



May 6, 2022

Phil Rinnander
Executive Director, Finance
Customer Contract Management
Merck Sharp & Dohme Corp.
351 North Sumneytown Pike
North Wales, Pennsylvania 19454

Dear Phil Rinnander:

The Health Resources and Services Administration (HRSA) has completed its review of Merck & Co., Inc.'s (Merck) policy, which places restrictions on 340B pricing for certain covered entities dispensing medications through pharmacies, unless the covered entities provide claims data to a third-party platform (with limited exceptions). After review of this policy and an analysis of the complaints HRSA has received from covered entities, HRSA has determined that Merck's actions have resulted in overcharges and are in direct violation of the 340B statute.

Section 340B(a)(1) of the Public Health Service (PHS) Act requires that manufacturers "shall...offer each covered entity covered outpatient drugs for purchase at or below the applicable ceiling price if such drug is made available to any other purchaser at any price." This requirement is not qualified, restricted, or dependent on how the covered entity chooses to distribute the covered outpatient drugs. Nothing in the 340B statute grants a manufacturer the right to place conditions on its fulfillment of its statutory obligation to offer 340B pricing on covered outpatient drugs purchased by covered entities. Furthermore, the 340B statute does not permit manufacturers to impose conditions on covered entities' access to 340B pricing, including the production of claims data. Section 340B(a)(1) of the PHS Act also requires manufacturers that have signed a Pharmaceutical Pricing Agreement (PPA) and PPA addendum to comply with these requirements. Merck is bound by the terms of the PPA and must ensure that the 340B ceiling price is available to all covered entities.

Consistent with section 340B(a)(1) of the PHS Act, manufacturers are expected to provide the same opportunity for 340B covered entities and non-340B purchasers to purchase covered outpatient drugs. This extends to the manner in which 340B drugs are made available to covered entities (e.g., access to 340B ceiling prices through wholesalers that make products available at non-340B ceiling prices).¹ The 340B Program Ceiling Price and Civil Monetary Penalties Final Rule (CMP final rule)² further specifies that a manufacturer's failure to provide 340B ceiling prices through the manufacturer's distribution agreements with wholesalers may violate a manufacturer's obligation under the 340B statute. HRSA has made plain, consistently since the issuance of its 1996 contract pharmacy guidance, that the 340B statute requires manufacturers to honor such purchases regardless of the dispensing mechanism.

¹ 82 Fed. Reg. 1210, 1230 (Jan. 5, 2017); 42 C.F.R. §10.11(b)(2)

² 82 Fed. Reg. 1210, 1230 (Jan. 5, 2017)

Merck purports that the rationale for its restrictive action is due to its concern with compliance issues arising from contract pharmacy arrangements. The 340B statute provides a mechanism by which a manufacturer can address these concerns. Specifically, the manufacturer must (1) conduct an audit, and (2) submit a claim through the Administrative Dispute Resolution process as described in section 340B(d)(3)(A) of the PHS Act. The 340B statute does not permit a manufacturer to impose industry-wide, universal restrictions.

For the reasons set forth above, Merck must immediately begin offering its covered outpatient drugs at the 340B ceiling price to covered entities through their contract pharmacy arrangements, regardless of whether they purchase through an in-house pharmacy. Merck must comply with its 340B statutory obligations and the 340B Program's CMP final rule and credit or refund all covered entities for overcharges that have resulted from Merck's policy. Merck must work with all of its distribution/wholesale partners to ensure all impacted covered entities are contacted and efforts are made to pursue mutually agreed upon refund arrangements.

Continued failure to provide the 340B price to covered entities using contract pharmacies, and the resultant charges to covered entities of more than the 340B ceiling price, may result in CMPs as described in the CMP final rule. The CMP final rule states that any manufacturer with a PPA that knowingly and intentionally charges a covered entity more than the ceiling price for a covered outpatient drug may be subject to a CMP not to exceed \$5,000 for each instance of overcharging.³ Assessed CMPs would be in addition to repayment for an instance of overcharging as required by section 340B(d)(1)(B)(ii) of the PHS Act. HHS will determine whether CMPs are warranted based on Merck's willingness to comply with its obligations under section 340B(a)(1) of the PHS Act.

HRSA expects Merck to provide an update on its plan to restart selling, without restriction, 340B covered outpatient drugs at the 340B price to covered entities with contract pharmacy arrangements by **May 20, 2022**. Please submit such a plan to 340Bpricing@hrsa.gov.

Sincerely,

/Carole Johnson/

Carole Johnson
Administrator

³ Note, HHS publishes inflation-adjusted increases for its various CMPs annually. The 2022 inflation adjusted penalty for 340B overcharging violations is \$6,323. 87 Fed. Reg. 15,100, 15,105 (Mar. 17, 2022).