



March 6, 2018

The Honorable Timothy D. Larson, Co-Chair
The Honorable Kevin C. Kelly, Co-Chair
The Honorable Sean Scanlon, Co-Chair
Honorable Members
Insurance and Real Estate Committee
Connecticut State Capitol
Hartford CT 06106

Re: Oppose HB 5384: An Act Concerning Prescription Drug Costs

Dear Chairs and Honorable Members:

On behalf of the Pharmaceutical Care Management Association (PCMA) we must respectfully oppose HB 5384 (Prescription Drug Costs). PCMA is the national trade association for pharmacy benefit managers (PBMs), which administer prescription drug plans for more than 266 million Americans with health coverage provided by large and small employers, health insurers, labor unions, and federal and state-sponsored health programs.

PBMs exist to make drug coverage more affordable for plan sponsors. PBMs achieve this by aggregating the buying clout of millions of enrollees through their payer clients, enabling health care consumers to obtain lower prices for prescription drugs through price discounts from retail pharmacies, rebates from pharmaceutical manufacturers, and using lower-cost dispensing channels. Though unions, large employers, and public programs are not *required* to use PBMs, most *choose* to because PBMs help lower the costs of prescription drug coverage.

We agree that the rising cost of pharmaceuticals in this country is a serious health policy problem, but HB 5384 is counterproductive because it presents significant legal problems and adopts policy that the Federal Trade Commission has indicated could actually *raise* drug prices. We set forth our concerns below.

HB 5384 Is Unconstitutional and Likely to be Struck Down under Federal Law

The Employee Retirement Income Security Act of 1974 (ERISA) is the federal benefits law that applies to all employer-based health plans, whether insured or self-insured. Connecticut residents who work for private sector employers (whether large or small) are for the most part enrolled in ERISA plans, and the majority of health plans retain PBMs to act as third party administrators to their plans. When enacting ERISA, Congress included a broad preemption clause that provides that federal law alone governs employer-provided health plans, and that federal law supersedes state laws and regulations that impact such plans, including prescription drug plans. When Congress provides for preemption in a federal statute, based on the Supremacy Clause of the U.S. Constitution, it effectively excludes the states from legislating in that area. ERISA provides a “comprehensive system for the federal regulation of employee



benefit plans.”¹ As the Supreme Court recently noted, there must be a “single uniform national scheme for the administration of ERISA plans without interference from the laws of several states.”² Even invocation of the states’ traditional power to regulate “public health” will not overcome ERISA’s broad preemption, as Congress “contemplated preemption of substantial areas of traditional state power.”³ No state mandate can directly or indirectly interfere with key matters of plan administration, such as interfering with PBM contracts with their clients by requiring reporting to state entities.

Requiring PBMs to Report Rebate Information is Preempted by ERISA

As the Supreme Court noted in *Gobeille*, ERISA’s “reporting, disclosure, and recording requirements for welfare benefit plans are extensive,” and states cannot impose differing or parallel regulations on administrators. Only the Secretary of Labor has authority to establish additional reporting and disclosure requirements, or require any data or information needed to carry out the purposes of ERISA.

HB 5384 (b) requires PBMs to report pharmaceutical rebate data to the Connecticut Insurance Commissioner. Requiring reporting and disclosures to a state official or agency about the economic bases for plan’s provision of prescription drug benefits in Connecticut intrudes on what the federal courts have called “a matter central to plan administration,” and further “interferes with nationally uniform plan administration.”⁴ Because PBMs are performing key administrative functions for ERISA plans, states cannot impose mandates—either directly or indirectly—that interfere with that administration, or that result in the imposition of a patchwork of differing regulatory requirements on PBMs. Thus, this bill runs afoul of the federal law.

HB 5384’s Terms May Damage PBMs’ Ability to Negotiate Lower Drug Costs

HB 5384 calls for revealing drug rebates negotiated between PBMs and manufacturers, in response to the concern that drug prices are rising and likely under the mistaken belief that this type of transparency would benefit consumers. Price concessions, in the form of rebates, negotiated by PBMs on behalf of plan sponsors, such as large employers, government programs, and insurers, significantly lower the cost of drugs. Pharmaceutical manufacturers set the list price for a given drug, and PBMs, when competitive forces in the market provide the environment for negotiation, attempt to bargain with competing manufacturers to secure the drug at a lower cost for their plan sponsors. Rebates are typically calculated and paid months after a drug has been dispensed based on the total volume of paid claims. Plan sponsors use these savings to benefit patients by lowering premiums or out-of-pocket costs. Each payer determines what percentage of rebates is passed through to it, and how much (if any) it wants the PBM to retain as payment for services. With approximately 80 different PBMs in the marketplace, the PBM industry is highly competitive; employer, union and government plans have a variety of choices when considering how best to manage their pharmacy benefit. In order to win business, PBMs have every incentive to reduce drug costs for their plan sponsors by

¹ District of Columbia v. Greater Was. Bd. Of Trade, 606 U.S. 125, 127 (1992).

² *Gobeille v. Liberty Mutual Ins. Co.*, 577 US ____ (2016).

³ *Id.*

⁴ *Gobeille*, 577 US ____ (2016), 136 S.Ct at 945.



eliminating excessive fees and passing rebate savings along to their plan sponsors and their beneficiaries.

We believe that it is important to keep the competitive marketplace among drug manufacturers in place in order to drive down the cost of prescription medications. Although HB 5384 attempts to protect data from public disclosure by indicating that drug-specific or carrier-specific information should not be disclosed, the potential consequences of failing to adequately protect the information are too great. Any public disclosure of rebate information would allow manufacturers to learn what type of price concessions other manufacturers are giving, thus establishing a disincentive from offering deeper discounts. This transparency will not lead to better health care or lower health care costs. In fact, the Federal Trade Commission (FTC) has stated that, "[i]f pharmaceutical manufacturers learn the exact amount of rebates offered by their competitors, then tacit collusion among them is more feasible" and "[w]hen competitors know the actual prices charged by other firms, tacit collusion — and thus higher prices — may be more likely."⁵

The FTC has also warned several states that legislation requiring PBM disclosure of negotiated terms could increase costs and "undermine the ability of some consumers to obtain the pharmaceuticals and health insurance they need at a price they can afford."⁶ Additionally, the Department of Justice and the FTC issued a report noting that "states should consider the potential costs and benefits of regulating pharmacy benefit transparency" while pointing out that "vigorous competition in the marketplace for PBMs is more likely to arrive at an optimal level of transparency than regulation of those terms."⁷

It is for these reasons that PCMA must respectfully oppose HB 5384. Please contact me at 202-756-5743 if you would like to discuss our concerns. Thank you.

Sincerely,

A handwritten signature in black ink that reads "April C. Alexander".

April C. Alexander
Assistant Vice President, State Affairs

⁵ Letter from FTC to Rep. Patrick T McHenry, U.S. Congress, (July 15, 2005); Letter from FTC to Assemblyman Greg Aghazarian, California State Assembly, (September 3, 2004).

⁶ Id.

⁷ US Federal Trade Commission & US Department of Justice Antitrust Division, "Improving Health Care: A Dose of Competition," July 2004.