



March 6th, 2019

The Honorable Delores Kelley
11 Bladen Street Room 3E
Annapolis, MD 21411

Re: OPPOSE: SB 819 An Act Concerning Health Insurance-Pharmaceutical Manufacturers-Transparency and Reporting

Dear Chair Kelley and Members of the Committee on Finance:

On behalf of the Pharmaceutical Care Management Association (PCMA) I am submitting this letter to express our concerns regarding SB 819, a bill requiring reporting of proprietary information. 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.

While we agree that the rising cost of pharmaceuticals in this country is a serious problem, we believe that parts SB 819 are counterproductive because they present significant legal problems and could actually *raise* drug prices.

The Employee Retirement Income Security Act of 1974 (ERISA) preempts state reporting and disclosure requirements such as the ones included in SB 819. ERISA is the federal law that governs all employer-based health plans, including both fully-insured and self-insured plans, and Maryland residents who work for private sector employers are for the most part enrolled in ERISA plans. PBMs provide administrative services to those ERISA plans. ERISA provides a “comprehensive system for the federal regulation of employee benefit plans,”¹ and 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 No state mandate can directly or indirectly interfere with key matters of plan administration. 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.

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)



SB 819 requires PBMs to report to the insurance commissioner pharmaceutical rebate data; administrative fees; rebates that are passed through to clients and amounts retained by the PBM; and, the “the highest and the lowest aggregate retained manufacturer payment percentage across all of the pharmacy benefits managers contractual relationships with all health plans and purchasers.” Requiring reporting and disclosures to a state official or agency about the economic basis for a plan’s provision of prescription drug benefits in Maryland intrudes on what the federal courts have called “a matter central to plan administration,” and further “interferes with nationally uniform plan administration.”³ 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.

Revealing the rebate, fees and other information required in SB 819 assumes that this type of information would benefit consumers and it does not. Consumers care about their cost-share, co-payment or deductible. The reports generated by PBMs as required by this bill, will not in any way assist consumers with obtaining that information. Given the consecutive reporting required by the health plans by this bill, it may even cause more confusion for consumers. PBM clients also do not need this legislation in order to obtain the information required in this bill. PBM clients are large sophisticated purchasers of healthcare. They require as much or as little pass through in their contracts as suits their needs. In fact, according to a recent study by Drug Channels Institute “66% of large employers have 100% rebate pass-through arrangements in 2018 on traditional meds.”⁴ They do not need the state to assist them in obtaining these terms in their contracts, nor are they asking for this legislation.

We believe that it is important that there be a competitive marketplace among drug manufacturers in order to drive down the cost of prescription medications. Pharmaceutical manufacturers alone set the list price of prescription drugs. Though SB 819 directs the commissioner to keep the data confidential, the risk of accidental public disclosure still exists. 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. 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]henver 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 Finally, the Department of Justice and the FTC issued a report noting that “states should

³ Gobeille, 577 US (2016), 136 S.Ct at 945.

⁴ Adam J. Fein, PhD., Drug Channels Institute, “DrugChannels 2019 Economic Report on Pharmacies and Pharmacy Benefit Managers”, (March 2019)

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.



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, PCMA respectfully opposes SB 819.

Sincerely,

A handwritten signature in black ink, appearing to read "Lauren Rowley". The signature is fluid and cursive, with a large initial "L" and "R".

Lauren Rowley
Vice President, State Affairs

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