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STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION

March 15, 2022

To: The Honorable Delores G. Kelley
Chair, Finance Committee

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

Re: Senate Bill 690 (Pharmacy Benefits Managers - Definition of Carrier, ERISA, and Purchaser): Support

The Office of the Attorney General's Health Education and Advocacy Unit (HEAU) supports Senate Bill 690, which removes carve outs for ERISA plans, allowing previously enacted protections to help more consumers. This bill provides that Maryland's Pharmacy Benefits Manager (PBM) regulatory scheme applies when a PBM contracts with a health benefit plan, including an ERISA plan, in keeping with the conclusions in the Report of the Maryland Insurance Administration *on Rutledge v. Pharmaceutical Care Management Association* and its impact on Title 15, Subtitle 16 of the Maryland Insurance Article issued on January 5, 2022:

Rutledge recognizes 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 impact ERISA plan costs and design structures or that might result in some lack of uniformity in plan design are not preempted.

Applying that standard to Maryland law, **it is the view of the MIA that should the legislature determine to apply additional provisions of Title 15, Subtitle 16 to PMBs when providing services to an ERISA plan, ERISA would not preempt the MIA’s enforcement of those laws in that context.** This view is informed in part by the recent opinion of the U.S. Court of Appeals for the Eighth Circuit in *Pharmaceutical Care Management Assoc. v. Wehbi*, No. 18-2926 (8th Cir. Nov. 17, 2021) (“*Wehbi*”), the first case applying the *Rutledge* decision. On remand from the U.S. Supreme Court following *Rutledge*, the Eighth Circuit in *Wehbi* found that North Dakota laws broadly regulating PBMs were not preempted by ERISA. While not binding on Maryland (which is in the Fourth Circuit), the reasoning of the Eighth Circuit is persuasive and presents a logical application of *Rutledge* and prior Supreme Court jurisprudence relating to ERISA preemption to legislative provisions similar to those in force in Maryland respecting PBMs.

(Emphasis added).

We concur with the MIA’s conclusions and urge a favorable report from the committee.

cc: Senator Ready, Sponsor