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ROLL NUMBER

DESCRIPTION

1244

2007 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HB 1244

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1244

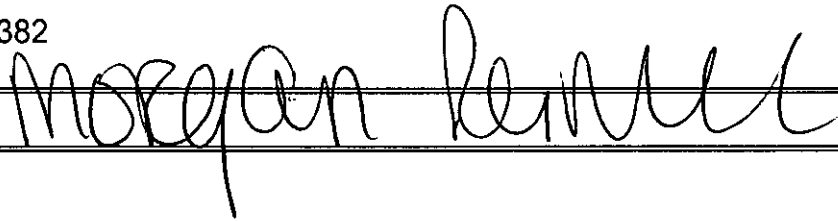
House Government and Veterans Affairs Committee

Check here for Conference Committee

Hearing Date: January 18, 2007

Recorder Job Number: 1382

Committee Clerk Signature



Minutes:

Rep. Kasper: *HB 1244 deals with Pharmacy Benefit Managers (PBM's). Briefly bills similar have been heard in our IBL Committee in the House and Senate side the last two sessions. It is somewhat a technical area and that is a part of my presentation that I'll go through when I come back. This bill deals with the ND Public Employees Retirement System (PERS). You should be receiving information that myself and our co-sponsors feel is important for disclosure and information in the PERS board so they can determine what the costs of the pharmacy part of their health plan is about. I know there is some heartburn with some of the members of the audience about the amendment. I just want to say that I am certainly open to that discussion, in fact I have an amendment that I will introduce in the next part of my testimony. I know that you will hear good information in testimony from those in the room about the merits or the demerits of this bill. I am willing to work with those who have the concerns that they do have to move forward to amend this bill. Also, to provide the PERS board what I believe is full disclosure in the area of PBM side of their health insurance plan for the state employees. After all, our health funds are all covered under that as well as some 12,000 other employees. It is funded by the citizens of ND and it is my intent on this bill to have as much information to the*

PERS board to make wise decisions on the carriers and the managements of the pharmacy part.

Rep. Dahl: The bill says that the board shall update and maintain their public records>

Rep. Kasper: That is the area of the bill that you will hear from those in the room that are concerned about it. That is also the area of the bill that I am certainly open to discussing amendments, and I think they may even have an amendment. With that, I must go but I will return.

Rep. Haas: Is there any more testimony in favor of HB 1244? Is there any opposition testimony?

Rod St. Aubyn: I think this is rather unfair that when all of a sudden this is alluded back to the personal amendments. How are you supposed to address the bill if there are no amendments? If we had the amendments it may change the testimony totally. It really puts us in a really awkward situation. I guess I ask you how we should proceed.

Rep. Haas: I think what we're going to do, and I had sort of a plan to delay this hearing. We have one bill that we can perhaps discuss briefly and take some action on. We can do that and recess the hearing until Rep. Kasper gets back. I think we are going to recess the hearing for just a few minutes and take up HB 1127.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1244

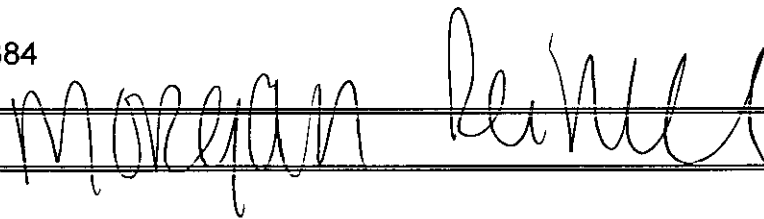
House Government and Veterans Affairs Committee

Check here for Conference Committee

Hearing Date: January 18, 2007

Recorder Job Number: 1384

Committee Clerk Signature



Minutes:

Rep. Haas: We are going to reopen the hearing on HB 1244 and hear Mr. Collins' testimony.

Sparb Collins: Testimony Attached.

Rep. Potter: The bottom of page 2 talks about spread pricing. We do get reports on rebates that they get from the PBM. It said the first one does not allow spread pricing. Will you remind me what spread pricing is?

Sparb Collins: One of the things that it meant is that the PBM has difference in the amounts of PBM reimbursement and the amounts that the pharmacy charges. There is a little bit of an administrative or care charge. There are other meanings in the term spread pricing, but it is used in different content. All PBM's will have some sort of administrative charge, and that may be charged in the contract. If you add 50 cents on a claim for example, you pay the pharmacy additional money for the difference.

Rep. Haas: Are there other questions?

Rep. Dahl: You mentioned that the PERS board may want to follow up with some additional thoughts.

Sparb Collins: The next time we are going to be meeting is in February. With the bill as amended, at this point there are three observations we have mentioned in the bill. I want to

also point out that I have an attachment; we asked our carrier, Blue Cross Blue Shield (BCBS), if they would sign an agreement with us with the language in there as it is written today. Their answer was no.

Rep. Haas: I know this is probably beyond your control but, you're working with BCBS with two PBM's, is that correct?

Sparb Collins: Just one. We have a contract with BCBS, well I should clarify that. For the main plan, it is the company called Prime Therapeutic. They knew the information. It is really them that are part of the major plan who administers our Blue Rx plan. They put together a product that replicated our plan. That is what our retiree's benefit from now. That entity then gets the federal government to make payments to the qualified drug plan. It helps to offset premiums for our retirees. So when that was first implemented our retiree's premiums went down by a total of \$3 million dollars. Prime Therapeutic is the same company that administers claims for Medicare Blue Rx.

Rep. Wolf: Why do you want to go one step further, is there problems? You mentioned in the testimony that you wanted to be able to go one step further, do you want to look at the information directly from the PBM, and why?

Sparb Collins: It's just for the board's oversight responsibility and paperwork. We want to monitor. We have someone that goes into the office on the claim and takes a look at it. We have to take one step back to look at the amount. It would just be part of the oversight responsibility. I would expect at some point, maybe in a different contract, you as a legislature might ask us well what you are doing to make sure you're getting the claims. It would just be part of that oversight.

Rep. Grande: On page 5 of your testimony, Medicare part B where you say instead we pay the plan for providing services for our members and they receive the federal subsidy. Are they

the retiree?

Sparb Collins: No, they means the prescription drug place. The way it is set up, underneath the federal procedures, there are all different plans that are qualified. They are eligible for funds to come from the federal government and offset the premiums that have been charged. You may remember that on a federal level, should each of these plans now negotiate with drug companies and get the prices that should be done. We just pay a fixed amount there and we aren't getting into an arrangement were we share that.

Rep. Haas: Is there any additional questions. At this time we are going to recess until Rep. Kasper returns.

2007 HOUSE STANDING COMMITTEE MINUTES

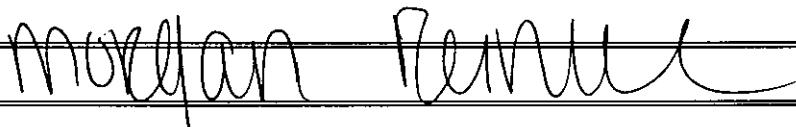
Bill/Resolution No. HB 1244

House Government and Veterans Affairs Committee

Check here for Conference Committee

Hearing Date: January 18, 2007

Recorder Job Number: 1385

Committee Clerk Signature 

Minutes:

Rep. Haas: We will reopen the hearing on HB 1244.

Rep. Kasper: *What I would like to do is give the committee a little bit of a background on the PBM's insurance industry and insurance companies. What I've learned about PBM come from the two sessions where we have dealt with PBM problems. We have our employer, our insurance company, and our PBM. I am in the insurance business. I've sold life and health insurance for many years throughout North Dakota and Minnesota, so this is my career. We have the employer who contracts with an insurance company to provide health insurance for his or her employees. What's happened over the years to deal with managing prescription drugs, a PBM industry has formed (Pharmacy Benefit Manager). The PBM has been formed in the beginning to provide records of how prescription drugs were charged and paid. So the customer, when they receive a drug, the PBM would track the drug they would charge with the insurance carrier and charge a fee. The PBM collected two types of fees, a monthly administration fee and a fee for the number of prescriptions that were filled. That was the original design of PBM's and it worked well for many years. As the industry has evolved, in my opinion, problems have resolved from it. The PBM has changed their scope on how they do business from simply a fee to a huge profit. What has been added in the PBM are rebates,*

sometimes spreads, and some other method of taking revenue out of the system and into the pockets of the PBM's. An example of a scope of a PBM is when I asked what the profit of the PBM five or six years ago was compared to now. The gentleman stated in 1999 the revenue was around \$5 billion. In 2005 it was around \$36 billion, so they have grown tremendously over that period. The big growth is in the area of their rebates and their spreads. The PBM industry has now become a multi billion dollar industry and has become a source again of huge cost to the consumers. So let's talk about the PBM. As I said the monthly transaction fee might be five dollars a month. The prescription fee might receive a \$3-\$5 a month. What a PBM does to receive a rebate, they go to the drug manufacturer where you hear the term formulary. A formulary is the amount of drugs the insurance can buy from the PBM. What happens is the PBM sets their formulary and they go to the drug manufacture and say that they plan on bringing them \$100 million of prescription drugs business for the next 12 months. For that \$100 million we want a rebate. My bill causes problems saying that the amount of rebate would have to be fully disclosed including the prescription. The PBM couldn't trade secrets then. The question is what service the PBM is providing to the employer for this \$10 million rebate. In my eyes that is an additional cost to the business. It is not fair. What my bill requires is that these rebates would have to be fully disclosed to PERS and to the public. My amendment will still require that PERS give full disclosure on the rebates. That is important because in the pricing of health insurance, if there is revenue flowing into that PBM, we as a state can share in part of the rebates which would lower costs. PBM's do negotiate with employers and share the rebates. What I'm saying is that the PERS board must get entered into the contract to be eligible for rebates. They can determine the pricing of what they pay for what they get for shares in the state funds. Let's say an employee goes to the pharmacist and buys a drug for \$80. The PBM reimburses the pharmacist for the \$80 and the employee then

would have taken his or her copy and the pharmacist will get the money. The spread is when the employer who pays the bill is charged \$100 dollars for what should have been \$80. That is common with PBM's, not all of them, but most. PBM's have said all along that employers know all about this. I can assure you that it's not true. This is a very complicated, technical thing that you are seeing this morning. Most employers who buy health insurance, at least in ND, know very little or nothing about it. Some of the larger ones are beginning to catch on now because they can hire council and consultants to help them. The contract that PERS has with our health care here now, I've been told there are no spread prices. My bill says that if there are spread prices and rebates it must be disclosed to the board so they know. The third area that is causing a lot of cost to the system is mail orders which is causing a lot of problems to local pharmacists. If a PBM and if they have a mail order service, and a customer orders his or her drugs right from the PBM through the mail order, our ND pharmacists are cut out. What PBM's do which is a very subtle thing, is they try to incent the customer to order from mail order by this mechanism. Some of you may have experienced it. If you order your prescription from your mail order PBM we will give you 90 day prescription fill where you pay one co pay and one deductible for your 90 days. If you don't order it by mail order you can only get a 30 day supply. So in 3 months you pay 3 co pays. Of course the argument from the PBM is we are going to save the customer and the consumer's money. I say maybe but we don't know because we don't know what the pricing is. So I'm saying that in the bill that the PERS board would have notification and complete information on mail order pricing. So my bill does is make PBM's have full disclosure to ND PERS board and what is going on with our PBM's in ND. This bill is not meant to target any one company, because it requires that whoever is involved with health insurance has to abide by the same thing. I do not wish to trade secrets or hurt other business with their competition. I will show you this amendment

Amendment attached.

Rep. Kasper: *My amendment says that the PERS board can get all the information they need. Last session they did pass the bill that the insurance commission has some oversight in this area and the intent of this amendment is that they will keep this oversight. The intent is to keep the commissioner involved in the process. Why is this good public policy? One of the largest costs for this legislator to address is the health insurance benefits that we provide for the public employees of the state of ND. I think that it is in the best interest of our constituents that we pay the right public policy so that the PERS board can know what the costs are and they get the best information possible. I believe we must put this in statute and get this information from the PBM.*

Rep. Schneider: Will your proposed amendment trump the full public inspection?

Rep. Kasper: Yes it will. It would replace the bill before you and the last sentences would be wiped out.

Rep. Haas: I might mention to the committee that with this amendment, it is a total substitution for what we had earlier. We probably won't act on this bill today, so I would like to recommend that you go to your century code and look at chapters 26.1-27.1. Is there any additional testimony in favor of HB 1244? Is there opposition testimony?

Rod St. Aubyn: Testimony Attached:

Rep. Froseth: If this amendment passes would that also effect the relationship between the PBM's and the manufacturer's contracts?

Rod St. Aubyn: Yes it could. We don't know. It's a situation where they might say it's not worth it, let's not bid. I can speak for our PBM and they are extremely doubtful.

Rep. Dahl: There are no other states with anything even remotely similar to this?

Rod St. Aubyn: I think the state of Maine had some stuff like this in their PBM bill and it has been to court many times. South Dakota passed a watered down version of this. You have to understand the original PBM bill was introduced. They don't want to see these networks have this kind of stuff. They could charge more themselves, and that's business. Pharmacists have an option of either accepting the terms of a contract like that or not. Instead they would rather see the PBM's do this.

Rep. Schneider: If this information is so proprietary and confidential that we can't even let the members of the board have this, how did it get to Rep. Kasper's reach?

Rod St. Aubyn: That is something where you negotiate with the group and we did agree to share information with PERS and the PERS board so they can manage their plans, but it was never intended to be released. So there was nothing to force us to do that, it was just negotiations. We agreed. Would we do it again? Based on this, I'm not sure.

Rep. Schneider: What is Blue Cross Blue Shields position on the mail order aspects?

Rod St. Aubyn: Our position is that we have always allowed the local community pharmacy the same. Fully insured products assume all risk. Self funded is paying someone to administer their plan if there is any losses; they have to come up with the money. Self funded are exempt from these regulations. The result does not apply to them. 50% of our business in ND is self funded. There are some self funded plans that do have some limitations on the mail order.

Rep. Kasper: I have the pages that Mr. Collins gave me that you said I refused to give to him. I did not refuse to give it to him; I said I would give it back to him. I also reassured him that there would be no other copies made. The only other copy I made of this was when I gave it to legislative council to draft the amendment. We have a client relationship with them, and I will make sure their copy is destroyed. Before the hearing is done, Mr. Collins will have this back

and there are no other copies. I wanted to clear that up. I do want to know how Mr. Collins came in position of these pages.

Rod St. Aubyn: I just explained that.

Rep. Kasper: You gave it to him?

Rod St. Aubyn: WE gave it to him based on negotiations with different things that we are supplying with the idea that they are not going to share it.

Rep. Kasper: So right now, under the law, there is no confidentiality provisions of what PERS receives from you? So this is an oversight on Mr. Collin's part to give it to me?

Rod St. Aubyn: that would be my assumption.

Rep. Kasper: I want to publicly state that this is certainly not done with any malicious or intent on Mr. Collins part, it was an honest mistake. I am the recipient of an honest mistake which I didn't want it if I shouldn't get it.

Rod St. Aubyn: I was just responding to the question I asked. I was told that they were going to request it back. We wanted the copy back; it does create a disclosure problem. I was told specifically that he would not disclose the information in the committee but he wasn't giving it up.

Rod St. Aubyn: This information is pertinent. This is exactly the type of information that the bill is trying to release. The other thing is that the comment was made that this is just about rebates. I reference you back again to my testimony.

Rep. Kasper: You said that your concern is that there may not be any PBM's that would bid on the ND PERS business. It is my understanding that under the current contract the Blue Cross and PERS have is that you will not allow them to separate the health insurance aspect from the PBM aspect. You have indicated that you could not do that? I am just asking for clarification.

Rod St. Aubyn: We don't control how they write their bid. We just said that we would not enter a bid that had a separate deal. If they want to do that they certainly can. We don't have any control to tell them what they are going to put in their bid and that is the same thing with any items in here. If you want to put all these stipulations in there that is your option. That way if you don't get any bids they can go back to Plan B and do something else.

Rep. Kasper: What you said is under the current contracts you would not allow PERS to have a different PBM if they wanted to because that is the current contract with the ND PERS. If in the future their bid said they wanted to separate the PBM from their health insurance you would refuse to bid?

Rod St. Aubyn: We would have to evaluate that at that time, but now we don't think we would.

Rep. Kasper: Are you aware of how many PBM's there are in the US that you alluded in your testimony to the provider networks your PBM has which is very good, but there are many numbers of PBM that have provider networks that could provide services similar to yours. You wouldn't even know because of proprietary information whether or not their provider network has better discounts than yours.

Rod St. Aubyn: No, that is confidential between the PBM, the health plan, and the provider. The provider should have to say something. This is something that is pretty common because of Part D. There is a lot of plans that have these networks in the states.

Pat Ward: I did not come here today planning to testify. I represent Medco health solutions, which is one of the 3 big PBM's in the US. I do want to make just some general comments. One of them is that a little knowledge is dangerous. Frankly, this is a very complicated contract. We have concerns. They do make a profit and that is why they are in business. This is very complicated and is not something you can learn about in a couple of minutes. I would consider this to re refer this to IBL where they already know this process.

Rep. Kasper: The way I understand the bill, we aren't getting into anything with profit with PBM's. The bill now with the amendment is to provide that PERS receives information on rebates and spreads. Not that anything changes.

Pat Ward: I did not see y our amendment until about 15 minutes ago. The amendment certainly improves the bill but from my understanding is that you are talking about arrogates of spread but not specific pricings of drugs. My concern is that if rebates have to be disclosed, it's just like the guy that is selling a car. If I know what he's buying a car for and offer it lower, there goes any competition he had. I really think that in the long run it might cost the state money.

Rep. Haas: Is there additional testimony to opposition to HB 1244?

Rep. Froseth: I would like to hear the commissioner of insurance's opinion on how this has been working.

Rep. Haas: Any other comments? If not we close HB 1244.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1244

House Government and Veterans Affairs Committee

Check here for Conference Committee

Hearing Date: January 25, 2007

Recorder Job Number: 1928

Committee Clerk Signature

Morgan Penner

Minutes:

Rep. Kasper: I move for a do not pass.

Rep. Potter: I second that.

Rep. Haas: Is there any discussion? If not we will take a roll call vote on a do not pass on HB 1244. The do not pass motion has passed with a vote of 11-0-2. Is there a volunteer to carry this bill?

Rep. Kasper: I will

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1244

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 54-52.1 of the North Dakota Century Code, relating to health insurance, pharmaceutical manufacturer, and pharmacy benefit manager records obtained by the public employees retirement system.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 54-52.1 of the North Dakota Century Code is created and enacted as follows:

Disclosure of certain health insurance contract provisions to board - Confidentiality. Notwithstanding any other provision of law, the board shall require its health plan insurer and any pharmacy benefit manager retained by the insurer or the board to disclose to the board any rebates the insurer or pharmacy benefit manager receives from a pharmaceutical manufacturer and any other information the insurer or pharmacy benefit manager produces with regard to spread pricing. Any information provided to the board relating to rebates and spread pricing is confidential and is not a public record subject to section 44-04-18 or section 6 of article XI of the Constitution of North Dakota.

Renumber accordingly

Date: 1-25-07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. "Click here to type Bill/Resolution No."

House Government and Veterans Affairs Committee

Check here for Conference Committee

Legislative Council Amendment Number HB 1244

Action Taken Do not pass

Motion Made By Rep. Kasper Seconded By Rep. Potter

Representatives	Yes	No	Representatives	Yes	No
Rep. C.B Haas Chairman	X		Rep. Bill Amerman		
Rep. Bette Grande V.P.	X		Rep. Louise Potter	X	
Rep. Randy Boehning	X		Rep. Jasper Schneider		
Rep. Stacey Dahl	X		Rep. Lisa Wolf	X	
Rep. Glen Froseth	X				
Rep. Karen Karls	X				
Rep. Jim Kasper	X				
Rep. Lisa Meier	X				
Rep. Dave Weiler	X				

Total (Yes) 11 No 0

Absent 2

Floor Assignment Rep. Kasper

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
January 25, 2007 12:58 p.m.

Module No: HR-17-1205
Carrier: Kasper
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1244: Government and Veterans Affairs Committee (Rep. Haas, Chairman)
recommends **DO NOT PASS** (11 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING).
HB 1244 was placed on the Eleventh order on the calendar.

2007 TESTIMONY

HB 1244

Testimony on HB 1244
House Government & Veterans Affairs Committee
January 18, 2007

Mr. Chairman and Committee members, for the record I am Rod St. Aubyn, representing Blue Cross Blue Shield of ND.

Passing this law is totally contrary to current laws regulating the PBM industry (HB 1332, 2005 Legislative Session).

I would reference NDCC 26.1-27.1-01 the definition of

"6. "Payment received by the pharmacy benefits manager" means the aggregate amount of the following types of payments:

- a. A rebate collected by the pharmacy benefits manager which is allocated to a covered entity;
- b. An administrative fee collected from the manufacturer in consideration of an administrative service provided by the pharmacy benefits manager to the manufacturer;
- c. A pharmacy network fee; and
- d. Any other fee or amount collected by the pharmacy benefits manager from a manufacturer or labeler for a drug switch program, formulary management program, mail service pharmacy, educational support, data sales related to a covered individual, or any other administrative function."

That section goes on to say in NDCC 26.1-27.1-06 for Examination of insurer-covered entity:

"1. During an examination of a covered entity as provided for in chapter 26.1-03, 26.1-17, or 26.1-18.1, the commissioner shall examine any contract between the covered entity and a pharmacy benefits manager and any related record to determine if the **payment received by the pharmacy benefits manager** which the covered entity received from the pharmacy benefits manager has been applied toward reducing the covered entity's rates or has been distributed to covered individuals.

2. To facilitate the examination, the covered entity shall disclose annually to the commissioner the benefits of the **payment received by the pharmacy benefits manager** received under any contract with a pharmacy benefits manager and shall describe the manner in which the **payment received by the pharmacy benefits manager** is applied toward reducing rates or is distributed to covered individuals.

3. Any information disclosed to the commissioner under this section **is considered a trade secret** under chapter 47-25.1." (emphasis added)

This bill will make this information public record. Because of contracts between the insurer and the PBM and contracts between the PBM and the drug manufacturer, proprietary agreements would make this law impossible to comply, thus resulting in preclusion of PBM's entering into contracts with NDPERS. I can't speak for other PBM's or other insurers, but I can say that if this bill passes it is extremely doubtful that BCBSND could provide PERS coverage at the conclusion of this contract period.

While this is a policy decision that you must make, please be aware of the consequences that this decision may have upon the employees of this state and political subdivisions. There is no question in my mind that if this bill passes, the cost of your health insurance plan will increase and the ability to offer a drug plan through a PBM may be very limited.

I am also including a resolution passed on January 8, 2007, by the American Legislative Exchange Council, ALEC, an organization that includes membership by many ND legislators. That resolution goes directly at this issue. They recognize that disclosure of this information will hurt the consumer. They categorically oppose "proposals that would mandate contract provisions or establish legal relationships or obligations between PBM's and their clients that require disclosure of private PBM contract terms that contain highly competitive, proprietary or trade secret information:.."

Mr. Chairman and committee members, that is exactly what this bill will do. I urge you to defeat this bill.



Resolution Opposing Government Mandated Disclosure of Proprietary, Trade Secret Information

Summary

A resolution in opposition to recent efforts by some state legislatures to mandate that Pharmacy Benefit Managers (PBMs) disclose competitive, proprietary, and trade secret information to their clients and other entities. The Federal Trade Commission (FTC) and other federal government agencies have determined that PBMs have successfully helped employers, health plans and other healthcare purchasers significantly reduce their drug costs. The FTC has determined that government-mandated disclosures of proprietary information would undermine the vigorous competition in the marketplace that has enabled PBMs to continue to control drug costs for their clients.

WHEREAS, vigorous competition leads to market innovations and increased efficiency in all economic sectors; and

WHEREAS, the cost structures which underlie market innovations are carefully guarded as proprietary trade secret information; and

WHEREAS, the contract is the fundamental basis for doing business in the United States and often contains proprietary business information; and

WHEREAS, the confidentiality and sanctity of private contracts give businesses protections and provide incentives to offer highly competitive and innovative services and contract terms; and

WHEREAS, pharmacy benefit managers (PBMs) enter into contracts to manage the pharmacy benefits of clients who are sophisticated purchasers of health care, including health plans, insurers, major employers, unions, and governmental agencies; and

WHEREAS, the Federal Trade Commission (FTC) has found competition between PBMs for contracts with sophisticated health plan sponsors to be "vigorous;" and

WHEREAS, the General Accounting Office (GAO), Congressional Budget Office (CBO) and Federal Trade Commission (FTC) have issued reports documenting how PBMs successfully have worked to hold down drug costs; and

WHEREAS, a number of proposals have been introduced in the states that would mandate by law the disclosure of private PBM contract terms that contain proprietary and competitive financial information, price negotiation strategies, and cost-saving methodologies; and

WHEREAS, the FTC has advised states that a mandate by law of the disclosure of proprietary financial information and cost structures would “hold PBMs to a standard that does not apply to other industries” and could increase costs and “undermine the ability of some consumers to obtain the pharmaceuticals and health insurance they need at a price they can afford;” and

WHEREAS, the FTC and Department of Justice (DOJ) have concluded that “[v]igorous competition in the marketplace for PBMs is more likely to arrive at an optimal level of transparency than regulation of those terms” and is “more likely to help ensure that gains from cost savings are passed on to consumers”; and

WHEREAS, the clients of PBMs are not supporting legislation that would require the mandatory disclosure of proprietary information.

NOW, THEREFORE BE IT RESOLVED, that the American Legislative Exchange Council (ALEC) opposes proposals that would mandate contract provisions or establish legal relationships or obligations between PBMs and their clients that require disclosure of private PBM contract terms that contain highly competitive, proprietary or trade secret information:

BE IT FURTHER RESOLVED that the American Legislative Exchange Council (ALEC) supports vigorous competition and the operation of free markets in the pharmaceutical benefits sector as the most effective means of guaranteeing quality service for the lowest price.

Adopted by the Commerce, Insurance and Economic Development Task Force at the States and Nation Policy Summit on December 9, 2006. Approved by the ALEC Board of Directors January 8, 2007.

TESTIMONY OF
SPARB COLLINS
ON
HOUSE BILL 1244

Mr. Chairman, members of the committee good morning. My name is Sparb Collins and I am Executive Director of the North Dakota Public Employees Retirement System. I appear before you today with some comments on HB1244 and in a neutral position. I also want to note the PERS board has not had an opportunity to review this bill, and when they do, I may have additional information to share beyond what I discuss today.

When we received the bill we referred it on to our group insurance consultant (GBS) and the Attorney General's office for review. I have attached their comments. As you will note, both highlight questions about the interpretation of the bill.

First of all let me start by giving you some background on the group insurance plan. We are a fully insured plan with BCBS. This means we contract with them for a specified level of benefits at a specified premium. As a fully insured plan they assume the financial risk if the claims exceed the premium. Unlike other fully insured plans, our contract provides that if claims come in below premiums we share 50/50 in the first \$3 million under and thereafter all of the remaining is

returned to the state. Also unlike other fully insured plans, we get interest on our account balance while the funds are held by BCBS, we get the pharmacy rebates they receive from the PBM they contract with, we have our own plan design, provider network, etc. Since we are a fully insured plan we have a single contract with the carrier, BCBS. They have other contracts in place to provide services with companies such as PBM's (pharmacy benefits managers), disease management firms, etc. If we were self insured we would likely contract separately and directly with the different companies listed above to provide us services but in return we would assume the financial risk if the claims exceeded premiums. In the 80's we were self insured and the state experienced a significant negative risk situation and the health plan could not cash flow claims, and, therefore, the plan was unable to fully pay the health care providers each month. This was followed by a premium increase the next biennium of 47% to get the plan back on track.

With this background in mind let me address HB1244 and provide some additional information about our prescription drug benefit. Concerning this bill, if it is read literally and narrowly it would mean that the carrier (BCBS) would only need to identify the total rebates they receive relating to PERS and if they do spread pricing then general information on that program. Applying this to PERS, we do get reports on the rebates BCBS receives from their PBM and BCBS has indicated to the PERS Board that it does not allow "spread pricing" in their contract with the PBM. Generally, our present procedure relating to rebates is to verify what BCBS is getting from

the PBM they hire on our account and that it is deposited in our account. The process works as follows:

1. Prime Therapeutics sends a report to BCBS showing the rebate amounts by employee group.
2. BCBS sends the rebate report to NDPERS.
3. NDPERS reconciles the rebate amount to the amount deposited in our account to the detail report from Prime Therapeutics.
4. BCBS sends a copy of their rebate wire transfer deposit amounts to NDPERS.
5. NDPERS verifies that the amount on the BCBS deposit to our account, the Prime Therapeutics detail report and the BCBS wire transfer deposit amount all agree.

In addition to the above information, PERS believes it would be appropriate to do a review of the amounts BCBS receives from the PBM by reviewing the process one step farther back. That is to review the data at the PBM level. During our renewal discussions with BCBS we indicated we would like to conduct such a procedure on the pharmacy claims and the rebates. They indicated to us that we could review any information in the possession of BCBSND, however they view some of it as confidential. They also indicated that we could not audit the PBM directly since we are not a party to that contract.

The board remains interested in reviewing this information directly to determine its accuracy and has expressed this to BCBS. The PERS Board has referred this issue to its audit committee and directed that committee to work with BCBS to resolve this impasse. The

committee is also seeking advice from consultants that have worked in this area for other states with similar types of review. As PERS has worked on this issue we have grown to understand that the complexity of this situation requires experience.

You will also note in the attached reviews that if the bill is read more broadly to mean the carrier would need to provide copies of their contract arrangements for rebates and those would be available for public inspection our consultant indicates this would likely be unacceptable to most PBM's and carriers. Further they indicate this could result in them not offering to do business with the state. The Attorney General's office indicates that under such a circumstance the board may not be able to legally contract with any provider not providing this information. Therefore, if the board receives no bids for these services based upon this provision, or one bid but it is conditioned on not providing this information, the board's decision would narrow to two options. Award the bid to the carrier responding in violation of state law, or alternatively, drop health insurance coverage and not offer this benefit which would be in violation of other provisions of the statute authorizing the board to contract for these services. Therefore, this interpretation would be of concern for PERS and we would suggest dropping the wording relating to making it public and allow us to maintain the confidentiality of the information. Secondly, consideration should be given to adding wording on how the board should handle this dilemma if an impasse should occur.

One final point is the new Medicare Part "D" benefit. We presently contract with BCBS to replicate our previous benefit but they do this with a separate contract with Medicare Blue Rx, a federally qualified prescription drug plan. We do not get any rebates from this plan. Instead we pay the plan a fixed fee to provide services to our members and they receive the federal subsidy, rebates etc. Since this is set up under federal law, we would request consideration be given to exempting this part of the plan from this provision.

Mr. Chairman, members of the committee this concludes my testimony.

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Wayne Stenehjem
ATTORNEY GENERAL

January 12, 2007

Mr. Sparb Collins
Public Employees Retirement System
PO Box 1657
Bismarck ND 58502-1657

Dear Sparb:

Thank you for your letter dated January 12, 2007, requesting that I review HB 1244. I have completed my review and have the following comments regarding the potential legal implications of such a bill.

As I understand the current situation, PERS has requested rebate information from Blue Cross/Blue Shield ("BCBS"). BCBS has agreed to let PERS view its internal audit of the terms of its agreement with its pharmacy benefits manager ("PBM") specifically as this agreement relates to the rebate provisions detailed therein. However, BCBS will not let PERS see the underlying records and data relating to its audit report with its PBM. What I understand this to mean is that BCBS does not mind if PERS sees the overall amount of the rebates that it is receiving in relation to the PERS prescription drug plans, but does not want PERS to see the specific rebates that it receives for each drug individually. BCBS considers this information to be confidential and proprietary. Under current law/contract, PERS does not have the authority to demand its own internal audit of BCBS's PBM in order to get this information.

This proposed bill would make changes to N.D.C.C. § 54-52.1-04, a section entitled "Board to Contract For Insurance." The bill requires PERS to "obtain" the subject information (records). The bill does not expressly order the carrier to provide this information. Therefore, PERS will have to release what information is currently in its possession, however, information BCBS refuses to give to PERS under current contract will likely be unavailable until such time as PERS can contract for release of such information. PERS would be expected to include, in their next contract with a Uniform Group Insurance Program carrier, the power to get information addressed by the bill. In addition, at that time, the carrier would be on notice that this information would no longer be protected by open records law.

This proposed bill fails to specify the type of information that is being sought. The bill states "...the board shall obtain and maintain for public inspection records from the carrier providing group health insurance coverage concerning any rebates the carrier receives from a pharmaceutical manufacturer and any other information the carrier produces with regard to spread pricing."

Mr. Sparb Collins
January 12, 2007
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PERS is currently in possession of certain records relating to rebates that the carrier receives in connection with prescription drugs, production of this information would appear to satisfy the proposed bill. A literal reading of this bill will only require PERS to obtain, from a carrier, overall numbers relating to the total amount of rebates generated on behalf of the PERS participants. BCBS would not likely consider this information to be confidential and proprietary. On the other hand, if intended to be read broadly, this bill could allow public inspection of much more detailed records, including rebates on individual drugs. This information would be closely guarded by BCBS and it would consider this information to be confidential and proprietary. Therefore, it is very important to determine what type of information would be publicly available under the proposed bill.

If read broadly, this bill would negatively affect the future ability of PERS to negotiate contracts for its Uniform Group Insurance Program. The result of this bill would be to make public or open, information that would be considered trade secret and confidential under North Dakota open records law. This information would not only be available to PERS, but would also be available to the general public (including any potential competitors of an existing carrier). This is not a result that would sit well with potential bidders for the State of North Dakota Uniform Group Insurance Program contract. Particularly when other companies (not dealing with the State of North Dakota) would be allowed to keep this type of information secret. This issue would likely become much bigger than just BCBS or any other carrier doing business in North Dakota. Therefore, there is a distinct possibility that under a broad reading of the proposed bill, PERS would not be able to find carriers for its Uniform Group Insurance Program.

If this proposed bill is passed into law, PERS would need to determine how to enforce it. In order for PERS to maintain its ability to provide group health insurance for state employees, PERS would need to interpret this proposed legislation narrowly. This means that PERS would request from its carriers, and provide publicly, information showing the overall amounts of rebates received by the specific carrier for prescription drugs attained by way of the pharmaceutical manufacturer.

If you need any additional information, just let me know.

Sincerely,



Aaron K. Webb
Assistant Attorney General

vkk

GALLAGHER BENEFIT SERVICES, INC. ≈ Memo

To: Sparb Collins, NDPERS

From: Bill Robinson, Denver Office

DRAFT Revision #3

Date: January 12, 2007

Re: House Bill 1244

You have asked Gallagher Benefit Services, Inc. (GBS) to review and comment on the potential impact to the NDPERS health plan from HB 1244. We provide the following in response to this request.

Overview

HB 1244 would amend the North Dakota Century Code as it relates to NDPERS in the following ways:

- The board "shall obtain and maintain for public inspection, records from the *carrier* concerning any rebates the *carrier* receives from a pharmaceutical manufacturer," and,
- The board shall "obtain and maintain for public inspection...any other information the *carrier* produces with regard to spread pricing."

Discussion

We referred HB 1244 to GBS' national Pharmacy Practice Leader, Michael E. Thomas, Pharm. D., for his review. The following summarizes his professional comments.

- The Bill's reference to "carriers" could be confusing. It is our understanding that NDPERS' current insurer, Blue Cross-Blue Shield of North Dakota (BCBSND), contracts with an independent Pharmacy Benefit Manager (PBM), Prime Therapeutics, to provide prescription drug plan administration. If this Bill is directed at insurance carriers, there is some question whether it would apply to NDPERS' current arrangement where an independent PBM administers the program. Whether this provision would also apply to NDPERS' Medicare Part D drug plan is not clear. Part D is subject to regulations developed by the federal Centers for Medicare and Medicaid Services (CMS). Whether state law can supersede federal regulations is a matter for legal counsel review.
- The rebate disclosure requirement, as written, would likely be acceptable to any PBM or insurance carrier. Most PBMs would be willing to disclose the total rebates received from a manufacturer. However, if the intent of the provision is

to require PBMs (carriers) to publicly disclose the contractual terms of their rebate arrangements for each of the manufacturer's drugs, we do not believe that this can be accomplished. PBMs consider their drug-specific rebate arrangements proprietary and very confidential. We have never seen any PBM (carrier) agree to publicly disclose this information. If NDPERS were to require public disclosure per drug rebate information, we would be concerned that no PBM (carrier) would consent to this, leaving it without such services. Alternatively, if the intent of the Bill is to have the PBMs disclose the rebate information only to NDPERS and not to the general public, this may be more palatable to the vendors. However, legal counsel would need to determine if NDPERS could, under North Dakota law, restrict disclosure of such proprietary information. Regardless of what party receives the rebate information, we suspect that PBMs will not provide drug-specific rebate data. Aggregated data by manufacturer might be provided.

- The spread pricing provision, as written, would also likely be acceptable to any PBM (carrier). Any information that a PBM "produces" about spread pricing would need to be available to public inspection. It does not prohibit spread pricing, which is common in the industry for plans that are not a true "transparency" model. Under a full "transparency" PBM model, there is usually no spread pricing. Under a non-transparency model, spread pricing is generally used to provide revenue for the PBM. If the actual intent of the provision is to have the PBM (carrier) disclose all financial arrangements of its spread pricing practices by manufacturer and drug, for the same proprietary and confidentiality reasons cited above, we do not believe that PBMs will agree to provide this information. Again, if NDPERS were to require public disclosure of detailed spread pricing information, we would be concerned that no PBM would agree to this requirement, leaving it without such services. As discussed in the bullet immediately above, if the actual legislative intent is to only have the spread pricing information disclosed to NDPERS and not the general public, then a legal determination will need to be made if this is allowed under North Dakota law. Regardless, we believe that PBMs will not provide drug-specific spread information. However, aggregated information by manufacturer might be attainable.

Our concerns with the spread pricing provision may not be currently applicable. If, as discussed, BCBSND and its PBM have agreed not to have any spread pricing for NDPERS, this indicates that they have a "transparency" type arrangement. However, if NDPERS changes PBMs in the future, our concerns about the possible impact of this provision could materialize.

Conclusion

The potential impact on NDPERS as a result of the passage of HB 1244 depends greatly on the intent of the sponsors and the resulting regulations that would describe the actual applications of the Bill. Taken literally as written, the Bill does not pose any significant problems to NDPERS. If the intent is full public disclosure of aggregated rebate and spread pricing information, we believe that PBMs would agree to comply with

such requirements. Alternatively, if the intent is for PBMs to provide this information to NDPERS only and not the general public, the issue of whether this is allowed under North Dakota law must be considered. Regardless of the recipient of the data, we think that PBMs are not currently willing to disclose to any party drug-specific rebate or spread pricing arrangements with manufacturers. To require them to do so may result in restriction to PBM access for NDPERS.

GBS is not qualified to provide legal advice. As with all matters involving interpretation of complex laws and regulations, qualified legal counsel should be consulted.

Thank you for the opportunity to review this pending legislation. Please let me know if we can provide any additional assistance.



Memorandum

TO: Sparb Collins, NDPERS

Copy: Chad Niles, Senior Vice President, Marketing
Rod St. Aubyn, Government Relations, BCBSND

FROM: Larry Brooks, BCBSND

DATE: January 16, 2007

SUBJECT: HB1244 – PBM audit provision

We have reviewed the proposed new PBM audit requirement contained in HB1244. Based on the proposed language, it is very doubtful that we would be able to respond to an RFP or sign a contract that contained the provision. The ultimate compliance with the bill will reside with the PBM's and thus may preclude our ability to provide PBM services.

If you have any questions, please let me know.