



Dec. 5, 2016

Senator Richard Devlin, Co-Chair  
Representative Nancy Nathanson, Co-Chair  
Joint Ways & Means Committee  
Oregon State Legislature  
Salem OR 97301

**Re: DCBS Report Regarding Pharmacy Benefit Manager Compliance and Recommendations for Rule Changes**

Dear Chairs:

The Pharmaceutical Care Management Association (PCMA) is writing to outline its concerns regarding the Department of Consumer and Business' Services (DCBS) Report and Recommendations for Rulemaking Regarding PBM Compliance. 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 Fortune 500 employers, state governments, health insurance plans, labor unions, and Medicare Part D.

In the 2016 legislative session, amendments related to enforcement of PBM compliance with the maximum allowable cost (MAC) statutes were considered and rejected. PCMA even suggested legislative language that would have given DCBS the power to impose civil penalties in the event PBMs failed to comply with the law, but this language was rejected, as well. The legislature instead adopted a Budget Note that required DCBS to examine enforcement of the statutes related to PBMs and MAC reimbursements to pharmacies, and make recommendations on enforcement.

PCMA and its member companies actively participated in this workgroup, by submitting letters and providing policy expertise on PBM and pharmacy reimbursement issues. PCMA believed its goal was aligned with DCBS' original charge: to develop a fair and effective enforcement mechanism for these statutes. However, the final DCBS Report and Recommendations reflect a different goal—to expand the reach of the PBM and MAC reimbursement statutes and change the underlying state policy. Unfortunately, these suggested changes impact the underlying state policy in a way that will increase costs for payers—costs which are ultimately borne by health care consumers and taxpayers. Specifically, we have the following concerns:

- 1. Requiring PBMs to accept “batch” appeals encourages entities to file appeals on reimbursements that are not covered by the statute, which results in unnecessary administrative expense.**

In its report, DCBS indicated that, to date, it had received 68,000 complaints regarding pharmacy reimbursement, but all but 150 of the complaints were from a single entity, more than one-third of those appeals were related to Medicare reimbursements and thus not covered by the statute, and that the vast majority of complaints were not accompanied by

any documentation. Those complaints that were related to Medicare or that did not have any documentation were wasteful to the state and to the PBMs because they required time from both department staff and PBM staff to respond. Allowing batch appeals encourages pharmacies or their PSAO representatives to file appeals on potentially every reimbursement, even those not covered by the statute. Given the number of pharmacy claims that PBMs process (billions each year nationally), one organization could singlehandedly bring business to a screeching halt by filing frivolous batch appeals that must be individually investigated, even when the pharmacy knows that those claims aren't covered by the statute. By creating an easy pathway for multiple appeals, without creating a penalty for filing frivolous appeals or appeals not covered under the state law, these recommended rules encourage wasteful practices by pharmacies.

**2. DCBS' proposed reimbursement adjustment requirements are significant and costly changes to the underlying statute's policy.**

DCBS proposes to require PBMs to adjust reimbursements for "all similarly situated pharmacies" when a MAC reimbursement appeal is upheld for a single pharmacy. This is a new substantive requirement that the statute does not require. Additionally, DCBS recommends requiring PBMs to adjust reimbursements from the date of initial adjudication, but the statute requires adjustments to be made from the date of an appeal determination. These departures from statute are inappropriate.

**3. DCBS' proposed definitions appear to provide implicit support for guaranteed profit for pharmacies.**

The underlying statute allows a network pharmacy to appeal a reimbursement if the reimbursement is less than the "net amount" that the pharmacy paid to the supplier of the drug.<sup>1</sup> DCBS' proposed definition of "net amount" is that amount reflected on the pharmacy's invoice for a particular drug. This definition ignores off-invoice discounts that reduce the net cost of the drug to the pharmacy. Invoice-based reimbursement in the pharmacy context amounts to guaranteed profit because of these off-invoice discounts. Furthermore, this policy ignores a primary reason the MAC reimbursement methodology was created—to encourage efficient purchasing practices by pharmacies. If there is a risk that their costs may not be fully covered, pharmacies have an incentive to shop for the best deal. Invoice-based reimbursement results in a race to the highest price. Knowing that invoice costs will ultimately be covered, there is no incentive for anyone in the supply chain to keep costs lower. No other business enjoys the luxury of guaranteed reimbursements, or guaranteed profitability, and health care payers and consumers should not bear the burden of inefficiencies in the market.

**4. Expansions to the underlying statute are unnecessary and will drive prices higher in the marketplace.** Some examples in the recommended rule changes include:

- a. Requiring the PBM to provide the appealing pharmacy with information about where the drug was generally available for purchase at a specified price. The PBM does not

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<sup>1</sup> ORS Sect. 735.534



know this information. PBMs know *average* prices based on surveys and other information; they do not know *exact* prices paid by any particular entity. Pharmacies and wholesalers are the only entities that know these amounts.

- b. Allowing a representative of the pharmacy or the pharmacy to appeal, instead of the entity with which the PBM has signed a network agreement. The appealing entity should be *either* the pharmacy or the pharmacy's representative for contracting. The appeal should come from the entity with which the PBM has a network agreement; otherwise, confidential information that is protected under the contract between the PBM and pharmacy or its representative would be disclosed. The PBM will not share confidential pricing information with an entity with which they do not hold a network agreement. To do so would invite collusion in the marketplace and ultimately drive prices higher for consumers. This is not only bad policy, it is not required by the statute and thus is a clear regulatory overreach.

As you know, health care costs are rising year after year. In the pharmaceutical space, PBMs have been able to successfully put downward pressure on the rising cost trends by using tools like MAC reimbursement, which establishes a financial incentive for pharmacies to be efficient purchasers of pharmaceuticals. PBMs are the only entities in the pharmacy supply chain that are not only focused on service, quality and improving health outcomes, but also on affordability and sustainability. The proposals DCBS has outlined make significant changes to state policy on MAC reimbursement, restricting PBM tools from working to reduce costs. Ultimately, it is clear that DCBS is picking winners and losers in the marketplace.

Thank you for your consideration of our concerns. Please do not hesitate to contact me at 202-756-5743 if you have any questions, or our Oregon counsel, Kelsey Wilson, at 503-220-0780.

Sincerely,

A handwritten signature in black ink, appearing to read "April C. Alexander". The signature is fluid and cursive.

April Alexander, Esq.  
Senior Director, State Affairs

cc: Senator Laurie Monnes Anderson, Co-Chair, Health Policy Committee  
Representative Mitch Greenlick, Co-Chair, Health Policy Committee  
Jeremy Vandehey, Governor's Office  
Richard Blackwell, Dept. of Consumer and Business Services