

Public Comments Summary

Arkansas Insurance Department

Rule 128: Fair and Reasonable Pharmacy Reimbursements

Date: 11-15-2024

This is a summary of public comments we received related to the above rule, during a public hearing on October 22, 2024 as well as comments we received until the administrative record closed on November 11, 2024. Due to a federal holiday on November 11, 2024, the Department extended the record to receive public comments to November 12, 2024. Due to the number of comments, we are not copying and pasting the entire letters or emails, these however may be reviewed in their entirety including those made in the public hearing, via a hearing transcript, that are all available for your review at: <https://portal.insurance.arkansas.gov/LegalPubsPublic/web/proposed-rules/index>. Public comments received through emails or letters which simply state that the submitter is “for” or “against” are simply noted here. More specific and substantive concerns, objections to the proposed rule are addressed in summary in this document. The Department’s comments are in italics.

November 12, 2024, National Association of Chain Drug Stores (NACDS) in support of Rule 128.

November 11, 2024, Randy Kassisseh, Pharmacist, in support of Rule 128.

November 12, 2024, Max Greenwood for Arkansas Blue Cross and Blue Shield.

The definition of “fair and reasonable pharmacy compensation program does not strictly align with 23-99-506 in the PBMLA.

AID: We agree and changed that definition. See markup filing for Section II. A.

We need a separate definition for “adequate network of pharmacies.”

AID: we already include pharmacies in our network adequacy rule in Rule 108.

We need the rule to specifically include or exclude the health benefit plans it applies to or not.

AID: the proposed rule already applies only to plans and healthcare payors as defined in the PBMLA, the state legislation through which the rule is authorized to be issued.

Section IV. Paragraph B should be deleted, or, if not, the language should reflect that the pharmacy compensation program “may” impair pharmacy network adequacy.

AID: we are keeping IV. B., but we agree, and inserted the verb, “may impair,” as suggested. See markup for Section IV. B.

Paragraph C in Section IV should be amended to allow the dispensing cost to be included in co-payment, co-insurance or deductibles for high deductible health plans or cases in which the dispensing plus ingredient cost is less than the co-payment or co-insurance requirement(s).

AID: we agree. See the new language in the markup for Section IV.C

Paragraph E in Section IV, addressing surplus rebates needs to be deleted.

AID: we considered this, and may remove this in the future however the pharmacies want more exploration and at least a certification from the plans that there exists no remaining rebate revenue to help defray a dispensing cost.

Paragraph E, related to confidentiality needs to add a provision to permit disclosure of the dispensing costs that each health benefit plan or healthcare payor is required to pay, and published on an annual basis.

AID: we entirely agree. See the markup up requiring that publication or disclosure, annually.

November 11, 2024, Kyle Lomax, pharmacist, in support of Rule 128.

November 11, 2024, Eric Hadley, pharmacist, in support of Rule 128.

November 11, 2024, Jennifer McKenney, pharmacist, in support of Rule 128.

November 12, 2024, Brandon Cooper, pharmacist, in support of Rule 128.

November 12, 2024, Zach Smith, pharmacist, in support of Rule 128.

However, has concerns about the self-funded employer plan exemption.

AID: we understand however the exemption (5,000 Arkansas covered lives) is needed by AID to reduce review volume and RX data analysis of hundreds to thousands of self-funded employer plans, we may however remove or reduce that exemption depending on the number of self-funded plans make the required filings after this first year.

November 12, 2024, Soo’s Drugstore, pharmacy, in support of Rule 128.

November 12, 2024, Cornerstone Pharmacy, in support of Rule 128.

November 12, 2024, Arkansas CPESN, pharmacy network, in support of Rule 128.

November 11, 2024, Baptist Health. Concerns over cost impact to health plans related to the proposed rule.

The proposed rule imposes new costs on health plans such as Baptist Health and the employees and families who participate in its health plan.

AID: we agree with your concerns, and cost impact to the plans will be part of our analysis and data review requirements in our decision to require a dispensing fee.

Fair and Reasonable Dispensing Cost is not adequately defined.

AID: we restructured the rule and removed that definition, but we agree the term, “fair and reasonable” is not defined in either the Rule or under the PBMLA. We believe this is a decision permitted to be made by the Insurance Commissioner, who is authorized under the PBMLA to issue a rule addressing “compensation” and network adequacy.

It is unclear whether the health plans are compelled to pay or not compelled to pay a dispensing fee from internal comments from AID staff. The originally filed rule says, the fee “shall be required.”

AID: we agree and edited the rule to say that a dispensing cost “may” be required and removed the language suggesting the fee or cost to be mandatorily required in all cases.

[WE] have concerns over cost impact, a \$10.50 dispensing fee would result in an additional plan expense for Baptist Health plan of \$1.68 million per year.

AID: again, we are also concerned about your health plan cost impact and this aspect will be reviewed in your data submission requirements as one factor in our analysis.

This proposed rule does nothing to correct the disparities in reimbursement between large chain pharmacies and retail independents.

AID: we agree, but that is not the function or purpose of this particular rule.

AID has not provided support or evidence that health plans have inadequate networks of pharmacies or that pharmacies are closing or that there is a lack network adequacy to support a proposed dispensing cost requirement.

AID: we certainly agree that there is a dispute between the plans, PBMS, and pharmacies about this issue, however, please note that we are asking the plans in our implementational bulletin to provide us with pharmacy network retention numbers, as one factor in our analysis. We also would like to note that the Commissioner has to review whether the pharmacy compensation program “ensures” an adequate network of pharmacies. Ensure to us means currently but also relates to the future sustainability of pharmacy networks. Therefore, some of this initiative may be pro active.

Rule 128 is preempted by ERISA to apply to self-funded ERISA employer plans.

AID: we disagree. The rule specifically relates to pharmacy reimbursement or “compensation,” and not plan benefit design which we believe is permitted to be regulated under the Rutledge decision that you cited.

November 11, 2024, Andrew Mize, pharmacist, in support of Rule 128.

November 11, 2024, APCI, Arkansas Pharmacy Cooperative, in support of Rule 128.

Proposed Rule 128 should apply broadly to all fully insured and self-funded employer plans.

AID: we agree, but believe there needs to a size limitation to self funded plans related to resource issues by AID to avoid reviewing thousands and thousands of employer plans.

The recoupment prohibition in Section IV (C) should extend to all adjudication recoupments or adjustments and offsets.

AID: we agree to the extent those costs are outside the co-payment or co-insurance requirements for high deductible health plans or outside the cost requirements on the consumer in cases in which the dispensing cost plus ingredient cost is below the co-payment.

The data reporting requirement should not exclusively rely upon aggregate statistics but instead should require claims level detail “per pharmacy types.”

AID: we agree ultimately need to collect that data on those types in detailed basis in the future.

The health plan cost impacts should be certified by an actuary for the health plan.

AID: we agree and are working on a form for that certification in the future.

November 11, 2024, PCMA, against the proposed Rule 128.

The public comment chronology and timelines were not adequately planned in light of the Department’s conflicting versions of the permanent rule and Emergency Rule including a later edition of an implementational bulletin.

AID: We somewhat agree as we were requested to apply this to plan year 2025, however we believe the current final version of the proposed permanent rule, which will replace the emergency rule, are now more internally consistent, and the bulletin helps further define or explain the data requirements as to whether we want to require a dispensing cost on a plan to plan basis.

Rule 128 violates ERISA.

AID: we disagree. The rule addresses or pertains to pharmacy compensation and not plan benefit design, we believe under the Rutledge decision.

AID’s data collection requirements are overly burdensome.

AID: we disagree, we are not requesting raw RX data, but statistical average calculations which we believe should not be burdensome to calculate.

The draft AID bulletin exceeds the AID’s statutory authority.

AID: we disagree, the Commissioner under the PBMLA is authorized to issue a rule under the PBM licensure act related to “network adequacy,” as well as “compensation.” The Bulletin is simply implementing or explaining the data we want to review to apply Rule 128.

Bulletins do not have the same review and approval process as administrative rules, and AID’s bulletin is simply circumventing the rule review process.

AID: We disagree. See recent markup of proposed Rule 128. The bulletin is incorporated into the Rule by reference as if it is part of the rule, no changes to the Bulletin are permitted unless those changes go through rule review.

PBM appeal rights should be clearer and strengthened.

AID: we agree and intend to provide more clarification in the future in amendments to the Rule and Bulletin.

Submission and Fee Payment timelines need clarity.

AID: we believe we have reasonably now clarified those timelines in recent edits to the permanent rule and Bulletin. The permanent rule 128 will completely replace the emergency rule standards if approved to avoid any inconsistencies. Secondly, see markup, for plan year 2025, required dispensing costs will not be retroactive to 1-1-2025 but will only apply on a prospective basis after a dispensing cost is required, if one is required.

There exist extraterritorial implications or limitations to non-Arkansas situated health plans but which have Arkansas members

AID: we agree this is an issue, and are reviewing the application of this rule and data requirements in the bulletin upon non-situated plans but which have Arkansas members. Ostensibly the plan should only be required to report its Arkansas member data, and AID understands there may be complications carving out such data for reporting required by this Rule and Bulletin.

November 11, 2024, Chris Duty, pharmacist, in support of the rule but however has concerns.

Data collection should be at the claims level and not in the aggregate.

AID: we definitely agree and as we go forward into this regulation in the future intend to require that in some form.

Against the cap on the dispensing fee.

AID: we assume you are referring to the Medicaid amount cap in Rule 128. We may later adjust this fee cap or limitation in the future, it is however in place over cost concerns.

November 11, 2024, Don's Pharmacy, pharmacy, in support of Rule 128.

November 11, 2024, University of Arkansas System, concerns over cost impact to the UA system health plan.

~~A new \$9 dispensing fee will add 3.6 million dollars annually to the expenses of the UA health plan with a substantial amount going to chain pharmacies. We already have an adequate network of pharmacies who are already being reimbursed NADAC + 1%.~~

“We were recently asked to determine the impact of a \$9.00 prescription fill fee on the university's plan, as well as the impact of a NADAC + 1% drug pricing scenario. First, our current average fill rate is 36,100 prescriptions per month. A new \$9.00 fill fee will add \$3.6M annually to the expenses of our health plan. If the Insurance Commissioner determines that a \$9.00 prescription fill fee will be a component of a fair and reasonable standard, for the UA System, this increase must be covered through health premium and/or tuition increases. Based on current utilization, approximately \$2.5M of this increase will go to chain pharmacies. There is no plan reserve or other resource to offset the increased costs of an additional pharmacy fee.

Second, to ensure compliance with Arkansas law and regulations, the system's health plan currently reimburses independent pharmacies and UAMS based on NADAC pricing greater than NADAC + 1%, and those payments have been established through existing pharmacy network contracts between MedImpact and pharmacies that reflect agreed-upon reimbursements. While we have seen reference to a single payment or reimbursement complaint of a payment \$0.68 below NADAC that was filed

against MedImpact, we are aware of no cases in which a similar complaint has involved the university's plan.

While a NADAC + 1% pricing scenario would result in cost savings for the university's plan (reduction in current payments to pharmacies), we understand this calculation is only a benchmark and does not reflect the actual pricing to be determined under Rule 128. With limited reference to standards or guidance, under the proposed rule, the Commissioner must assess fair and reasonable pricing in some multiples of the NADAC +1% benchmark. In the university's case, we are already reimbursing pharmacies at agreed rates that are above NADAC +1%.”

AID: we are also concerned over health plan cost impact from additional dispensing costs, and it will be one factor, as well as your pharmacy network availability and rates, in our determination of where the plan will have to add a pharmacy dispensing cost.

November 11, 2024, City Pharmacy, in support of Rule 128.

September 24, 2024, Georgia Robinette, Stephens Insurance. Has questions.

Does the rule apply to all health plans, fully insured and self-funded?

AID: yes, it does.

The report has to be filed on or before November 30, 2024 and plans already have planned their rates before the reporting date, and this fee will end up being an unplanned or unbudgeted expense.

AID: we understand this dilemma but were requested to apply this requirement to plan year 2025. Please also note the permanent rule and bulletin requires the filing of this report from November 30, 2024 until February 17, 2025.

September 19, 2024. Simon Dobretsov, pharmacist (CARTI). in support of Rule 128.

The projected health insurance premium impact from any dispensing costs should consider the plan's cost savings from more timely access to medications. In calculating fair and reasonable dispensing fees, it is essential to consider all types of medications including specialty drugs and not just generics. We also recommend using federal models of “fair and reasonable pricing,” including using ASP or average sales pricing. Additionally, it is crucial to recognize that NADAC and other benchmark data are only averages and may be delayed and not necessarily reflecting real time costs that pharmacies incur when purchasing drugs.

AID: thank you for your observations, we of course will always explore looking into other pricing models for more accurate real time evaluation of pharmacy costs.

October 21, 2024, Kenneth Kuenzel, pharmacist, in support of Rule 128.

October 21, 2024, Michael Butler, pharmacist, in support of Rule 128.

October 21, 2024, Sam McHaney, pharmacist, in support of Rule 128.

October 21, 2024, Tony Rogers, pharmacist, in support of Rule 128.

October 21, 2024, David Eddington, pharmacist, in support of Rule 128.

October 21, 2024, Blake Johnson, pharmacist, in support of Rule 128.

October 23, 2024, Lelan Stice, pharmacist, in support of Rule 128.

October 23, 2024, Joey Robbins, pharmacist, in support of Rule 128.

October 21, 2024, Navitus, PBM. Neither support nor opposes Rule 128 and has observations.

Plans should consider several options to file with AID for approval, a flat amount in addition to NADAC, a schedule based drug class due to the level of pharmacy interaction, a flat percentage above NADAC for each drug, or an average percentage above NADAC.

AID: we considered all of these options and may later consider a different approach, we believed at least in its initial phase, a simple statistical average relative to NADAC minimums was the easiest basis for us to evaluate the need for a health plan to pay an additional dispensing cost.

Fair and reasonable reimbursement programs require a greater level of actuarial analysis that may strain state resources to be completed within 20 days.

AID: we agree. We intend to use our internal staff and an outside actuarial firm to help review the plan RX data. We are largely exempting self-funded employer plans with less than 5,000 Arkansas covered lives to reduce the strain on review requirements.

The increased costs to the health plans [from this Rule] would be passed directly to the plan sponsor/employer and its members.

AID: we agree, however AID is also concerned about cost impact on the health benefit plan, and this will be one factor we will review in our review of whether an additional dispensing cost will be required by the plans.

Question(s) related to applying this Rule requirement to various co-payment scenarios.

AID: See recent edits and markup to Rule 128. In those examples, the fee could be absorbed by the co-pay requirement, "up to the co-pay amount," but not "outside" or above that amount.

October 24, 2024, Stacy Cooper, pharmacist, in support of Rule 128.

November 5, 2024, Jon King, pharmacist, in support of Rule 128.

November 5, 2024, Mandy Wallace, pharmacist, in support of Rule 128.

November 7, 2024, Harps Food Stores, in support of Rule 128.

November 7, 2024, NACDS, National Association of Chain Drug Stores, in support of Rule 128.

November 8, 2024, National Community Pharmacists Association, in support of Rule 128.

November 8, 2024, American Drugs, pharmacy, in support of Rule 128.

November 10, 2024, Peyton Harvey, pharmacist, in support of Rule 128.

November 8, 2024, Dwayne Buxton, President/Mid-America Cabinets, against Rule 128.

The rule imposes new costs and causes a substantial monetary impact. If imposed, a \$10.50 dispensing fee approximately raises costs \$5,250 and forces us to make difficult choices about our plan offerings at a time when health plan and prescription drug spending are rising at a rate above is

AID: we share your concerns over cost impact if a plan is required to pay an additional dispensing cost. As we have responded to this complaint made by others, health plan cost impact will be one factor we will evaluate to decide whether an additional dispensing cost will be required.

Rule 128 overreaches without the benefit of a legislative process.

AID: all of our administrative rules including this Rule, Rule 128, have to be reviewed and approved by the State Legislature.

There exists no true emergency especially given there has only been a net loss of 6 pharmacies.

AID: we disagree. AID has been receiving 1,500 to 2,000 pharmacy complaints a month on reimbursement complaints from pharmacies, indicating their payments being below NADAC minimum acquisition costs.

Rule 128 should target areas with proven network access problems instead of being applied uniformly.

AID: good suggestion and AID may later emphasize geographical areas for dispensing costs, however, at this time, we are receiving reimbursement complaints over payments at pharmacy acquisition costs or below them for all parts of the State.

The Rule has confusing language on whether it applies to insurers or self-insured plans. It is unclear as to reporting dates.

AID: Please see proposed AID Bulletin 18-2024 which provides these clarifications. The Rule and the reporting data requirements will apply to self-funded plans, subject to the limitation or exception for self-funded plans with less than 5,000 Arkansas covered lives.

November 10, 2024, Michelle Page, HFA-AE, Ltd, against Rule 128.

AID: this comment letter exactly repeats the previously summarized comment and AID response, made in the preceding comment.

November 1, 2024, American Tubing, against Rule 128.

AID: this comment letter exactly repeats the previously summarized comment and AID response, made in the preceding comment.

November 11, 2024, Sam McHaney, pharmacist, in support of Rule 128. Requests data evaluation using claims level data and not aggregate and also requests no cap on the dispensing fee.

AID: as we have previously explained in response to other public comments on this request, our intention is to eventually examine claims level data but right now we simply do not have the staff or technology for this purpose, so the first year of the review(s) will use statistical averaging. A fee cap at Medicaid levels is, we believe, protection on cost impact, at this time.

November 11, 2024, Tony Rogers, pharmacist, in support of Rule 128.

November 11, 2024, Ryan Waterford, pharmacist, in support of Rule 128.

November 11, 2024, Chester Barber, pharmacist, in support of Rule 128.

November 11, 2024, Brittany Sanders, pharmacist, in support of Rule 128.

November 11, 2024, Mike Stover, pharmacist, in support of Rule 128.

November 11, 2024, Cathy Goodman, pharmacist in support of Rule 128.

November 8, 2024, John Brown University, has concerns over the adoption of Rule 128.

Submitter has concerns over cost impact .

AID: as we have explained in previous replies to this concern in public comments, AID is also concerned about cost impact or the health plan cost impact, and it is one factor we will review to determine whether a dispensing cost shall be required.

It would be better for Rule 128 to focus on areas where there are actual pharmacy network access problems instead of applying this requirement state-wide.

AID: good suggestion, and, as we responded to a previous comment about this consideration, we may in the future emphasize that consideration in terms of requiring a dispensing cost, however, we are receiving complaints about reimbursement levels at acquisition cost(s) or below throughout the state.

The rule is confusing whether it requires reporting from “insurers” only or also self-funded plans.

AID: See the markup to the and bulletin which indicate it applies the reporting requirements for both entities, with some limitations related to self-funded plans with less than 5,000 Arkansas covered lives.

November 10, 2024, Arkansas Pharmacists Association, in support of Rule 128 with some concerns.

We are concerned about aggregate level reporting required in the Bulletin.

AID: we agree it should eventually be on a claims level basis, but due to staffing and resource issues in this first year of implementation at least in plan year 2025, we decided only to use aggregate averaged data.

Concerned over lack of granular level data is needed to see pricing trends at national chains vs. local pharmacies.

AID: we agree and want to reach that level of review, but, again at this time, we do not have the staff, technology or analytical tools to require this. We may in the second or third plan year filings.

Concerned why self-funded plan are given data production limitations.

AID: again AID resource issue, we do not have the staffing or resources, at least we believe to review thousands of small employer self-funded plans.

The PASSE plans should not be exempted.

AID: we agree and have removed that exemption.

Concerned over the apparent graduation of dispensing fees from \$1 to the cap at \$10.50.

AID: in our first year(s) of implementation, given the concerns over cost impact from these fees, the fee is graduated in those amounts to be required in those graduated amounts, dependent upon NADAC statistical averaging that plan is making for pharmacy compensation, ostensibly in total, but also to us, more so in generic. We agree however a fixed fee based on administrative costs might eventually be adopted, but as you are aware that approach was not requested by executive leadership. We are here, due to cost concerns, trying to phase in these dispensing costs, to address health plan cost concerns.

Concerned that national chains may be paid inflated amounts in the aggregate level.

AID: agree and we will do our best to monitor that potential in future modifications of the data reporting requirements.

You should collect direct and indirect rebate information.

AID: we kept the rebate reporting requirement in related to the fairness and cost sharing act only, however, we may in the future request such rebate information as you outlined in your comment(s).

November 11, 2024, Chrissy Stallings, Medisav Homecare Pharmacy, in support of Rule 128.