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March 19, 2021

The Honorable Nicholaus R. Kipke
212 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Kipke:

You have asked for advice concerning whether the entire PBM law can be applied to ERISA plans under the law as interpreted in the *Rutledge* case. Specifically, you have asked whether the *Rutledge* ruling applies only to issues related to reimbursement. It is my view that the *Rutledge* holding is not so limited, and that PBM laws may apply to ERISA plans so long as their application does not have the effect of dictating plan terms or effectively forcing certain options in plan structure.

In my letter of January 6, 2021, I discussed the opinion of the Supreme Court in *Rutledge v. Pharmaceutical Care Management Association*, 141 S.Ct. 474 (2020), which addressed an ERISA challenge to an Arkansas law very similar to those found in Insurance Article ("IN"), §§ 15-1628.1 and 15-1642[1] and held that the law "ha[d] neither an impermissible connection with nor reference to ERISA and [wa]s therefore not preempted." *Id*. at 478.

ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). Generally, "a state law relates to an ERISA plan if it has a connection with or reference to such a plan." *Rutledge*, 141 S.Ct at 479, citing *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001). Addressing the "connection with" portion of the test first, the Court considered ERISA's objectives "as a guide to the scope of the state law that Congress understood would survive." *Id*. at 480, citing *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc*., 519 U.S. 316, 325 (1997). The Court concluded that "ERISA is . . . primarily concerned with pre-empting laws that require providers to

[1] The Act required PBMs to tether reimbursement rates to pharmacies' acquisition costs by timely updating their MAC lists when drug wholesale prices increase. It also required that PBMs provide administrative appeal procedures for pharmacies to challenge MAC reimbursement prices that are below the pharmacies' acquisition costs, and barred them from paying less than the acquisition cost if the pharmacy could not have acquired the drug at a lower price from its typical wholesaler. The Act further permitted a pharmacy to decline to sell a drug to a beneficiary if the relevant PBM will reimburse the pharmacy at less than its acquisition cost. *Id*. at 479.

structure benefit plans in particular ways, such as by requiring payment of specific benefits, or by binding plan administrators to specific rules for determining beneficiary status,." *Id*. The Court further stated that a "state law may also be subject to preemption if "acute, albeit indirect, economic effects of the state law force an ERISA plan to adopt a certain scheme of substantive coverage." *Id*. In summary, the Court stated that "ERISA does not pre-empt state rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage." This language does not limit this conclusion to regulations relating to reimbursement, but would include any regulation that might increase costs or alter incentives but would fall short of forcing plans to adopt any particular scheme of substantive coverage. The *Rutledge* Court found that the effect of the Arkansas law was not "so acute that it will effectively dictate plan choices," and thus found that it did not have an impermissible connection with an ERISA plan. *Id*. at 481.

Turning to the "refers to" branch of the test the Court stated that a law refers to ERISA plans if it "acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation." *Id*. at 481, citing *Gobeille v. Liberty Mut. Ins. Co.*, 577 U. S. 312, 319-320 (2016). It held that the Arkansas law did not refer to ERISA plans because it applied to PBMs whether or not they manage an ERISA plan, and did not directly regulate health benefit plans at all.

Maryland laws regulate a number of aspects of the interactions between a PBM and a contracted pharmacy, but none address the structure of plans or place requirements or prohibitions on the structure of any plan. Nor does it appear that any of the provisions would have the effect of forcing a PBM to structure their plans in a particular way. In addition, like the Arkansas law, the provisions of the bill apply to PBMs whether or not they are ERISA plans and do not directly regulate health benefit plans. For these reasons it is my view that the current provisions of Title 15, Subtitle 16 that House Bill 601 would make applicable to PBMs that do manage ERISA plans would not be preempted. It is possible, however, that some provisions would have some effect on plan structure of which I am not aware.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

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