STATEMENT

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In Opposition to Minnesota HF 8
February 1, 2021

Position: The Pharmaceutical Research and Manufacturers of America (PhRMA) respectfully opposes Minnesota's House File (HF) 8, which creates a Prescription Drug Purchasing Program for its Medicaid and MinnesotaCare populations. PhRMA does not oppose bulk purchasing in the non-Medicaid populations, but does oppose efforts to include Medicaid populations in aggregate purchasing programs with other state public programs, or any other private or public entity. Minnesota's proposal to obtain Medicaid rebates for non-Medicaid populations requires federal approval, and the state's burden to prove compliance with federal requirements would likely be a costly and uncertain effort.

PhRMA represents the country's leading innovative biopharmaceutical research companies, which are devoted to discovering and developing medicines that enable patients to live longer, healthier, and more productive lives. Since 2000, PhRMA member companies have invested nearly $1 trillion in the search for new treatments and cures, including an estimated $83 billion in 2019 alone.

HF 8 would establish a Prescription Drug Purchasing Program for the state of Minnesota, allowing the Minnesota Department of Human Services (DHS) to: (1) purchase prescription drugs or reimburse pharmacies for prescription drugs in order to receive discounted prices and rebates; (2) make prescription drugs available at the lowest possible cost to participants in the program; (3) establish one preferred drug list (PDL); and (4) engage in price negotiations for rebates and discounts.

Minnesota does not have the authority to require Medicaid rebates for non-Medicaid populations if there are no Medicaid expenditures.

At least one court has found that Congress, in enacting the Medicaid Drug Rebate Program under section 1927 of the Social Security Act, did not intend to allow a state to require manufacturers to pay Medicaid rebates for drugs purchased with non-Medicaid funds. Specifically, in *PhRMA v. Thompson*, the U.S. Court of Appeals for the D.C. Circuit stated:

> Perhaps Congress could require manufacturers to pay rebates when no funds appropriated for Medicaid purposes were actually expended. Perhaps Congress could authorize [the U.S. Department of Health and Human Services] to accomplish directly what it has done indirectly through the [Vermont Pharmacy Discount Program], require pharmaceutical manufacturers to provide substantial discounts to individuals not otherwise covered by the state Medicaid programs. But [Congress] has done neither…[N]othing in the [Medicaid Drug Rebate] statute's language or legislative history suggests that Congress considered the possibility of requiring rebates where no Medicaid funds are expended.[1]

HF 8 directs state agencies to request approval from the Centers for Medicare & Medicaid Services (CMS) to obtain Medicaid rebates for non-Medicaid populations when no Medicaid funds are spent. The bill

1 *PhRMA v. Thompson*, 251 F. 3d 219, 226 (D.C. Cir. 2001).

impermissibly leverages rebates for the Medicaid population outside of the Medicaid Drug Rebate Program for the benefit of programs other than Medicaid.

Medicaid may only be leveraged to obtain rebates for non-Medicaid populations when doing so benefits the Medicaid population as a whole and/or increases the efficiency and economy of the Medicaid program.

CMS and the U.S. Supreme Court have made clear that when a state includes rebates for non-Medicaid populations within its Medicaid drug rebate negotiations, the state must show that doing so furthers the goals and objectives of Medicaid. Specifically, CMS has said that the state must submit appropriate evidence to CMS demonstrating that securing such rebates for non-Medicaid populations would:

(1) "sufficiently benefit the Medicaid population as a whole by making available to financially needy individuals medically necessary prescription drugs, thereby improving their health status and making it less likely that they will become Medicaid eligible;" and
(2) "increase the efficiency and economy of the Medicaid program."[2]

CMS has made clear that the burden is on the state to explain how leveraging Medicaid lives to obtain rebates for non-Medicaid populations would advance the goals and objectives of the Medicaid program.

Minnesota's burden to show that combining Medicaid and non-Medicaid lives will meet CMS requirements is tremendous in terms of resources and cost.

HF 8 requires DHS to seek the necessary federal approvals for this proposal, which will require time and resources. However, there is currently no Minnesota Management & Budget (MMB) Fiscal Note for HF 8 indicating the funding for seeking such federal approval. Without funding, it is unclear how DHS will be able to complete the necessary research to identify how this proposal would sufficiently benefit the Medicaid population as a whole as well as demonstrate how this proposal would increase the efficiency and economy of its Medicaid program.

For all of these reasons, we respectfully oppose HF 8 and ask for a no vote.

2 CMS, Letter to State Medicaid Directors, SMDL #02-014 (Sept. 18, 2002); see also *Thompson*, 251 F.3d at 226.
("[B]ecause we think it so obvious that Congress's purpose in requiring manufacturer rebates was to reduce the cost of the Medicaid program, we think that Congress's silence cannot provide a basis for allowing the Department to extend the rebate requirement to situations where, as here, rebates produce no Medicaid savings"); *PhRMA v. Thompson*, 362 F.3d 817, 825 (D.C. Cir. 2004) ("If the ... program prevents borderline populations in Non-Medicaid programs from being displaced into a state's Medicaid program, more resources will be available for existing Medicaid beneficiaries.").