

June 14, 2021

The Honorable Michael Conway  
Chair, Regulatory Framework (B) Task Force  
National Association of Insurance Commissioners  
444 North Capitol Street NW, Suite 700  
Washington, DC 20001

**RE: COMMENTS ON DRAFT PBM REGULATORY ISSUES SUBGROUP CHARGE**

Dear Chair Conway and members of the Regulatory Framework (B) Task Force:

The National Community Pharmacists Association appreciates the opportunity to provide written comments on the “Draft Pharmacy Benefit Manager Regulatory Issues (B) Subgroup 2021 Charge.” NCPA supports the development of a white paper that delves into pharmacy benefit managers’ (PBMs’) role as middlemen in the drug supply chain and their impact on drug formulary creation, consumer access to community pharmacy services, and drug pricing. We believe that the white paper will help the nation’s insurance commissioners and their staff to better understand the role of PBMs and help them enforce the laws that have been enacted to protect consumers from certain PBM practices and conflicts of interest.

NCPA believes that the draft charge can be made more specific to ensure the PBM Regulatory Issues Subgroup develops a white paper that can be used to help consumers in the states. We ask that the Task Force consider making the following changes to the charge:

Develop a white paper to: 1) analyze and assess the role that pharmacy benefit managers (PBMs) play in the provision of prescription drug benefits, including, but not limited to, ownership of pharmacies, provider network development, drug formulary creation, rebate aggregation; 2) identify, examine and describe current and emerging state regulatory approaches to PBM business practices and sources of revenue, such as price transparency and reporting requirements, rebating and spread pricing, including the implications of the *Rutledge vs. Pharmaceutical Care Management Association (PCMA)* decision on such business practices; and 3) discuss any challenges, if any, the states have encountered in implementing such laws and/or regulations and investigating violations of those laws.

**Addition #1**

PBMs’ role in the provision of prescription drug benefits goes far beyond administering reimbursements to providers on behalf of payers. To fully understand how PBM business practices impact consumers, one must understand how fully PBMs dominate the drug supply chain. PBMs are involved in the creation of drug formularies, thus determining which drugs are covered by a consumer’s insurance plan. PBMs create provider networks, thus determining which pharmacies a consumer may utilize. And PBMs negotiate drug prices/rebates, thus determining how much consumers pay at the pharmacy counter.

Furthermore, there are many conflicts of interest in PBMs' business models that put into question whether PBMs are working in the best interest of consumers. The largest PBMs own their own pharmacies, meaning that provider networks and reimbursement amounts for pharmacies are created by a competitor. As has been seen in states like Florida, PBMs have used this position to steer consumers, especially those with high-cost specialty prescriptions, to their own pharmacies where they reimburse themselves at higher rates than non-affiliated pharmacies.<sup>1</sup> Additionally, PBMs are typically under no obligation to negotiate manufacturer rebates in the best interest of the plan sponsors or their beneficiaries. As was seen in New York, this leaves payers paying higher amounts to the PBM with no added benefit to the consumer.<sup>2</sup>

For these reasons, we ask the Task Force to amend the charge to recognize that PBMs' role goes beyond passing money from insurers to pharmacy providers, and the true extent of that increased role must be investigated to determine how PBMs impact consumer choice and the cost of their drugs.

#### **Addition #2**

PBMs have a long history of using opaque practices to keep it a mystery where consumers' money is going. This has led many states to establish reporting requirements to bring some transparency to those practices, including manufacturer rebates for formulary placement.

Another such practice, spread pricing, has received a lot of attention recently. Many people know that spread pricing occurs when a PBM reimburses a pharmacy one amount for filling a prescription then charges the plan sponsor a higher amount for administering the benefit. What many people do not know is that the pharmacy reimbursement is not the end of the story. PBMs often charge pharmacies transaction fees after a claim has been adjudicated and reimbursed, or they may adjust the reimbursement amount under a "reconciliation" process. It is important for the Subgroup to investigate how these "post-adjudication" payments to PBMs are factored into spread pricing reporting and whether consumers' out-of-pocket expenses are similarly adjusted to account for the post-adjudication adjustments.

For these reasons, we ask the Task Force to amend the charge so that the Subgroup will investigate all the sources of revenue for PBMs. A complete understanding of the revenue will give regulators a better understanding of the incentives behind the PBM practices that impact consumers.

#### **Addition #3**

A regulator cannot enforce a law if that regulator is unaware that the law has been violated. When it comes to PBM regulations, there are a number of obstacles to discovering violations. For example, as was found in Maryland, pharmacists may be hesitant to report possible violations

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<sup>1</sup> Milliman, *Florida Agency for Health Care Administration: Pharmacy Benefit Manager Pricing Practices in Statewide Medicaid Managed Care Program* (Dec. 2020).

<sup>2</sup> Office of the New York State Comptroller, *Medicaid Program: Cost of Pharmacy Services Under Managed Care*, (Sept. 2020), <https://www.osc.state.ny.us/files/state-agencies/audits/pdf/sga-2020-19s11.pdf>.

because they fear the PBM will take retaliatory action.<sup>3</sup> Also, most consumers are not aware of the impact PBMs have on their prescription drug benefit, so they are unaware of potential violations that harm their freedom to choose providers or raise their costs. Pharmacists, however, are often in a position to notice the patterns of PBM practices that indicate a possible violation of the law. A state's law may not allow for a pharmacist to submit a complaint on behalf of patients, or the state's complaint intake procedure may be too burdensome for a patient to file a complaint.

For these reasons, we ask the Task Force to amend the charge to recognize that obstacles to investigations of violations can leave consumers vulnerable and without the benefit of the legal protections.

### **Conclusion**

Thank you for the opportunity to provide these comments. If you have any questions about the information provided in this letter, please contact me at (703) 600-1186 or [matthew.magner@ncpa.org](mailto:matthew.magner@ncpa.org).

Sincerely,



Matthew Magner, JD  
Director, State Government Affairs

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<sup>3</sup> Maryland Insurance Administration. "Maryland Insurance Administration Pharmaceutical Services Workgroup Report" 13 (Jan. 21, 2018) ("Independent pharmacists do not file complaints [with the Insurance Administration] because they are then retaliated against by the PBMs through audits and increased scrutiny.").