

# ESI/DHA RECOUPMENT ACTION: LATEST INFORMATION

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PREPARED FOR

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## **ESI/DHA RECOUPMENT ACTION: LATEST INFORMATION**

### Background

In early June 2020, hundreds of compounding pharmacies across the United States received letters from Express Scripts, Inc. (“ESI”) stating, on behalf of TRICARE and the Defense Health Agency (“DHA”), that ESI was recouping money from the pharmacies for compound drug claims submitted to TRICARE in 2015 on the grounds that there was a lack of a proper physician-patient relationship (“PPR”). Each letter included a report setting out the prescription number, fill date, Member ID number, and the discrepant dollar amounts to be recouped. Although the letters were dated April 7, 2020, pharmacies did not receive this letter until early June. Recoupment amounts varied by pharmacy—from a few thousand dollars to hundreds of thousands of dollars. In some cases, recoupments on these compound claims began on or about the date of receipt of these letters.

Many pharmacies immediately responded to ESI, by email, in which they asserted arguments against recoupment including (i) the delay between the April 7, 2020 letter date and the actual date of receipt in early June; (ii) the unfairness of recouping without giving notice and opportunity to be heard; (iii) comparisons of the information contained in ESI’s claim report with the claim information in the pharmacy’s records resulted in findings that the Member ID shown on the ESI report does not match the cardholder ID as reflected in the pharmacy’s claims system; (iv) for a number of claims, the Paid Amount/Discrepant Amount shown on the ESI report does not match the actual amount paid as reflected in the pharmacy’s claims system; and (v) the lack of specific evidence upon which DHA determined the absence of a proper PPR.

Without exception, ESI responded to all pharmacies with the same email response saying:

- Should the pharmacy decide to provide medical records establishing that proper PPR existed during the year prior to dispensing of the drug, then the records must be accompanied with metadata or similar validating facts that substantiate the records creation date;
- The physician and pharmacy must both provide a signed attestation validating that they understand that if they provide false statements, then they are subject to (i) criminal prosecution and (ii) termination from the TRICARE program;
- The requirements for documentation will not be satisfied by letters from physicians attesting to the PPR; and
- The medical records and attestations must be provided within 90 days for Reconsideration Review purposes.

In a letter dated June 25, 2020, ESI issued a temporary suspension of recoupment actions related to the letters dated April 7, 2020. ESI also acknowledged that the April 7, 2020 letter should have been dated June 1, 2020. Subsequent to June 25, 2020, pharmacies and industry stakeholders were notified by ESI that (i) the 90-day time period to submit information and documentation in support

of a request for an administrative review is being stayed as of June 23, 2020 until further notice; (ii) DHA and ESI are reassessing the recoupment actions; and (iii) there is no plan to return previously recouped funds, but rather, ESI will hold the funds until the reassessment is completed.

#### Most Recent Information from DHA

On August 23, 2020, DHA sent a document to Ronna Hauser (Vice President Policy and Government Affairs Operations, NCPA) that updates NCPA, APC and PAAS National on ESI's/DHA's recoupment efforts. In summary, the document states<sup>1</sup>:

- **Incorrect Date on Initial Recoupment Letter** – The letter was dated April 7, 2020, when it should have been dated June 1, 2020. TRICARE attributes this mistake to pandemic-related disruptions.
- **When the 90 Days Start** – DHA recommends that the 90 day response period, to file an appeal, start 90 days from August 23, 2020.
- **Why There is a Recoupment** – A claim may not be paid if there is “program abuse,” which includes a pharmacy failing to provide documentation supporting the validity of the claim. An example of invalidity is if the physician did not conduct a physical exam of the patient. None of the audited claims included evidence that during the previous year, the physician submitted a claim to TRICARE for a physical exam. According to DHA, it is “highly unusual” that a pharmacy claim is submitted without an associated physician claim. However, DHA acknowledges that there may be physicians who do not bill TRICARE for medical services, yet write prescriptions that are billed to TRICARE. ESI will “review any such claims.”
- **Recoupment Discrepancy Report/Member ID Issue** – ESI pulled data from incorrect fields that did not match the DHA DEERS ID. However, the internal data driving the recoupments was correct.
- **Christine Dunse** – She is the point of contact.
- **Legal Authority to Recoup/Medical Necessity** – TRICARE will only pay for *medically necessary* services.
- **Recoupment Without Notice** – Appeal rights were included with the recoupment letter. This “deviated slightly” from ESI’s standard procedure in which it first sends out a notification before recoupment begins. This “slight deviation” was as the direction of DHA.

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<sup>1</sup> Restatement of TRICARE’s position does not indicate that TRICARE’s position is valid. Neither Brown & Fortunato, P.C., Macaulay & Jamerson, P.C., any pharmacy professional pharmacy association, nor any individual pharmacy should be construed to consent to or concur with TRICARE’s positions as restated herein.

- **Determining if a PPR Exists** – ESI cannot contact physicians because it does not have a contract with them. Having said this, ESI *is* contacting some physicians.
- **Frustrating DHA Quote** – “Although it is acknowledged that the lack of PPR is contingent on a provider relationship (to which the pharmacy may not be privy) the fact that the prescription was based upon false information requires the government to recover the overpayment.”
- **Medical Necessity** – DHA provides recommended “routine language” for submitting documentation to support medical necessity. The documentation may include (i) copy of the prescription; (ii) medical records; and (iii) additional documentation. Pharmacies are not required to collect records from a physician when the pharmacy fills the prescription; however, pharmacies *are* obligated to ensure that prescriptions are valid. If there is a question regarding the validity of the prescription, then additional documentation may be requested by the pharmacy to support the prescription.
- **Attestation Letter** – An attestation letter from a physician may be accepted if it clearly identifies the specific patient, prescription, date of service and medical necessity of the prescription.
- **Other Documentation Supporting Medical Necessity** – Any documentation to support medical necessity of the prescription is appropriate.
- **PPR vs. Medical Necessity** – The pharmacy is *not* required to establish a PPR. However, the pharmacy *is* required to provide documentation to support medical necessity and the validity of the prescription in accordance with TRICARE requirements.
- **Restoration of Recouped Funds** – Recouped funds will not be restored during the suspension of the recoupment. Recouped funds will be restored if supporting documentation is provided that establishes that the prescription was medically necessary.
- **Audit vs. Administrative Recoupment** – DHA and ESI have developed a tiered plan for determining whether a pharmacy will be subjected to an audit or administrative recoupment. A determining factor will be the dollar value of the alleged improper payments.
- **Proceeding with Administrative Recoupments** – As to if or when the administrative recoupment will proceed against a pharmacy will be determined by ESI’s review of the documentation submitted by the pharmacy in support of medical necessity.
- **Deadline for ESI/DHA to Respond to an Appeal** – Normally, ESI/DHA provide a response within 90 days from the date of filing of the appeal.
- **Recoupment of Claims For 2016 – 2020** – Recoupment has already been initiated for 2015 and later.

## Important Takeaways

- ESI/DHA are no longer asserting that pharmacies have the responsibility to establish a proper PPR. However, they *are* asserting that pharmacies must submit documentation establishing *medical necessity*.
- Although TRICARE states that a physician attestation by itself will not establish medical necessity, TRICARE notes that it can be submitted as evidence of medical necessity. TRICARE outlines specific elements it will require be present in an attestation.
- TRICARE acknowledges the prescription itself can be submitted as evidence of medical necessity.
- Failure to submit information to ESI in response to these findings could form the basis for termination of the pharmacy's ESI provider contract.
- Recouped funds will not be restored during the suspension of the recoupment.
- TRICARE is recommending to ESI that pharmacies be required to submit appeals within 90 days from August 23, 2020. It is not clear whether ESI will accept this recommendation or communicate this deadline to pharmacies.
- TRICARE states that recoupments that have already occurred are for 2015 *and later*. This suggests that pharmacies will not be facing additional recoupments for years subsequent to 2015.

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