

**United States House of Representatives Energy and Commerce Committee**

**Subcommittee on Health Hearing**

**“Opportunities to Improve Health Care”**

**Written Testimony of:**

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**On Behalf of the National Community Pharmacists Association (NCPA)**

**September 5, 2018**

Chairman Burgess, Ranking Member Green, and Members of the Subcommittee:

Thank you for conducting this hearing that focuses on egregious contract clauses that PBMs impose on pharmacies and providing me the opportunity to share how these clauses have impacted the relationship between my patients and me. My name is Hugh Chancy, and I have been a community practice pharmacist since 1998 and currently am a pharmacist-owner of five community pharmacies located in southern Georgia. I am here on behalf of the National Community Pharmacists Association (NCPA) where I currently serve on NCPA’s Board of Directors. NCPA represents America’s community pharmacists, including the owners of more than 22,000 independent community pharmacies. I am here today as a healthcare provider and small business owner to present my experience with restrictive contractual language (often referred to as gag clauses) that may result in patients being charged inflated prices for their medications.

My first experience with so called gag clauses occurred in 2015 when one of my pharmacies in a rural city in southern Georgia served several patients on the city's employer-sponsored insurance, including the city's mayor. The city had just changed insurance providers and many of my patients experienced a rise in their prescription co-payments. Specifically, the mayor's co-payment for one medication went from roughly \$7 to \$26. When I noticed this difference, I informed the mayor that it would be cheaper if he paid for his prescription off his insurance. The mayor was fortunate to have the political wherewithal to contact the right people in charge of the city's insurance plan to complain about the change changes and the oddity that paying for the prescription off insurance was a better deal. It goes without saying that other patients do not have similar avenues to voice their concerns about their prescription drug coverage.

What happened next has become a common story. After the mayor contacted the plan, the plan consulted with their PBM who then issued a verbal warning to my pharmacy for talking to patients about their drug costs. The PBM stated we were in violation of our contract for disparaging the plan when we discussed the cost of a drug off insurance. We were told that if our pharmacy were to do so again, there would be consequences, including exclusion from PBM networks.

The common denominator in all community pharmacies' experiences with gag clauses is a strained relationship with the PBMs. When a patient comes to the pharmacy and presents insurance, the pharmacy is bound by the terms of that patient's insurance and the PBM's rules. Put simply, pharmacists do not play a role in determining a patient's financial responsibility for

prescription medications that they access through any prescription drug coverage. If a patient does not present insurance or if a patient inquires directly, however, pharmacies can tell the patient alternative means to purchase a drug. When a PBM is involved, however, communication with the patient becomes murky because pharmacies are contractually required to charge the patient what the PBM says when the prescription is processed.

I am often asked what gag clauses look like in contracts but the answer to that question is not as simple as it may seem. The expression “gag clauses” is a misnomer because what is most often being referred to are multiple contract provisions or requirements embedded in lengthy PBM provider manuals that include overly broad confidentiality requirements and non-disparagement clauses, as well as requirements that pharmacies charge insured patients what the PBM says at point of sale. Some PBMs have even included provisions that can be interpreted as prohibiting communication with news media, policy makers, and elected officials. The following is an example of one such provision:

***Contacting Sponsors or Media.*** *Provider hereby agrees (and shall cause its affiliates, employees, independent contractors, shareholders, members, officers, directors and agents to agree) that it shall not engage in any conduct or communications, including, but not limited to, contacting any media or any Sponsor and/or Sponsor’s Members or other party without the prior consent of [PBM]. Further, Provider acknowledges and agrees that any breach of this Section by Provider (or any affiliate, employee, independent contractor, shareholder, member, officer, director or agent) would cause [PBM] immediate and irreparable injury or loss that cannot be fully remedied by monetary damages. Accordingly, in the event of a breach of this Section by Provider (or any affiliate, employee, independent contractor, shareholder, member, officer, director or agent), [PBM] shall be entitled to specific performance, including immediate issuance of a*

*temporary restraining order or preliminary injunction enforcing the terms of this Agreement, and to judgment for damages (including reasonable attorneys' fees and costs) caused by the breach, and to all other legal and equitable remedies available to [PBM].*

Ultimately, these provisions have the effect of chilling a range of pharmacist communications with patients for fear of retaliation by the PBM. For this reason, the gag clause issue goes well beyond drug pricing disclosures. Further, community pharmacies like mine have very little negotiating power to strip these provisions out of our contracts.

As a solution to this problem, community pharmacies need a place to point to in the law that will allow for the free flow of information between them and their patients. NCPA strongly supports the Discussion Draft that is the focus of this hearing. The Draft is legislation to prohibit "gag clauses" in Medicare and private insurance by banning health plans from restricting a pharmacy's ability to inform a customer about the lower cost, out-of-pocket price for their prescription.

Just this summer, I was pleased to hear that the Center for Medicare and Medicaid Services (CMS) sent letters to plan sponsors in Medicare explaining that any form of gag clauses in contracts is unacceptable. In addition, twenty-five states have passed legislation prohibiting gag clauses. These actions give pharmacists the ability to point to laws and rules that prevent PBMs from restricting the free flow of information.

### **Conclusion**

In conclusion, as Congress demands increased transparency into the prescription drug marketplace, this Committee can provide a much-needed stake in the ground to allow pharmacists

to freely discuss drug costs with their patients. Providing for the free flow of this kind of information is a step in the right direction to meaningfully address drug costs for Americans. Thank you.