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Andria Seip
Chair, Employee Retirement Income Security Act (ERISA)
and Alternative Health Coverage (B) Working Group
National Association of Insurance Commissioners
444 North Capitol Street, NW, Suite 700
Washington, DC 20001

Sent via email to: Jennifer Cook at Jcook@naic.org

Dear Ms. Seip,

The Blue Cross Blue Shield Association (BCBSA) appreciates the opportunity to comment on the NAIC's draft guidance document on ERISA preemption and state laws related to Pharmacy Benefit Managers (PBMs). BCBSA is a national federation of independent, community-based and locally operated Blue Cross and Blue Shield companies (Plans) that collectively provide health care coverage for one in three Americans. Blue Plans serve members through both state-regulated fully insured products and administrative services for self-funded employer health plans, giving us a direct interest in the accuracy and balance of guidance that state legislators and regulators will use to evaluate PBM legislation.

We found earlier versions of this document to be a useful and generally balanced legal overview. Our comments on this version focus primarily on the newly added Addendum, where we believe a few areas would benefit from additional clarification before the document is finalized.

We recommend the Addendum include a more prominent acknowledgment of the evolving status of the cases it describes. Several cases discussed, including *Central States v. McClain* and *Iowa ABI v. Ommen*, remain on appeal or are otherwise subject to further judicial review. Given this procedural posture, it would be helpful to include language noting that these cases are still active, and that outcomes remain uncertain. Clarifying this point at the outset of the Addendum would help ensure readers understand the need to consider these decisions in context and to consult counsel when drawing legislative or regulatory conclusions.

The Addendum's discussion of *PCMA v. Bonta* would also benefit from additional context. The current discussion describes PCMA's ERISA preemption challenge to California's SB 41 but does not fully develop one of the central arguments PCMA has raised in the case: that a provision applying specifically

to PBMs in their relationships with self-insured employer plan clients may constitute an impermissible “reference to” ERISA plans under *Gobeille v. Liberty Mutual Insurance Co.*, because the existence of ERISA plans is arguably essential to the provision's operation. Acknowledging this argument and noting that the case raises unresolved questions regarding ERISA preemption, would provide a more complete picture and avoid any unintended implication that the approach is settled.

We also suggest that the document's treatment of ERISA's saving and deemer clauses would benefit from clarifying language. While ERISA's saving clause preserves state laws that regulate insurance, the deemer clause prevents states from treating self-funded ERISA plans as insurers or as engaged in the business of insurance for purposes of state insurance regulation. As a result, a PBM provision may be permissible as applied to state-regulated insurers or fully insured arrangements yet still raise preemption concerns when applied to self-funded ERISA plans or to PBMs in a manner that effectively regulates those plans. A clearer articulation of this relationship would help states evaluate how a given measure is likely to apply across fully insured and self-funded arrangements.

Relatedly, the addendum currently discusses *McKee Foods Corp. v. BFP Inc.* as a case subject to additional judicial review. We understand the rationale for treating such cases with caution. However, given *McKee's* direct relevance to the network and cost-sharing provisions that states are actively considering, we encourage fuller treatment of the decision with appropriate procedural context. This could be accomplished in the body of the paper once the decision is final or through a more developed discussion in the Addendum in the interim. In particular, the Sixth Circuit held in *McKee* that Tennessee's any-willing-provider and incentive/anti-steering provisions have an impermissible connection with ERISA plans and are therefore preempted as applied to a self-funded ERISA plan and its PBM. Addressing *McKee* more fully would help provide states with a more complete understanding of the current post-Rutledge appellate landscape.

We also suggest revisiting a recent revision in the “Lessons for States” section in the body of the document. The updated language encouraging states to look to recent court decisions for guidance would benefit from additional balance, given that courts of appeals have continued to reach differing conclusions on similar PBM provisions and that these issues continue to evolve. The Eighth and Tenth Circuits have reached opposing conclusions in post-Rutledge PBM cases, and the Supreme Court has not resolved that tension. Restoring or incorporating language that acknowledges this variability would reinforce the genuine uncertainty in this area of law.

BCBSA supports the Working Group's broader objective of helping states navigate the complex interplay between state PBM regulation and ERISA preemption. These comments are not intended to limit state authority, but to ensure the guidance accurately reflects the current legal landscape and its unresolved questions, so that states can make informed decisions as they consider policy approaches.

We appreciate the opportunity to provide these comments and welcome further discussion as the document is finalized. If you have any questions, please contact Randi Chapman at Randi.Chapman@bcbsa.com.

Sincerely,

A handwritten signature in black ink that reads "Clay S. McClure". The signature is written in a cursive style with a large, stylized initial "C".

Clay S. McClure
Senior Director, State Affairs