Leonard D. Schaeffer Center
for Health Policy & Economics

UNITED STATES HOUSE COMMITTEE ON THE JUDICIARY

Sub-Committee on the Administrative State, Regulatory Reform, and Antitrust

"The Role of Pharmacy Benefit Managers: Market Power, Pricing Practices, and Policy Implications"

September 11, 2024 Hearing

Dr. Karen Van Nuys

Response to Ranking Member Correa's

QUESTION FOR THE RECORD:

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?

There is no federal law requiring PBMs to act as fiduciaries to their clients, but a few states have recently passed legislation imposing fiduciary requirements on PBMs:

- Maine enacted LD 1504 in 2019
- Tennessee enacted HB 1398 in 2021
- Vermont enacted H 353 in 2022 and H 233 in 2024
- New Jersey enacted A 536 in 2023

I am unaware of any analyses that study the impact of these laws, perhaps because they are relatively new.

I believe that a fiduciary duty to clients should be required of PBMs, and have written about it with my colleagues, along with other suggestions for PBM reform, here. The benefit of such a requirement would be to align PBMs' priorities with their clients' goals, and end practices that enrich the PBM at the client's expense. For example, a fiduciary duty should prevent a PBM from preferring a high-cost branded version of a drug over its low-cost generic to collect rebates or fees based on the drug's list price.

Under ERISA, employers have a fiduciary responsibility to their plan enrollees; the Consolidated Appropriations Act of 2021 further strengthened this responsibility by requiring employers to (among other things) disclose compensation to brokers and consultants. By extending fiduciary responsibilities to PBMs, regulators can make it easier for employers to fulfill their fiduciary responsibility to their employees and improve the cost and quality of benefits for employees.

Imposing new fiduciary requirements will create new costs associated with providing more data and reporting to PBM clients, but I believe that the added transparency about plan costs will enable employers to make more informed buying decisions, thereby increasing competitive pressure on PBMs to offer better value.

Compared to other types of policy fixes, imposing a fiduciary duty on PBMs is a more robust mechanism for aligning the two parties' interests. Large, integrated PBMs can implement workarounds to less-comprehensive policies. For example, PBMs can avoid regulatory scrutiny of rebates by re-naming them as "fees." If a new law prohibits spread pricing, an integrated PBM can adjust its internal transfer prices to direct the margin that would have been earned through "spread" to its affiliated pharmacy. By contrast, a requirement that PBMs act as fiduciaries to their clients would be much more difficult to circumvent.