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NATIONAL COMMUNITY PHARMACISTS ASSOCIATION

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VIA Electronic Submission to e-ORI@dol.gov

November 17, 2010

Office of Regulations and Interpretations
Employee Benefits Security Administration
United States Department of Labor
Attn: 408(b)(2) Hearing
Room S-4215
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Written Request to be Heard and Outline of Proposed Testimony on Reasonable Contracts or Arrangements for Welfare Benefit Plans Under Section 408(b)(2)—Welfare Plan Fee Disclosure of ERISA

To Whom it May Concern:

In response to the Notice of Public Hearing on Reasonable Contracts or Arrangements Under Section 408(b)(2)—Welfare Plan Fee Disclosure, published in the Federal Register on November 5, 2010, the National Community Pharmacists Association (NCPA) submits this written request to testify at the public hearing to be held on December 7, 2010.

The National Community Pharmacists Association (NCPA®) represents the interests of America's community pharmacists, including the owners of more than 23,000 independent community pharmacies, pharmacy franchises, and chains. Together they represent a $93 billion health-care marketplace, have more than 315,000 employees including 62,400 pharmacists, and dispense over 41% of all retail prescriptions.

As indicated in the Notice of Public Hearing, our testimony will last for ten minutes and we will be fully prepared to answer any questions the Department may have.

Outline of Testimony

I. (0:30 min.) Introductory Remarks

II. (6:00 min.) The proposed regulation should be applied to contracts or arrangements involving the provision of administrative services to employee welfare benefit plans, specifically Pharmacy Benefit Management (PBM) service contracts. PBMs should be required to disclose necessary information about their primary revenue sources and potential conflicts of interest in order to give plan fiduciaries the necessary tools in order to assess the reasonableness of the PBM's compensation and any potential conflicts of interest that may affect the service providers' performance.
   a. PBMs administer the pharmacy benefit for a variety of health plans (employers, managed care organizations, public sector and unions) and these entities have multiple, extremely profitable revenue streams. The "Big Three" PBMs (Medco, ExpressScripts and CVS/Caremark) manage the drug benefits for approximately 95% of Americans with Rx drug coverage and each of these companies have annual revenues exceeding $15 billion. In spite of these facts, PBMs are virtually unregulated at the state or federal level.
   b. One of the PBM's primary profit streams is derived from rebates provided by drug manufacturers for driving brand drug market share on drugs purchased on behalf of PBM clients. PBMs retain all or a very large percentage of these rebates, even though they are generated by the welfare benefit plans' pharmacy "spend." This is a clear conflict of interest of the PBM—serving as a service provider—to welfare benefit plans.
   c. Between 2004 and 2008, substantial enforcement actions against each of the major PBMs indicating fraudulent and deceptive conduct, have resulted in over $370 million in damages. These cases also shed light on some of the questionable widespread practices in the PBM industry, including the misuse of rebates, kickbacks, submission of false claims and drug switching.
   d. Many states have attempted to introduce and pass legislation to regulate PBMs in recognition of their abusive practices. Virtually across the board, the PBM industry has managed through aggressive lobbying campaigns to either defeat such proposals or to gut them by asserting that such proposals are not applicable to ERISA plans.

III. (1:00 min.) Enacted federal health care reform legislation recognizes the value of PBM transparency and will require certain disclosures of all PBMs that serve any of the state insurance exchange health plans. This federal mandate was scored by CBO as cost neutral and due to the fact that the federal legislation provides for confidentiality between the PBM and the plan sponsor, there is no risk that such data will become public information and in any way impair the PBM's ability to negotiate with drug manufacturers.

IV. (1:00 min.) Transparency will allow plan sponsors and payers, to confirm that a PBM is providing the service it was hired to do—to secure low drug costs. Without transparency, a plan sponsor has no way to verify that their PBM is sharing manufacturer rebates or that the PBM is negotiating the lowest possible costs for specific drugs.

V. (1:00 min.) Conclusion-- The term "compensation or fees" should be specific 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 and should be considered for the purposes of evaluating the reasonableness of the service providers' compensation.

We appreciate the opportunity to testify on this important proposal.

Sincerely,
Susan Pilch, J.D.
Director, Policy and Regulatory Affairs

THE VOICE OF THE COMMUNITY PHARMACIST

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