February 5th, 2019

The Honorable Senator Michael Maroney
Chair, Committee on Health and Human Resources
Room 439M, Building 1
State Capitol Complex
Charleston, West Virginia 25305

Re: Opposition to S.B. 489: Relating to Pharmacy Audit Integrity Act

On behalf of the Pharmaceutical Care Management Association (PCMA) I am writing in opposition to S.B. 489. 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 by aggregating the buying power of millions of enrollees through their plan sponsor/payer clients. PBMs help health care consumers 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.

This special interest legislation is unnecessary and if passed *will* raise the cost of prescription drugs for consumers in West Virginia.

Below are some specific concerns with the bill:

§33-51-4. Procedures for Conducting Pharmacy Audits

Section (a) (12) Page 6 lines 39 – 49 provide when an auditing entity may seek a recoupment from a contracted pharmacy. This section is in conflict with Section (b)(9) that provides direction to auditing entities on recoupment.

§33-51-8. Licensure of Pharmacy Benefit Managers – Unnecessary regulation on an already regulated industry

PBMs already must register with the Department of Insurance (DOI) in order to do business in the state. PBMs are not insurers and therefore do not assume insurance risk. They do not collect premiums from consumers with a promise of later coverage; rather they are a third party administrator of a transactional benefit.

Additionally, the Department of Insurance exercises significant oversight of PBMs, both directly and indirectly, through registration and through regulatory authority over state licensed health plans. The state department of insurance has appropriate oversight of the PBMs activity such as claims payments, utilization review, appeals, formulary development and management access,

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complaints, and network adequacy through their market conduct examinations of the risk bearing, state regulated health plans. In a meeting with the commissioner and others at the DOI earlier this year, they agreed that they had regulatory oversight of PBMs through the health plans and market conduct examinations.

Section (e) Fiduciary Duty – This State mandate would drive up costs and destroy the contractual business relationship that current exists between PBMs and their clients

PBMs have a contractual relationship with their clients. These contracts require both parties to exercise "good faith and fair dealings." If a PBM violates the terms of their contract with its client there are enforcement provisions within the contracts. Requiring PBMs to be fiduciaries to their clients creates a conflict in the contracted relationship.

Under ERISA, "fiduciaries" are those persons or entities who exercise *discretionary authority* over plan assets or management. PBMs do not exercise authority over a plan or asset, rather they serve in administrative and advisory roles for health plan and employer clients, performing claims processing and other administrative tasks pursuant to their contracts. PBMs don't make decisions about whether the plan should offer pharmaceutical benefits or the scope or design of those benefits—that's the plan sponsor's job. PBMs carry out the terms of their contracts with their customers, who are large, sophisticated health care purchasers. The Department of Labor says specifically that Third Party Administrators such as PBMs "who have no power to make any decisions as to plan policy, interpretations, practices or procedures, but who perform [certain] administrative functions for an employee benefit plan…*are not fiduciaries of the plan*."

State-imposed fiduciary duties make no sense in the context of a detailed, negotiated, arm's length contract between an employer and a PBM. PBMs lack both discretionary authority and control of plan assets. Imposing such duties would override *every provision* of that contract. Requiring PBMs to be fiduciaries would force contracting parties to enter into a more costly type of relationship for payers, as the PBM necessarily charged additional fees to cover the cost associated with taking on additional liability.

Designating PBMs "fiduciaries" would reduce the options available to PBM customers to structure a services agreement and pay for that agreement in the way that works for that customer. It may also discourage the use of PBM tools, including tiering and utilization management, given the possibilities for conflicts between the PBM's fiduciary and contractual obligations. At the very least, such rules would allow second-guessing of every element of a PBM-customer contract, and require retrospective analysis of all the surrounding facts and circumstances to determine if a prohibited conflict exists, increasing the chances for costly litigation. By restricting flexibility and increasing liability costs, these rules would also undermine the joint efforts of PBMs and health plans to assure the availability of an affordable drug benefit to consumers. No other service providers to employer health plans are subject to state mandated fiduciary standards—which were never intended to apply to such commercial contracts.

Fiduciary mandate language has only been passed in two states in the last 20 years – Maine and the District of Columbia. When the Maine legislature's party control changed, the new Republican leadership legislatively repealed the fiduciary law that had had a significant chilling effect in the State's marketplace. The law in the District of Columbia was legally challenged by

PCMA in the United States Court of Appeals for the DC Circuit in PCMA v. District of Columbia. PCMA prevailed in this litigation and the law was struck down in July 2010.

§33-51-9. Regulation of Pharmacy Benefit Managers – Guaranteeing profits for pharmacies at the expense of small businesses, consumers and payers in West Virginia

Section (d) lines 17 – 26 statutorily mandating the reimbursement terms in commercial market places will effectively function as "guaranteed profits" for pharmacies. Thus, no matter how much a pharmacy spends to acquire a drug, they are guaranteed they will be repaid at least that amount, and likely more. And, because of rebates and discounts, invoiced prices may not reflect actual drug acquisition costs – further inflating the guaranteed profits.

"In the pharmaceutical setting, such legislation is likely to have a number of specific undesirable consequences, including:

- Increased spending on pharmaceuticals and the cost of pharmaceutical coverage;
- Reduced competition at the wholesaler and manufacturer level;
- Increased use of off-invoice discounting, thereby decreasing transparency of pharmaceutical pricing and reducing pricing competition;
- Guaranteed profits for pharmacies, irrespective of their actual efficiency;
- Reduced consumer welfare.

Apart from heavily regulated natural monopolies and government mandated agricultural cartels, we generally do not observe government-mandated guaranteed profits at the expense of third parties."[1] Further, the language in this bill "is designed to benefit pharmacies, at the expense of consumers, employers, and PBMs."[2]

This legislation is unnecessary for the protection of independent pharmacies. The independent drugstore industry has been flourishing in West Virginia over the last 8 years. According to Quest Analytics analysis of NCPDP data, the number of independent pharmacies has increased 20% between 2010 and the beginning of 2018.

I appreciate your consideration of our industry concerns. Please let me know if you have any questions, I may be reached at 202-756-5740 or by email at lrowley@pcmanet.org.

Sincerely,

Lauren Rowley

Cc: Members of the Health and Human Resources Committee

[1] *The Adverse Consequences of Mandating Reimbursement of Pharmacies Based on Their Invoiced Drug Acquisition Costs*, David A. Hyman, MD, JD, H. Ross & Helen Workman Chair in Law Professor of Medicine, University of Illinois, January 2016

[2] *Ibid*

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