



**THE ERISA
INDUSTRY COMMITTEE**
*Shaping benefit policies
before they shape you.*

JAMES GELFAND
President

February 2, 2023

The Honorable Maria Cantwell
Chair
Committee on Commerce,
Science, and Transportation
United States Senate
254 Russell Senate Office Building
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
Committee on the Budget
United States Senate
624 Dirksen Senate Office Building
Washington, DC 20510

Dear Chair Cantwell and Ranking Member Grassley,

On behalf of The ERISA Industry Committee (ERIC) and our large employer member companies, we write to convey our serious concerns with the “*Pharmacy Benefit Manager Transparency Act*” (*PBMTA*, S. 127). While ERIC is deeply committed to transparency, accountability, and reform of the pharmacy benefit manager (PBM) industry, **we believe the *PBMTA* contains numerous problematic provisions and should not advance through the legislative process without significant revisions.** If advanced in its current form, patients across the country will be harmed and employer-sponsored health benefits will continue to be threatened.

ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans.

ERIC has worked with a broad range of stakeholders to develop and propose reform measures to address the lack of transparency and accountability in the prescription drug supply chain, especially as it relates to PBMs. Employers that are self-insured are particularly and most severely impacted by the lack of transparency and accountability, and the “black box” that represents payments made to and through PBMs. We are pleased that you are working on PBM reform and would like to partner with you to ensure that the measures advanced will protect patients and allow their employers to ensure drug prices can be lowered as a result of transparency and accountability.

As the premier employer organization advancing PBM reform, we worked with leaders such as the former Chair and Ranking Member of the Senate Health, Education, Labor and Pensions Committee Patty Murray (D-WA) and Lamar Alexander (R-TN), to develop policy and legislative language to address transparency and accountability. We are very interested in working with you to reform the PBM industry for the benefit of employer-sponsored health plans and patients alike.

The purpose of this letter is to share with you our serious concerns about *PBMTA*, and to begin a dialogue between you and the employer community (and our substantial network of allied stakeholders) in hopes of developing legislation that all the stakeholders who support PBM reform can coalesce around. As such, please consider the following concerns:

- This legislation was drafted without the input or priorities of employers, who sponsor health benefit plans for more than 155 million Americans, and who are the primary customers of PBMs. ERIC's large employer member companies have a fiduciary responsibility under the *Employee Retirement Income Security Act* (ERISA) to protect our workers and their families – a legal responsibility not shared by medical providers, pharmacists, prescription drug manufacturers, or the PBMs themselves. Employer input is critical in reforming the PBM industry.
- Large employers operate in many states, and rely upon ERISA's national, uniform framework of rules in order to offer health care benefits to our employees and their families, no matter where they live, work, or receive medical care. While the Supreme Court's *Rutledge v. PCMA* decision did allow states to regulate certain aspects of the relationship between a PBM and a pharmacist, the Court decidedly **did not** allow states to interfere in plan design elements of self-insured ERISA plans (such as provider networks, cost-sharing or formulary design, size or length of prescription drug fill, etc.). States do not have enforcement powers under ERISA – that power solely rests with the federal government. As such, *PBMTA*'s language can be interpreted to erode the protections ERISA provides, thus threatening health benefits currently enjoyed by tens of millions of Americans.
- No doubt you are aware of the previous Administration's so-called "*Rebate Rule*," which would have placed restrictions on prescription drug manufacturer rebates (unless those rebates were passed directly to patients). In actuality, the *Rebate Rule* would have hindered employers' abilities to keep health insurance premiums low, and according to the Congressional Budget Office, the Rule would have raised the federal deficit by \$177 billion, and it would not have led to lower drug prices. Fortunately, Congress repealed the Rule to offset other spending. While *PBMTA* does not include provisions reinstating the *Rebate Rule*, it does require the Government Accountability Office (GAO) to produce a study that appears to bolster policies such as the *Rebate Rule*. Rather than attempt to mandate or pressure "point-of-sale rebates," Congress should work to end the rebate system, and achieve actual and transparent drug prices.
- While *PBMTA* does include limited language requiring transparency from PBMs, this language is wholly inadequate. In fact, the transparency called for in *PBMTA* would give an employer virtually no insight into the "black box" in which a PBM is spending the employer's (and patients') money, instead solely focusing on information related to reimbursement and payments to pharmacies. While ERIC member companies do believe reform is needed in order to protect pharmacies, transparency for the primary customers of PBMs (i.e., employer-sponsors of self-insured plans) is the most important aspect of PBM transparency and is completely missing from *PBMTA*.
- While *PBMTA* attempts to outlaw certain problematic PBM practices, it leaves out numerous, critically needed reforms that have been previously proposed on a bipartisan basis. For instance:
 - *PBMTA* does not apply ERISA fiduciary responsibility to PBMs. As such, **if *PBMTA* became law, a PBM would still not be required to act in the best interest of a group health plan and its beneficiaries.**

- PBMTA does not adequately regulate, nor does it adequately apply transparency requirements, to PBM-owned pharmacies (including retail, mail-order, and specialty pharmacies).
- *PBMTA* does not apply reasonable limitations on so-called “spread pricing.”
- *PBMTA* does not require PBMs to be transparent about secret agreements with pharmaceutical manufacturers, which may be affecting drug prices, formulary placement, and other critically important aspects of prescription drug benefits.
- Further, while *PBMTA* calls for a study on PBM practices, it fails to outlaw direct payments related to drug formulary placement. Patients deserve immediate relief from these practices. Moreover, a study is not needed and will only cause patients to suffer unnecessarily high prices and lack of access to competing products for additional years.

Because of these serious concerns we have with the language of *PBMTA*, **if the bill was to come before the U.S. Senate Committee on Commerce, Science, and Transportation for a vote, ERIC would urge members to vote NO**, unless significant revisions are made prior to a vote.

Despite our concerns, we applaud your leadership on this immensely important issue and are eager to work with you on PBM legislation that meets the objectives of key stakeholders, including employers. Together, we can design and craft legislation that can pass Congress, be signed into law by President Biden, and bring true transparency, accountability, and reform to the PBM industry – and as a result, achieve more affordable prescription drugs for patients. We look forward to working with you on these efforts.

Sincerely,



James P. Gelfand
President

CC: Cosponsors of S. 127
Members of the Commerce Committee