 of HHS Department's appropriations bill (HF 891) that permits Medicaid managed care organization contracts to discriminate against retail pharmacies who are not headquartered in the state and who have more than 30 locations inside the state.

By way of background, HF 891 includes language directing the HHS Department (the "Department") to amend Medicaid managed care organization contracts to require those contracts to establish a managed care pharmacy dispensing fee reimbursement that is either: a) the established pharmacy dispensing fee reimbursement in the Medicaid fee-for-service program (meaning reimbursement is no less than \$10.38); or b) a pharmacy dispensing fee that is agreed upon by the Managed care organization and pharmacies *with more than 30 locations in the state and headquarters outside the state*, not to exceed the established dispensing fee in the Medicaid fee-for-service program (meaning reimbursement cannot be more than \$10.38).

We have attached a redline version of the text in section 31 that we believe should be stricken from the HHS budget (see "Attachment A"). As demonstrated in Attachment A, our request is limited to the language in section 31 of HF 891 that seeks to set reimbursement policy for retail pharmacies headquartered outside of the state and have more than 30 locations inside the state differently – and in fact significantly less than – other retail pharmacies in the state (hereinafter, the "Discriminatory Language").¹ This policy is unfair, anti-competitive, and could impact patient access to care. Most importantly, this policy raises significant legal concerns under the U.S. Constitution's

Commerce and Equal Protection Clauses and therefore, must be stricken from the Department's budget.

To be clear, we are not requesting a line-item veto of the language that requires Medicaid managed care contracts to establish a pharmacy dispensing fee floor that aligns with the fee under the Medicaid fee-for-service program (\$10.38). Our request is simply that the Discriminatory Language described in the preceding paragraph be stricken from the Department's budget so that all retail pharmacies, regardless of headquarter location and store count, can benefit from Medicaid managed care contracts that establish such a fee floor.

Should you conclude that you are not able to strike only the Discriminatory Language in section 31 and leave the remaining language in section 31 intact, we request a formal meeting with your office before the Governor proceeds with any veto or non-veto activity on this section.

I. The Discriminatory Language in Section 31 Violates the U.S. Constitution's Commerce Clause

A court would likely find the policy set in the Discriminatory Language is a *per se* violation of Article I, Section 8 of the U.S. Constitution – the Commerce Clause.² It is well-established that the U.S. Constitution gives Congress the power to regulate interstate commerce. Courts utilize the dormant Commerce Clause analysis to evaluate whether a state law undermines Congress' power by determining whether a state law discriminates against out-of-state actors or out-of-state competition or has the effect of favoring in-state economic actors.³ If a court determines such discrimination has occurred, the law is *per se* violation of the Commerce Clause and is thus, unconstitutional.⁴

Here, the policy set under the Discriminatory Language is a *per se* violation of the Commerce Clause because the policy establishes different reimbursement policies for pharmacies who are headquartered outside of the state from those pharmacies that are headquartered inside of the state. Indeed, the reimbursement policy for in-state pharmacies sets a floor for reimbursement (no less than \$10.38), while the

² The Commerce Clause authorizes Congress "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." However, courts review state action under the Commerce Clause utilizing a dormant Commerce Clause analysis.

³ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 585 (1986). A court will rule the state law unconstitutional unless the state can show that it has no other reasonable means of advancing a legitimate state or local interests.

⁴ The analysis does not stop there, however. If a court does not find a *per se* violation of the Commerce Clause, a court would still look at whether the state violates the Commerce Clause by determining whether the law unduly burdens interstate commerce. If the state or local law falls into this bucket, then a court will use a balancing test to determine constitutionality by looking at whether the benefits of the state's interest are outweighed by the burden on state commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under a balancing test, a court would likely evaluate the undue burden/validity of this legislation by weighing the incidental burdens imposed on interstate commerce against any local benefits to be gained by asking questions such as: Are there less restrictive alternatives? Are there any conflicts with other states' regulations?

reimbursement policy for out-of-state pharmacies sets a ceiling (no more than \$10.38). Such distinction is significant because under this policy in-state pharmacies enjoy a guaranteed reimbursement rate floor, while reimbursement for out-of-state pharmacies could quickly become a race to the bottom. This discriminatory policy shields in-state pharmacies from competition by out-of-state pharmacies, which is the exact type of behavior courts strike down a *per se* dormant Commerce Clause violation and unconstitutional. Thus, the Discriminatory Language is unconstitutional and must be vetoed.⁵

II. The Discriminatory Language in Section 31 Violates the U.S. Constitution's Equal Protection Clause

The policy set in the Discriminatory Language also violates the U.S. Constitution's Equal Protection Clause.⁶ In determining whether a law violates the Equal Protection Clause for pharmacies, a court would determine whether the law is rationally related to a legitimate state interest. The U.S. District Court for the Eastern District of Arkansas engaged in such an analysis when it held in Wal-Mart Stores, Inc. v. Kurt Knickrehm⁷ that the state's "tiered reimbursement rate" policy between chain and independent pharmacies violated the Equal Protection Clause because the policy was not rationally related to a legitimate state interest. The court concluded that the state's argument that independent pharmacies needed a differential rate from chains because "it protects smaller pharmacies which offer additional services that greatly aid the low-income, elderly and disabled citizens of the state" was not persuasive because the state did not prove that chain pharmacies were not also providing such services, among other considerations.⁸

Here, the reasoning under Knickrehm is directly applicable to the policy set in the Discriminatory Language because the policy makes has no justification for the distinction between chain and independent pharmacies reimbursement. Further, the policy makes no argument for why differential reimbursement between pharmacies headquartered in the state and outside of the state protects is needed. Instead, the policy appears to hamper competition for pharmacies with more than 30 stores and those that are headquartered outside of the state, while providing no additional support for why such policy would ultimately benefit lowans. In fact, such a policy could have the effect of

⁵ Even if the headquarter language were removed from policy, however, a court would still likely find the policy is unconstitutional because the Discriminatory Language imposes an undue burden on interstate commerce by discriminating against pharmacies with more than 30 stores. Indeed, a court would likely find that there are less restrictive means to protect pharmacies that have less than 30 stores than setting differential reimbursement policies that constrain competition. For example, more than 40 states in the U.S. have set "any willing pharmacy" laws, which seek to ensure that smaller retail pharmacies can participate in payer networks if pharmacies are willing to accept the terms and conditions of that network.

⁶ U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

⁷ Wal-Mart Stores, Inc. v. Knickrehm, 101 F. Supp. 2d 749 (E.D. Ark. 2000).

⁸ The Knickrehm court also declared that tiering reimbursement based on the characteristics of the dispensing pharmacy is "arbitrary, capricious, and contrary to the Medicaid Ac

undermining Iowan's access to care should this policy contribute to fewer pharmacy locations in the state in total. A court would likely find the Discriminatory Language unconstitutional under the Equal Protection Clause and must, therefore, be vetoed.

Conclusion

For the reasons above, we urge you to exercise your line-item veto authority granted under the Iowa Constitution for the Discriminatory Language in section 31 of HF 891. Should you need more information, we make ourselves available for an in-person meeting at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven C. Anderson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Steven C. Anderson, FASAE, IOM, CAE
President and Chief Executive Officer

Attachment

cc: Jim Henter, Iowa Retail Federation
Paige Thorson, Office of the Governor
Michael Boal, Office of the Governor

specified pursuant to subparagraph division (a) for the patient populations residing in Medicaid-certified nursing facilities.

(2) Medicaid managed care organizations shall adjust facility-specific rates based upon payment rate listings issued by the department. The rate adjustments shall be applied prospectively from the effective date of the rate letter issued by the department.

b. (1) For the fiscal year beginning July 1, 2021, contingent upon implementation of the contractual agreements with Medicaid managed care organizations as described pursuant to subparagraph (2), the department shall establish the fee-for-service pharmacy dispensing fee reimbursement at \$10.38 per prescription, until a cost of dispensing survey is completed. The actual dispensing fee shall be determined by a cost of dispensing survey performed by the department and required to be completed by all medical assistance program participating pharmacies every two years. A change in the dispensing fee shall become effective following federal approval of the Medicaid state plan.

(2) The department shall amend Medicaid managed care organization contracts to authorize establishment of a managed care pharmacy dispensing fee reimbursement in accordance with ~~either of~~ the following:

(a) The established fee-for-service pharmacy dispensing fee reimbursement per prescription as specified pursuant to subparagraph (1).

~~(b) A dispensing fee determined contractually by mutual agreement between the managed care organization and a participating pharmacy with more than thirty locations in the state and headquarters located outside the state, not to exceed the established fee-for-service pharmacy dispensing fee reimbursement per prescription as specified pursuant to subparagraph (1).~~

(3) The department shall utilize an average acquisition cost reimbursement methodology for all drugs covered under the medical assistance program in accordance with 2012 Iowa Acts, chapter 1133, section 33.

c. (1) For the fiscal year beginning July 1, 2021, reimbursement rates for outpatient hospital services shall