THE COALITION
for Government Procurement

February 27, 2018

Craig Robinson
Associate Deputy Assistant Secretary
National Acquisition Center
Department of Veterans Affairs
Hines, IL 60141

Dear Craig:

At our September 6, 2017 meeting with representatives from the National Acquisition Center in Chicago, our members raised an issue of concern that you kindly agreed to investigate. The purpose of this letter is to provide additional information regarding the resale of drugs purchased through the FSS program to third parties at a profit.

The Coalition is a non-profit association of firms selling commercial services and products to the Federal Government, including the Department of Veterans Affairs. Our members include small, medium and large businesses representing many different industries, including both brand and generic pharmaceutical manufacturers, and collectively account for a significant percentage of commercial items purchased annually by the Federal Government. The Coalition is proud to have worked with government officials for more than 35 years towards the mutual goal of common sense acquisition, and we appreciate your ongoing willingness to provide our members with opportunities to discuss topics concerning administration of the VA's FSS contracts.

The specific issue we addressed with you involved revelations that the Indian Health Service and state veterans' homes have been billing Medicaid for drugs purchased under the FSS. Medicaid pays these entities for drugs dispensed to their patients at the standard Medicaid reimbursement rate, which is unrelated to their actual acquisition cost and in fact is considerably higher than the FSS price. Here are a few examples of several high-cost Medicaid outpatient drugs that show a delta between Medicaid ingredient reimbursement and FSS pricing[1].

Suboxone 4 mg-1mg SL film (NDC# 12494120403)

[1] NADAC price was used as a default to illustrate the delta between FSS acquisition cost and Medicaid reimbursement for ingredients – actual values for ingredient cost reimbursement under Medicaid will vary based upon state-specific requirements.

- NADAC per unit price: $7.80782
- FSS per unit price: $5.20167

Abilify 10 mg tablet (NDC# 59417010110)

- NADAC per unit price: $28.56703
- FSS per unit price: $19.38467

Vyvanse 10 mg capsule (NDC# 59417010110)

- NADAC per unit price: $9.42649
- FSS Price: $5.3641

Seroquel XR 150 mg tablet (NDC# 00310028160)

- NADAC per unit price: $37.68869
- FSS per unit price: $8.535

While VHCA prohibits duplicate discounts for drugs purchased under the 340b program, no such express prohibition exists for duplicate discounts applied to drugs purchased under the FSS. Based on this, CMS has advised state Medicaid directors to collect rebates on drugs dispensed by these FSS users. As a result, manufacturers will realize far less than the FSS price on those sales. CMS is correct that the VHCA does not prohibit it from collecting rebates when it pays providers other than 340B providers, but that is because the law did not contemplate that Big Four Agencies would resell deeply discounted drugs acquired under the FSS to third parties and receive payment that would exceed their FSS acquisition costs and augment their budgets.

This issue is very similar to one that arose in the early years of the VHCA program: whether Indian tribes' right to acquire drugs under FSS contracts at the Federal Ceiling Price as part of the Indian Health Service is limited to the tribes' own use in providing direct care to tribal members, or whether they are permitted to resell those drugs to casino employees and others and receive payment from health plans. Industry objected to the practice of an FSS user reselling drugs acquired under a government contract at a price intended to lower certain agencies' cost of providing direct care, and the VA concluded that the practice constituted improper diversion of federal supplies. It has been longstanding VA policy that authorized FSS users cannot use schedule contracts as vehicles to acquire drugs for resale, and thus cannot receive payment from health plans. *See* FSS AS3023. Likewise, the Pharmaceutical Prime Vendor Contract recognizes that drugs ordered under the FSS are intended solely to carry out agency missions and not for resale or barter. Accordingly, any transfer of a federal contract-priced drug that does not service the ordering agency's defined mission or is transferred for the purpose of generating a profit is prohibited as an improper diversion of federal supplies. Contractors with evidence of diversion may withhold chargebacks while disputing the transactions.

Respectfully, this is not a CMS issue, but a VA issue. Specifically, whether the same policy and clause that prohibits Indian tribes from reselling drugs acquired under the FSS to

beneficiaries of health plans, and receiving compensation for those drugs, applies to state veterans' homes, regardless of whether the payment comes from Medicaid plans. We urge the VA to reiterate to the FSS user community that a condition of purchasing under the FSS is a prohibition against charging third parties for the drugs to recoup their costs and make a profit. Additionally, we request that the VA notify manufacturers that they may reject chargebacks upon evidence that the purchaser was doing so. If the state veterans' homes want to charge health plans for drugs dispensed to their beneficiaries, they should use a different contract vehicle to acquire the drugs for which they are seeking payment.

Thank you for your consideration of this issue. Please let us know if you have any questions or would like to discuss the matter further.

Best regards,

Roger Waldron
President