

July 1, 2021

Victor Mullins, Esq.
West Virginia Offices of the Insurance Commissioner
900 Pennsylvania Ave.
Charleston, WV 25302

RE: NATIONAL COMMUNITY PHARMACISTS ASSOCIATION COMMENTS ON PROPOSED AMENDMENTS TO SERIES 114-99

Dear Mr. Mullins:

Thank you for the opportunity to provide comments on behalf of the National Community Pharmacists Association regarding the proposed amendments to series 114-99, "Pharmacy Auditing Entities and Pharmacy Benefit Managers." NCPA represents the interest of America's community pharmacists, including the owners of more than 21,000 independent community pharmacies across the United States and 227 independent community pharmacies in West Virginia. These West Virginia pharmacies filled over 13 million prescriptions last year, impacting the lives of thousands of patients in your state.

We appreciate the West Virginia Offices of the Insurance Commissioner's (WVIOC's) work to adopt regulations that will allow the agency to enforce HB 2263's provisions in a manner consistent with the Legislature's intent. To ensure the proposed rules align with the language, spirit, and intent of HB 2263, we request the following changes be added to the proposed amendments.

Pharmacy reimbursement transparency

5.9. A PBM may not reimburse a pharmacy or pharmacist for a prescription drug or pharmacy service in ~~an~~ a net amount less than the national average drug acquisition cost for the prescription drug or pharmacy service at the time the drug is administered or dispensed plus a dispensing fee of \$10.49. ~~The net amount is inclusive of all transaction fees, adjudication fees, price concessions, and all other revenue passing from the pharmacy to the PBM.~~ If the national average drug acquisition cost is not available at the time a drug is administered or dispensed, a PBM may not reimburse in ~~an~~ a net amount that is less than the wholesale acquisition cost of the drug as defined in 42 U.S.C. §1395w-3a(c)(6)(B) plus a dispensing fee of \$10.49.

HB 2263 requires that pharmacy reimbursements be tied to a benchmark of the national average drug acquisition cost (NADAC) and a dispensing fee of \$10.49, and it prohibits a PBM from engaging in any practice that imposes a point-of-sale fee or retroactive fee or derives revenue from a pharmacy or insured in connection with performing pharmacy benefits management services. By enacting HB 2263, the West Virginia Legislature intended to bring transparency to pharmacy reimbursements so that insureds and insurers know how their money is being spent. By clarifying that the reimbursement amount must not be less than NADAC plus \$10.49 net of any revenue passing from the pharmacy to the PBM, the rule would align with the Legislature's intent, and patients and insurers will have a better idea of where their healthcare dollars are going.

Similarly, we ask WVIOC to monitor permissible fees that PBMs may charge to pharmacies once these rules take effect and are implemented. We are concerned that, without proper oversight, PBMs will increase the number and amount of permissible fees. We ask that WVIOC monitor and analyze these fees to ensure that they are not used in a manner that “derives revenue from a pharmacy or insured in connection with performing pharmacy benefits management services,” in contravention of HB 2263 and the proposed rules.

ERISA applicability

1.6. Applicability. -- This rule applies to pharmacy benefit managers that perform pharmacy benefit management for covered entities, which may include health benefit plans, and persons or companies that perform pharmacy audits, as provided by the Pharmacy Audit Integrity Act in Article 51, Chapter 33, of the West Virginia Code. Certain sections of this rule may not apply to Medicare Part D plans or Medicare Advantage plans that offer prescription drug coverage as 42 U.S.C. §1395w-26(b)(3) and 42 U.S.C. §1395w-112(g) provide that standards established under 42 U.S.C. §1395w-101 et seq. and 42 U.S.C. §1395w-21 et seq. shall supersede any state law or regulation, other than state licensing laws or state laws relating to plan solvency. PBMs that perform pharmacy benefits management for Medicare Part D plans and Medicare Advantage plans in this state must be appropriately licensed. Additionally, certain sections of this rule may not be applicable to health benefit plans or health plans that are subject to the Employee Retirement Income Security Act of 1974 (ERISA) if the subject provision of the rule regulates a key facet or essential part of plan administration or design and is preempted by ERISA. However, certain sections of this rule that only affect costs, pricing or alter incentives for ERISA plans are not preempted by ERISA and are accordingly applicable. PBMs that perform pharmacy benefits management for ERISA plans in this state must be appropriately licensed, and all provisions of the rule that are not preempted by ERISA are applicable. A PBM that performs pharmacy benefit management for workers’ compensation insurers or self-insured employers must be licensed to operate in this state if it manages prescription drug coverage for “covered entities,” as that term is defined in W. Va. Code §33-51-3 and this rule.

We ask that WVIOC make this suggested change to provide the agency with more flexibility regarding ERISA preemption. In *Rutledge v. Pharmaceutical Care Management Association*, the U.S. Supreme Court ruled that ERISA does not preempt states from enforcing PBM regulations affecting drug costs and pricing. There is currently more litigation, such as *Wilke v. Pharmaceutical Care Management Association* in the Eight Circuit Court of Appeals, to further clarify a state’s authority to regulate PBMs that serve ERISA plans. It is important that the rules provide WVIOC with the ability to adapt to future judicial decisions and changes to federal law.

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I appreciate your consideration of our comments. If you have any questions about the information contained in this letter, please do not hesitate to contact me at matthew.magner@ncpa.org.

Sincerely,

A handwritten signature in cursive script that reads "Matthew Magner".

Matthew Magner, JD

Director, State Government Affairs