

MAXIMUM ALLOWABLE COST (MAC) NEWS

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Helping Independent Pharmacies and Plan Sponsors to Better Understand and Find Solutions Regarding Maximum Allowable Cost (MAC) Pricing.

Understanding the Complexities of Maximum Allowable Cost (MAC):

MAC pricing is one of the many tactics utilized by PBMs to control reimbursement. If left unchecked, improper PBM MAC reimbursement practices can cause substantial financial harm to Payors, Pharmacies and ultimately Patients. To prevent financial harm from improper MAC reimbursement, Pharmacies must be proactive, aggressive, and gain an in-depth understanding of the various laws, rules, and regulations governing MAC pricing as well as their PBM contracts, including the various provisions related specifically to MAC pricing. But why is MAC pricing so controversial and potentially harmful to Pharmacies? The answer to this question is complex.

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PBMs Unilaterally Set MAC Prices. First, MAC pricing is unilaterally created by PBMs. In unilaterally setting the MAC prices, PBMs do not consult with Pharmacies. Thus, PBMs often rely on inaccurate information related to Pharmacies' acquisition costs, including flawed assumptions regarding a Pharmacy's ability to acquire the drugs that PBMs include on their MAC lists at a price that is below the PBMs' MAC price. In fact, in many cases Pharmacies struggle to acquire the drugs **at** the PBM MAC price. This results in PBM MAC prices often being set at unreasonably low prices resulting in Pharmacies losing money when they dispense the drugs that have been priced based on MAC. The harm from this is exacerbated from the fact that generic drugs constitute that vast majority of drugs dispensed in the United States. According to several studies, generic drugs represent approximately ***85% to 90% of the drugs dispensed*** in the United States with the remaining 10%-15% attributable to brand name drugs. While the increased use of safe and effective generic drugs is one way in which healthcare costs can be decreased, it should not be done at the expense of Independent Pharmacies and certainly not to the financial benefit of PBMs. Therefore, more steps must be taken at the federal and state level to ensure that MAC pricing is set fairly and not unilaterally by PBMs.

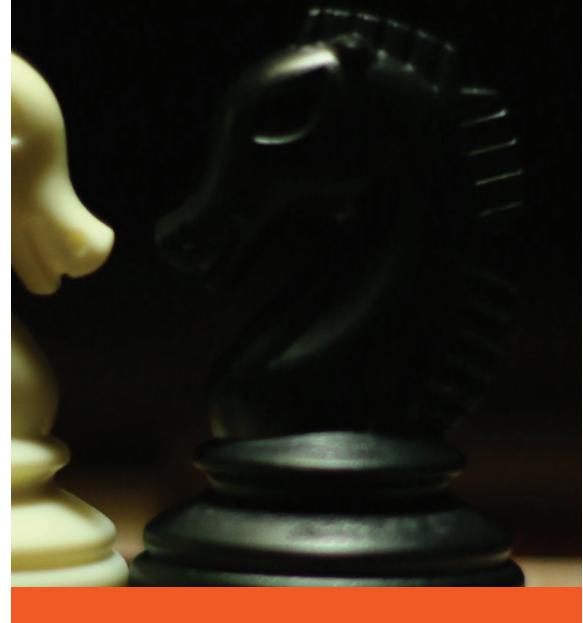
Inconsistency in Drug Placement on MAC Lists. Second, there is inconsistency between what drugs **should** be included on a MAC list and what drugs **are** included on a MAC list. Traditionally, MAC was considered a way to incentivize Pharmacies to be prudent in their multiple source generic drug acquisition—the thought process being that if Pharmacies know that reimbursement will reflect the lowest acquisition cost **generally available** to Pharmacies, then Pharmacies will be motivated to shop smartly and negotiate aggressively to obtain multiple source generics at the lowest possible price. However, over time MAC morphed into another tool used by PBMs to increase profits. While

there *are* various ways MAC can be used by a PBM to increase profit, one of the simplest ways to achieve this is to use MAC in connection with the controversial practice of spread pricing, a PBM practice wherein the PBM receives or bills a Plan Sponsor (e.g. Medicare, Medicaid, private insurance) one price for a particular drug but reimburses the Pharmacy a lesser amount for the same drug and retains the difference. Use of this practice is well established. For example, in late 2018, Pennsylvania Solicitor General Eugene A. DePasquale [released a report](#) indicating that for 2017 in Pennsylvania Medicaid alone, “three PBMs made between \$2 million and nearly \$40 million on spread pricing earning average profits between 28 cents and \$13 per Medicaid prescription filled.” PBMs use MAC pricing to effectuate spread pricing by establishing two separate MAC lists, one for the Plan Sponsor (the higher MAC prices) and one for Pharmacies (the lower MAC prices). With the ability to control these lists, PBMs are then motivated to add as many drugs to these lists as possible since they have complete discretion over setting the prices on these drugs. Thus, if a particular drug is not profitable to a PBM as a non-MAC drug (for example not receiving significant rebates) then the PBM can “MAC” the drug and adjust the prices accordingly. This is often done regardless of whether the drug truly fits within the traditional understanding of a drug that should be reimbursed based on MAC, i.e., a multiple source generic drug. Over the past several years there has been a significant increase in branded drugs and single source generic drugs being added to PBM MAC lists. Often the MAC prices set on these particular drugs are excessively low since these drugs are harder to acquire at very low prices which exacerbates the financial harm to Pharmacies. One way this issue can be resolved is for States to enact laws that clearly define those drugs that can be placed on a MAC list as multiple source generic drugs available from at least two manufacturers (or more). This type of definition appropriately minimizes the ability of PBMs to include brand drugs and single source generics that are more expensive for a Pharmacy to acquire on their MAC lists.

MAC Lists Are Cloaked in Secrecy and Avoid Public Scrutiny. A third factor increasing the complexities related to PBM MAC pricing is that PBM MAC lists are cloaked in secrecy and avoid public scrutiny. This is by design. Most every PBM states that their MAC lists are a confidential and proprietary trade secret. Thus, these MAC lists rarely see the light of day. Even when used in connection with taxpayer funded programs (e.g., Medicaid) these lists are labeled as “FOIA exempt.” Even when States try to make progress in combatting improper MAC pricing tactics, the PBMs influence can be felt at the legislative level. For example, in Texas, V.T.C.A. § 1369.358 states that “[a] [MAC] list that applies to a ... pharmacy and is maintained by a ... m [PBM] is confidential.” Thus, even in States that enact legislation to curb improper PBM pricing tactics, PBMs, via the Pharmaceutical Care Management Association (PCMA) (a powerful PBM lobby group), ensure that these laws can only go so far. With MAC lists being deemed strictly confidential, it substantially limits meaningful oversight to ensure that PBMs are following the various laws governing MAC reimbursement. It also permits PBMs to use the MAC lists in improper ways such as a tool to manipulate pricing.

To overcome these complexities, it is critical that Pharmacies be proactive, aggressive, and gain an in-depth understanding of the various laws, rules, and regulations governing MAC pricing as well as their PBM contracts, including the various provisions related specifically to MAC pricing. Approximately 40 states have enacted some form of law governing MAC pricing and the corresponding appeals process, with some

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states even enacting laws that afford their resident pharmacies additional protections under their business tort laws. This number is increasing and even States with laws already in place have revisited their laws and amended them to reflect some of the limitations under their law. In some instances, a PBM's failure to follow MAC pricing laws may constitute a deceptive and unconscionable trade practice, exposing the PBM to direct claims by the pharmacy for monetary damages, including, for example, treble damages, and attorneys' fees. Because of variations in

state law and PBM processes and procedures for MAC-related legal disputes, including MAC appeals, knowledgeable legal counsel is critical to fully understanding the legal rights related to MAC pricing. With laws being amended and enacted on a regular basis and generic dispensing increasing, it is important that Pharmacies prioritize increasing their knowledge and understanding of MAC and how it effects their business operations. ■

State Law Spotlight: Mississippi's New MAC Law Takes Effect in 2021

A new MAC law took effect in the State of Mississippi beginning in 2021. **MS ST § 73-21-156** contains several different provisions that Mississippi Pharmacies should be aware of and take advantage of. Critically, Mississippi Pharmacies must take the steps necessary to ensure they are receiving all information they are legally entitled to regarding PBM MAC reimbursement. A few highlights from **MS ST § 73-21-156** include:

- A requirement that any drug placed on a MAC list must “be available for purchase by each pharmacy in the state from national or regional wholesalers operating in Mississippi[.]”
- PBMs must “[p]rovide a process for each pharmacy subject to the [MAC] list to receive prompt notification of an update to the [MAC] list.”
- PBMs must establish “a reasonable administrative appeal procedure to allow pharmacies to challenge a [MAC] list and reimbursements made under a [MAC] list for a specific drug or drugs[.]”
- If an appeal is upheld, the PBM must “[m]ake the change in the [MAC] list payment to at least the pharmacy acquisition cost;... [and] [p]rovide the [NDC] that the increase or change is based on to the pharmacy[.]”
- Importantly, the law also provides an important component which makes it stand out from many other State MAC laws. Specifically, MS ST § 73-21-156(d)(ii) requires that if an appeal is denied, the PBM must “provide the challenging pharmacy... **the [NDC] and the name of the national or regional pharmaceutical wholesalers operating in Mississippi that have the drug currently in stock** at a price below the [MAC] as listed on the [MAC] list[.]” (emphasis added).

This new law is significant in the information that a PBM must provide to a pharmacy in connection with MAC appeals. The provision contained in MS ST § 73-21-156(d)(ii) is critical and a potential game changer for Mississippi Pharmacies. This provision means that PBMs can no longer “hide the ball” as to where a particular MAC comes from. If an appeal is denied, the PBM must tell the Pharmacy where it can obtain the drug at a price that is below the PBM's MAC price. Any Mississippi Pharmacies not receiving this information from a PBM should promptly contact legal counsel to discuss potential solutions. This law is a significant development and improvement for all Mississippi Pharmacies. ■



Legislative Update: Michigan House Introduces Pharmacy Benefit Manager (PBM) Bill Regulating PBM MAC Pricing



One of the most challenging issues for independent pharmacies throughout the United States is the issue of pharmacy benefit managers' (PBMs) reimbursement practices. There are numerous ways in which PBMs dictate reimbursement to independent pharmacies which often results in pharmacies being reimbursed below their drug acquisition cost. PBMs also dictate pharmacy reimbursement to increase their own profit margins—one primary tactic relied on by PBMs to achieve this is "spread pricing," a practice where PBMs reimburse a pharmacy one price for a drug but collect a higher or different amount from the plan sponsor and retain the difference. Maximum Allowable Cost (MAC) is one method by which a PBM effectuates spread pricing.

MAC pricing is distinct from other pricing benchmarks used in pharmacy as both MAC prices and MAC lists are created exclusively by PBMs and unilaterally deemed by PBMs to be proprietary and confidential. Thus, PBM MAC prices and MAC lists are often cloaked in secrecy and avoid public scrutiny. There are numerous issues with how PBMs create their MAC lists and set MAC prices—one of the most critical issues related to setting MAC prices is inconsistency as to what drugs should be included on a MAC list. Traditionally, MAC has been viewed as intended for multisource generics. But as PBMs have recognized opportunities to profit from MAC pricing, they have expanded the types of drugs included on their MAC lists to include single source generics and in some cases even branded drugs.

In Michigan, Representative Julie Calley recently introduced House Bill 4348, which if enacted could serve as a model to ensure that PBM MAC pricing is used for its intended purpose—ensuring that widely available generic drugs are acquired smartly by pharmacies—and not as a mechanism to increase PBM profit margins at the expense of pharmacies. The important features contained in House Bill 4348 that make it stand out include a clear definition of "maximum allowable cost" that applies only to generic drugs and a definition of "multiple source drug" that is defined to require that such a drug be "a therapeutically equivalent drug that is available from at least 2 manufacturers." These definitions combined mean that a PBM can only include drugs on a MAC list that are both generic and available from at least two manufacturers. This is significant because it appropriately limits the ability of PBMs to include brand drugs and single source generic drugs on their MAC lists thereby minimizing PBMs' ability to under-reimburse for such drugs. Although this Bill will still be subject to additional scrutiny in the Michigan legislature, if enacted as currently drafted, this language would add significant protections to Michigan pharmacies. ■

About Frier Levitt's MAC Pricing Practice Group

With an in-depth knowledge of PBMs and the various tactics used by PBMs related to pharmacy reimbursement, including a comprehensive knowledge of MAC Pricing, Frier Levitt's MAC Pricing Practice Group provides unique services and counsels Pharmacies and Plan Sponsors throughout the United States on all aspects of MAC pricing. Frier Levitt works on behalf of Pharmacies and Plan Sponsors to ensure that PBMs comply with all applicable laws governing MAC pricing and MAC reimbursement.



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