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OFFICE OF THE STATE COMPTROLLER

September 8, 2022

Mary T. Bassett, M.D., M.P.H.
Commissioner
Department of Health
Corning Tower
Empire State Plaza
Albany, NY 12237

Re: Improper Medicaid Payments for
Terminated Drugs
Report 2022-F-7

Dear Dr. Bassett:

Pursuant to the State Comptroller's authority as set forth in Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law, we have followed up on the actions taken by officials of the Department of Health to implement the recommendations contained in our audit report, *Improper Medicaid Payments for Terminated Drugs* (Report [2019-S-45](#)).

Background, Scope, and Objective

The State's Medicaid program is administered by the Department of Health (Department) and is overseen at the federal level by the Centers for Medicare & Medicaid Services (CMS). The Medicaid program covers medically necessary prescription and non-prescription drugs. The Department uses two methods to pay for pharmacy services: fee-for-service (FFS) and managed care. Under FFS, pharmacy providers submit claims for drugs dispensed to Medicaid recipients to the Department's claims processing and payment system, called eMedNY. Under managed care, the Department pays managed care organizations (MCOs) a monthly premium for each Medicaid recipient enrolled in one of their plans, and the MCOs, or their contracted Pharmacy Benefit Manager (PBM), process their members' drug claims and reimburse pharmacies. MCOs are required to submit encounter data to the Department detailing each pharmacy service provided.

Drugs may be removed from the market (i.e., terminated) for safety or commercial reasons. To ensure terminated drugs will not be dispensed or paid for, CMS requires state Medicaid programs to reject these claims on the basis of the drug's termination date (defined as either the expiration date of the final batch produced or the date the drug was recalled for health and safety reasons). Pursuant to CMS guidelines, the Department maintains drug termination dates in eMedNY.

We issued our initial audit report on September 17, 2020. The audit objective was to determine whether the Medicaid program made improper payments for drugs dispensed after their drug termination date. The audit covered the period July 1, 2014 through June 30,

2019. We determined the Department did not establish sufficient controls to prevent improper payments for terminated drugs. As a result, \$29 million in improper Medicaid payments were made during the audit period for drugs dispensed after their termination date.

The objective of our follow-up was to assess the extent of implementation, as of June 30, 2022, of the five recommendations included in our initial audit report.

Summary Conclusions and Status of Audit Recommendations

Department officials made minor progress in addressing the problems identified in the initial audit report, and significant action is still required to prevent future Medicaid overpayments. Specifically, the Department does not monitor pharmacy claims to identify payments made for terminated drugs, and the Office of the Medicaid Inspector General (OMIG) has not attempted to recover any of the improper payments we identified. Since the initial audit, Medicaid improperly paid another \$11 million for drugs dispensed after their termination date, some of which were recalled for safety reasons. Of the initial report's five audit recommendations, two were implemented and three were not implemented.

Follow-Up Observations

Recommendation 1

Review the Medicaid payments made for terminated drugs identified by the audit and determine an appropriate course of action, including recovery where feasible.

Status – Not Implemented

Agency Action – OMIG did not take any action because the Department did not provide regulatory support for recoveries. Department officials disagreed that recoveries of payments for terminated drugs can be made, stating the termination dates provided by CMS are often updated retrospectively and there is often conflicting information in the marketplace regarding drug dates.

However, this is contradictory to other Department action. Specifically, to comply with CMS requirements, the Department implemented an eMedNY edit to deny FFS payments of pharmacy claims for terminated drugs based on drug termination dates provided by CMS. Therefore, it is unclear why there is reluctance to use this data for recovery purposes when the Department uses it to deny claim payments.

Furthermore, retroactive updates of termination dates by CMS are relatively infrequent. Our analysis of the initial audit's findings showed that for 13,689 (97%) of the National Drug Codes, the drug termination date was not subsequently updated.

Recommendation 2

Formally instruct MCOs on CMS guidance to ensure they, or their PBMs, reject claims for drugs based on termination date.

Status – Implemented

Agency Action – The Department instructed MCOs in April 2020 to deny pharmacy claims if the drug was dispensed after the reported drug termination date.

Recommendation 3

Monitor pharmacy encounters and take steps to ensure MCOs are not paying for terminated drugs.

Status – Not implemented

Agency Action – Department officials stated they evaluate pharmacy encounters and issue statements of deficiency to MCOs based on those reviews, if appropriate. However, the Department does not review or monitor MCOs' pharmacy encounters to ensure the MCOs are not paying for terminated drugs.

To determine whether MCOs were still paying claims for terminated drugs, we analyzed pharmacy encounters for the period July 2019 to March 2022, and identified over \$10.5 million in managed care claim payments for terminated drugs made since the initial audit. Furthermore, the top three MCOs that paid for terminated drugs during the original audit are still the top three MCOs, having paid nearly \$6 million (of the \$10.5 million) in claims for terminated drugs. Additionally, some of these terminated drugs were recalled by the U.S. Food and Drug Administration for safety reasons. Medicaid paid for at least 108 such claims totaling \$1,298.

Department officials believe that once managed care pharmacy benefits are carved out of managed care and paid by the Medicaid FFS program (scheduled for April 2023), such improper payments will be reduced. However, this expected carve-out was already postponed from when it was originally scheduled to take effect in April 2021 and there is no certainty that it will be implemented timely. Since the original April 2021 carve-out date, over \$3 million was paid inappropriately and more will likely continue to be paid while no corrective action is taken by the Department.

Recommendation 4

Monitor FFS payments for terminated drugs that were a result of the timing issue and investigate options to mitigate this problem.

Status – Not Implemented

Agency Action – In order to reject FFS claims for terminated drugs, the eMedNY system uses drug termination dates from CMS that are reported to the Department on a quarterly basis. This leaves the potential to process and pay claims for terminated drugs before termination dates are updated. Our original audit identified 192,672 improper payments, totaling \$1,470,301 due to this lag in timing. Since the initial audit, the Department did not take any action to monitor FFS payments for terminated drugs and, as a result, improper payments continue to be made. To determine the extent to which FFS claims were still being paid for terminated drugs, we analyzed FFS pharmacy claims for the period July 2019 to March 2022, and identified \$676,174 in improperly paid FFS pharmacy claims due to the timing issue.

Recommendation 5

Ensure proper functioning of the new drug termination date control for paper and tape claim submission types.

Status – Implemented

Agency Action – During our review, we confirmed that an edit was configured to deny FFS paper and tape claims when a drug termination date is on file.

Major contributors to this report were Salvatore D’Amato, Aissata Niangadou, and Edward Reynoso.

We would appreciate your response to this report within 30 days, indicating any actions planned to address the unresolved issues discussed in this report. We thank the management and staff of the Department for the courtesies and cooperation extended to our auditors during this review.

Very truly yours,

David Schaeffer
Audit Manager

cc: Robert Schmidt, Department of Health
Frank T. Walsh, Jr., Acting Medicaid Inspector General