March 5, 2021

Booth Rand, Managing Counsel
Arkansas Insurance Department
1 Commerce Way
Little Rock AR 72202
Via email: booth.rand@arkansas.gov

Dear Mr. Rand:

I am writing on behalf of the Pharmaceutical Care Management Association (PCMA), in response to your email on February 4, 2021, requesting that stakeholders respond to the question of whether the amendments to the MAC law that were enacted in SB 520 (2018)—specifically, the extension of the MAC law to claims for brand-name drugs—apply to self-insured claims. We appreciate the outreach and are happy to have further dialogue about this or other issues after you review our response.

While the MAC law, focusing on generic drug reimbursement, had been in place for several years (and the 2015 law—Act 900—was the subject of our *Rutledge* lawsuit), the laws enacted in 2018 changed the landscape in a number of ways. First, the statutory change granted the AID the authority to draft rules relating to "compliance and enforcement requirements" under the MAC law that is embedded in the pharmacy code, at A.C.A. §17-92-507 (*See* A.C.A. §23-92-509). Second, the law expanded the definition of "MAC" to include other types of non-generic drug reimbursements. There were additional changes, but we believe these two are the most relevant to the question at hand.

We believe that a threshold question on this matter is the extent of the reach of AID's authority to enforce MAC law, including those amendments enacted in 2018. We believe that AID's ability to enforce the MAC law is limited to fully-insured business by the AID's enabling statute, the specific provisions of the Pharmacy Benefit Manger Licensure Act (A.C.A. § 23-92-501 et seq. "PBM Licensure Act"), and the implementing regulation. Thus, the AID may not enforce the MAC law, including the 2018 amendments to the MAC law, to self-insured claims at all.

The scope of the AID's regulatory authority over PBMs was created through the PBM Licensure Act. The act's purpose is to establish the standards and criteria for the regulation and licensure of PBMs "providing claims processing services or other prescription drug or device services for 'health benefit plans.'" (A.C.A. §23-92-502.) "Health benefit plans" are plans "issued or delivered by a *healthcare insurer* in *this state*." (emphasis added) (A.C.A. §23-92-503(2)(A).) A "healthcare insurer" is an "insurance company, an HMO, or a hospital or medical service corporation." (A.C.A. §23-92-503(3).) Self-insured groups are not insurers, HMOs or hospital or medical service corporations, and there was no change to this "insurer" definition in 2018 when the PBM licensing statute was created. While the legislature had the opportunity to clarify the AID's authority with respect to enforcing the PBM licensing statute and the newly amended MAC law, it did not.

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The implementing regulation for the PBM Licensure Act further cements this interpretation, by (appropriately) using the same definitions as outlined in statute. (*See* Rule 118 §(4)(A) – "Health benefit plan," and §(5) – "Healthcare Insurer"). The rule further references "MAC" as the requirements of A.C.A. §17-92-507 "for PBMs which are administering pharmacy benefits for a Health benefit plan of a *Healthcare insurer*" (emphasis added).

For these reasons, we believe that the AID does not have enforcement authority over the MAC law, including the amendments to MAC law including brand name drugs, with respect to claims processed by PBMs for self-insured employers. We would be happy to discuss this issue further if needed. Thank you.

Sincerely,

April C. Alexander
General Counsel and Vice President, State Regulatory Affairs

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