



June 17, 2019

Honorable Janet Mills  
Governor  
Maine State Capitol  
Augusta ME 04333-0100

**RE: LD 1504 - Pharmacy Benefit Managers**

Dear Governor Mills:

On behalf of the Pharmaceutical Care Management Association (PCMA), I am writing you to request your action on LD 1504, relating to pharmacy benefit managers (PBMs). PCMA is the national association representing pharmacy benefit managers (PBMs), which administer prescription drug plans for millions of Americans with health coverage provided through large and small employers, health plans, labor unions, state and federal employee-benefit plans, and government programs.

LD 1504, if enacted, would be one of the most expansive intrusions into carrier - PBM contracting in the country. While PCMA has concerns on numerous provisions in the bill, we focus our comments in this letter on the proposal to require PBMs to have fiduciary obligations to their insurer carrier clients. Requirements that PBMs serve as fiduciaries to plan sponsor clients is a concept that state legislatures have considered and rejected across the country and courts have determined are preempted by federal ERISA.

According to the U.S. Department of Labor (DOL) and federal courts,<sup>1</sup> PBMs are not fiduciaries. ERISA defines the term "fiduciary" as a person who (i) exercises any discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets or (ii) has any discretionary authority or discretionary responsibility in the administration of such plan."<sup>2</sup> The DOL has said that "Third Party Administrators (TPAs)," (which PBMs are) "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."<sup>3</sup>

The U.S. Supreme Court has ruled that a person is a fiduciary for an ERISA plan only "to the extent" a person has or exercises such discretionary authority or control on behalf of a plan.<sup>4</sup> Following this decision, multiple federal courts have ruled that the PBM was not acting in a fiduciary capacity in managing its PBM-related services (e.g., negotiating with drug

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<sup>1</sup> Pharm. Care Mgt Ass'n v. District of Columbia, 613 F.3d 179 (D.C. Cir. 2010).

<sup>2</sup> 29 U.S.C. § 1002(21)(A).

<sup>3</sup> 29 CFR 2509.75-8 - Questions and answers relating to fiduciary responsibility under the Employee Retirement Income Security Act of 1974.

<sup>4</sup> Pegram v. Herdrich, 530 U.S. at 223, 120 S. Ct. 2143.



manufacturers or retail pharmacies or managing its formulary), but rather managing its own business which did not involve the discretionary control of plan assets.<sup>5</sup>

PCMA understands that after the Maine Legislature initially adopted the fiduciary requirement, the First Circuit upheld the law under PCMA's legal challenge. However, the First Circuit's decision in *Pharmaceutical Care Management Association v. Rowe*,<sup>6</sup> does not protect LD1504 from ERISA preemption for two separate independent reasons. First, in *Rowe* the First Circuit upheld a statute imposing direct obligations on PBMs in part because the law did not purport to directly regulate ERISA plans themselves. The court expressly distinguished state laws that would "restrict the freedom of employee benefit plans to administer or structure their plans in Maine precisely as they would elsewhere."<sup>7</sup> In contrast, LD1504 directly regulates ERISA plans as well as PBMs on matters of plan administration and structure, and for that reason is preempted under *Rowe*.

In any event, the Supreme Court has effectively overruled *Rowe*'s cramped view of ERISA preemption. Since *Rowe*, the Supreme Court decided *Gobeille v. Liberty Mutual Insurance Company*.<sup>8</sup> There, the Supreme Court held that ERISA preempted a Vermont law requiring a third-party administrator to report information about an ERISA plan because the law had a "connection with" ERISA.<sup>9</sup> *Gobeille* thereby effectively overruled *Rowe*'s conclusion that regulation of a PBM could not bind plan administrators to particular choices for preemption purposes.<sup>10</sup> As a result, even if LD1504 is read to only regulate PBMs, such regulation of plan administration and structure is preempted under *Gobeille*. As you know, the Maine Legislature ultimately repealed the a few years after it passed it in LD 1116 (2011), because the requirement caused a chilling effect on innovation in the benefit design and contracting among PBMs and plans.

In addition, just in the past two years, California, Minnesota and Nevada legislatures have rejected fiduciary requirements. In early versions of California's AB 315 (2017-18), a fiduciary requirement was proposed, but ultimately the legislature adopted a "good faith and fair dealing" requirement by the time it was enacted in 2018. See Cal Health & Safety Code §1385.004 and Cal Bus & Prof Code § 4441. Likewise, in Minnesota, this year, in HF 728 (2019), the legislature considered and rejected a fiduciary requirement and instead adopted a requirement that a PBM "exercise good faith and fair dealing in the performance of its contractual duties."

Nevada SB 378 (2019), signed by Governor Sisolak (D-NV) and attached to this letter, repealed the fiduciary requirement that the legislature enacted two years ago in SB 539 (2017). Although that fiduciary requirement's applicability was limited to plans that do not fall under federal ERISA programs, the legislature this year determined that even the limited scope of this law was undesirable for its constituents and the state. Like Minnesota and California, the

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<sup>5</sup> See *Chicago District Council of Carpenters Welfare Fund. v. Caremark*, 474 F.3d 463, (7th Cir. 2007); see also *Moeckel v. Caremark, Inc.*, 622 F. Supp. 2d 663 (M.D. Tenn. 2007), and *In re Express Scripts/Anthem ERISA Litigation*, 2018 WL 339346 (S.D.N.Y. Jan. 5, 2018).

<sup>6</sup> 429 F.3d 294 (1st Cir. 2005).

<sup>7</sup> *Id.* at 303.

<sup>8</sup> 136 S. Ct. 936 (2016).

<sup>9</sup> *Id.* at 946-47.

<sup>10</sup> 429 F.3d at 303.



Nevada Legislature changed the “fiduciary” requirement to “an obligation of good faith and fair dealing toward a third party or pharmacy when performing duties pursuant to a contract...” The Nevada Legislature meets only every two years; thus, at its first opportunity, it chose to repeal this requirement, and this policy was affirmed with the governor’s signature.

Finally, the bill’s sponsor testified at LD 1504’s first hearing that the bill was modeled after a Montana PBM bill (SB 71), and a representative of the Montana State Auditor’s office was the lead witness testifying in favor of LD 1504. Montana SB 71 did not include the fiduciary requirement, and the bill was ultimately vetoed by Gov. Bullock (D-MT) on May 9, 2019, because of his concern that it would increase costs.

Imposing fiduciary duties on PBMs would raise drug benefit costs by increasing their legal liability because of the greater potential legal exposure that exists as an entity that exerts control over plan assets (as opposed to one that merely administers a plan, within the benefit parameters established by the plan sponsor). It could also undermine PBMs’ ability to effectively implement cost management tools for their clients, increasing projected drug expenditures by an estimated 5.8% over the next 10 years, or \$309 million just in Maine.<sup>11</sup>

These legal and policy considerations are just some of the reasons that legislatures across the country have rejected fiduciary requirements that are not appropriate in carrier-PBM relationships. LD 1504’s fiduciary mandate is preempted by ERISA, and the bill would significantly increase costs, damage innovative PBM product development in Maine, and restrict flexibility for plan sponsors. For these reasons, we respectfully request your veto of LD 1504, or request that the bill be recalled from your desk and amended to require only an obligation of good faith and fair dealing, in the place of the fiduciary requirement. We are happy to discuss further. Please contact me at 202-756-5743 if you have any questions. Thank you.

Sincerely,

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

April C. Alexander  
Assistant Vice President, State Affairs

Enclosure: Nevada SB 378 (2019)

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<sup>11</sup> “Increased Costs Associated With Proposed State Legislation Impacting PBMTools,” Visante, January 2019.