

Federal Trade Commission Settlement with ESI

The past few weeks also brought an interesting settlement between the Federal Trade Commission (FTC) and Express Scripts, Inc. (Settlement). The Settlement stems from the FTC's lawsuit against the three largest PBMs in the country (ESI, Caremark and OptumRx), along with related entities. The lawsuit focused on alleged anti-competitive practices related to insulin. However, the Settlement is much broader than that.

Plan sponsors will likely need to ask their PBM consultants how the required changes in the Settlement will impact their plan. Although the Settlement only involved ESI, plan sponsors might want to ask other PBMs (i.e., not just ESI) to "match" some of the terms in the Settlement. If PBMs agree to make such changes, the contracts between the PBMs and the plan sponsors will need to be updated. Note that the Settlement's terms have varying effective dates, but many of them will likely take effect in 2027.

Key points of the Settlement that impact plan sponsors are that ESI must:

- Provide as part of its "Standard Offering to Plan Sponsors" that an enrollee's out of pocket costs are based on the "Net Unit Cost" of a drug.
- Provide "full access to programs that reduce" these costs, including its "Patient Assurance Program and a Preferred Drug List with first-dollar coverage for insulin and other drugs."
- Ensure that its Standard Offering to plan sponsors provides that:
 - **Member Receives Benefit.** A "Member" receives the benefit of "direct-to-consumer pricing through the [TrumpRx platform](#)."

The term "Member" is defined as "any individual whose health insurance plan includes a Pharmacy Benefit Plan serviced by" ESI. The Settlement is unclear whether reference to "insurance plan" includes self funded group health plans, but presumably it does.

- **Deductibles/MOOPs.** Member payments "made through the TrumpRx platform" must count toward Member deductibles and maximum out of pocket (MOOP).

It is unclear how a PBM, TPA or insurer would know that the member has

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used the TrumpRx platform to purchase a prescription drug.

- **Rebates at Point of Sale.** Members can receive the benefit of any rebate or discount applicable to a drug “directly at the point of sale” and ESI cannot charge a fee for such program (other than its “actual cost to pre-fund any rebate, if applicable”).
- **No Guarantee of Compensation.** ESI “will not provide a guarantee to the Plan Sponsor of a pre-determined amount of compensation, including Rebates, from Drug Manufacturers.”
- **No Spread Pricing.** ESI cannot “employ Spread Pricing”. The term “Spread Pricing” is defined in the Settlement to mean the amount paid by a plan sponsor for a drug compared to the amount ESI pays to a pharmacy.
- **Automated Reporting.** ESI must provide “additional automated reporting for Plan Sponsors including an annual report disclosing each Drug Product costs and pharmacy claim-level reporting.”
- Provide “full access to the Patient Assurance Program for ... Insulin Products” unless the plan sponsor has “opted out in writing.”
- Provide plan sponsors with “any data or other information necessary for” them to comply with the Transparency in Coverage regulations.
- Fully disclose any compensation ESI pays or facilitates to consultants or brokers in connection with ESI providing pharmacy benefit services to plan sponsors, if any.

For more information, please contact John Barlament, Stacie Kalmer or Greg Storm, or your Reinhart attorney.

This is the third article in our series, [“Changes Abound for PBMs, Plan Sponsors, Health Plan Vendors and Prescription Drug Plans”](#)

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