March 16, 2016

Governor Jay Inslee
Office of the Governor
PO Box 40002
Olympia WA 98504-0002

Re: Request for Veto of SB 5857: Pharmacy Benefit Managers

Dear Governor:

The Pharmaceutical Care Management Association (PCMA) is submitting this letter as you consider SB 5857, relating to pharmacy benefit managers (PBMs). PCMA is the national trade association representing America's pharmacy benefit managers, which administer prescription drug plans for more than 266 million Americans with health coverage provided through Fortune 500 employers, health insurance plans, labor unions, Medicaid managed care, and Medicare Part D.

Thank you for the opportunity to provide comments on SB 5857. PCMA is concerned that this bill is not only unnecessary, its substantive provisions are premature and will raise costs for Washington health care consumers. SB 5857 establishes a complex regulatory scheme over pharmaceutical reimbursement in Washington health programs, with an underlying intent to increase reimbursement for pharmacies. Perhaps most importantly, while the bill calls for a study of issues related to the pharmacy supply chain, ***SB 5857 implements legislative solutions to an alleged problem that hasn't yet been fully defined, analyzed or understood***. By passing a bill to study issues related to the pharmacy supply chain, the Legislature acknowledged that it does not fully understand the problem, yet at the same time and within the same bill, it adopted solutions to this undefined, indeterminate problem. Thus, these legislative "fixes" are premature.

Specifically, the bill calls for:

- Increased reimbursement for pharmacies in cases where they are unsatisfied with the reimbursement methodology to which they agreed in contract;
- An unprecedented grant of authority to the Office of the Insurance Commissioner to adjudicate reimbursement disputes between private contracting parties;
- An investigation of the pharmaceutical supply chain, including pricing and reimbursement methodologies which are confidential and proprietary; and
- Application to a much broader set of drugs—including brand name drugs—than the original maximum allowable cost statute contemplated.

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Pharmaceutical Supply Chain Background

The market for pharmaceuticals is complex and competitive. Manufacturers, wholesalers, PSAOs, PBMs, pharmacies, and health insurance carriers all compete for market position and to provide affordable, high-quality products to their purchasers. While drug manufacturers and wholesalers set the purchase prices for drugs, payers (e.g., employers, health plans, labor unions) make pharmacy reimbursement decisions. Pharmacies participate in plan networks, and in doing so, agree to terms and conditions, including reimbursement terms, at the time of voluntarily entering into contracts with payers.

Drug prices fluctuate frequently as new drugs are introduced into the market, supplies change, and demand changes. The prices pharmacies pay to purchase generic drugs from wholesalers are generally confidential and not transparent to the PBM responsible for reimbursing on behalf of the payer. The prices that pharmacies pay to purchase drugs dispensed in their stores are stated on invoices, but often there are discounts, rebates, or other incentives a pharmacy receives that are not reflected on the invoices, but ultimately reduce the net cost of the drug. Generic drug reimbursement methodologies that payers use are thus typically based on surveys of national pricing data, and are not cost-based (i.e., based on the individual pharmacy's invoice). This provides incentives for pharmacies to shop around for the best price of a drug, so that inefficient purchasing practices will not be rewarded.

Like many products sold in stores, some products will be reimbursed at cost, some higher than cost, and some lower than cost. In the case that a pharmacy feels unsatisfied with reimbursement because of a sudden, significant shift in drug cost or reimbursement, a pharmacy can appeal a reimbursement. It is in payers' best interests to keep pharmacies profitable, because plans must have a sufficient number of pharmacies to serve the payer's member/patient population. However, payers cannot control other aspects of the pharmacy business such as the presence of competition from other pharmacies (large or small) or how efficiently/effectively pharmacies run other areas of their stores. These factors, and many others, can "make or break" a pharmacy's success as a business—totally irrespective of drug reimbursement. Fortunately, the number of pharmacies has remained relatively stable over the years, and patient choice of pharmacy and access to medications continues to be strong.

SB 5857 will raise cost for payers—employers, labor unions, and individual health care purchasers.

The proponents' goal in pursuing SB 5857 was to increase reimbursements and profitability for pharmacies. While some believe that enriching a specific set of private businesses is a laudable goal, these increases in reimbursements will ultimately be funded by someone: in this case, payers—employers, unions, and individual health care consumers.

Other than the general intent, there are a number of specific cost-driving provisions in the bill:

(1) Section 2 of the bill creates broad authority within the Office of the Insurance Commissioner to adjudicate pricing disputes between PBMs and pharmacies. Even though the focus of the discussion during the legislative session was on generic drugs only, the language is so broad in this section that it appears to encompass and provide a pathway for increased reimbursement for

both brand name and generic drugs. This is an overreach and applies a "fix" to a problem that was not even described during the legislative process.

(2) Similarly, section 4(1)(a) of the bill significantly broadens the definition of "list" to include reimbursement methodologies other than maximum allowable cost. Current law was created to address generic drug reimbursement and is only applicable to how pharmacies are reimbursed by health plans and employers for dispensing generics. SB 5857 expands the scope of the law to apply to drugs that have "predetermined reimbursement costs." This could arguably apply to anything a pharmacy gets "reimbursed" for – including brand drugs, dispensing fees, etc. These are all types of payments that a pharmacy agrees to *upon signing the contract*.

(3) Section 4(3) requires a PBM to uphold a reimbursement appeal for certain pharmacies if the pharmacy can demonstrate that it "is unable to purchase a therapeutically equivalent interchangeable product from a supplier doing business in Washington at the PBM's list price." This section raises a number of concerns:

- Although it is not an express requirement, the bill in practice will provide for cost-based reimbursement because an appealing pharmacy will simply provide an invoice to prove the "cost" of the drug. SB 5857 fails to require a pharmacy to provide information on any off-invoice discounts or other incentives, so the true cost of the drug to the pharmacy may never be understood.
- Invoice-based reimbursement also "creates a significant incentive for wholesalers and manufacturers to use off-invoice discounting…reducing pricing transparency and decreasing the effectiveness of price competition."[1] Failing to consider discounts and rebates associated with pharmaceutical purchases "creates a virtual license for wholesalers, manufacturers, and pharmacies to collude at the expense of public and private payers. This will result in…higher costs for pharmaceutical coverage."[2]
- Furthermore, if a manufacturer or wholesaler knows that products are going to be reimbursed "at cost," there is an evergreen incentive to raise prices, knowing that ultimately, whatever price the product is, it will be covered by the downstream purchaser. The inflationary consequences of cost-based reimbursement systems are well known and have caused…purchasers of services time and time again to retreat from cost-based reimbursement systems and instead utilize reimbursement strategies that encourage efficiency.[3]
- SB 5857 provides an incentive for pharmacies to "game" the system—there are no protections in place that require a pharmacy to provide the correct invoice *for the particular drug dispensed*. There is nothing that ties an invoice to a particular drug dispensed.

(4) The same concerns about inflationary cost impacts exist for the OIC's review process established in Section 4(6). Any reimbursement a pharmacy is not happy with—for a brand or generic

[1] *The Adverse Consequences of Mandating Reimbursement of Pharmacies Based on Their Invoiced Drug Acquisition Costs*, David A. Hyman, H. Ross & Helen Workman Chair in Law, Professor of Medicine, University of Illinois, January 2016, at page 4.
[2] Id., page 5.
[3] Id., pages 5-7.

drug—potentially could be subject to the OIC appeals process, which will make a reimbursement decision based on what the Commissioner deems "fair and equitable," a vague standard that provides no notice to payers as to what the mandated reimbursement rate will be. In the absence of any other standard for making reimbursement determinations***, the OIC will default to looking at the pharmacy's invoice cost (acquisition cost) for each drug*** and will likely mandate reimbursement at or above this amount.

(5) Sections 7 and 8 require the OIC to perform a study of the pharmacy supply chain, to be concluded by November 2016. The provisions of this bill—the "fix" to the alleged problems—will be implemented just a month later, with no time to digest the conclusions of the study and consider whether the fixes passed in this bill are appropriate. This issue should be studied, results should be digested, and the appropriate solutions to any problems should be debated, in that order. Unfortunately, SB 5857 puts the cart before the horse and implements solutions before analyzing the problem.

We appreciate the opportunity to provide comments on this bill, and because of the aforementioned concerns, respectfully **ask for your veto of SB 5857**. Please do not hesitate to contact me at 202-756-5743 if you have any questions.

Sincerely,

April C. Alexander
Senior Director, State Affairs

cc: Matt Steuerwalt, Executive Director of Policy, Office of the Governor
Jason McGill, Policy Advisor, Office of the Governor

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