To: **Committee on Education and the Workforce Subcommittee on Health, Employment, Labor, and Pensions**

Re: **"Competition and Transparency: The Pathway Forward for a Stronger Health Care Market" (June 21, 2023, 10:15 a.m.)**

Responses from J.C. Scott, CEO of the Pharmaceutical Care Management Associations (PCMA) to Questions for the Record from Rep. Mark DeSaulnier (D-CA)

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1. During the hearing you stated that you believe your companies are in compliance with the requirements of Section 408(b)(2) of ERISA. As you are aware, this requirement provides that covered service providers disclose their direct and indirect compensation to plan fiduciaries. This includes the "development or implementation of . . . pharmacy benefit management services."

   [PCMA Response]

   It is PCMA's understanding that its member companies do, when negotiating the terms of and providing PBM services to ERISA-covered group health plans, take reasonable and good faith efforts to comply with all applicable legal requirements. This includes providing appropriate disclosure of direct and indirect compensation to ERISA fiduciaries so they may ensure their plans are not paying more than reasonable compensation as required under Section 408(b)(2)(A) of ERISA.

   The disclosure requirements referenced in the Subcommittee's statement above, which were promulgated via provisions in the Consolidated Appropriations Act of 2021 (CAA), are not required by *all* of an ERISA-covered plan's service providers, but instead, only those that qualify as "*covered* service providers." The statutory language then defines that term as targeting brokers and benefit consultants—i.e., those providing "[b]rokerage services . . . with respect to selection of . . . pharmacy benefit management services" and "[c]onsulting . . . related to the development or implementation of . . . pharmacy benefit management services." 29 USC § 1108(b)(2)(B)(ii)(bb).

   As a trade association representing a host of member company PBMs of different sizes and business models, PCMA is unable to comment on the specific compliance positions taken by any one of its members. In light of the above, PCMA's member companies may be taking varying positions on whether or not they are considered covered service providers under Section 408(b)(2)(B). PCMA is unable to provide definitive comments on an interpretation of the scope and nature of the disclosure rules set forth in Section 408(b)(2)(B).

   Nevertheless, as service providers to ERISA plans and thus parties in interest, PBMs customarily make appropriate disclosures to ensure their clients have the information necessary to confirm that no more than reasonable compensation be paid for their services as required by Section 408(b)(2)(A). Likewise, PBMs may provide such information to facilitate plan sponsors' ability to comply with their obligations (to the extent

applicable) to report service provider fees and other compensation on Schedule C to Form 5500 on an annual basis.

a. Please confirm that your member companies provide these disclosures to their clients.

[PCMA Response] PCMA's response to Item 1 above is incorporated herein by reference.

b. Please describe in detail what compensation is being provided through these disclosures:

[PCMA Response] PCMA's response to Item 1 above is incorporated into the following responses by reference. Further, in regard to the responses below, as a trade association, PCMA is unable to comment on the specific terms and disclosures agreed upon and made by its member companies to their respective customers under their applicable contracts.

i. Do pharmacy benefit managers disclose whether they are acting as a fiduciary with respect to the plan? In what situations, if any, do pharmacy benefit managers agree that they are acting as a fiduciary?

[PCMA Response] Specifically with respect to ERISA, PBMs are generally not considered (under statute or federal case law) fiduciaries on behalf of their ERISA-covered plan customers with respect to most of the services they provide. Nonetheless, PCMA understands that PBMs may sometimes agree to serve as fiduciaries on behalf of applicable plans in certain limited circumstances pursuant to negotiated customer contracts (e.g., in regard to claims appeals).

ii. How is information presented? Is compensation expressed in a dollar amount or only as a formula? If expressed as a dollar amount, is sufficient detail provided to ensure that the plan fiduciary understands costs with respect to their plan? Is compensation described with specificity or only aggregate amounts?

[PCMA Response] Member companies ordinarily participate in extended negotiations with ERISA-covered plan customers and their advisors, which include detailed discussions and disclosures relating to the services provided, and fees charged or retained under such arrangements. The information furnished by its member companies to ERISA plan fiduciaries is customarily provided in a format and on a cadence mutually agreed to between the parties, which may be updated at any time throughout the term of the arrangement.

iii. What steps are taken to ensure information is understandable to plan fiduciaries?

[PCMA Response] The information furnished by its member companies to ERISA plan fiduciaries is customarily provided in a format and on a

cadence mutually agreed to between the parties, which may be updated at any time throughout the term of the arrangement.

2. Under Section 408(b)(2) of ERISA, "indirect compensation" is defined as "compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, or an affiliate." Do you believe that this definition includes remuneration that pharmacy benefit managers receive in the form of rebates from drug manufacturers? If not, please explain why rebates are not "compensation received from any source other than the covered plan, the plan sponsor, the covered service provider, or an affiliate."

   [PCMA Response] PCMA's response to Item 1 above is incorporated herein by reference. As noted above, PBMs often disclose information on various forms of compensation, including indirect compensation, sufficient to allow the applicable ERISA fiduciaries to confirm that the compensation paid to the PBM is reasonable for purposes of Section 408(b)(2)(A). Whether such information includes rebates as a form of "indirect compensation" may depend on varying factual circumstances, including the structure of the arrangement between the PBM and plan and the underlying negotiated contractual terms. Given the fact-dependent nature of the inquiry, PCMA does not have a definitive interpretation regarding whether manufacturer rebates are a form of "indirect compensation" under Section 408(b)(2) of ERISA.