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May 29, 2024

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Administrator Brooks-LaSure,

I write in response to the Centers for Medicare & Medicaid Services' (CMS) January 30, 2024 request for information on Medicare Advantage (MA) data.[1] I am concerned that CMS does not collect adequate data to track intercompany transfer prices between private insurers in MA and their vertically integrated provider subsidiaries, leaving regulators, lawmakers, and researchers ill-equipped to analyze potentially anti-competitive behavior that raises health care costs for patients and American taxpayers — including whether health insurers are using profit-shifting strategies to evade the Medical Loss Ratio (MLR), the statutory requirement for health insurers to spend at least 85 percent of health care premium dollars on medical claims.[2]

Over a decade ago, Congress instituted the MLR to cap the amount of premium dollars that insurers in MA could spend on profits and administrative costs at 15 percent, requiring insurers to spend the remaining 85 percent on medical claims.[3] However, by acquiring subsidiaries that are eligible for those medical claims payments, including pharmacies, physician practices, and other health care providers, giant insurance companies – such as UnitedHealth Group (UnitedHealth) and CVS/Aetna – may be evading these requirements.[4] Under this arrangement, health care conglomerates operate as both the providers of health care services *and* the entities responsible for paying, or reimbursing, for those services, allowing the parent companies to engage in profit-

[1] Centers for Medicare & Medicaid Services, Federal Register Notice, "Medicare Program; Request for Information on Medicare Advantage Data," January 30, 2024, https://www.federalregister.gov/documents/2024/01/30/2024-01832/medicare-program-request-for-information-on-medicare-advantage-data.
[2] Centers for Medicare & Medicaid Services, "Medical Loss Ratio," https://www.cms.gov/marketplace/private-health-insurance/medical-loss-ratio.
[3] *Id.*
[4] American Economic Liberties Project, "Medicare Advantage and Vertical Consolidation in Health Care," Hayden Rooke-Ley, April 2024, p. 33, https://www.economicliberties.us/wp-content/uploads/2024/04/Medicare-Advantage-AELP.pdf.

shifting strategies to undermine MLR requirements.[5] For example, insurers can send inflated payments to their provider subsidiaries. Then, by realizing those payments on the provider side — the side that charges for care — the insurance branch of the business appears to be in compliance with MLR requirements, while the parent company walks away with increased profits.[6]

Last year, I wrote to the HHS Office of Inspector General about this type of behavior in the generic drug market. Reporting by the *Wall Street Journal* (WSJ) revealed significant markups of generic drugs at specialty pharmacies owned by CVS, Cigna, and UnitedHealth. In addition to owning giant specialty pharmacies, these companies also own the three largest pharmacy benefit managers in the country — CVS Caremark, Express Scripts, and Optum Rx, respectively — which set prices and reimburse pharmacies for prescription drugs. Accordingly, as the WSJ noted, the three companies leveraged their subsidiaries to pay themselves: "PBMs try to pay as little as possible for drugs distributed through independent retail pharmacies. But when their own pharmacies dispense prescriptions, PBMs profit from the higher prices."[7]

To complete its analysis, the WSJ used Medicare Part D data, which allowed it to track intercompany transfer payments between insurers, PBMs, and pharmacies.[8] The Medicare Payment Advisory Commission (MedPAC) relied on similar Medicare Part D data in its June 2023 Report to Congress that found that "[f]or a limited number of drug categories, we found that payments and costs… were more likely to be higher at vertically integrated (VI) pharmacies compared with costs at other pharmacies, particularly when those prescriptions were filled for their own VI plans."[9] These data will also aid HHS OIG in its new probe, which I requested, into high generic drug costs at vertically integrated entities.[10]

While I'm encouraged that regulators and independent experts are scrutinizing anti-competitive tactics in Medicare Part D, I'm concerned that similar analyses involving insurers that own their own provider practices cannot be completed due to insufficient data collection, which is alarming given recent trends in insurer-provider consolidation. For example, UnitedHealth now employs or is affiliated with over 90,000 doctors, or one in ten doctors in the United States, through its

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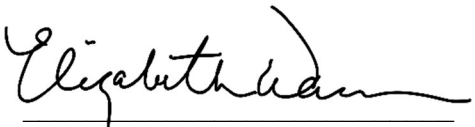
[5] Letter from Senator Elizabeth Warren and Senator Mike Braun to HHS OIG Inspector Grimm, November 21, 2023, https://www.warren.senate.gov/imo/media/doc/2023.11.21%20Letter%20to%20HHS%20OIG%20regarding%20MLR%20evasion.pdf.
[6] *Id.*
[7] Wall Street Journal, "Generic Drugs Should Be Cheap, but Insurers Are Charging Thousands of Dollars for Them," Joseph Walker, September 11, 2023, https://www.wsj.com/health/healthcare/generic-drugs-should-be-cheap-but-insurers-are-charging-thousands-of-dollars-for-them-ef13d055.
[8] *Id.*
[9] MedPAC, "Report to the Congress," June 2023, p. XV, https://www.medpac.gov/wp-content/uploads/2023/06/Jun23_MedPAC_Report_To_Congress_SEC.pdf.
[10] Wall Street Journal, "U.S. Probes High Generic Drug Prices," Jennifer Calfas, April 16, 2024, https://www.wsj.com/livecoverage/stock-market-today-earnings-04-16-2024/card/u-s-probes-high-generic-drug-prices-7L04Lg6yABfMAwOXtQfW.

subsidiary, Optum Health.[11] In 2023 alone, Optum Health received 62 percent of its *total* revenue from UnitedHealth's insurance branch, meaning well over half of all of Optum Health's payments came from itself.[12] Similarly, CVS/Aetna employs or is affiliated with 40,000 physicians, pharmacists, nurses, and nurse practitioners, while other health insurers are following close behind with aggressive acquisitions of physician practices across the country.[13] This insurer-provider consolidation is especially harmful in MA, as private insurers can leverage taxpayer dollars to evade MLR requirements, even using unlawful tactics like upcoding to further pad profits.[14]

To better track transfer payments from insurers to their affiliated providers, which would help determine whether insurers are engaging in unlawful profit-shifting schemes, I urge CMS to collect better ownership data of MA plans and providers. Specifically, CMS should collect the Taxpayer Identification Number (TIN) for each parent company; the corresponding TIN for each health care provider that the parent company owns or controls; and the parent company's ownership share of each health care provider. Moreover, CMS should collect better financial data from insurers in public programs, such as MA, including requiring insurers to identify payments to related parties and the profit margins those entities realize. To aid in this analysis, CMS should also consider establishing benchmarks for common health care services to compare transfer prices.

Given rapid consolidation in the health care industry, particularly from vertically integrated insurers that receive payments from government-funded programs, I urge you to strengthen CMS's data collection to better track intercompany transfer prices.

Sincerely,



Elizabeth Warren
United States Senator

[11] STAT, "UnitedHealth Group now employs or is affiliated with 10% of all physicians in the U.S.," Bob Herman, November 29, 2023, https://www.statnews.com/2023/11/29/unitedhealth-doctors-workforce/.
[12] Gist Healthcare, "Gist Weekly: March 15, 2024," March 15, 2024, https://gisthealthcare.com/gist/gist-weekly-march-15-2024/.
[13] HEALTH CARE un-covered, "Here are the Five Areas the New DOJ Task Force on Monopolies in Health Care Should Focus On," Wendell Potter, May 23, 2024, https://wendellpotter.substack.com/p/here-are-the-five-areas-the-new-doj?utm_source=post-email-title&publication_id=255152&post_id=144844033&utm_campaign=email-post-title&isFreemail=true&r=20662o&triedRedirect=true&utm_medium=email.
[14] Letter from Senator Elizabeth Warren to CMS Administrator Brooks-LaSure, January 25, 2024, https://www.warren.senate.gov/imo/media/doc/2024.01.25%20Letter%20to%20CMS%20on%20Medicare%20Advantage%20overpayments.pdf.