MEMORANDUM

TO: Assembly Member Rudy Salas, Chair
Members, Assembly Business and Professions Committee

FROM: April C. Alexander, Esq., Sr. Director, State Affairs
Pharmaceutical Care Management Association (PCMA)

Date: April 11, 2017

RE: AB 315 (Wood)—Pharmacy Benefits Management (OPPOSE)

On behalf of the Pharmaceutical Care Management Association (PCMA), we remain opposed to AB 315. PCMA is the national trade association representing America's pharmacy benefit managers (PBMs), which administer prescription drug plans for more than 266 million Americans with health coverage provided through large employers, health insurance plans, labor unions, state government health programs, and Medicare Part D.

PCMA submitted a letter of opposition to AB 315 on March 2, 2017, and remains opposed to the proposal to place PBM oversight under the jurisdiction of the Board of Pharmacy, whose members sit across the negotiating table from PBMs on contracts and financial arrangements, creating a clear conflict of interest in regulatory power. The U.S. Federal Trade Commission (FTC) has indicated its concern about boards of pharmacy regulating PBMs and the potential for conflicts of interests clouding regulatory judgment.[1]

PCMA feels it is important to respectfully oppose recent amendments, adopted on April 6, 2017. These are not minor amendments; in fact, they are substantive changes which appear to depart from the initial "consumer protection" focus of the bill and redirect its focus on business-to-business, private contracting relationships. These new amendments not only interfere with private contracting relationships, they also invoke complex federal legal issues.

The amended bill would require that PBMs have a fiduciary duty to purchasers. It is important to note that ***fiduciary requirements are not in effect in any state***. This idea has been considered and rejected across the country, for a number of reasons. First, the DC Circuit Court of Appeals struck down a PBM fiduciary mandate in the DC Access Rx Act, finding that it was pre-empted by ERISA and therefore unconstitutional.[2] In fact, federal courts around the country have consistently held that PBMs are not ERISA fiduciaries because PBMs simply do not fit ERISA's definition of "fiduciary." ERISA describes a "fiduciary" as a person who exercises discretionary control or authority of plan management or assets, has discretionary authority or administration of a plan, or provides investment advice to a plan for compensation.[3] Specifically, the courts

---

[1] See, FTC Letter to The Honorable William P. Brough, California State Assembly, March 31, 2017, and FTC Letter to The Honorable Mark Formby, Re: SB 2445, March 21, 2011, available at: https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-letter-honorable-mark-formby-mississippi-house-representatives-concerning-mississippi/110322mississippipbm.pdf.

[2] See, *PCMA v. District of Columbia*, (2010), available at: https://www.cadc.uscourts.gov/internet/opinions.nsf/756F1DEAF13424B9852578070070BCF8/$file/09-7042-1254193.pdf

[3] Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq.

have looked at the terms of the agreements freely negotiated between the PBMs and their clients and found that the PBMs' contractual obligations in administering the plans were ministerial and did not grant discretion over plan assets.[4]

Second, the FTC has raised a number of problems with fiduciary mandates. In analyzing a bill that the New Jersey Legislature considered and rejected, the FTC said the bill would:[5]

- Limit the abilities of health benefit plans and PBMs to design and implement certain cost-saving practices for distributing pharmaceuticals, such as utilizing mail-order pharmacy or establishing preferred pharmacy networks.
- Undermine the latitude that PBMs and their health plan clients now have to tailor contracts to suit a particular client's needs—which helps to foster competition between PBMs and keeps costs down.
- Impose additional litigation risks and increase legal liability by exposing PBMs to tort actions, in addition to contractual liability claims, which is likely to cause an increase in legal and administrative costs that may be passed on to clients through higher fees.
- Implicate a broad set of common law fiduciary obligations beyond those contemplated in contracts for PBM services and may conflict with or complicate express contractual or statutory duties.

Furthermore, the FTC indicated serious concerns about a bill considered by the New York Legislature that would have established fiduciary-like mandates and disclosure provisions.[6]

Finally, in 2011, the last remaining fiduciary mandate was repealed in Maine.

The second major amendment to AB 315 appears to be borrowed from a 2004 bill, AB 1960 (Pavley), and is similar to AB 29 (Nazarian 2017) that will be heard in your committee soon. This amendment requires PBMs to provide specified disclosures to their clients, regardless of whether clients have asked for this information or whether the parties to the contract have agreed otherwise. Based on the DC Circuit Court opinion mentioned above and ERISA case law going back years, this language would also be pre-empted by ERISA.

Furthermore, the FTC has opined that these sorts of disclosures may have the unintended consequence of increasing costs to consumers, and to the extent confidentiality provisions are inadequate, may also facilitate collusion and raise prices.[7] Specifically, the FTC has said, "with no indication that clients of PBMs lack accurate information on the price and quality of the service that they intend to purchase, it is unclear how requiring PBMs to reveal information related to rebates…would improve market outcomes."[8] In a later

---

[4] See *Bickley v. Caremark RX, Inc.*, 361 F. Supp. 2d 1317 (N.D. Ala. 2004); *Mulder v. PCS Health Sys.*, 432 F. Supp. 2d 450 (D. N.J. 2006); *Chicago Dist. Council of Carpenters Welfare Fund v. Caremark RX, Inc.*, 474 F.3d 463 (7th Cir. 2007)
[5] See FTC Letter to The Honorable Nellie Pou, New Jersey General Assembly, April 17, 2007, available at: https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.nelie-pou-concerning-new-jersey.b.310-regulate-contractual-relationships-between-pharmacy-benefit-managers-and-health-benefit-plans/v060019.pdf.
[6] See FTC Letter to The Honorable James Seward, New York Senate, March 31, 2009, available at: https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-james-l.seward-concerning-new-york-senate-bill-58-pharmacy-benefit-managers-pbms/v090006newyorkpbm.pdf
[7] See Id.
[8] Letter from FTC to Rep. Patrick T McHenry, U.S. Congress, July 15, 2005.

discussion about competition in healthcare, the FTC also stated that “[v]igorous competition in the marketplace for PBMs is more likely to arrive at an optimal level of transparency than regulation of those terms.”[9]

The recent amendments to AB 315 miss the point that PBMs design contracts to meet payers’ needs and expectations. Payers issue RFPs that call for competitive PBM bids and through this process, the selected PBM designs a contract for the payer. As a part of this, the payer has the ability to contract for the disclosures it desires. Though there are only a few large PBMs, there are over 80 PBMs in the country and competition among both the large PBMs and the smaller PBMs is strong. As an example, CalPERS recently chose to change its contract with its PBM and design its new contract with transparency terms it felt were more favorable than its prior contract.[10] Competition is fierce in the PBM market, and clients ultimately dictate the level and type of disclosures they want. There is no need for the state to dictate contract terms between payers and PBMs.

PCMA remains committed to addressing any consumer protection concerns surrounding the administration of pharmacy benefits, but we do not believe that AB 315 achieves this goal. For the above reasons, we remain opposed to AB 315. Please contact me at 916-769-2094 or our Sacramento advocate, John Caldwell, at 916-441-0702 if you have any questions or would like to discuss further. Thank you.

---

[9] U.S. Federal Trade Commission & U.S. Department of Justice Antitrust Division, “Improving Health Care: A Dose of Competition,” July 2004.
[10] See, Testimony of Kathleen Donneson, Chief, Health Plan Administration Division, CalPERS, Assembly Health Committee Informational Hearing, February 14, 2017, available at: https://ca.digitaldemocracy.org/hearing/51798?startTime=177&vid=a7089b90bacd8f45db6a231a2aa464d7.