

**Senate Industry and Business Committee**  
**HB 1584 – 3/31/25 – 2:30pm**  
**Senator Jeff Barta – Chairman**

Chairman Barta and members of the Senate Industry and Business 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 process for enforcing existing PBM laws. In the very first definition (covered entity page 1 – lines 16-18), explicitly exempting self-funded ERISA plans in the law, could preempt the entire law. I have summarized the two 8<sup>th</sup> Circuit cases below that deal with a state law when it exempts ERISA self-funded plans by reference in the law.

**1<sup>ST</sup> Case - Prudential Ins. Co. of Am. v Nat'l Park Med. Ctr., Inc. 154 F.3d 812, 822-26 (8<sup>th</sup> 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.

**2<sup>nd</sup> Case – PCMA (PBMs) v. Gerhart (Iowa) 852 f.3d at 729 (8<sup>th</sup> 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. 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 8<sup>th</sup> Circuit, but that has been their position twice. The US Supreme Court has never addressed the 8<sup>th</sup> Circuit position related to directly exempting ERISA plans causes federal preemption. The 8<sup>th</sup> Circuit’s 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-](https://www.texasattorneygeneral.gov/opinions/ken-paxton/kp-0480?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)

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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 or exemption for ERISA plans in the PBM laws. Therefore, his opinion letter concludes the laws are not preempted. I also think his opinion is helpful because AG Paxton, is a conservative heavy weight.

### **On page 2 – Lines 17-19**

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 gather information on rebate aggregators since the Big 3 PBMs now own them. Rebate aggregators have a negative effect on the rebates that employer plans should be receiving. Through these overseas companies, PBMs are able to maximize rebate retention for the benefit of the PBM and not the plans or patients. Rebate aggregators retain a portion of the rebate amount as fees. PBMs also reclassify rebates as administrative fees through this process. It is not uncommon to see higher cost drugs with higher rebates prioritized on formularies over better value or lower costs. You will also find contract language that excludes rebates when drugs are filled by a PBM owned pharmacy, mail order or specialty mail order pharmacy.

[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 23-24**

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 other price concessions or financial payments that are paid by the pharmacy to the PBM also be reported.

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 7 - 15**

We support changing the definition of pharmacy benefits manager as amended in the House to reflect the concerns raised by self-funded pools/trust. By making this change, we can avoid or lessen concerns around ERISA preemption. This amendment was suggested by Mr. Robert Smith an expert ERISA attorney the State of ND hired to defend our PBM reform laws when the state was sued by the PBMs.

**Section 2 – Bottom of page 3 (line 23) through page 4 (line 27)**

This section provides for a formal process for licensing PBMs in North Dakota. This section also establishes the condition, terms, fees and application process to bring oversight under the ND Insurance Commissioner's office. This section was offered by the ND Insurance Commissioner's office as an amendment in the House which the House added to the bill to formalize the process for

oversight of PBMs in ND. The ND Insurance Commissioner's office is the best place for authority over PBM practices and is considered a best practice for enforcement of state PBM laws.

#### **Page 5 – Lines 2-3**

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.

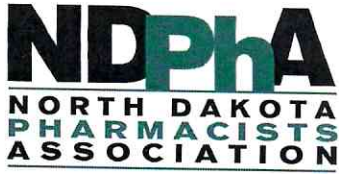
#### **Page 5 – Lines 10-14**

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 agreed upon.

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 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 6 – Last Page – Enforcement and Penalties**

This section would 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



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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 any 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 concerns, (3) adds a couple of PBM reforms laws 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,

A handwritten signature in blue ink that reads "Mike Schwab". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mike Schwab

NDPhA - EVP