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The Honorable Virginia Foxx
Chairwoman
U.S. House of Representatives
Committee on Education and the Workforce
2176 Rayburn House Office Building
Washington, DC 20515

March 15, 2024

Subject: Request for Information: ERISA's 50th Anniversary: Reforms to Increase Affordability and Quality in Employer-Sponsored Health Coverage

Dear Chairwoman Foxx,

On behalf of the California Public Employees' Retirement System (CalPERS), I am writing in response to your request for information (RFI) on ways to build upon and strengthen the Employee Retirement Income Security Act of 1974 (ERISA). Though CalPERS is not an entity covered by ERISA, we perform functions similar to covered entities and believe our experience can provide valuable insight into proven strategies that reduce health care costs and improve quality of care. We appreciate your leadership in efforts to increase affordability of coverage, quality of care, and access to care. As health care costs continue to rise for employers and outpace the rate of employee wage growth, the need for federal attention to reduce costs while protecting employees is vital.

With more than 1.5 million members, CalPERS is the largest purchaser of public employee health benefits in California and the second largest public purchaser in the nation after the federal government. In 2022, we spent over $10.6 billion to purchase health benefits for active and retired members and their families on behalf of the State of California (including the California State University) and nearly 1,200 public agencies and schools. Approximately 19 percent of our $10.6 billion spend was for outpatient prescription drugs alone. CalPERS strongly supports legislative changes that improve health care quality, access, and affordability for our members.

We are responding to the RFI's questions regarding specialty drug coverage, prohibited transactions, and data sharing. Specialty drugs account for a large portion of our overall spending. CalPERS is deliberate in its initiatives to increase generic and biosimilar market entry and uptake, as well as to support legislation that promotes pharmacy benefit manager (PBM)

transparency. We offer recommendations informed by our implementation of various strategies to balance member choice, quality, safety, affordability, and prescription drug access.

Specialty Drug Coverage

1. What challenges do employers face in offering coverage of high-cost specialty drugs, and how can those challenges be addressed?

Prescription drugs play an increasingly important role in the health and well-being of our members and their families. Rising costs of these drugs are driven largely by the growing number and increasing launch prices of specialty drugs and gene therapies, which represent a small fraction of drugs prescribed and dispensed, but account for a large portion of the overall CalPERS spend. Our experience has found that the use of generics, biosimilars, and evidence-based pharmacy benefit management strategies are critical to controlling increasing prescription drug cost trends.[1]

We are concerned some looming challenges may exceed our ability to successfully control prescription drug costs. For example, emerging gene therapies offer the potential for significant health gains for patients, including in some cases the possibility of a lifelong cure from a chronic illness. The value and cost-effectiveness of the therapies must be taken onto consideration when determining the appropriate price, and exceedingly high prices could impact our ability to offer access to therapies for our members. CalPERS is monitoring the issue and evaluating the Institute for Clinical and Economic Review (ICER) policy recommendations[2] to address the uncertainty and the high costs of these therapies. We anticipate that gene therapies will have long term financial impacts and that there will be many gene therapies in the future.

4. What tools can employers use to expand risk pools to lower the collective costs of coverage of high-cost specialty drugs?

Health care purchasers should consider joining forces with others to increase purchasing power, and not specifically for the stability their own health programs. Employers of all sizes should collectively work with others to increase purchasing power, assert leverage, and obtain better pricing.

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[1] *See* CalPERS, Comment Letter, Subject: Legislation to Speed and Expand Generic and Biosimilar Drug Access, *available* at https://www.calpers.ca.gov/docs/legislative-regulatory-letters/letter-federal-congress-09-19-23.pdf

[2] *See* ICER, Gene Therapy for Hemophilia B and An Update on Gene Therapy for Hemophilia A: Final Policy Recommendations, *available* at https://icer.org/news-insights/press-releases/icer-publishes-final-evidence-report-on-gene-therapies-for-hemophilia-a-and-b/

6. What role should the federal government play in assisting employers, drug manufacturers, and other entities to manage risks and to share the costs and savings of employer-sponsored coverage of high-cost specialty drugs?

CalPERS supports extending the Inflation Reduction Act to the commercial sector and allowing commercial health plans to utilize the maximum fair prices established under the Medicare Drug Price Negotiation Program, which has the potential to generate substantial savings for purchasers and employees.

CalPERS recommends that the federal government pursue policies that would require price transparency from the commercial health sector, including PBMs. We are also supportive of provisions that would delink PBM reimbursement from drug price and instead reimburse PBMs through a flat service fee. If the Committee were to advance such reforms, we believe these changes will provide purchasers with critical information to better serve plan members and improve the financial incentives in the pharmaceutical space.

CalPERS has long advocated for legislation designed to lower prescription drug costs by reforming the drug patent and approval systems. Particularly, initiatives that are aimed at prohibiting anti-competitive arrangements used by manufacturers to block or delay the market entry of lower-cost generic drugs and biosimilar products.

8. What innovative coverage models are currently in use that address the high cost of specialty drugs?

CalPERS has explored a variety of strategies to address the high cost of specialty drugs, including models to increase biosimilar and generic utilization and PBM contracting practices focused on delivering value and generating savings.[3] Examples include the following:

- *Biosimilars First* – Starting in 2021, CalPERS worked with our Anthem PPO Basic Plan on Biosimilars First, a program that requires the use of biosimilars for new adult patients when a biosimilar was available and clinically appropriate. Anthem's results from this initial study included widespread patient and provider acceptance. In 2022, the Biosimilar First program was expanded to include all drugs with available biosimilars.

  Today, CalPERS is exploring expansion of the Biosimilar First program to all our health plans and talking with our pharmacy benefit managers about a similar biosimilar program. Studies have found that substituting biosimilar drugs for biologics could drive down the price of expensive medicines, with savings estimated to be $38.4 billion or 5.9

[3] *See* CalPERS, Pension and Health Benefits Committee, Agenda Item 10, *available* at https://www.calpers.ca.gov/docs/board-agendas/201802/pension/item-10-a.pdf

percent of projected total U.S. spending on biologics from 2021 to 2025, according to the American Journal of Managed Care.[4] For these efforts, CalPERS recently received the Purchaser Business Group on Health Moonshot Award and was named a "Health Care Affordability and Accountability Innovator" for the Biosimilar First Program.[5]

- *PBM Contracting* – Throughout our contract with OptumRx, CalPERS has deployed several strategies to improve drug pricing, increase transparency, and reduce overall costs. Initially, CalPERS compensated OptumRx largely by price spread and increasing rebates. In 2020, CalPERS transitioned to an acquisition cost-based contract so that CalPERS could compensate OptumRx for its costs associated with procuring and dispensing mail order and specialty drugs, rather than on the margins they profit from through drug manufacturer rebates and price spread.[6]

  To evaluate the effectiveness of the acquisition cost-based contract, CalPERS performed its annual market check for contractual financial guarantees for CalPERS Basic and Medicare plans and found that it resulted in lower overall costs. CalPERS retains audit rights to confirm the acquisition price of mail order and specialty drugs in its contract with OptumRx.

- *Analysis of Clinical Input and Pharmacy Data to Improve Pharmacy Benefit Strategies* – CalPERS is developing clinical programs to support our highest-cost members and is developing an ongoing clinical monitoring plan to better manage increased utilization of specialty drugs. Additionally, we will focus on developing a strategy for an upcoming PBM solicitation in order to secure the most transparent and effective contract possible to meet CalPERS pharmacy benefits needs.

Prohibited Transactions

1. The Committee broadly seeks feedback on how vertical integration and consolidation in the health care sector impact ERISA's prohibited transactions.

Anti-competitive mergers and acquisitions cause higher prices without improving the quality of care. CalPERS encourages the committee to consider policies to ensure the health care market is

[4] *See* CalPERS Health Team Pushes for Broader Acceptance of Biosimilars, *available* at https://news.calpers.ca.gov/calpers-health-team-pushes-for-broader-acceptance-of-biosimilars/
[5] *See* CalPERS, Biosimilar First Program Earns CalPERS a Moonshot Award, *available* at https://news.calpers.ca.gov/biosimilar-first-program-earns-calpers-a-moonshot-award/
[6] *See* CalPERS, Pension and Health Benefits Committee, Agenda Item 6b, *available* at https://www.calpers.ca.gov/docs/board-agendas/202303/pension/item-6b_a.pdf

not impacted by anti-competitive contracting practices at the insurer and provider level that can lead to higher health costs. Additional oversight of mergers and acquisitions by health care entities as well as increased transparency and information regarding market activities can help contain health care costs for employers and consumers.

In California, the $575 million settlement with Sutter Health highlights how aggressive hospital consolidation can drive up premiums and costs to patients.[7] A UC Berkeley report found evidence that the consolidated market in Northern California has led to higher prices for consumers, finding that the average hospital inpatient procedure cost was $131,586 in Southern California and $223,278 in Northern California.[8] Premiums for patients with Marketplace coverage were similarly much higher in Northern California than Southern California.

CalPERS seeks to improve provider competition to mitigate high costs in low competition areas because our research has shown that price variation for the same services within a geographic area is largely explained by market forces, as consolidations and mergers result in less competition and higher prices. The bargaining strength of a hospital, provider group, or insurer is determined by the amount and type of competition in a region. CalPERS aims to increase competition using a variety of strategies including the utilization of Centers of Excellence for procedures with high variation in cost across regions, encouraging the use of telehealth in areas with fewer providers, and utilizing appropriate site of care for routine services.[9]

3. The Committee broadly seeks feedback on how changes in transparency affect how plan sponsors determine whether spending and costs are reasonable and necessary.

CalPERS is a longtime proponent of data transparency as a tool to improve health outcomes and increase the quality of care while lowering costs.[10] We support transparency requirements that can help purchasers determine if their spending and costs are reasonable. Multi-payer all-claims databases provide all stakeholder groups – purchasers, the public and other health plan

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[7] Attorney General Becerra Secures Preliminary Approval of Settlement with Sutter Health Resolving Allegations of Anti-Competitive Practices, State of California - Department of Justice - Office of the Attorney General, 11 Mar. 2021, https://oag.ca.gov/news/press-releases/attorney-general-becerra-secures-preliminary-approval-settlement-sutter-health

[8] *See* Consolidation in California's Health Care Market 2010-2016: Impact on Prices and ACA Premiums, *available* at https://petris.org/wp-content/uploads/2018/03/CA-Consolidation-Full-Report_03.26.18.pdf

[9] *See* CalPERS, Comment Letter, Subject: FTC-2023-0043 – Draft Merger Guidelines for Public Comment, *available* at https://www.calpers.ca.gov/docs/legislative-regulatory-letters/comment-federal-ftc-09-18-23.pdf

[10] *See* CalPERS, State of California Board of Administration Public Employees' Retirement System Resolution, Health Benefit Purchasing and Data Transparency, *available* at https://www.calpers.ca.gov/docs/board-agendas/201302/pension/item-8-attach-1.pdf

beneficiaries, researchers, insurers, and providers – access to comprehensive quality, outcomes, and cost data that each can use to evaluate, choose, and compete on quality and value.

Data transparency is a prerequisite for actions to address market consolidation in the health care market. In California, the recently established Office of Health Care Affordability (OHCA) can conduct cost and market impact reviews (CMIRs) on transactions likely to significantly impact market competition, the state's ability to meet cost targets, or affordability for consumers and purchasers. Future CMIRs will identify opportunities for timely intervention by OHCA, CalPERS, and other state agencies to stop transactions that could adversely impact competition and affordability.

Data Sharing

1. The Committee broadly seeks feedback on ways to improve data sharing between employer-sponsored plans and contracted entities.

Insight into health care prices through price transparency tools enables purchasers to act as responsible fiduciaries. While existing price transparency regulations have the potential to spur market forces and constrain costs, additional actions are needed to improve the availability and usability of health care pricing information. The CalPERS data warehouse, known as the Health Care Decision Support System (HCDSS) is an example of such a tool.

HCDSS provides CalPERS with insight into health care data for health plan rate setting, clinical program evaluation, health plan performance monitoring, and analytical reporting. All contracted health partners are required to submit data to CalPERS. The current HCDSS contains 12 years of data, with more than 1.0 billion records for approximately 1.5 million members. The HCDSS is a strategic analytic tool providing a rich source of healthcare financial and utilization data by way of data warehousing and business intelligence services, allowing CalPERS to actively participate in the development, reconciliation, and validation of health plan premiums.

We encourage the Committee to advance policies that provide all purchasers access to their data, allowing them to make informed decisions affecting the costs of purchasers as well as their consumers.

2. The Consolidated Appropriations Act, 2021 (CAA) prohibited provisions in health plans that prevent plan fiduciaries from accessing quality and costs information, known as "gag clauses." However, plan fiduciaries still struggle to receive this information from TPAs. How can Congress strengthen the prohibition on gag clauses to ensure that plan fiduciaries have access to this data?

The prohibition on gag clauses is a good first step towards increasing transparency in price and quality information and improving plan fiduciaries' decision making with respect to limiting

certain anti-competitive contracting prices. CalPERS encourages Congress to establish transparency requirements that give purchasers access to their members' data. Congress should pair these new requirements with a prohibition on data sharing restrictions. Together, these policy changes would allow plan fiduciaries to negotiate lower in-network prices while ensuring adequate access to a network of high-quality providers.

3. The CAA requires plans to attest that their contracts do not contain these gag clauses. Is this requirement effective?

We commend Congress for requiring plans and issuers to annually submit the Gag Clause Prohibition Compliance Attestation to the Departments of Labor, Health and Human Services, and the Treasury. Contractual provisions restricting the disclosure of cost and quality information limit the purchasers' ability to access and analyze their healthcare data. We are encouraged by what we believe is an important first step in achieving data transparency for employers. We are eager to assess the rule's effectiveness on data transparency once further guidance is rolled out on this matter.

We thank you for your consideration and we welcome the opportunity to work with you on our shared goal to improve health care affordability. Please do not hesitate to contact Donald Moulds, Chief Health Director, at (916) 795-0404, or Danny Brown, Chief of our Legislative Affairs Division, at (916) 795-2565, if we can be of any assistance.

Sincerely,

Marcie Frost
Chief Executive Officer