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February 10, 2021

To: The Honorable Shane E. Pendergrass  
Chair, Health and Government Operations Committee

From: The Office of the Attorney General's Health Education and Advocacy Unit

Re: House Bill 601 (Pharmacy Benefits Managers - Definition of Purchaser and ERISA): Support with Amendment

The Office of the Attorney General's Health Education and Advocacy Unit (HEAU) supports House Bill 601 which would repeal the current exclusion of ERISA plans from the definition of the term "purchaser" in Maryland's registration and regulatory scheme regarding pharmacy benefits managers (PBMs). We are also submitting friendly amendments to clarify that all health benefit plans, including self-funded plans, are expressly included in the definition of purchasers in Title 15, Subtitle 16 of the Insurance Article once the exclusion is repealed.

Maryland is one of many states that have enacted legislation in recent years to curb abusive prescription drug reimbursement practices by PBMs, who make money on the spread between the rates at which they reimburse pharmacies and the drug prices they charge health plans. The Pharmaceutical Care Management Association (PCMA), a PBM trade association, launched litigation across the country to invalidate these state laws intended to address escalating prescription drug prices. PCMA contended that state regulation of PBMs generally, and state drug-reimbursement regulations specifically, were categorically preempted by ERISA. Maryland's current PBM law was not challenged by PCMA, presumably because the law does not apply to health benefit plans subject to ERISA. Md. Code Ann., Ins. § 15-1601(i).

PCMA did challenge an Arkansas law requiring a PBM to reimburse pharmacies for prescription drugs at a rate equal to or higher than the pharmacy's acquisition cost. The PCMA litigation ended unfavorably for PBMs when the Supreme Court recently

ruled 8-0 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.” *Rutledge v. Pharmaceutical Care Management Association*, 592 U.S. \_\_\_, 141 S.Ct. 474 (2020). The Court concluded the Arkansas law is “merely a form of cost regulation” without an impermissible connection to an ERISA plan because the law would not effectively dictate plan choices. *Id.* at 481. In addition, because the law did not act “immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law’s operation,” the Court concluded the law did not impermissibly “refer to” ERISA and upheld the law. *Id.*

We urge the committee to update Maryland’s PBM law to give the fullest possible force to the ruling in *Rutledge v. Pharmaceutical Care Management Association*, and further urge a favorable report, with amendments.

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