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The Honorable Thomas Massie
U.S. House of Representatives
House Subcommittee on Administrative State,
Regulatory Reform, and Antitrust
2453 Rayburn House Office Building
Washington, DC 20515

The Honorable Luis Correa
U.S House of Representatives
House Subcommittee on Administrative State,
Regulatory Reform, and Antitrust
2301 Rayburn House Office Building
Washington, DC 20515

Dear Chair Massie, ranking member Correa, and members of the House Judiciary Subcommittee on the Administrative State, Regulatory Reform, and Antitrust:

This letter is in response to the following question posed by Representative Correa:

> 1. During the hearing, witnesses suggested that clients may benefit if pharmacy benefit managers (PBMs) had fiduciary responsibilities to their clients. Do PBMs have a fiduciary responsibility to their clients at either the federal or state level? If not, should PBMs have a fiduciary duty to their clients? What specifically would this entail and what are the positive and negative costs, financial or otherwise, and impacts of imposing a fiduciary duty to clients on PBMs on clients or any other entity or market?

Question: Do PBMs have a fiduciary responsibility to their clients at either the federal or state level?

Response: "No to federal, yes to some states."
In the context of health insurance, the phrase *fiduciary responsibility* typically refers to the expectation created under the Employee Retirement Income Security Act (ERISA) that anyone with "discretionary authority" for the administration of the health plan or management of the plan assets.[1] It has been the position of Pharmacy Benefit Managers (PBMs), through their trade organization Pharmaceutical Care Management Association (PCMA), that:

> "No. PBMs merely serve in administrative or advisory roles for health plan and employer clients, performing claims processing and other administrative tasks pursuant to their contracts. PBMs don't make decisions about whether the plan should offer pharmaceutical benefits or the scope or design of those benefits – that is the plan sponsor's job."[2]

Based on this assessment, it would be my opinion that PBMs would not be held to the fiduciary responsibility standard based on Federal law. However, a recent Government Accountability Office (GAO) report to Congress evaluated several states' regulation of PBMs and found that multiple states (California, Louisiana, Maine, and New York) have

[1] Fiduciary Responsibilities. US Department of Labor. Accessed September 20, 2024. Available at: https://www.dol.gov/general/topic/retirement/fiduciaryresp
[2] Why Fiduciary Responsibility for PBMs is Costly and Unworkable. PCMA. Accessed September 20, 2024. Available at: https://www.pcmanet.org/wp-content/uploads/2022/11/PBMs-as-a-Fiduciary.pdf

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imposed a "duty of care" requirement on PBMs to reflect the wishes of policymakers to set this standard for the relationships between PBMs and their clients (e.g., health plans).[3]

Question: If not, should PBMs have a fiduciary duty to their clients?

Response: "It depends on who you consider the client. If you consider the client the "health plan sponsor" then yes, I think language could be drafted to meet the goals of the policy."
Some of the concerns raised with policies designating a PBM as a fiduciary (in addition to the health plan sponsor) stem from the way these policies are implemented into practice. By definition, a PBM currently serves the health plan sponsor, which makes it a service provider. We need to be clear that when we say "the PBM is a fiduciary to their clients" that we specify that we define "clients" as the health plan sponsors – not the plan members or beneficiaries.

Personally, I believe the "client" definition may cause some of the confusion and create some of the issues we see in newspaper articles or academic papers criticizing PBMs – as many authors often mistakenly define the "client" as the patient receiving care. If Congress wishes to define the "client" as the patient receiving care, then it must be very explicit in that definition and consider several changes in ERISA as well.

Question: What specifically would this entail and what are the positive and negative costs, financial or otherwise, and impacts of imposing a fiduciary duty to clients on PBMs on clients or any other entity or market?

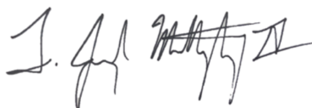
Response:
Ultimately, there seems to be agreement around the concept that: "PBMs need to do what is in the best interest of their plan sponsor customers." While PBMs would argue that they currently do this, the overwhelming criticisms and concerns raised in recent years seem to suggest that policy intervention could serve both the plan sponsors and the PBMs who are already acting in the best interest in their clients – hopefully, just removing any incentives or temptations to act in ways that do not serve the plan sponsor's best interest.

One of the challenges will be the additional costs that may be required for health plans to "audit" their PBMs in order to provide appropriate oversight and contract compliance. While this may be straightforward for some employers and large governments, this might be a difficult (and expensive) task for smaller health plans who may need to rely on external consultants to conduct these audits and help determine if any PBM actions should be challenged.

One solution may be to require that all PBMs offer plan sponsors a contract with a fiduciary option, but not force health plans to select it. Or if it is a requirement for all contracts, the government could help serve small businesses by providing free or discounted consulting services – but this would mean the government would need to identify the appropriate agency and determine a budget to provide these services.

If you have any additional questions, please contact me (502-552-5104, joey.mattingly@utah.edu).

Sincerely,



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[3] Selected States' Regulation of Pharmacy Benefit Managers. GAO. Report number: GAO-24-106898. Available at: https://www.gao.gov/assets/d24106898.pdf