



# MEMORANDUM IN OPPOSITION

FOR IMMEDIATE RELEASE: MAY 16, 2011

Re: S.4664 (Maziarz)/A.809 (Gottfried) AN ACT to amend the public health law, in relation to pharmacy benefit managers.

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This bill, S.4664/A.809, mandates a fiduciary responsibility between pharmacy benefit managers (PBMs) and health plans with which they contract. The establishment of this relationship raises several concerns because it will:

- Hinder plan flexibility to negotiate PBM contracts.
- Establish an improper and often unwelcome transfer of authority.

According to PricewaterhouseCoopers, these contracting mandates in tandem with the disclosure provisions in this bill will result in a **10.2% increase in the cost of providing pharmacy benefits**. For that reason, the New York Health Plan Association (HPA) opposes the passage of this legislation.

## LIMITS HEALTH PLAN CONTRACTING OPTIONS

Many health plans contract with PBMs to help manage pharmaceutical benefits on behalf of the plan. Traditionally, PBMs serve in an administrative and advisory role to the plan – often providing advice on formulary management, claims processing and other tasks related to the proper administration of a pharmacy benefit.

Meeting the needs of consumers in the evolving health insurance marketplace requires health plan contracting flexibility. Typically a plan will seek to establish a hard price for its expected pharmaceutical purchases based on a certain benchmark (Average Wholesale Price, Average Manufacturers Price, etc.). Once a price is agreed upon, the plan is able to underwrite the entire product offering for premium pricing. This contractual arrangement prohibits a business model that places the onus on the PBM to chase price concessions from manufacturers to meet its costs. This legislation, however, effectively eliminates the ability of a plan to obtain price certainty from PBMs when it designs the benefit, which would likely cause the drug benefit to be priced conservatively high to allow the plan to guard against the uncertainty of final rebates and other future price concessions by manufacturers.

## MAKING PBMS FIDUCIARIES WILL INCREASE PHARMACY COSTS

Requiring PBMs to be fiduciaries of health plans will increase the cost of providing pharmaceutical benefits. Conferring fiduciary responsibilities on PBMs will trigger higher liability exposure that will require PBMs to insure themselves against potential lawsuits. The increased costs related to this additional risk in tandem with the disclosure provisions in this bill will be passed on to health plans and their enrollees in the form of higher prescription costs (10.2%). This is an unacceptable result in a state that reportedly has nearly 5 million individuals with no pharmacy coverage.

### **IMPROPER TRANSFER OF FIDUCIARY AUTHORITY**

Sponsors of this legislation mistakenly miscast the proper contractual relationship between plans and PBMs. According to the Center for Fiduciary Studies, a fiduciary is defined as any entity that has the legal responsibility for managing the property for the benefit of another, exercising discretionary authority or control over assets and acting in a professional capacity of trust. PBMs administer a plan benefit that health plans have designed and implemented for their members. PBMs have no discretionary control over plan assets and, while parties can negotiate such a relationship, most health plans have preferred keeping their PBMs at “arms length.” This legislation inappropriately alters this relationship by removing the plan’s discretionary authority over the pharmacy benefit and transferring it entirely to the PBM. Furthermore, in an effort to establish a single national standard for fiduciaries, ERISA specifically preempts state fiduciary mandates as embodied in this proposal. Imposing a new “fiduciary obligation” where no such obligation arises is in direct conflict with provisions in ERISA and disruptive to the administration of health plans. While the ERISA preemption issue is under legal challenge, it would seem imprudent for New York to pass this legislation.

### **COMPETITIVE PBM MARKETPLACE IS FAVORABLE FOR HEALTH PLANS AND THEIR MEMBERS**

PBMs have demonstrated the ability to deliver a high quality benefit at a competitive rate. A 2004 Federal Trade Commission (FTC) Report, entitled *Improving Health Care: A Dose of Competition*, concluded that patients who bought their pharmaceuticals through a PBM saved 47% off the retail cost of generic drugs and 18% off the retail cost of brand name drugs. That report also concluded that there is vigorous competition in the PBM marketplace with more than 60 PBMs operating in the United States today. This competition is embodied by intense open bidding processes, which has helped garner favorable contract terms for health plans, dampening sky rocketing pharmaceutical costs and preserving access to pharmaceuticals. Health plans have used their leverage in these negotiations to ensure comprehensive auditing oversight and a level of transparency that enables plans to make appropriate business decisions about the PBM they contract with for pharmacy services.

Health plan professionals currently negotiate their PBM contracts within this market. Plans are sophisticated buyers who use outside consultants and rigorous RFP bidding processes to negotiate the best deals possible for their particular needs. This legislation reduces these options by tying the hands of all parties by prohibiting contract terms that suit the interest and goals of all the entities. New York should not handicap this contracting dynamic, nor interfere with a vital marketplace that is meeting the needs of all parties. Our member health plans are not asking for this protection, do not need it and do not want it.

For all these reasons and more, the New York HPA opposes the passage of S.4664/ A.809.

*The New York Health Plan Association represents 25 managed care health plans that provide comprehensive health care services to nearly 7 million New Yorkers.*