CITIZENS AGAINST GOVERNMENT WASTE

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Mr. TK Keen, Chairman
Pharmacy Benefit Manager Regulatory Issues (B) Subgroup
National Association of Insurance Commissioners
444 North Capitol Street, N.W., Suite 700
Washington, D.C. 20001-1512

Dear Chairman Keen and Subgroup Members,

Citizens Against Government Waste (CAGW) is submitting these comments on the proposed draft of the State Pharmacy Benefit Manager Licensure and Regulation Model Act on behalf of our more than one million members and supporters nationwide.

While this letter is arriving past September 1, we hope you understand the exigencies created by the pandemic and ask that it be shared with members of the Pharmacy Benefit Manager Regulatory Issues (B) Subgroup.

The draft legislation would be available to states that may be interested in implementing tighter oversight of pharmacy benefit managers (PBMs). Many of the provisions of the draft bill, if adopted, would limit the ability of PBMs to save employers and their employees, insurers, and government programs valuable healthcare dollars for their pharmacy benefit plans. According to the Pharmaceutical Care Management Association, more than 266 million Americans with health insurance have their drug benefits managed by a PBM.

In regard to Section 6, "Gag Clause Prohibited," CAGW believes it is unnecessary. On October 10, 2018, the Patient Right to Know Drug Prices Act was signed into law by President Trump. This law amended the Public Health Service Act and prohibits "a health insurance plan or pharmacy benefits manager from restricting a pharmacy from informing an enrollee of any difference between the out-of-pocket cost of a drug under the plan and the cost of the drug without health insurance coverage." This law covers commercial and Medicare Part D plans.

The provisions in Section 6 go beyond what a pharmacist should discuss with patients. For example, a pharmacist may not be fully knowledgeable regarding "information on financial incentives and structures used by the insurer," and "the process that is used to authorize or deny healthcare services or benefits." Those are conversations that patients should have with their insurer or employer.

We also believe that Section 8 should be eliminated because it interferes with a PBM's ability to lower drug costs. For example, determining PBM network adequacy invites interference in plan design. Networks are created to not only drive down drug costs, but to increase quality and

provide good service to their sponsor and drug plan beneficiaries. There have been calls to adopt any willing pharmacy mandates but if any pharmacy can belong to a network, then there is no incentive to negotiate and lower drug prices.

Other provisions in Section 8 like compensation, medical loss ratio compliance, and spread pricing requirements invite government manipulation and implementation of price controls, which always disrupt markets.

It is not clear how the proposed model legislation addresses rebates. We are concerned there will be attempts to restrict or alter how they are used. Rebates, instead of up-front discounts, have been used by PBMs and pharmaceutical manufacturers since 1996 due to a settlement of a class-action lawsuit by thousands of retail pharmacies against pharmaceutical manufacturers and wholesalers, claiming they violated both the Sherman Act and Robinson-Patman Act.[1] While CAGW has no problem with using upfront discounts to drive down costs instead of rebates, doing so would likely require a change in federal law. Simply eliminating rebates will drive up drug costs.

CAGW appreciates and understands the frustration over drug prices. Much of the pharmaceutical marketplace operates under the influence of government price controls like Medicaid, Medicare Part B, the VA and the coverage gap in Medicare Part D. These price controls have distorted the pharmaceutical marketplace and have increased costs in the commercial market.

It would not be helpful to constrain private-sector price negotiations by PBMs with pharmaceutical companies and pharmacists, which decrease drug costs for employer-based and commercial insurance drug plans and Medicare Part D. Sections 6 and 8 would interfere with this process.

Thank you for your consideration of these comments.

Sincerely,

Thomas Schatz

[1] Thomas Barker and Ross Margulies, FoleyHoag, LLP, The History of Rebates in the Drug Supply Chain and HHS's Proposed Rule Change Safe Harbor Protection for Manufacturer Rebates, April 2, 2019, https://foleyhoag.com/publications/ebooks-and-white-papers/2019/march/the-history-of-rebates-in-the-drug-supply-chain