



June 6, 2019

Via: Hand-Delivery

The Honorable Jon Bel Edwards  
Office of the Governor  
PO Box 94004  
Baton Rouge, LA 70804

**RE: SB 41: Provides relative to the regulation of pharmacy benefit managers**

Dear Governor Edwards:

I am writing, respectfully, to explain why SB 41 is special interest legislation that, in this time of rising prescription drug costs, will eliminate cost containment tools and add costs for payers, employers and patients. As background, 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, health insurance plans, labor unions, and Medicare Part D.

Employers and health insurers contract with PBMs to manage prescription drug benefits for their employees or enrollees. In addition to negotiating price concessions with pharmacies and drug manufacturers, PBMs handle a range of administrative functions including verifying eligibility, processing pharmacy claims, administering prior authorization and utilization review programs, auditing pharmacies for fraud and abuse, suggesting drug formularies to clients and handling grievances and appeals when requested to by the client. Since PBM benefit management supports health plans, they are already required to comply with state and federal insurance laws and regulations on behalf of their clients.

**Federal Trade Commission (FTC) Opines Board of Pharmacy Regulation of PBMs is Anti-Competitive and Could Raise Drug Costs**

In 2011, Mississippi Representative Mark Formby (R) received a letter from the FTC regarding legislation granting the Mississippi Board of Pharmacy regulatory oversight of PBMs. The FTC warned that, "If pharmaceutical manufacturers, pharmacists, and pharmacies gain access to whatever information the Pharmacy Board requires the PBMs to produce, they could have access to competitively sensitive information, potentially facilitate collusion, and increase prescription drug prices."<sup>1</sup> The FTC further cautioned Representative Formby that the regulation of PBMs by the Board of Pharmacy would contribute to anti-competitive practices, because "pharmacists, who negotiate retail prescription drug prices with PBMs and compete against PBM-owned mail-order pharmacies, would now be regulating PBMs."<sup>2</sup> PBMs negotiate rates for prescription drugs with pharmacies and, later, audit pharmacies for activities such as fraud, waste and abuse. Consequently, a Board of Pharmacy which is composed of pharmacists cannot impartially regulate PBMs. The FTC concluded that "pharmacists and PBMs have a competitive, and at times, adversarial

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<sup>1</sup> FTC letter to Representative Mark Formby (R-MS), March 22, 2011 [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-letter-honorable-mark-formby-mississippi-house-representatives-concerning-mississippi/110322mississippipbm.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-letter-honorable-mark-formby-mississippi-house-representatives-concerning-mississippi/110322mississippipbm.pdf).

<sup>2</sup> *Ibid*

relationship, we are concerned that giving the pharmacy board regulatory power over PBMs may create tensions and conflicts of interest for the pharmacy board. Indeed, the antitrust laws recognize that there is a real danger that regulatory boards composed of market participants may pursue their own interests rather than those of the state.”<sup>3</sup>

Additionally, the Supreme Court of the United States ruled in *North Carolina Board of Dental Examiners vs. Federal Trade Commission*<sup>4</sup> that “when a controlling number of the decision makers on a state licensing board are active marketplace participants in the occupation the board regulates, the board can invoke state-action immunity only if it is subject to active supervision by the state.” The FTC has recently filed a complaint<sup>5</sup> against the Louisiana Real Estate Appraisers Board for violating the Supreme Court’s ruling in the North Carolina Board of Dental Examiners decision.

PCMA strongly believes, given the FTC’s comments in Mississippi, their recent complaint against the Louisiana Real Estate Appraisers Board, along with the guidance found in *North Carolina Board of Dental Examiners*, SB 41 direct-intentions of the Louisiana Board of Pharmacy regulating PBMs without any appropriate active supervision of the state could run afoul of the FTC. It is foreseeable that a situation could arise where the Board of Pharmacy, ostensibly acting in the best interests of the consumers of this state, promulgates a regulation perceived by the FTC as favoring pharmacists at the expense of PBMs.

### **Board of Pharmacy Regulation of PBMs is Inappropriate and Unnecessary and Will add Costs for Prescription Drug Benefits**

- **PBMs are not acting as pharmacies with respect to their benefits management functions.** PBMs are administering plan design of employers and health plans – *payers* of pharmacy services – when they determine an enrollee’s eligibility and cost-sharing, process claims, conduct prior authorization and utilization review, and negotiate rates with pharmacies. PBMs clearly are not providing pharmacy services when they undertake these benefits management functions.
- **Health plan subcontractors are regulated by state insurance departments.** Health plans and their contracts with a variety of vendors for carved-out services, which, in addition to prescription drug management, may include behavioral health, imaging, and disease management. The services PBMs provide for prescription drug benefits are the same types of services health plans contract for with PPOs, utilization review companies, and third-party administrators with respect to medical benefits.
- **State insurance departments are best situated to protect consumers.** Oversight of health plan subcontractors is best undertaken by the state agency tasked with ensuring that consumers receive the benefits that they have contracted for and that the health plans remain solvent, which is the insurance department. State boards of pharmacy oversee the practice of pharmacy, which involves delivery of care. The insurance commissioner oversees the management and delivery of contractual obligations.

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<sup>3</sup> *Ibid*

<sup>4</sup> *North Carolina Board of Dental Examiners v. FTC* available at [https://www.supremecourt.gov/opinions/14pdf/13-534\\_19m2.pdf](https://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf)

<sup>5</sup> United States of America Before the Federal Trade Commission in the matter of Louisiana Real Estate Appraisers Board, Respondent, Docket No. 9374



- **PBMs comply with state laws and also the laws applicable to health insurance.** As subcontractors, PBMs in their benefit management capacity must comply with the same state laws – designed to protect consumers rather than health care service providers – as their health plan clients.

This legislation inappropriately determines that utilization management techniques such as prior authorization and step therapy are the practice of pharmacy. Utilization management is used as an administrative tool to both control costs and ensure that patients are utilizing the most effective clinical care.

In conclusion, the regulation of PBMs by the Board of Pharmacy is akin to the Board of Medicine regulating health insurance plans. SB 41 is special interest legislation that was nearly universally opposed by employers, payers and health plans for the simple reason that, as they struggle to maintain prescription drug benefits, this bill will eliminate cost containment tools and will lead to higher costs for providing prescription drug benefits.

We appreciate your consideration of our concerns and if you have any questions, please feel free to contact me at [lrowley@pcmanet.org](mailto:lrowley@pcmanet.org), or Rob Rieger, Esq., Adams and Reese, LLP at [Robert.Rieger@arlaw.com](mailto:Robert.Rieger@arlaw.com).

Sincerely,

A handwritten signature in blue ink, appearing to read "Lauren", is positioned above the typed name.

Lauren Rowley  
Vice President, State Affairs

CC: Attorney General Jeff Landry