



STATE OF TENNESSEE
DEPARTMENT OF COMMERCE AND INSURANCE

500 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37243-5065
615-741-6007

BILL LEE
GOVERNOR

CARTER LAWRENCE
COMMISSIONER

Bulletin 21-05

TO: Tennessee-Licensed Pharmacy Benefits Managers
FROM: Carter Lawrence, Commissioner 
Carter Lawrence (Dec 22, 2021 06:33 CST)
RE: Appeals Processes under Tenn. Code Ann. § 56-7-3206
DATE: December 22, 2021

The purpose of this bulletin is to provide guidance on the applicability of the recent changes affecting Pharmacy Benefits Managers (PBM) and other Covered Entities found in 2021 Tennessee Public Chapter (“Pub. Ch.”) 569.

Specifically, this bulletin provides guidance with respect to the Tennessee Department of Commerce and Insurance’s (“Department”) understanding of Tenn. Code Ann. § 56-7-3206(c)(1) and the appeals processes that are to be filed by PBMs with the Department pursuant to Tenn. Code Ann. § 56-7-3206(c)(3).

Tenn. Code Ann. § 56-7-3206(c)(1), Generally

Tenn. Code Ann. § 56-7-3206(c)(1) requires that “[n]otwithstanding a law to the contrary, and except as otherwise provided in this subsection (c), a pharmacy benefits manager shall not reimburse a contracted pharmacy for a prescription drug or device an amount that is less than the actual cost to that pharmacy for the prescription drug or device.” Tenn. Code Ann. § 56-7-3206(c) provides only two exceptions to Tenn. Code Ann. § 56-7-3206(c)(1). The first exception, set out in Tenn. Code Ann. § 56-7-3206(c)(2), applies only to a PBM “when utilizing a reimbursement methodology that is identical to the methodology provided for in the state plan for medical assistance approved by the federal centers for medicare and medicaid services.” The second exception, found in Tenn. Code Ann. § 56-7-3206(c)(3) and discussed further below, states “[s]ubdivision (c)(1) does not apply to a covered entity or pharmacy benefits manager that establishes a clearly defined process through which a pharmacy may contest the actual reimbursement received for a particular drug or medical product or device.” Such an appeal process must be approved the Commissioner of the Department (“Commissioner”) under Tenn. Code Ann. § 56-7-3206(c)(4) “and comply with the timing and notice requirements of § 56-7-3108.”

Tenn. Code Ann. § 56-7-3206(c)(1) and Maximum Allowable Cost Lists

The language of Tenn. Code Ann. § 56-7-3206(c)(1) is clear and unambiguous that PBMs not reimburse a contracted pharmacy less than the actual cost to the pharmacy for the prescription drug

or medical product or device, except as otherwise provided in subsection (c), and expressly superseding other laws on the subject. It must be read and applied according to its plain meaning. *Arden v. Kozawa*, 466 S.W.3d 758, 764 (Tenn. 2015). Accordingly, it is the Department's position that even if a drug or medical device is on a maximum allowable cost (MAC) list pursuant to Tenn. Code Ann. § 56-7-3106 and subject to an appeal process as set out in Tenn. Code Ann. § 56-7-3108, a PBM must reimburse the pharmacy at least the pharmacy's actual cost for the drug or medical device under Tenn. Code Ann. § 56-7-3206(c)(1) unless another exception in Tenn. Code Ann. § 56-7-3206(c) is met, even if that actual cost is greater the MAC list price.

Requirements of Appeals Processes Under Tenn. Code Ann. § 56-7-3206(c)(3)

It is the Department's position that an appeals process under Tenn. Code Ann. § 56-7-3206(c)(3) must apply to all drugs and medical products or devices, not just those on a MAC list. Tenn. Code Ann. § 56-7-3206(c)(3) must be read according to its plain language and the phrase "a particular drug or medical product or device" does not contain any limitation on the drugs or medical products or devices to which the appeals process must apply. Without such limitation, it is the Department's position that the plain language of Tenn. Code Ann. § 56-7-3206(c)(3) appeals process apply to all drugs or medical products or devices. However, it is the Department's position that if a MAC list appeals process meets the requirements of Tenn. Code Ann. § 56-7-3206(c) and is filed with and approved by the Commissioner, it may be sufficient under Tenn. Code Ann. § 56-7-3206(c)(3) regarding those drugs and devices covered by the MAC list appeals process. However, it is the Department's position that a MAC appeals process, alone, would not be enough to meet the requirements of Tenn. Code Ann. § 56-7-3206(c)(3) since a process applying only to those drugs and devices on a MAC list would, by definition, not apply to all drugs or medical products or devices.

Further, it is the Department's position that the plain language of Tenn. Code Ann. § 56-7-3206(c)(3) only requires that the appeals process allow a pharmacy to contest its "actual reimbursement." "Actual reimbursement" is defined at Tenn. Code Ann. § 56-7-3201(1) as "the total amount that a covered entity or pharmacy benefits manager determines that a pharmacy or other dispenser will receive consistent with the provider agreement, and is the sum of the amount the covered entity or pharmacy benefits manager will pay directly to the pharmacy or other dispenser plus any applicable patient out-of-pocket cost paid directly by the patient to the pharmacy or other dispenser, for dispensing of a particular prescription or providing a covered service." It is the Department's position that Tenn. Code Ann. § 56-7-3206(c)(3) does not require any specific process or particular outcome from that process so long as the appeals process is "clearly defined"¹ and allows the pharmacy to contest its "actual reimbursement." As such, it is the Department's position that there is no requirement in Tenn. Code Ann. § 56-7-3206(c)(3) that a pharmacy be reimbursed at least its actual cost as a result of such an appeals process.

An appeals process under Tenn. Code Ann. § 56-7-3206(c)(3) must also, pursuant to Tenn. Code Ann. § 56-7-3206(c)(4), "comply with the timing and notice requirements of § 56-7-3108." It is the Department's position that the "timing and notice requirements of § 56-7-3108" are as follows:

¹ It is the Department's position that the term "clearly defined" is unambiguous and subject to its ordinary meaning as being defined in such a way that the appeals process is, as included in the Merriam-Webster Dictionary as a definition of the word "clear," "free from obscurity or ambiguity: easily understood." *Clear*, Merriam-Webster.com Dictionary, (<https://www.merriam-webster.com/dictionary/clear>. Accessed Dec. 16, 2021).

- “The pharmacy must file its appeal within seven (7) business days of its submission of the initial claim for reimbursement for the drug or medical product or device” (Tenn. Code Ann. § 56-7-3108(c));
- “The pharmacy benefits manager or covered entity must make a final determination resolving the pharmacy's appeal within seven (7) business days of the pharmacy benefits manager or covered entity's receipt of the appeal” (Tenn. Code Ann. § 56-7-3108(c)); and
- “A pharmacy benefits manager or covered entity shall make available on its secure web site information about the appeals process, including, but not limited to, a telephone number or process that a pharmacy may use to submit ... appeals” (Tenn. Code Ann. § 56-7-3108(f)).

It is the Department's position that the remaining requirements of Tenn. Code Ann. § 56-7-3108 are not “timing and notice requirements” but are, rather, substantive requirements of a MAC list appeals process and thus are not subject to review and approval by the Commissioner.

The Department requests that timing and notice requirements are located at the beginning of filed PBM appeals processes.

PBM appeals processes can be filed with the Department electronically at the following email address: PBM.Appeal@tn.gov. Any further questions should be directed to Scott McAnally, Director for Insurance, at Scott.McAnally@tn.gov.