



January 21, 2020

OSI Records and Docketing  
New Mexico Office of Superintendent of Insurance  
Attention: Mariano Romero, Room 331  
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Santa Fe NM 87504-1689  
*via email: [osi-docketfiling@state.nm.us](mailto:osi-docketfiling@state.nm.us)*

**Re: PCMA Response to Comments Made at January 10<sup>th</sup> Public Hearing on OSI's Proposed Rule Relating to Pharmacy Benefit Managers**

Dear Mr. Romero:

The Pharmaceutical Care Management Association (PCMA) provided initial comments on the New Mexico Office of the Superintendent of Insurance's (OSI) proposed rule implementing SB 415 (2019) relating to pharmacy benefit managers (PBMs) on January 10, 2020. Per the announcement by the OSI at the Public Hearing on January 10<sup>th</sup> PCMA is submitting supplemental comments responding to comments provided during that public hearing. As noted in our prior comment letter, PCMA is the national trade association representing PBMs, which manage prescription drug benefits for large and small employers, health insurance carriers, labor trusts, government programs, and other payers.

At the outset, and as we noted previously, SB 415 established licensing requirements and several other new requirements for PBMs. All our original comments in our letter dated January 10, 2020 remain valid and should be considered by the OSI.

### **1. Rulemaking Authority**

PCMA acknowledges the rulemaking authority of the OSI to implement the terms and provisions in the Insurance Code and specifically the requirements in SB415, however, we again urge caution when being urged by the pharmacy lobby to adopt rules outside the scope of the statute. Specifically, we must again remind the pharmacy lobby and the OSI that no rule established by the superintendent "shall extend, modify, or conflict" with any provision of the Insurance Code.<sup>1</sup>

Sections of SB 415 that allow the OSI to gather information for the license application and enforce the provisions of the legislation do not grant any additional broad authority that was not spelled out or contemplated in the original legislation. A court shall set aside an administrative agency ruling if it is found to be: (a) arbitrary and capricious; (b) not supported by substantial evidence, or (c) otherwise not in accordance with the law. *Law v. New Mexico Human Services Dep't*, 2019- NMCA-066, ¶ 11, 451 P.3d 91, 97, cert. denied (Aug. 1, 2019). The courts have defined "arbitrary and capricious" as an agency action "which is unreasonable or does not have a rational basis and is the result of an unconsidered, willful and irrational choice of conduct and not the result of winnowing and sifting process. *Saenz v. New Mexico Dept. of Human Services, Income Support Div. ex rel. Human Services Dept.*, 1982-NMCA-159, ¶ 13, 98 N.M. 805, 808, 653 P.2d 181, 184; see also *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 104, 61

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<sup>1</sup> NMSA § 59A-2-9



P.3d 806, 61 (“A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record”).

## 2. Maximum Allowable Cost Appeals

PCMA does not object to an appeal process, however, we adamantly object to any regulated appeals process that determines a reimbursement amount. PBMs have existing processes for pharmacies to appeal reimbursements and communicate with the PBM regarding disputes. PCMA acknowledges that SB 415 specifically states that a PBM must grant an appeal if the PBM fails to respond to a complete submission within fourteen business days. However, we must remind the pharmacy lobby and the OSI that SB 415 also specifically states that a PBM shall determine a reimbursement amount, as found in NMSA § 59A-61-4, and there is no statutory authority to determine the reimbursement amount to be paid upon appeal. We remind the pharmacy lobby that reimbursement amounts are outlined in a contract signed by two consenting parties and any pharmacy has a statutory right as provided for in NMSA § 59A-61-5 to reject any contract.

Restating our previous comment, we oppose the imposition of a default reimbursement rate—such as the NADAC amount or the “usual and customary amount,” as the pharmacy lobby suggested—when the PBM does not comply with the timeframes for MAC appeals. The statute does not call for the OSI to establish reimbursement rates and thus, this requirement is an expansion of the statute as prohibited by NMSA § 59A-2-9. The OSI has sufficient enforcement mechanisms if a PBM fails to comply with its statutory obligations and conditions of licensure and we reiterate our original comment to strike any reference to NADAC reimbursements or any other reimbursement mechanism the pharmacy lobby might suggest.

PCMA remains committed to an open dialogue on these issues and the issues identified in our earlier comment letter. We encourage the OSI to convene all stakeholders so that an open and honest dialogue can continue. We feel strongly that the OSI can provide the opportunity for a thorough dialogue between our industry and the pharmacy lobby.

Thank you for the opportunity to provide additional comments responding to issues brought up in the hearing. Please contact me at [aaalexander@pcmanet.org](mailto:aaalexander@pcmanet.org) if you would like to discuss our comments further. Thank you.

Sincerely,

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

April Alexander  
General Counsel and Vice President, State Regulatory Affairs