1550 Columbus Street
Sun Prairie, WI 53590 | 800.755-1531 phone
800.274-5525 fax

June 25, 2018

The Hon. Kevin Cahill
Chair, Health, Long-Term Care & Heath Retirement Issues Committee
National Conference of Insurance Legislators
2317 Route 34, Suite 2B
Manasquan, NJ 08736

RE: Comments on NCOIL Proposed "Pharmacy Benefits Manager Licensure and Regulation Model Act"

Dear Chair Cahill and Members of the NCOIL Health Committee:

Thank you for the opportunity to provide written comments in support of the NCOIL discussion draft Pharmacy Benefits Manager (PBM) Licensure and Regulation Model Act. The Independent Pharmacy Cooperative (IPC) is a national trade group representing the interest of nearly 2,700 independent pharmacy store owners in all 50 states. Many of our member pharmacies reside in rural, underserved and economically disadvantaged parts of the country. These community-based, small businesses continue to accept the responsibility of being health care providers that are the first point and often only source for delivering health care in their local communities. Among the services IPC provides to our member stores is legislative and regulatory advocacy that affect independent pharmacy through our Government Relations Department. In that role, I am submitting this written comment in support of the PBM Discussion Draft Model Act, with some suggestions for revisions and the inclusion of other patient protection language.

First, IPC applauds the committee's discussion draft PBM Regulation Model Act as a positive initial effort to create a uniform state model bill of needed state-based regulation of the activities of PBMs. While states iteratively have been passing PBM state laws to addressing many of the issues, this unregulated part of the health care benefits market, which is highly concentrated and lacking a competitive marketplace, needs a consensus approach to protect patients and their pharmacies from PBM abuses that have added to the high cost of

prescription benefits while unnecessarily interfering with the pharmacist-patient relationship.

IPC strongly supports the sections of the model bill to license and regulate PBM activities (Sections 4, 6, 8, 9 and 11). Our experience advocating for passage of state PBM bills is that formal state regulation of PBM and state regulatory enforcement powers in the law are crucial to having effective patient/consumer protections against PBM abuses.

We do have suggestions of changes to the following sections:

1. Under definitions (Section 3), the model should –
   a. Revise "independent pharmacy" to a clearer definition that indicates there is no ownership or legal control of the pharmacy by a PBM.
   b. Eliminate from the definition of "health plan" the exemption for self-funded and ERISA plans [(Section 3 (b) (2) (viii)] since this model is consumer protection legislation that does not impede or infringe the benefit design

   There are other definitions needed that will be address further in our comments.

2. While IPC supports the goal of the PBM Network Adequacy Section (Section 5), IPC recommends the following changes to make sure that PBM pharmacy networks fully work for the benefit of the patient and not the PBM:
   a. In the convenience of access subsection (Section 5 (a) (1) needs to be revised to include "time" in addition to "distance as a factor." This subsection also needs to include language "as determined by the Department of Insurance as promulgated by regulation" to ensure it a standard that protects the patient, not the PBMs.
   b. This section needs to include the anti-mandatory mail order (AMMO) provisions to ensure these state contracts will not force patients to use mail order for both prescriptions and durable medical equipment (DME). Both the New York and Pennsylvania state AMMO laws have been well received and are appropriate language to include in this network adequacy section of the model.

3. The model needs to fully protect a pharmacy patients right to choose its provider for both prescription and pharmacy related services so long as: a) a network pharmacy is willing to agree to a contract; b) the network includes all types of pharmacies (independent, chain, mass retailer, mail-order) and c) all pharmacies in the network receive equal terms (i.e. no incentives for mail-order pharmacies).

4. The Compensation Prohibited Practices Section (Section 6) offers important consumer protections, but it lacks one important provision – prohibitions against PBM conflicts of interests. As some states have enacted, this section needs to include a subsections that prohibits PBM's from having an ownership interest in a mail order facility and language that makes having a conflict of interest in operating a prescription benefit program a regulatory actionable offense under the model bill.

5. The Gag Clause Prohibition (Section 7) is a vital patient protection provision that ensures the pharmacists-patient relationship is strengthened by eliminating contract prohibition of pharmacist being able to discuss prescription costs options with their patient. And the prohibition against allowing pharmacists to talk to policy makers (Section 7 (d)) is an equally important protection. IPC would suggest that this subsection specifically include a sentence to include talking to state legislators about PBM legislation or regulation since many pharmacy owners fear retaliation under their contracts, including network termination, if they participate in the public policy advocacy process.

6. The Enforcement Section (Section 8) is the most important provision in this Model Act if there is to be true consumer protections in this highly non-competitive health care coverage marketplace. The one regulatory tool that this model should include is the ability of the Insurance Commissioner to order a market conduct review of PBMs. Also, a remedy under the individual state's Consumer Protection Act is commendable.

7. The MAC provisions (Section 12) have been passed by 33 states. Several important protections need to be changed in the proposed model to ensure patient access to these prescriptions:
    a. MAC updates should happen no fewer than seven (7) calendar days, rather than "in no event longer" [Section 12 (b) (2)].
    b. Ensure that MAC appeals that are upheld be applied retroactively to the date of the claim and for all similar claims [Section 12 (b) (4) (C) (i) (d)].
    c. Provide a new subsection under Section 12 to ensure against PBM's creating a loophole from the MAC provisions by creating disclosure requirements of how a PBM utilizes and determines its Generic Effective Rate ("GER") reimbursements for all its MAC drugs to all network pharmacies, including mail-order.

The following important pharmacy patient protections not included in this discussion draft model that IPC believes need to be included:

<u>Pharmacy Audit Protections</u> - Forty states have enacted pharmacy audit protections to ensure that PBM's do not recoup claims payment for "technicalities" that are not truly fraudulent claims. These bills ensure that pharmacies do not see all payment taken away for legitimate prescription that have been filled and dispenses because of paperwork violations. IPC suggests that NCOIL include an Audit section based on provisions found in existing state statutes. One additional consumer protection needed in the pharmacy audit protection section of a PBM model bill is that if a PBM recoups a prescription payment through an audit, it must remit back to the patient any out of pocket costs (co-pay, deductible, co-insurance) that is recouped.

PBM role as a Fiduciary - The underlining purpose of this PBM Model bill is to protect consumers, including ultimate payers of prescription claims. This principal requires a PBM model regulation bill to include the same protections for all consumers when it comes to prescription benefits as applies to other health care claims coverage – a fiduciary responsibility for the PBM's in how it conducts its role in prescription benefits management. The Trump Administration is considering such a regulatory requirement under ERISA.

Medicaid Managed Care Reimbursement - A key PBM prescription benefit management activity that this model bill has to address is their role as subcontractor to Medicaid Managed Care Organizations (MCO's) to managed the prescription claims for states that have moved their Medicaid prescription benefits from a State Medicaid fee-for-service benefit, designed and paid for by the State, to a benefit "carved in" to the Medicaid managed care system. Under the MCO model, the Medicaid managed care prescription reimbursement does not have to follow the newly federally-mandated transparent Medicaid fee-for-service reimbursement. That lack of payment standards has led in many instances with PBM MCO prescription payments below pharmacy drug acquisition costs. This disparity is creating access issues for Medicaid MCO beneficiaries for certain drugs. IPC recommends that the Model bill include provisions that would mandate MCO prescription benefits reimburse pharmacies at the same rate as paid for that drug under the state's Medicaid FFS system. Since many states using Medicaid managed care consider it a commercial insurance marketplace product, it is appropriate for inclusion in this model bill. For states that have implemented 100% Medicaid managed care, the adoption of the National Average Drug Acquisition Cost (NADAC) and a surveyed professional dispensing fee.

Patient Explanation of Benefit (EOB) Mandate - There should be a new patient protection section in the draft model that requires a PBM operating in the state to provide monthly to each covered patient an explanation of their pharmacy benefit for each prescription claim during that month that includes: 1) the contracted prescription price paid to the network pharmacy for each prescription dispensed; 2) the patient out-of pocket cost (co-pays, deductibles and co-insurance); and the amount charged for each prescription to the plan sponsor or health insurance company. Such basic disclosures are required to health care consumers for all health and dental insurance claims. States must provide the same standard of transparency and disclosure to pharmacy patients for state covered prescription benefits claims.

Prompt payment of claims uniform standard - While federal law requires health insurance claims be paid promptly no later than 30 days after receiving a "clean claim", individual states lack uniform standards when it comes to PBM's promptly paying pharmacy claims. Most states require 30 days, but some states allow up to 45 days for pharmacies to receive prescription claims payment. This is a unique problem for pharmacy providers since they have to stock drug inventory in order to serve patient prescription drug needs and they in many cases must pay their

wholesalers every 2 weeks in order to secure enough drug inventory to legally operate their pharmacy. The Medicare Improvement for Patients and Providers Act (P.L. 110-275a) mandates that all Medicare Part D PBM's pay pharmacies "clean" Part D claims within 14 days. The model should also mandate that all PBM's have to pay state commercial insurance prescription claims, including MCO claims, in the same timeframe as required under the MIPAA of 2008.

Continuity of Care - The model should also provide the following care continuity requirements on PBMs to ensure that patients are not harmed by PBM contract practices:

a. Require notice to prescriber, patient and pharmacy at least 90 days prior to a formulary change in a prescription contract that a current prescription drug will no longer be covered by the formulary and allow an initial 30 day fill of the non-formulary drug during the first 14 days for a new contract year. This must include MCO contracts and allow an initial 90 day fill for LTC (SNF and non-SNF) MCO patients.

b. Mandate that any prescription on a PBM formulary contract that is not currently identified by the plan sponsor as a specialty drug, must be allowed to continue to be filled by all network pharmacies at the network contract rate.

IPC is pleased to support NCOIL's effort to develop and adopt an effective and comprehensive PBM regulation bill that protects patient interests and the ability of their pharmacies to serve them, while subjecting PBMs to the same level of market regulation as others in the health care industry. Prescription benefits is an important and growing portion of the health care coverage needs of patients. The activities of PBM's in providing these benefits demands these consumer protections.

IPC looks forward to continuing to work with this NCOIL committee on the process to finalize a PBM Licensure and Regulation Model Act.

Please let me know if you have any questions or need any additional information about the issues in my written comments.

Sincerely,

Mark Kinney

Mark E. Kinney R. Ph. | SVP Government Relations
Independent Pharmacy Cooperative
608-628-7311 | mark.kinney@ipcrx.com