United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

April 17, 2017

VIA ELECTRONIC TRANSMISSION

Mr. Chet Burrell
President and Chief Executive Officer
CareFirst, Inc.
840 First Street, NE
Washington, D.C. 20065

Dear Mr. Burrell:

The Committee has received information regarding a concerning trend in CareFirst's prescription drug coverage copayments and fees. Specifically, it appears some members of CareFirst's policy have faced brand penalties in substantial excess of the normal prescription copayment, despite a "medically necessary" annotation, such as "Dispense as Written," by CareFirst network doctors on the prescription.[1] The brand penalty can potentially cost patients thousands of dollars per year through no fault of their own. It would be helpful to know what CareFirst's policy is and how it is applied to this particular prescription drug space and whether CareFirst's approach is common practice in the industry.

Typical policies include language defining the Prescription Drug Tiers. Specifically, the issue with CareFirst appears to land squarely within Tier 3, non-preferred brand drugs, wherein brand name drugs have generic equivalents. The presence of these equivalents presumably allows CareFirst to charge the difference between the price of the brand name drug and the generic drug, if the doctor chooses the brand name drug.[2] This is commonly referred to as a 'brand penalty.' However, according to CareFirst's Prescription Guidelines, "Generics are

[1] The Committee has also been informed that when the brand penalty is imposed, it will not be applied to the annual deductible.
[2] Drug Coverage, https://member.carefirst.com/members/drug-pharmacy-information/drug-coverage-your-prescription-drug-plan.page.

dispensed when available unless your provider determines that a brand name drug is necessary for your overall health."[3] This medical necessity is further discussed in the policy.

The policy not only states that, "[a] Member will be allowed to obtain a non-Preferred Brand Name Drug in place of an available Generic Drug and pay only the non-Preferred Brand Name Drug Copayment when Medically Necessary, as determined by CareFirst," but also that "[i]f a drug on the Preferred Drug List is determined to be inappropriate therapy for the medical condition of the Member, the Member will be allowed to obtain a specific, Medically Necessary non-Preferred Drug List Prescription Drug for the non-Preferred Brand Name Drug Copayment or Coinsurance."[4] According to the Department of Labor Employee Benefits Administration, the Public Health Service Act requires a plan or issuer to accommodate an individual and waive cost-sharing for the branded drug when medically necessary.[5] Both the policy and the law appears to place emphasis on a doctor's decision to make a drug medically necessary. This stands in stark contrast to the brand penalty that has been apparently imposed on some policyholders.

The imposition of a brand penalty causes due process concerns. If CareFirst has entered into thousands of contracts with individuals based upon a certain set of policy promises, it must provide proper notice to policyholders when contracted-for terms change. It is not clear whether CareFirst is providing notice, and it would be helpful to the Committee if it could describe, in detail, how it handles the notice requirement and whether it comports with the standard in the industry.

Further, the Committee has received information that CareFirst may be imposing brand penalties upon pharmacies when a brand name drug has to be filled because a generic is no longer available. In that scenario, the patient would pay a co-pay amount but the pharmacy would pay CareFirst the brand penalty. It is important to understand whether this is occurring throughout CareFirst's plans or if these are isolated incidents based upon error.

The issues at stake not only have a financial impact but a medical impact. Many patients have tested generics but have found that their body simply does not react positively to them and therefore require brand name drugs. Understanding how CareFirst, and the industry in general, approaches these situations is important not only to the consumer but Congress as well.

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[3] Prescription Guidelines, https://member.carefirst.com/members/drug-pharmacy-information/drug-coverage-your-prescription-drug-plan.page.
[4] Policyholder Policy (PPO) and Prescription Drug Benefits Rider.
[5] United States Department of Labor, Employee Benefits Security Administration, "FAQs about Affordable Care Act Implementation Part XII."

To better understand the foregoing, please answer the following questions:

1. Please provide a single definition for medical necessity and answer whether "Brand Only" or "Dispense As Written" qualifies under that definition.

2. Is it CareFirst's general practice to impose a brand penalty even when a doctor has noted that a drug is "medically necessary"? Is this a practice that is followed by other insurers?

3. How is the imposition of a brand penalty after a prescription is deemed to be "medically necessary" consistent with state and federal law?

4. Is CareFirst required to provide notice to policy holders before imposing a brand penalty? If so, please provide a copy of that prior notice that is generally sent to policyholders before imposing a brand penalty. If not, why not?

5. Is it CareFirst's general practice to impose brand penalties upon pharmacies when a brand name drug is filled because no generic is available? If so, is this a practice followed by other insurers? Please provide a copy of that prior notice sent to dispensing pharmacists before imposing a brand penalty.

Thank you for your attention to this matter. Please number your answers according to their corresponding questions and respond by May 1, 2017. If you have any questions, please contact Josh Flynn-Brown of my Judiciary Committee staff at (202) 224-5225.

Sincerely,

Charles E. Grassley
Chairman
Committee on the Judiciary