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DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION

In Opposition to L.D. 1938

"An Act To Prohibit Discriminatory Practices Related to the 340B Drug Pricing Program"

Presented by Senator Claxton

Before the Joint Standing Committee on Health Coverage, Insurance & Financial Services

February 15th, 2022 at 10:00 a.m.

Senator Sanborn, Representative Tepler, and members of the Committee, I am Senior Staff Attorney for the Bureau of Insurance, Ben Yardley. I am here today to testify in opposition to L.D. 1938.

This bill would amend Title 22 by adding a subchapter to the Prescription Drug Access chapter. The bill would prohibit pharmacy benefit managers (PBMs) as defined by 24-A M.R.S. § 4347(17) and payors from various acts in connection with the federal drug pricing program operated under Section 340B of the Public Health Service Act and also require them to make certain disclosures to patients.

We appreciate the bill's intent of taking measures to reduce prescription drug prices in Maine. However, we are very concerned about the constitutionality of the bill. Similar legislation was enacted in Arkansas in 2021, as the 340B Drug

Pricing Nondiscrimination Act, at Ark. Code § 23-92-601. In September 2021, Pharmaceutical Research and Manufacturers of America (PhRMA), sued the Arkansas Insurance Department which – as the Bureau would be under this bill – was charged with the law's enforcement. In the U.S. District Court complaint against Arkansas, PhRMA argues that that federal law preempts the Arkansas statute, and that it violates the Commerce Clause by regulating transactions that have nothing to do with the state.

We have technical concerns with the bill:

- It prohibits PBMs and payors from requiring or "coercing" patients to use mail-order pharmacies, (or even from allowing patients to use mail order pharmacies without a signed waiver of the patient's rights to use brick-and mortar pharmacies) but does not define "coercion."
- PBMs and payors must inform all patients of their right to use mail-order pharmacies, whether or not they have any relationship with the patient. Even if a coverage relationship trigger is implied, the bill does not say when or how often the notice must be given, or whether a carrier and its contracted PBM must both deliver duplicate notices to the same patients.
- The bill does not define "payors." It is unclear what constitutes "discriminatory" contracting that "relates to" one of the five topics enumerated in proposed section 2699-A 2(E)(1) through (5).
- Proposed section 2699-A(2)(D) requires all payors to allow patients to use any pharmacy provider the patient chooses whether or not the provider is in the insurer's or PBM's provider network.

- Although the bill would not apply to MaineCare and self-insured government employee plans, it does not exclude private self-insured plans specifically. If the bill is meant to apply to them, this would raise ERISA preemption concerns.
- Although the Bureau licenses PBMs, we do not administer anything related to the 340B pricing program, and this bill would require us to enact rules regarding a federal program to which we have no connection.
- The bill would impose prohibitions on manufacturers and pharmacies. The Bureau does not regulate them, and we would have no authority to enforce their compliance.

Thank you, I would be glad to answer any questions now or at the work session.