

Testimony of Dennis Pathroff in Opposition to HB 1032

Good afternoon Chairman Weisz and members of the House Human Services Committee.

My name is Dennis Pathroff, and I am an attorney with the Zuger Kirmis & Smith law firm in Bismarck. I am here today representing Prime Therapeutics, a pharmacy benefit manager ("PBM"). Prime's sole insurer that it represents in ND is BCBSND.

We oppose HB 1032 in its current form. As drafted, HB 1032 requires PBMs to disclose competitive financial data to the state board of pharmacy. See page 4, lines 12-13 of the bill. While we don't necessarily oppose the disclosure, we oppose disclosure to the board of pharmacy.

PBMs' disclosure of competitive financial data to the board of pharmacy creates an inherent conflict of interest. This is because the board of pharmacy is made up of pharmacists – direct competitors of PBMs. Pharmacists and PBMs negotiate prices that plan sponsors pay for prescription drugs at retail pharmacies; the lower the price that PBMs negotiate, the lower the profits for pharmacies. HB 1032 gives the pharmacist-controlled board of pharmacy the opportunity to weaken PBMs' competitive bargaining positions, and in turn, benefit pharmacies. As was suggested by the US Supreme Court in *North Carolina State Board of Dental Examiners v. F.T.C.*, 574 U.S. 494 (2015), there is a real danger that regulatory boards composed of market participants may pursue their own interests rather than those of the state.

To avoid the conflict of interest in providing competitive financial data to a market adversary, HB 1032 could be amended to require that the data be disclosed to the Insurance Commissioner – a neutral third party.

Attached to my testimony is a memorandum more fully explaining the problems associated with disclosing PBMs' financial data to the board of pharmacy. Please review this memorandum at your convenience.

As currently drafted, I urge a do not pass recommendation on HB 1032. Chairman Weisz and members of the committee, thank you for the opportunity to comment on HB 1032. I'd also like to mention that Prime's Principal Government Affairs Lobbyist, Alex Sommer, is in the Zoom queue and would like to testify on this bill.

I'd stand for questions.

MEMORANDUM

TO: House Human Services Committee
FROM: Dennis Pathroff contract lobbyist for Prime Therapeutics
DATE: 1/6/2021
RE: *HB 1032 (21.0006.05000) – Disclosure of Pharmacy Benefits Manager Information to the State Board of Pharmacy*

INTRODUCTION

As drafted, the Prescription Drug Cost Transparency Bill requires a pharmacy benefit manager (“PBM”) to disclose competitive financial data to the state board of pharmacy. The bill also provides the state board of pharmacy with discretion to disseminate the data. This memo analyzes the problems associated with the disclosure and recommends the data be classified as a “confidential record” and be disclosed only to the Insurance Commissioner.

DISCUSSION

A. The Disclosure Requirement

The bill provides in pertinent part as follows:

1. On or before April first of each year, a pharmacy benefits manager providing services for a health care plan shall file a report with the board. The report must contain the following information for the previous calendar year:
 - a. The aggregated rebates, fees, price protection payments, and any other payments collected from each drug manufacturer;
 - b. The aggregated dollar amount of rebates, price protection payments, fees, and any other payments collected from each drug manufacturer which were passed to health insurers;
 - c. The aggregated fees, price concessions, penalties, effective rates, and any other financial incentive collected from pharmacies which were passed to enrollees at the point of sale; and
 - d. The aggregated dollar amount of rebates, price protection payments, fees, and any other payments collected from drug manufacturers which were retained as revenue by the pharmacy benefits manager.
2. Reports submitted by pharmacy benefits managers under this section may not disclose the identity of a specific health benefit plan or enrollee, the prices charged for specific drugs or classes of drugs, or the amount of any rebates or fees provided for specific drugs or classes of drugs.
3. Within thirty days of receipt of a report under this section, the board shall provide the reported information to the commissioner in a format ready for publication on the commissioner's website. The information the board provides to the commissioner may

not disclose or tend to disclose proprietary or confidential information of any pharmacy benefit manager.¹

B. Problem of Disclosing Information to a Competitor

A PBM's disclosure of its competitive financial information to the state board of pharmacy may lead to a Federal Trade Commission ("FTC") complaint or lawsuits resulting from an anticompetitive restriction on trade. This is because the state board of pharmacy is made up of pharmacists, the direct competitors of PBMs.

Pharmacists and PBMs are competitors in two different areas of the prescription drug market.² First, pharmacists and PBMs negotiate prices that plan sponsors will pay for prescription drugs at retail pharmacies; the lower the price that PBMs negotiate, the lower the profits for pharmacies.³ Second, retail pharmacies directly compete with PBM-owned mail-order pharmacies for prescription drug sales; the more prescription drugs sold by mail-order pharmacies, the fewer drugs sold by retail pharmacies.⁴

As currently drafted, the Prescription Drug Cost Transparency Bill gives the pharmacist-controlled board of pharmacy the opportunity to exploit the disclosure of the PBMs' competitive data in ways that benefit pharmacies at the expense of PBMs. Wielding the competitive financial information disclosed by PBMs, the board could establish various rules or practices that improve pharmacists' bargaining position as they negotiate with PBMs for retail prescription drug prices.⁵ Similarly, the board could establish rules that restrict cost-saving practices that attract consumers to mail-order pharmacies and away from retail pharmacies.⁶

In a letter addressing the likely consequences of allowing a state board of pharmacy to regulate PBMs and gather competitive financial data from PBMs, the FTC opined:

Because pharmacists and PBMs have a competitive, and at times, adversarial relationship, we are concerned that giving the pharmacy board regulatory power over PBMs may create tensions and conflicts of interest for the pharmacy board. Indeed, the antitrust laws recognize that there is a real danger that regulatory boards composed of market participants may pursue their own interests rather than those of the state. . . . [A]llowing the Pharmacy Board to demand confidential business

¹ HB 1032, Pages 4-5 (emphasis added).

² Joanna Shepherd, *The Fox Guarding the Henhouse: The Regulation of Pharmacy Benefit Managers by a Market Adversary*, 9 NW J.L. & SOC. POL'Y.1 (2013), p. 9.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 10.

⁶ *Id.*

information from PBMs and to disclose it presents a significant threat to competition that could lead to higher prescription drug prices.⁷

Similarly, the FTC has opposed regulatory boards composed of market participants in other industries. In 2010, the FTC filed an administrative complaint charging the North Carolina Dental Board with violations of federal antitrust law. The FTC alleged that the board's concerted action to exclude non-dentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. At the time, the dental board consisted of six licensed dentists, one licensed hygienist, and one consumer member. In its analysis of the regulatory framework of the North Carolina Board of Dental Examiners, the FTC stated that when a state regulatory body is controlled by participants in the very industry it purports to regulate, "common sense and economic theory . . . dictate the conclusion that Board actions in this area could be self interested."⁸ In response to the FTC's administrative complaint, the North Carolina Dental Board argued for the state-action exemption from antitrust law and moved to dismiss the complaint. The state-action exemption provides immunity for (1) public actors performing state-mandated activities or (2) private actors working under the oversight of the state. Ultimately, in *North Carolina State Board of Dental Examiners v. F.T.C.*, 574 U.S. 494 (2015), the United States Supreme Court held that the North Carolina Dental Board was a sovereign entity controlled by active market participants that did not receive active supervision by the state, and therefore, the board's anticompetitive actions were not entitled to immunity from antitrust law.

As was suggested by the FTC and Supreme Court in *North Carolina Dental*, it is safe to assume that the members of a professional board that are competitors to a group they are charged with regulating may act in their own self-interest. Requiring the disclosure of a PBM's competitive and proprietary financial data to the state board of pharmacy creates an inherent conflict of interest by giving pharmacists an advantage over their natural competitors in the marketplace. Ultimately, this may lead a potential lawsuit or FTC complaint.

To avoid the inherent conflict of interest in providing financial data to a competitor, the Prescription Drug Cost Transparency Bill could simply require a PBM to disclose the data to the Insurance Commissioner – a neutral third party. Note that the Insurance Commissioner is already reviewing PBM's competitive, proprietary financial data for other reasons.⁹ Also note that in states that have adopted similar legislation, the reports go to the insurance regulatory authority.¹⁰

⁷ Letter from Susan S. DeSanti et al., Director Fed. Trade Comm'n, et. Al. to Mark Formby, Representative, Mississippi House of Representatives (Mar. 22, 2011).

⁸ Joanna Shepherd at p. 10 (quoting Opinion of the Commission, NC Bd. of Dental Examiners, Docket No.9343 (Feb. 8, 2011).

⁹ See N.D.C.C. 26.1-27.1-06 (2)-(3) ("[T]he commissioner shall examine any contract between the covered entity and a pharmacy benefits manager and any related record . . . 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 . . . [a]ny information disclosed to the commissioner under this section is considered a trade secret under chapter 47-25.1).

¹⁰ See e.g., Minnesota (Minn. Stat. § 62W.06), Texas (Tex. Ins. Code § 1369.502), Arkansas (A.C.A § 23-92-505), and Iowa (Iowa Code §510C.2).

C. Protection from Open Records Requests

Reports containing a PBM's competitive financial data should not be subject to open records requests. As currently drafted, the Prescription Drug Cost Transparency Bill gives the state board of pharmacy the discretion to disclose a PBM's competitive financial data. In pertinent part the bill provides:

4. A report received by the board is an **exempt record** as defined by 44-04-17.1.¹¹

In North Dakota "all records of a public entity are public records, open and accessible for inspection . . . [e]xcept as otherwise specifically provided by law."¹² Because the open records law does not apply "if otherwise specifically provided by law," public records need not be disclosed if they fall within a specific exemption from the open records law.¹³ There are 3 classes of public records under ND law:

- (1) Confidential – disclosure of these documents is generally prohibited;
- (2) Exempt – disclosure is discretionary; and
- (3) Subject to open records law – disclosure of these documents is required.¹⁴

As drafted, the reports containing PBMs' competitive financial data are "exempt records." Therefore, it is in the pharmacy board's discretion to disclose a PBM's competitive financial data via an open records request. As explained in Section B, *supra*, the members of the board of pharmacy are competitors of PBMs, and therefore, may act in a manner that disadvantages PBMs. Indeed, imagine a scenario where a pharmacist or drug manufacturer makes an open records request for the competitive financial data. It's not hard to imagine the board coming up with some viable reason to provide the information. If, in fact, the board does disclose PBMs' data on rebates, fees, and price protection payments via an open records request, it will reduce PBMs' bargaining power to negotiate discounts with pharmacies and rebates with drug manufacturers because both pharmacies and drug manufacturers are less likely to offer the same price terms to PBMs when they know rival pharmacies and manufacturers can learn the specifics of the arrangement. Ultimately, the open records request disclosure of the competitive data would likely lead to reduced discounts and rebates that PBMs can pass on to consumers and health plan sponsors. Therefore, the reports containing PBMs' competitive financial data should not be classified as "exempt records" but rather "confidential records" – not subject to open records requests.

CONCLUSION

Granting the state board of pharmacy control to collect PBMs' competitive financial data creates an inherent conflict of interest by giving a group of pharmacists regulatory control of their natural

¹¹ HB 1032, Page 6, line 10 (emphasis added).

¹² N.D.C.C. § 44-04-18.

¹³ See ND AG Open Records Manual, August 2019, Page 23.

¹⁴ *Id.* at 24-25 (citing § N.D.C.C. 44-04-17.1(3) and § 44-04017(5)).

competitors in the marketplace. Under the current reporting scheme in the Prescription Drug Transparency Bill, the board of pharmacy will have the opportunity to weaken PBMs' competitive positions, and in turn, benefit pharmacies. This issue could likely be resolved by requiring the data disclosure to the Insurance Commissioner and classifying the competitive financial data as "confidential records".