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Date: **March 21, 2023**

Bill # / Title: **Senate Bill 898 – Pharmacy Benefits Managers - Definitions of Carrier, ERISA, and Purchaser**

Committee: **Senate Finance Committee**

Position: **Letter of Information (LOI)**

The Maryland Insurance Administration (MIA) appreciates the opportunity to provide information regarding Senate Bill 898.

Senate Bill 898 amends the pharmacy benefit manager (PBM) subtitle within the Insurance Article to make the entire subtitle applicable to PBMs when providing services on behalf of self-funded plans. Currently, the subtitle as a whole applies to PBMs when providing services on behalf of a carrier. In 2021, legislation was passed to apply selected provisions of the subtitle to PBMs when acting for self-funded plans. Under Senate Bill 898, the provisions of the subtitle would now also apply to PBMs providing services to self-funded plans with respect to prohibitions on gag clauses, choice of pharmacy rights, the prohibition on a PBM reimbursing a pharmacy less than it would itself or an affiliate, pharmacy and therapeutics committee requirements, financial disclosures and reports between PBMs and purchasers, PBM audits of pharmacies, the internal review process related to reimbursements on claims, and requirements for therapeutic interchanges. Under the bill, the MIA will gain jurisdiction over PBMs providing services to self-funded plans in certain situations, and will be required to evaluate PBM compliance with the additional laws through complaint investigations and market conduct activities.

As drafted, Senate Bill 898 gives rise to a potential ERISA challenge. This is due to the elimination of the definition of "carrier" from § 15-1601, and the replacement of all references to "carrier" throughout the subtitle with the term "purchaser" which is defined to include ERISA self-funded plans. Some sections of the subtitle, specifically §§ 15-1606, 15-1628, and 15-1628.3, currently impose affirmative obligations on carriers, rather than on PBMs. By changing the references in these sections to "purchaser" (which includes ERISA self-funded plans), these sections of the law now place a direct obligation on the self-funded plan, and would likely be subject to an ERISA challenge. The MIA understands that it is not the intent of the sponsor to directly regulate the plans themselves, but to regulate the PBMs.

The MIA notes two options for avoiding this potential challenge: (1) retain the definition of "carrier" in § 15-1601, and revert references to "purchaser" in §§ 15-1606, 15-1628, and 15-1628.3 back to "carrier." Or, (2) delete references to "purchaser" in these three sections, because it is unusual for the PBM subtitle to include requirements specifically applicable to carriers, which may be more appropriately addressed in a different subtitle of Title 15. Please note that even if one of these changes is made in the bill language, and the "purchaser" references are deleted or changed back to "carrier," the law would still prohibit the PBM itself from engaging in the specified activities in these sections when acting on behalf of a self-funded plan or insured plan, even if the obligation is removed from plan directly.

Thank you for the opportunity to provide this letter of information. The MIA is available to provide additional information and assistance to the Committee.