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February 24, 2011

RE: AN ACT to the amend the public health law, in relation to pharmacy benefit managers

A. 809 (Gottfried)

MEMORANDUM IN OPPOSITION

Submitted on behalf of the Blue Cross and Blue Shield Plans

The Blue Cross and Blue Shield Plans of New York strongly oppose enactment of this bill, which would severely limit insurers' flexibility in providing cost-effective prescription drug benefits by imposing onerous reporting, accounting, and disclosure requirements on pharmacy benefit managers (PBMs). Specifically, the bill imposes a fiduciary duty on PBMs, creates a trust for all funds received by PBMs, requires disclosure of financial transactions, and mandates disclosure of terms and conditions for all contractual arrangements. Proponents of the requirements claim that transparency will protect consumers, but in reality, the requirements will render PBMs less effective by imposing bureaucratic reporting requirements and undermining their ability to capitalize on the competitive marketplace. PBMs operate in a highly-competitive environment and work with large and sophisticated clients in negotiating prescription drug discounts for their clients.

Customers regularly obtain multiple bids from competing PBMs and demand contracts tailored to their particular needs, such as those boasting performance guarantees, higher quality, and cost savings. They look for indicia such as Utilization Review Accreditation Committee approval and frequently demand even more transparency than this bill would provide. As a result, PBMs compete to maintain their client base by providing savings and service. Transparency already exists between PBMs and their clients, providing consumers with protection without undermining the negotiating power of PBMs to secure savings for their beneficiaries.

In fact, PBMs are projected to save consumers and employers $1.3 trillion on the cost of their prescription drugs between 2008 and 2017.[1] Imposition of this bill's onerous and unnecessary requirements would significantly increase administrative costs and diminish the value PBMs currently provide to New York's employers and consumers.

PBM contracts necessarily include proprietary business information about pharmacy network and mail-service discounts, manufacturer rebates, and other tools PBMs use to curtail drug prices. Because these contracts are tailored to each client's needs and remain confidential, PBMs can structure their offerings in innovative ways – without the fear that the terms and cost-saving methodologies will become known to their competitors and suppliers.

Similarly, it is only by maintaining the confidentiality of their contracts that PBMs are able to successfully negotiate price discounts. Both manufacturers and pharmacies have strong incentives to provide PBMs with discounts, as each PBM typically represents thousands of consumers. Because these discounts may be developed, measured, and negotiated in many ways, their structures and strategies vary significantly. The contracts that spell out the discount arrangements are unique and reflect the closely guarded strategies each PBM has developed to be competitive in the marketplace. Public disclosure of these confidential contracts would dilute their value and significantly impair PBMs' ability to negotiate such discounts in the future. The Director of the Congressional Budget Office (CBO) noted that "revelation of rebates to PDPs would create pressure to reduce those rebates, which would tend to increase costs."

Disclosure requirements would likely lead to the standardization of contract terms, undermining competitive innovation. According to CBO report, "increased transparency would make it easier for those firms to observe the prices charged by their rivals, which could lead to reduced competition between them."[2] For example, a drug manufacturer willing to increase a rebate to one PBM may not[3] to do so if the rebate became public knowledge. Without confidentiality, that manufacturer would face intense pressure to make the same concession to all PBMs, creating a price floor. Manufacturers would lack the incentive to offer concessions, resulting in standardization of drug prices at higher levels than competition currently achieves.

This bill would also impose a fiduciary duty on PBMs, which is unnecessary due to the contractual relationship between PBMs and their customers. Imposing this duty would impair PBMs' ability to function in a competitive marketplace, eroding the significant cost savings they currently provide. In an analysis of the benefits of PBMs, Pricewaterhouse Coopers found that PBMs create savings of almost 30% when compared with unmanaged purchases.[4] The study also found that implementing the restrictions this bill proposes would increase drug costs by $127 billion over the ten year period from 2008-2017.

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[1] Pricewaterhouse Coopers (PwC), *Pharmacy Benefit Management Savings In Medicare and the Commercial Marketplace & the Cost of Proposed PBM Legislation, 2008-2017*, Mar. 2007.
[2] Congressional Budget Office, *Increasing Transparency in the Pricing of Health Care Services and Pharmaceuticals*, June 5, 2008.
[3] Congressional Budget Office, Letter of Director Peter R. Orszag to U.S. House of Representatives Comm. on Energy and Commerce and Comm. on Ways and Means, Mar. 12, 2007.
[4] Pricewaterhouse Coopers, *supra* note 1.

PBMs harness the buying power of a multitude of consumers to compel drug price discounts. By forcing PBMs to share trade secrets and other proprietary information, disclosure mandates would rewrite the rules of market competition. PBMs would be effectively precluded from finding innovative ways to limit drug costs for consumers.

Respectfully submitted,

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