USET
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Submitted via regulations.gov

September 5, 2024

The Honorable Chiquita Brooks-LaSure
Administrator
Center for Medicare and Medicaid Services
Department of Health and Human Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Administrator Chiquita Brooks-LaSure,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments to the Centers of Medicare and Medicaid Services (CMS) regarding the CMS Medicare Part D Addendum. Similar to the position of the CMS Tribal Technical Advisory Group (TTAG), USET SPF expresses our disappointment that this latest version of the Part D Addendum failed to incorporate the substantive policy recommendations that the TTAG provided to CMS previously. USET SPF strongly urges CMS to reconsider this version and incorporate the TTAG's policy recommendations to expand the scope of the Part D Addendum to address critical priorities in Indian Country.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico[1]. USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

CMS Must Adopt the TTAG's Substantive Policy Proposals for Part D

Previously, the CMS TTAG submitted two different sets of recommendations for the Addendum, the first addressing certain "housekeeping" items within the document to make it consistent with the Qualified

[1]] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Health Program Addendum, and the second providing more substantial policy recommendations to improve the Addenda's efficacy for Tribal entities. However, CMS elected to only accept the TTAG's housekeeping edits and failed to incorporate the significant policy proposals. As the problems that prompted the TTAG's recommendations continue to persist, USET SPF strongly urges CMS to consider and adopt these policy proposals.

In its original requests, the TTAG identified two major policy proposals for the Part D Addendum, and we reiterate those recommendations now. The first request is that the scope of the Indian Part D Addendum be expanded beyond Part D plans to include other pharmacy plans. Tribal pharmacies are experiencing the same issues with other pharmacy plans that first necessitated the creation of the Part D addendum. Due to the unique nature of Tribal pharmacies and the federal rights and restrictions under which we operate, insurance companies, pharmacy benefit managers, managed care companies and sponsors of health plans are currently resisting offers to contract with Tribal pharmacies. Because we insist upon asserting our rights under the law, these commercial pharmacy entities are increasingly refusing to reimburse Tribal pharmacies for otherwise covered services. This is the very issue that the Part D Addendum was created to address – requiring issuers to comply with the unique federal laws that apply to Tribal entities rather than continue to allow them to coerce Tribal providers into contracting away our rights. In some circumstances, Tribal pharmacies and providers have the ability to negotiate on a case-by-case basis with commercial pharmacy issuers, but that often requires time, expertise and capacity that many Tribal Nations and providers lack. Many Tribal Nations are small, and the majority are chronically understaffed, resulting in the majority of those that would benefit from negotiation missing out on reimbursements that they are owed. Further, many issuers flatly refuse to negotiate anything in their standard provider agreements, resulting in the same issue. The Part D Addendum fixes this issue within Part D plans, and that is why the Addendum's scope must be expanded to include other pharmacy issuers as well.

The TTAG's second substantive recommendation is for CMS to require all pharmacy plans to reimburse Tribal pharmacies at the rate they reimburse other network providers. Currently, commercial issuers are "discounting" the reimbursements owed to Tribal providers when those providers exercise their rights to repackage pharmaceuticals or access them using the 340B program or the Federal Supply Schedule. Tribal providers have the right under federal law and regulations to access pharmaceuticals in these ways, and under the Indian Health Care Improvement Act (IHCIA), all issuers are required to pay Tribal providers at the highest rate offered to other, non-Tribal in-network providers. This means that the current practice of pharmacy benefit managers discounting or reducing reimbursements to Tribal providers in situations like this is prohibited under federal law. Despite this issue implicating Tribal providers' rights under federal law and it being a long-standing priority of the CMS TTAG and USET SPF, CMS has failed to remedy this problem. USET SPF strongly urges CMS to take up these critical policy proposals and address the substantial issues Tribal providers continue to experience with pharmacy issuers.

CMS Has Trust and Treaty Responsibility to Identify a Fix

USET SPF reminds CMS that, as an arm of the federal government, it is responsible for upholding the trust and treaty obligations that the federal government owes to Tribal Nations. This obligation includes the responsibility to consult with Tribal Nations and meaningfully incorporate the guidance that we provide, particularly in situations like these, where a well-documented problem in Indian Country with basis in federal law is brought to the agency's attention.

Therefore, in the event that the Part D program lacks the authority expand the scope of the Addendum beyond the program, USET SPF echoes the request of the CMS TTAG to develop a new Addendum that would incorporate these priorities and cover all other issuers not covered by Part D or find a comparable solution that remedies the issues Tribal pharmacies are experiencing with commercial issuers.

Conclusion

USET SPF appreciates this opportunity to provide CMS with comment on the Part D Addendum. While we are disappointed that CMS elected to ignore the CMS TTAG's previous recommendations to improve the Addendum, we are hopeful that the agency will consider these comments and meaningfully incorporate our policy proposals into the Addendum moving forward. CMS, in recognition of its trust and treaty obligations to Tribal Nations and its responsibilities under federal law, must identify and implement a workable fix for the issues Tribal providers continue to experience with pharmacy issuers outside of the Part D program.

For more information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at (615) 838-5906 or by email at lmalerba@usetinc.org.

Sincerely,

Kirk Francis
President

Kitcki A. Carroll
Executive Director