PSSNY
Pharmacists Society of the State of New York, Inc.

COMMENT LETTER

The National Council of Insurance Legislators
Assemblyman Kevin Cahill
Chairman, Health Subcommittee
2317 Route 34, Suite 2B
Manasquan, New Jersey 08736

10 July, 2018

RE: Comments to Pharmacy Benefits Manager Licensure and Regulation Model Act

Dear Chairman Cahill and NCOIL Health Subcommittee Members:

The National Council of Insurance Legislators' ("NCOIL") model Pharmacy Benefits Manager Licensure and Regulation Model Act is a welcome and necessary step forward in the development of policy solutions that promote the delivery of safe, cost-effective healthcare solutions to America's families.

The Pharmacists Society of the State of New York ("PSSNY") was formed in 1879, with the goal of achieving formal recognition of pharmacy as a profession. Today, PSSNY has evolved into the voice of pharmacists throughout the state with more than 20,000 licensed pharmacists residing in New York State. PSSNY agrees with the NCOIL's conclusion that PBMs must be licensed and regulated by the states. In fact, PSSNY has identified PBMs as the most disruptive actors in the delivery of healthcare to patients. PBMs are middlemen who began as health insurance claims processors but have become multi-billion-dollar corporations that we believe are responsible for raising the cost of prescription drugs for consumers, health plans, and the State of New York. PBMs raise drug prices by extracting rebates from pharmaceutical manufacturers for formulary positioning. As a result, manufacturers are forced to increase drug prices to offset rebates they anticipate paying to the PBMs. PBMs often keep a sizable portion of manufacturer rebates, which are not transparent to the payers, i.e. health plans, insurers, and large employers. This lack of transparency negatively impacts consumers who are uninsured or have high deductible policies as well as unions, employers, health plans, and any others who don't have full access to the rebates. The big three PBMs control approximately 85% of covered lives in the United States, yet they are the only member of New York's healthcare provider community that is not regulated. This must change.

While we applaud and support the intent of the model act, in particular the reference to the fact that the Act is not applicable to health benefit plans that are self-funded and specifically exempted from regulation by The Employee Retirement Income Security Act of 1974 (ERISA), PSSNY must point out a few areas of concern. First, the model act's definitions do not include a definition of "patient" or "consumer." Ultimately, legislation such as this must keep patients/consumers at the forefront, by defining them in the law and providing a mechanism for them to identify and report bad actors in the PBM arena. PSSNY also believes that the definition of a "PBM" is drafted too narrowly in the model act. Considering the mergers occurring in this space, PSSNY supports a definition of "PBM" that captures the conduct of a pharmacy benefit manager, in addition to the corporate entity that engages in the conduct.

The second issue that the model act should address is Generic Effective Rates (GER). PBMs have been applying GER to mitigate their responsibility under existing maximum allowable cost ("MAC") laws. Rather than provide

continuously updated MAC rates for their drugs, PBMs will retroactively reimburse the GER, which is AWP minus a certain percentage, resulting in lower than expected rates to pharmacies. This is becoming a common manipulation by PBMs, and must be addressed in any proposed law.

Third, the model act should consider the steps that must occur once a PBM is sanctioned. If a PBM is forced to cease operations in a state, the existing patients/customers must be provided with continuous coverage. Additionally, the PBM must be ordered to satisfy existing claims as well as technical and administrative support for patients to transition to another service. Ultimately, the sanctions levied against a PBM must not harm the patient.

Finally, PSSNY recommends that the enforcement provisions be modified to contemplate the size, sophistication, and financial resources of PBMs. As huge, multi-billion dollar corporations, PBMs can easily navigate around loosely written laws (as illustrated in the GER discussion above), and absorb minor financial penalties for non-compliance. Therefore, PSSNY recommends that the model act provide significant financial penalties for bad actors, as well as the revocation of a PBM's privilege to operate in the state if certain bad acts are committed (fraud, deceit, misrepresentation of terms, etc.).

PSSNY has worked closely with Members of the New York State Legislature to develop a bill that provides a comprehensive PBM licensing and regulatory apparatus. We ask NCOIL and fellow pharmacist associations to consider the approach that we have developed in New York. A10985 (Gottfried) / S8934 (Rivera) is an important piece of legislation that, if enacted, will rein in New York's PBMs. The comprehensive bill, which is annexed to these comments, provides for the Commissioner of the Department of Health to license, regulate, and prosecute PBMs who provide services to New Yorkers. The bill provides for the Commissioner to "establish minimum standards for pharmacy benefit management services which shall address the elimination of conflicts of interest between PBMs and health insurers, plans, and providers; and the elimination of deceptive practices, anti-competitive practices, and unfair claims practices. Importantly, the bill also allows for the revocation or suspension of a PBM's license to operate in New York if that PBM has been found to have "used fraudulent, coercive or dishonest practices." These are important bulwarks against the practices that PSSNY's members have experienced for years.

Although A10985 (Gottfried) / S8934 (Rivera) provides important measures that will improve the delivery of healthcare throughout the State of New York, PSSNY believes that it would be best practice to locate the regulations within insurance law. However, due to the unique dynamics here in New York, the bill places regulatory responsibility within the Department of Health. However, despite that feature, A10985 (Gottfried) / S8934 (Rivera), is a tremendous step forward in New York's effort to protect patients, pharmacies, and the State from the aggressive and abusive practices of PBMs.

In conclusion, PSSNY supports NCOIL's model legislation. With the proper amendments, the model act could provide important patient protections. PSSNY encourages NCOIL's legislative members to introduce robust PBM licensure in their home states to protect their constituents from the least-regulated player in the healthcare community.

Respectfully Submitted,

Kathy Febraio, CAE
Executive Director