

Question for the Record from Representative Correa for Dr. Frank, Dr. LoSasso, Dr. Van Nuys, and Dr. Mattingly.

“The Role of Pharmacy Benefit Managers”

September 11, 2024

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?

Thank you for this question. I appreciate the opportunity to offer my thoughts. Pharmacy Benefit Managers (PBMs) do not generally have fiduciary responsibilities to their clients at the federal or state level. Under the Employee Retirement Income Security Act (ERISA), fiduciary duties are imposed on entities that exercise discretionary authority over plan assets or plan management. PBMs, however, primarily serve in administrative and advisory roles, executing claims processing and other contractual obligations determined by the plan sponsors, who are typically large and sophisticated healthcare purchasers. This distinction is critical because PBMs do not have decision-making power regarding the scope or design of benefits; they are executing terms set by their clients rather than exercising control over plan assets.

Proponents of imposing fiduciary duties on PBMs argue that it could align PBM incentives more closely with those of plan sponsors and participants, potentially enhancing transparency and ensuring that PBMs act solely in the interest of their clients. However, the practical implications of such a shift are complex.

If PBMs were subjected to fiduciary duties, they would be required to act solely in the interest of plan participants and beneficiaries, similar to trustees managing assets on behalf of clients. However, there are several potential downsides to a fiduciary relationship:

- **Increased Administrative Costs:** Imposing fiduciary duties would result in PBMs charging higher fees to cover the added liability and compliance costs. This could reduce the overall cost savings PBMs currently generate through their scale and market expertise.
- **Weaker Negotiating Leverage:** Fiduciary responsibilities may require PBMs to negotiate rebates and price concessions separately for each health plan, which would weaken their leverage in the marketplace. PBMs currently use the collective bargaining power of their

client base to secure rebates from manufacturers. Imposing fiduciary duties could reduce this negotiating power and lead to higher drug prices for consumers.

- **Legal and Regulatory Risks:** PBMs would be exposed to lawsuits from clients or consumers who believe that PBM decisions did not fully serve their interests. This could lead to protracted legal battles and create significant compliance burdens.
- **Disruption and Diminution of Market Competition:** Smaller PBMs, or those with limited service offerings, might find it difficult to absorb the costs and risks associated with fiduciary duties, leading to further consolidation in the PBM market and reducing competition, which is already a concern in the industry.
- **Potential Conflict with Plan Sponsors:** A fiduciary duty could put PBMs in a difficult position when their contractual obligations to plan sponsors conflict with their fiduciary responsibility to plan participants. For instance, PBMs often implement cost-saving tools like step therapy or drug tiering, which may benefit the overall population but could harm individual participants by restricting access to certain drugs. A fiduciary duty could create conflicting obligations, decreasing the effectiveness of cost-saving tools.

While fiduciary duties for PBMs might bring some benefits in terms of transparency and the alignment of interests with plan sponsors and participants, the costs—financial and otherwise—are likely to be substantial. Increased fees, reduced negotiating power, and legal complexities could diminish the effectiveness of PBMs in controlling drug prices. Moreover, fiduciary duties could introduce conflicts between PBMs' obligations to plan sponsors and participants, undermining the flexibility and efficiency of PBM operations. Therefore, while the idea of fiduciary duties may have surface appeal, the practical challenges and clear downsides outweigh any hypothetical benefit.

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