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House Industry, Business and Labor Committee
HB 1584 – 2/11/25 – 2:30pm
Rep. Jonathan Warrey – Chairman

Chairman Warrey and members of the House Industry, Business and Labor committee, my name is Mike Schwab, Executive Vice President of the North Dakota Pharmacists Association. We are here today in support of HB 1584.

HB 1584 looks to address a legal concern, changes to the marketplace and how can North Dakota create a better process for enforcing existing PBM laws. As discussed previously, it is not just our opinion that we should change the existing PBM law in front of us. In the very first definition (covered entity), explicitly exempting self-funded ERISA plans in the law, could preempt the entire law. I have summarized the two 8th Circuit cases below that deal with a state law when it exempts ERISA self-funded plans by reference in the law.

1ST Case - Prudential Ins. Co. of Am. v Nat'l Park Med. Ctr., Inc. 154 F.3d 812, 822-26 (8th Cir. 1998)

The court concluded, first, that if a state law contains a "reference to" ERISA plans by singling out such plans for special treatment, such as, an exemption from the law, there is an established "reference to" and therefore preempted under federal law (the law in its entirety).

2nd Case – PCMA (PBMs) v. Gerhart (Iowa) 852 f.3d at 729 (8th Cir. 2017)

The same logic from 1998 was used in this PBM case. Iowa passed some PBM laws and in the laws, they exempted self-funded ERISA plans from the law. Because Iowa had a "reference to" ERISA plans in their law, even though it was to exempt them from the law, the State of Iowa lost to the PBMs. The laws were preempted under ERISA because they had a "reference to" ERISA by explicitly exempting self-funded ERISA plans in their law. Crazy I know and I do not agree with the 8th Circuit, but that has been their position twice. The US Supreme Court has never addressed the 8th Circuit position related to directly exempting ERISA plans causes federal preemption. The 8th Circuit's

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standard for an express reference to ERISA therefore remains good law. This is why it is important to remove language that directly exempts ERISA plans.

Opinion letter by Attorney General Paxton (TX) concluding that ERISA does not preempt two recent Texas laws that regulate PBMs: (February 5, 2025)
https://www.texasattorneygeneral.gov/opinions/ken-paxton/kp-0480?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

The opinion is helpful in a number of ways: First, I think it is a well-reasoned analysis of why ERISA does not preempt the PBM laws at issue in Texas. Second, you will notice in his opinion, Paxton sights PBM laws in Texas where there is no reference to ERISA in the PBM laws. Therefore, the laws are not preempted and last, it comes from AG Paxton, a conservative heavy weight.

On page 2 – Lines 5-6

Language is added to include rebate aggregators. What is a rebate aggregator? A rebate aggregator is often owned by the PBM or affiliated with the PBM. Two of the three main rebate aggregators are located outside the United States with one being Ireland and the other in Switzerland. We feel most of the rebate model has shifted in favor of rebate aggregators. If we are asking for information on rebates, it is important to note the rebate aggregators that the Big 3 now own.

Plan Sponsor ALERT: Beware of Rebate Aggregators

FTC Expands PBM Investigation to PBM-Owned Rebate Aggregators/GPOs

Language is also added to verify how much of the rebate dollars were retained by the PBM.

Page 2 – Lines 21-22

Since this law was enacted, we have seen a lot of market changes, especially around fees pharmacies pay to PBMs. From 2010 to 2020, PBM fees charged to pharmacies increased 91,000%! That is not a typo. We would like to see price concessions that are paid to the PBM also be reported.

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According to the fiscal year 2022 budget justification (p.242) estimate sent to Congress by CMS, pharmacy DIR fees increased by 91,500 percent between 2010 and 2019. For context, a $4 gallon of milk increased by that much would cost $3,660. (NCPA).

Page 3 – Lines 5 thru 11

We would agree with changing the definition of pharmacy benefits manager as suggested to reflect the concerns raised by self-funded pools/trust. By making this change, we can avoid or lessen concerns around the entire law being preempted by ERISA and provide clarity for self-funded ERISA plans.

Page 3 – Lines 25-26

Twenty years ago, when this law was passed, the "substitution of one prescription drug for another" was really the only other PBM related law under 19-02.1, Since the passage of that law, the ND Legislative Assembly has passed a number of other PBM reforms and they are placed under 19-02.1. HB 1584 would help bring the rest of the PBM laws in 19-02.1 under enforcement of the Insurance Commissioner.

Page 4 – Lines 3-7

HB 1584 adds two more provisions dealing with PBM contracting practices. In recent years, the PBMs have started to offer "silent agreement" contracts. They basically send out a fax or email and state "if we do not hear from you in the next 14 days, the pharmacy will automatically agree to the terms and conditions." HB 1584 looks to add language that requires a signature from the pharmacy and PBM before a contract is finalized and enforceable.

HB 1584 also looks to provide the ability of a pharmacy to opt-out of a PBM contract giving a 90-day notice. We are seeing PBMs trying to lock pharmacies into multi-year contracts with no

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reasonable opt-out structure. PBMs can drop a pharmacy from the network with little to no notice, so we feel it is fair that pharmacies are given a more reasonable way to opt-out of a PBM contract. Providing a 90-day notice should be a reasonable request.

Page 5 – Last Page – Enforcement and Penalties

This section would hopefully establish not only an enforcement pathway but provide some expertise and help to the insurance commissioner's office. There are a number of states that have placed PBM enforcement with their Insurance Commissioner. Maybe I am wrong, but I assume the ND Insurance Commissioner, Board of Pharmacy and ND Health & Human Services could enter into a meaningful agreement(s) to help ease the workload and help provide additional expertise. Depending on what the agreement(s) looks like, the Board of Pharmacy could help with fielding complaints, fact finding, hearings, etc. and then turn things over to the Insurance Commissioner for final review and potential enforcement. The penalties section is kind of self-explanatory and should help with PBM compliance.

In conclusion, HB 1584 (1) cleans up language from twenty years ago, (2) removes language to help withstand legal scrutiny, (3) adds a couple of PBM reforms to address market changes, (4) provides a pathway for enforcement and (5) helps streamline enforcement efforts while attempting to help provide expertise to the Insurance Commissioner's office.

Thank you for your time and attention today. I am happy to try and answer any questions.

Respectfully Submitted,

Mike Schwab

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NDPhA - EVP