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Innovations in Healthcare Financing Policy

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Testimony of Jane Horvath on S706/H1133
"An Act to Ensure Prescription Drug Cost Transparency and Affordability"

Thank you for the opportunity to speak today about S706/H1133, which would establish a process to create statewide upper payment limits (UPLs) for certain high cost prescription drugs in Massachusetts. I have worked with state officials on prescription drug cost containment policy for three years. I developed the model act that is the basis for the provisions we are discussing today while working with the National Academy for State Health Policy. The model act is the basis of legislation introduced in seven other states.

Why an Upper Payment Limit for High Cost Prescription Drugs?

Setting UPLs for certain high cost products is one of the very few ways states can effectively address the costs of prescription drugs and get lower costs to the consumer at the point of service on a statewide basis. As you all well know, there is federal law and caselaw that has severely limited state policy options to constrain drug costs. Although the pharmaceutical industry will challenge any state policy innovation addressing drug costs, I believe that an UPL process will surmount legal challenges. Patent law experts and dormant commerce clause legal scholars have reviewed the approach for vulnerabilities.

An Upper Payment Limit Will Increase Sales of Costly Drugs

I think it is important to know that an UPL program is designed to *increase sales* of costly drugs. If drugs are less costly, insurers can more freely cover them without restrictions and without shifting costs to the patients – which insurers must do now to constrain growth in premiums – which as you know is important for maintaining a robust insurance risk pool.

The UPL is not designed to cause revenue loss for manufacturers. There is no reason to think that selling more drugs at a lower reimbursement will create less revenue than the current industry business model – selling less of a drug at a higher cost.

An Upper Payment Limit Reduces the Need for Back Room Rebates
Importantly, an UPL should cause back-room rebates to diminish for drugs subject to an UPL. If pharmacies get a product at less cost, insurers reimburse the pharmacy at the lower cost. In today's market, rebates are designed to lower insurer net spending on a drug when the insurer's pharmacy reimbursement is high because the pharmacy's cost to stock the drug is high.

An UPL will create discounts in the supply chain that follow all the way through to the pharmacies, so rebates will not be needed to offset insurer drug costs.

The mantra of the drug industry for the last five years or so has been that they get no credit for all the rebates they pay. And that is quite true. In contrast, under an UPL, manufacturer rebates will become discounts – transparent discounts that travel through the supply chain to the pharmacy and the patient. Manufacturers will get the benefit of better public relations when drugs are no longer unaffordable as well as the benefit of more sales. So, an UPL should be considered a win for the industry – not an unbearable loss.

At its core, when applied to a specific drug, the UPL will rearrange the flow of funds, and create up front discounts. Up-front discounts benefit patients when they pay for drugs. Back end rebates never benefit the patient although rebates are important to offset insurer costs and relieve some upward pressure on premiums.

An Upper Payment Limit is in the Tradition of State Oversight of Consumer Costs of Essential Services
The UPL process is modeled on how every state regulates the consumer cost of essential public services. It is fully consistent with the Commonwealth's health care cost growth benchmark. The State sets a spending cap, and it is up to the market to figure out how to comply with the law – through negotiations between suppliers and all the different parts of the health care system. An UPL is quite the same. Once the limit is set, it is up to the suppliers and all different parts of the health care system to meet the requirements of the UPL.

Additionally, all states regulate consumer costs of public services like water and gas – services and products that are essential to health and safety. We may have to start to think of prescription drugs in much the same way. Clean water is incredibly valuable, but state oversight makes clean drinking water affordable to the people of Massachusetts. Prescription drugs are very valuable too, but they are not affordable to the people of Massachusetts today.

It is important to note that the cost of drugs is one of the very few areas of health care where the cost or charges are not regulated.

How the Upper Payment Limit Would Work
The Center for Health Information and Analysis (Center) and the Health Policy Commission (Commission) will each have a role in the UPL process.

The data that the Center and Commission gather from manufacturers and other parts of the industry that is proprietary will be held confidential. Payers, purchasers, patients and manufacturers have every incentive participate.

The Center will make an initial determination of whether a full review of the cost and financial impact of a drug is needed, in which case the issue is referred to the Health Policy Commission. The Commission will obtain public input on whether a costly drug creates financial stresses for the Massachusetts' heath care system and individuals. A full review by the Commission will include assessing the net costs for therapeutically similar (competitor) drugs. The Commission will have to understand how many people in the Commonwealth should be taking the drug and what that would cost at market rates. The Commission could decide to limit the cost of the drug in Massachusetts using the decades old US health system method of setting upper payment limits for services, drugs and devices.

There is nothing new in the mechanism the Commission will use. Like the statewide cost growth benchmark, the UPL adds strength to the negotiations of payers, suppliers and pharmacies to negotiate discounts in order to comply with an UPL. Negotiations for price concessions on prescription drugs happens across the US every day for every drug, but Massachusetts payors and purchasers have the force of law behind them. The UPL process makes the drug cost transparent. Payors and purchasers can negotiate lower costs/greater price concessions, but the UPL is the most anyone can pay.

Transparency Does Not Lower Drug Costs
While many states are legislating transparency for insurers and pharmacy benefit managers (PBMs), this transparency will not reduce costs to consumers or payers. Transparency can be an important first steps for states that do not have the health policy expertise that is here in Massachusetts.

The Upper Payment Limit is Now in the Mainstream of Policy Thinking
A statewide UPL is not the radical idea it might have seemed two years ago. Even at the federal level, the administration has proposed several far more radical ideas that validate the merits of the UPL approach:

- Drug rebates in Medicare will be classified as kickbacks under federal law and no longer permitted in Medicare Part D or Medicaid managed care.
- Medicare Part B drug reimbursement will be tied to the lower drug prices in Europe and elsewhere.

These are stunning ideas. Importantly *a Massachusetts UPL is completely consistent and complementary to the proposals put forth by federal agencies:*

- The UPL will not outlaw rebates like the federal proposals but will make them unnecessary for drugs that have an upper payment limit.
- The Health Policy Commission may choose not to consider US market prices in setting a Massachusetts UPL – which is consistent with the Medicare proposal that delinks federal reimbursement from US manufacturer prices.
- Like a statewide UPL, the federal agencies intend that the industry paradigm *move away* from unaffordably high prices that are partially offset by secret rebates and *move to* a more transparent system of discounts that make the drugs affordable for providers, pharmacies and patients – which then benefits insurers and state programs.

Thank you for your time and consideration.