

NATIONAL COUNCIL OF INSURANCE LEGISLATORS
HEALTH INSURANCE & LONG TERM CARE ISSUES COMMITTEE
INTERIM COMMITTEE MEETING – FEBRUARY 17, 2023
DRAFT MINUTES

The National Council of Insurance Legislators (NCOIL) Health Insurance & Long Term Care Issues Committee held an interim meeting via Zoom on Friday, February 17, 2023 at 2:00 P.M. (EST)

Delegate Steve Westfall of West Virginia, Chair of the Committee, presided.

Other members of the Committee present were:

Rep. Deborah Ferguson, DDS (AR)
Rep. Matt Lehman (IN)
Rep. Edmond Jordan (LA)
Sen. Robert Mills (LA)

Rep. Brenda Carter (MI)
Sen. Paul Utke (MN)
Sen. Bob Hackett (OH)
Rep. Carl Anderson (SC)

Other legislators present were:

Rep. Darlene Taylor (GA)
Rep. Jennifer Ladisch Douglass (IL)
Rep. Jim Gooch (KY)

Also in attendance were:

Commissioner Tom Considine, NCOIL CEO
Will Melofchik, NCOIL General Counsel
Pat Gilbert, Manager, Administration & Member Services, NCOIL Support Services, LLC

QUORUM

Upon a Motion made by Rep. Edmond Jordan (LA) and seconded by Rep. Brenda Carter (MI), the Committee voted without objection by way of a voice vote to waive the quorum requirement.

INTRODUCTORY REMARKS: CHAIR WESTFALL

Del. Steve Westfall (WV), Chair of the Committee, thanked everyone for joining the meeting and stated that before we go any further I'd just like to say how honored I am to be Chairing this Committee. Asw. Pam Hunter (NY), NCOIL Treasurer, did such a great job Chairing this Committee the past few years and I look forward to building upon her great work. The purpose of today's meeting is for the Committee to conduct some business in advance of its March meeting in San Diego so that the Committee is able to handle all of the issues on its San Diego agenda in a timely manner. This Committee has a lot of work to do over the next several months, so I asked to call this interim meeting because I wanted to make sure that we are not pressed for time and people don't feel unduly rushed.

Today, we will provide an opportunity for comment and discussion on the NCOIL Pharmacy Benefits Manager (PBM) Licensure and Regulation Model Act that is

scheduled for consideration of re-adoption in San Diego. Per NCOIL's bylaws, all NCOIL Model Acts are scheduled to be considered for re-adoption every five years. If a Model is not re-adopted, it sunsets. I note that the Model will not be voted on for re-adoption today. Rather, this will be an opportunity for comment and discussion in advance of the San Diego Meeting where the actual vote will take place. It is very unlikely that the San Diego agenda will allow time for additional discussion on the PBM Model, so we will have the entire discussion now, but simply hold the vote until March.

OPPORTUNITY FOR COMMENT/DISCUSSION ON NCOIL PBM LICENSURE AND REGULATION MODEL ACT

Del. Westfall stated that the NCOIL PBM Model was originally adopted in December of 2018 and it's hard to believe how quickly 5 years has passed. The development of the Model is a great example of how NCOIL is able to discuss a complex issue and develop model policy in a timely, efficient manner. Indeed, I think the development and adoption of that Model really marked a turning point for the organization as it was in the beginning stages of new leadership, and the organization hasn't looked back since.

Jason Rapert, COO, Managing Director, Legislative & Regulatory Affairs at NTG Consultants and former NCOIL President and sponsor of the NCOIL PBM Model, thanked the Committee for the opportunity to speak and stated that many of you present on the call today were present when we took this up and I thought I would make my comments based upon positives that I've seen from NCOIL taking up this issue and also speak to some improvements that might be made to the Model in the future. Going back to that time, I can remember calling Cmsr. Tom Considine, NCOIL CEO, when I was NCOIL President and you have to think about that time – the healthcare industry was up in arms over PBM issues and the pharmacists were struggling and every aspect of the healthcare system was struggling with how do we get some accountability because we began to see that many PBMs were underpaying independent pharmacists across the country while they were paying upcharges and even more out to their affiliate pharmacies and we began to see this disparity and the problem with all of this is that it was tough to pull back the Rx curtain which actually became a hashtag.

As we began to pull that curtain back, we began to see real disparities and in all of that vacuum of leadership I reached out to Cmsr. Considine and other leadership at NCOIL and we said we need to take a stand on this and if you remember a phrase that was often repeated during that time – doctors answer to medical boards, insurance companies answer to insurance departments, pharmacists answer to pharmacy boards but PBMs answer to nobody. And so as we looked at this and saw that many of the complaints dealing with the issue often got brought to the feet of the insurance commissioners and then to the legislators so we felt that it probably made the best sense to authorize the insurance department of each state to have the authority to regulate the PBM industry. I also believe that this Model was the strongest bipartisan piece of legislation that I ever was a part of. I saw great friends that came together, both Democrats and Republicans, at NCOIL to say we have to do something to take a stand. We never were trying to do anything that harmed PBMs per se, we just said its time for a referee to be in play. They were playing streetball with nobody holding them accountable and we just wanted everyone to have a fair and level playing field and for the insurance departments to into it and have a say. I'm not sure what the current count is but at one time I was told that nearly 40 states had filed bills based at least in part on the NCOIL PBM Model and over 200 pieces of PBM-related legislation were filed.

Another positive of the Model is that NCOIL stepped up when there was a vacuum and I will always be proud of NCOIL's leadership at that time because the issue needed a leader and we punched through that and the National Association of Insurance Commissioners (NAIC) had joined the issue as well. In fact, at that time, the NAIC invited me to speak as NCOIL President at their roundtable and some of my older colleagues at NCOIL told me that was the first time that an NCOIL president had been asked to do that and it was because of the PBM issue and I came out of that not only having the support of many of the commissioners there at the NAIC but we ended up with a lot of partners that went back to their states and began to be champions for the idea of what we were trying to do at NCOIL and that was in the face of a lot of opposition. I could say more about this but I don't want to take up any more time but I will tell you that of anything that we've ever done at NCOIL this issue affects everyone across the country and I hope that it will be readopted and in terms of what might need to be updated, I'm hearing that in some states they really need the commissioners to enforce the authority that have been given because there are problems popping up in the states across the country.

Anne Cassity of the National Community Pharmacists Association (NCPA), thanked the Committee for the opportunity to speak and stated that NCPA represents independent community pharmacies across the country. I thank the Committee for considering the re-adoption of the Model and I also want to thank the Committee for all of the hard work that was done back in 2018 when it was initially adopted and thank you Sen. Rapert for making this a priority during your tenure as President of NCOIL. Looking back at what's happened in the states since 2018, the first thing that comes to mind is that the floodgates were opened. Since then, hundreds of bills have been introduced and some were good and some weren't so good but the discussion was happening – the discussion about the impact of PBM practices on patients, employers, taxpayers, and community pharmacies. I've counted approximately 60 bills that have been passed that fall within the scope of the NCOIL Model. I give all of the credit to NCOIL as you are the standard nationwide for insurance legislation and policy. Because you are the standard it is imperative that the NCOIL PBM Model be readopted.

Finally, I urge this committee to consider updating the Model in the near future. Many things have changed since 2018 as there have been several court cases primarily the Rutledge case at the U.S. Supreme Court and the Wehbj case in the Eighth Circuit Court of Appeals that have clarified the state's authority to regulate PBMs. I urge the committee to consider strengthening the language in the drafting note in section 7 and adding more specific language under prohibited market practices. Specifically, I urge the following to be addressed: patient choice issues like steering, mandatory use of pharmacies and discriminatory copay structures; below acquisition cost reimbursements to pharmacies; reimbursements by PBMs to PBM owned pharmacies; and stronger enforcement language to guide departments of insurance or relevant regulatory body in the state. Thank you for considering readoption and I look forward to continuing to work with the committee on this and other issues and NCPA has supported this Model from the very beginning and we continue to do so.

Sandra Guckian, Vice President, State Pharmacy and Advocacy at the National Association of Chain Drug Stores (NACDS), thanked the Committee for the opportunity to speak and stated that NACDS would also like to offer our thanks to the Committee and to NCOIL for your leadership on this issue. It's very important for not only

pharmacies who are our members but most importantly it impacts patients every day and in many different ways depending upon the practices of the PBM that administers the prescription drug benefit plan. NACDS is also supportive of NCOIL re-adopting the Model but like Ms. Cassity said, there has been a lot of activity in the states on this issue since the model was adopted in 2018 and we would encourage the committee to look at and re-evaluate the model in the context of the types of activities that are ongoing in legislatures across the country to address issues such as spread pricing, claw backs, retroactive fees and many of the other issues that Ms. Cassity outlined. Also as many of you may know, some of these issues are being discussed by Congress and the Federal Trade Commission. Thank you and we appreciate the opportunity and we hope the committee will take some time to re-evaluate and make some revisions to the Model.

John Covello, Director of Gov't Relations at the Independent Pharmacy Cooperative (IPC), thanked the Committee for the opportunity to speak and stated that the IPC has also been involved with this issue since the beginning and I want to echo my colleague's comments. Something to point to that I think this committee should look at going forward is that you have a few states that have developed very comprehensive bills, and I would point to West Virginia, that deal with access to specialty drugs that are good for evaluation and looking at New York's regulations as well, they could provide guidance for states and how to flesh out on the regulation end what the departments should look at and one issue that we hope the NAIC will address is that many states are developing online complaint forms that are specific to pharmacy benefit complaints that can be used by pharmacies or patients and that's something we should be urging the NAIC to develop as a model form for the NAIC to approve so that all insurance departments would use it. Twenty six states have done PBM licensure but there are certainly other areas to look at. Also, the NCOIL Joint State-Federal Relations & International Insurance Issues Committee may want to take a look at U.S. Sen. Maria Cantwell's (WA) bill to ensure that it provides federal preemptive authority to the states under the McCarran-Ferguson Act to make sure that the standards of any federal PBM licensure bill do not supersede the states that have already taken action there. That would be an unfortunate step backwards for protecting patients and their pharmacy providers and the ultimate end payers.

Jeff Klein stated that although he represents the American Bankers Association (ABA) he is speaking today in his individual capacity to note the significant activity surrounding PBMs at the state and federal level. There was also a PBM model law in development at the NAIC and there was a 35 page NAIC white paper which has been exposed that goes beyond just licensure issues that I would encourage the Committee to read however it wishes to proceed with the Model.

Miranda Motter, Senior Vice President, State Affairs and Policy at America's Health Insurance Plans (AHIP), thanked the Committee for the opportunity to speak and stated that some of the developments that have been raised today are very narrow and as I think has been raised there is activity on the ground whether its litigation or other issues that states are working through. I would also refer the Committee to the work that's been done at the NAIC on this issue as there were updates made recently to a regulator's handbook and if there are questions about regulatory authority and how commissioners are enforcing this I think having a discussion with the insurance commissioners would be very important before any action is taken that would change the model and I hope that there would be a lot of discussion and opportunities to weigh in if there were changes made.

Jonathan Buxton, Senior Director of State Affairs at the Pharmaceutical Care Management Association (PCMA), stated that PCMA is the national association that represents PBMs and stated that we got on the call assuming that this would be a discussion about reauthorizing the Model and my question is procedural – if it's the will of this group to continue discussions on this, when and where would they occur and under what format? Reauthorizing is one thing but re-opening the model is another as that would require a lot of time and effort with a lot of different stakeholders and we encourage the committee to consider that. Mr. Buxton asked NCOIL staff to weigh in on what that process might look like going forward.

Cmsr. Considine stated that we haven't got to the legislator portion of this meeting yet but here at the office we have not heard anything from a legislator suggesting that any amendments to the model be made. We certainly expected a vibrant discussion today but we've had no indications from a legislator that there is any desire to do anything other than re-adopt the Model as-is. Del. Westfall asked if it's an option for the Committee to re-adopt the Model in March and then discuss possible amendments to the Model at the Summer or Annual Meeting. Cmsr. Considine replied yes and stated that just because a Model is re-adopted on its schedule that doesn't mean that if there's a desire from a legislator to examine it in between the 5 year schedule that can't happen whether its later this year or next year. Models aren't totally locked up during that 5 year schedule.

Rep. Deborah Ferguson, DDS (AR), NCOIL President, stated that she would just like to say how successful the PBM Model has been and thanked Sen. Rapert for his work at NCOIL and also in Arkansas where he sponsored that PBM law there. One thing that made me very happy from the Rutledge decision is that the Employee Retirement Income Security Act of 1974 (ERISA) wall might not be as impenetrable as we thought. I do hope that the Committee re-adopts the Model.

Rep. Matt Lehman (IN), NCOIL Immediate Past President, stated that I echo Rep. Ferguson's comments and stated that we are working on something now in the Indiana legislature to tap into that ERISA space and someone said we can't because that's federal territory but I said we cracked that door open with Rutledge and there are a lot of things that I think us as state legislators would agree that should be under our purview and control and they are not so hopefully this pushes us in that direction where we re-adopt the Model and then look to other similar issues to get involved with that might finally tear down that ERISA wall.

ADJOURNMENT

Hearing no further business, upon a Motion made by Rep. Lehman and seconded by Rep. Ferguson, the Committee adjourned at 2:30 p.m.