

December 10, 2010

Submitted electronically e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: 408(b)(2) Hearing on Fee Disclosures to Welfare Benefit Plans
Rooms N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Supplemental submission with respect to Hearing on Fee Disclosures to Welfare Benefit Plans Under Section 408(b)(2)

To Whom it May Concern:

The National Community Pharmacists Association wishes to thank the Department of Labor for its attention to the issue of Fee Disclosures to Welfare Benefit Plans and for holding the December 7, 2010 hearing on this issue. NCPA appreciated the opportunity to testify on this issue specifically as it relates to the provision of pharmacy benefit management services. At this point, we would simply like to highlight several issues that were raised at the hearing and offer some additional observations.

NCPA feels strongly that the proposed interim final rule should apply to contracts or arrangements involving the provision of administrative services to employee welfare benefit plan, specifically pharmacy benefit management service contracts. In addition, the term “compensation or fees” should encompass both direct and indirect forms of remuneration and specify that “compensation” does in fact include discounts received by a PBM or an affiliate with respect to the acquisition of goods or services for resale to PBM clients and any related profits. All of these factors should be considered for the purposes of evaluating the “reasonableness” of the service providers’ compensation.

The Pharmaceutical Care Management Association (PCMA) testified at the December 7 hearing that they were concerned that if such disclosures were required, these disclosures would encourage “tacit collusion” on the part of the pharmaceutical manufacturers. As NCPA testified at the hearing, the PBM transparency provisions included in federal healthcare reform (applicable to all PBMs that will serve any of the state insurance exchange plans) are accompanied by a confidentiality provision. In order to allay the fears of the PBMs, EBSA could add a similar confidentiality provision to the proposed rule that would provide an additional layer of assurance that plan sponsors will hold such disclosures in confidence.

Some large employers with the requisite amount of negotiating power have been able to demand certain measures of transparency from their PBM---and the PBMs have argued that because of these contractual arrangements, the mandatory disclosures proposed by EBSA are unnecessary. However, the smaller ERISA plans do not have the same negotiating power or knowledge base to demand the same disclosures. Also, during the course of the December 7 hearing, a representative of a very large corporation included on Panel Number Three testified to the fact that although they do require transparency of their PBM, they have found it to be extremely difficult to audit the activities of their PBM. As a result, that company would support requiring disclosures of those service providers that utilize complex fee structures like the PBMs.

For these reasons, it appears that EBSA regulation is indeed necessary in order to protect all plans regardless of size and to establish a baseline or minimal level of required PBM disclosures. It is also worth noting that the PBM industry has invested a great deal of time and money into defeating virtually all state and federal legislative and regulatory proposals that would require even a minimal level of oversight. In fact, the PBMs serving the ERISA plans have a long history of using their status or connection to an ERISA plan to evade attempts at state regulation.

In conclusion, the totality of the circumstances: the extremely concentrated PBM marketplace, the minimal amount of state and federal regulation, and the lack of any verifiable harm to the PBMs by requiring a certain degree of transparency when weighed together with the high likelihood of potential benefit to plan sponsors, clearly suggests that the proposed regulation should be applicable to service providers to welfare benefit plans, specifically to Pharmacy Benefits Management contracts. Disclosures regarding revenue sources and potential conflicts of interest will enable the plan fiduciary to confirm that the PBM is providing the service it was hired to do—to secure low drug costs on behalf of the plan. Without transparency, the plan fiduciary has no way to verify that the PBM is sharing manufacturer rebates or that the PBM is negotiating the lowest possible cost of specific drugs.

Again, thank you very much for affording us the opportunity to weigh in on this topic. As you move forward on this issue, please let us know if we can be of any further assistance.

Sincerely,

Susan Pilch, J.D.