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**TO:** The Honorable Melony Griffith, Chair and  
Members of the Senate Finance Committee

**FROM:** Office of the Attorney General  
Health Education and Advocacy Unit

**RE:** HB357 (On Crossover) – Pharmacy Benefits Managers - Definition of  
Purchaser and Alteration of Application of Law: **Support**

The Office of the Attorney General's Health Education and Advocacy Unit (HEAU) supports House Bill 357, which allows the State to apply various pharmacy benefit consumer protections (and independent pharmacy protections) to Pharmacy Benefit Managers (PBMs) in accordance with the U.S. Supreme Court decision in *Rutledge v. Pharmaceutical Care Management Association*, 1415 S. Ct. 474 (2020). In *Rutledge*, the Court ruled that the federal Employee Retirement Income Security Act (ERISA) did not preempt Arkansas's law regulating pharmacy benefit managers (PBMs), the intermediaries that administer prescription drug benefits for health plans, "merely because state regulations increase costs or alter incentives [without] forcing plans to adopt any particular scheme of substantive coverage." *Id.* at 480.

Until recently, Subtitle 16 of the Maryland Insurance Article only applied to PBMs when they were acting on behalf of a carrier, and did not apply when the PBM was acting for a self-funded plan exempt from regulation under ERISA because ERISA preempted any state action that placed a direct obligation on the plan itself. However, *Rutledge* recognized that PBMs are not health benefit plans as defined under ERISA and, thus, that the regulation of PBMs is not preempted by ERISA. *Rutledge* confirmed that this is so, even when the purchaser of PBM services is an ERISA plan, as long as the state's regulation of the PBM does not effectively regulate the ERISA plan itself. While that line has been the subject of much litigation, as a general rule this means that state

laws that direct the decisions of the ERISA plan itself, such as requiring certain benefits, benefit structures, or benefit determinations, are preempted; while state laws regulating PBMs that may also happen to impact ERISA plan costs and design structures or that might result in some lack of uniformity in plan design are not preempted.<sup>1</sup>

This legislation expands the protections the General Assembly has provided regardless of on whose behalf the PBM is acting. HB357 applies these protections without “forcing plans to adopt any particular scheme of substantive coverage.” For example, the bill would not allow a PBM to prohibit a pharmacy or pharmacist from telling consumers the retail price of a prescription drug or if a more affordable drug is available, nor require a consumer to use a specific pharmacy if the PBM has an ownership interest in the pharmacy.

Amendments made to the original bill addressed concerns raised by the Maryland Insurance Administration and we urge a favorable report from the committee for HB357.

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<sup>1</sup> See also, *Wilke v. Pharmaceutical Care Management Association*, where trade association representing PBMs brought action in North Dakota alleging that ERISA and Medicare Part D preempted ND statutes regulating PBMs. The District Court, 326 F. Supp. 3d 873, entered partial summary judgment in favor of state officials. The Association appealed. The Court of Appeals, 968 F.3d 901, *aff'd* in part, *rev'd* in part, and remanded with directions. On *writ of certiorari*, the Supreme Court vacated and remanded, 141 S. Ct. 1364, directing the lower court to reconsider its decision in light of *Rutledge*. On remand, 18 F. 4<sup>th</sup> 956, the Court of Appeals held, on the issue of ERISA preemption, that preemption did not apply to the extent that statutes did not require payment of specific benefits or otherwise have impermissible connections with an ERISA plan (rehearing and rehearing *en banc* denied, 2022 WL 419848 (Feb. 11, 2022)).