

FROM THE NAIC CONSUMER REPRESENTATIVES

June 21, 2021

To: Health Insurance and Managed Care (B) Committee

RE: Consumer Representatives' Urge Approval of Pharmacy Benefit Manager Licensure and Regulation Model Act & PBM White Paper Charge

On behalf of the undersigned Consumer Representatives to the National Association of Insurance Commissioners (NAIC), we urge the Committee to approve 1) the NAIC's Pharmacy Benefit Manager (PBM) Licensure and Regulation Model Act and 2) the PBM Regulatory Issues (B) Subgroup charge to develop a white paper.

Pharmacy benefit managers play a critical role in the drug pricing, access, and delivery system. As such, their actions have a profound impact on consumer access and affordability of prescription medications.

Draft Model Act

The Draft Model Act provides states direction on how to establish a licensing and registration process for PBMs, prohibits certain PBM practices, such as gag clauses, and sets up an enforcement mechanism. While the Model Act is rather limited in its scope and does not address many of the PBM practices that directly impact medication access and affordability for consumers, we urge the committee to move forward with enactment of the model. Many states have already enacted the provisions included in the draft Model Act. The National Academy of State Health Policy (NASHP) reports that over 27 states already have registration or licensing requirements while almost all prohibit gag clauses.

During the drafting process, the Subgroup did discuss several additional matters that did not make it into the Draft Model Act. Some of these issues included 1) ensuring greater transparency in the work of PBMs, 2) ensuring greater enforcement, 3) establishing that PBMs have a fiduciary relationship with health carriers, and 4) allowing PBMs to pass rebates on to consumers. However, most of these issues were referenced as part of the drafting note for Section 8 that provides examples of laws passed by states that other states may want to utilize. While we understand that the use of a drafting note may not be the ideal mechanism to provide states that are interested in enacting these policies, we appreciate the intent of the Subgroup to provide states options to further regulate PBMs, complete with statutory and regulatory citations from states that have done so.

Additionally, near the end of the drafting process, the United States Supreme Court unanimously ruled in *Rutledge vs. Pharmaceutical Care Management Association (PCMA)* that the Employee Retirement Income Security Act of 1974 (ERISA) did not preempt an Arkansas state PBM law. This will likely pave the way for more meaningful state regulation of PBMs. In order to understand implications of the Supreme Court ruling, particularly as it relates to state regulation of PBMs, and to further examine many of the unresolved issues during the drafting process, we suggested that the NAIC undertake the development of a white paper.

White Paper

We are very pleased that the NAIC is responding to our suggestion and is considering the development of such a white paper. We fully support the new charge for the PBM Issues (B) Subgroup to develop a white paper to analyze and assess the role of PBMs in the provision of prescription drug benefits, examine different state approaches to addressing some of the PBM business practices included in the Section 8 drafting note, in addition to implications of the *Rutledge* case, and finally, discuss challenges that states have encountered in regulating PBMs. We believe the white paper should be used to provide states who wish to go further in regulating PBMs than what is provided under the Model Act.

The NAIC Consumer Representatives welcome the opportunity to be an active participant in the drafting of the white paper in order to ensure the needs of the consumer are being addressed. We have questions as to who exactly will be drafting the paper, if the NAIC will turn to outside experts, and if there is a timeline for its completion.

We appreciate that the NAIC is addressing the regulation of PBMs since they play such an important role in consumer affordability and access of prescription medications. **Passing the Draft Model Act is an important first step. Development of a white paper would be a good second step. We then hope this will turn into further discussions and the development of an updated and more meaningful PBM Model Act.**

For any questions, please contact Carl Schmid, HIV+Hepatitis Policy Institute at cschmid@hivhep.org. Thank you very much.

Sincerely,

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