Why Oregon Needs to Regulate PBMs

Pharmacy Benefit Managers (PBMs) administer the prescription drug benefit for nearly every public and private health plan…controlling the pharmacy benefits of more than 253 million Americans. Since their origination decades ago as flat-fee-based drug claim processors, PBMs have evolved into behemoth corporations (just three PBMs now control 78% of prescription drug benefit transactions in the U.S.) that affect nearly all aspects of the prescription drug marketplace, including:

- Determining which drugs are covered on the formulary and setting copay amounts.
- Contracting to set pharmacy networks.
- Negotiating discounts and rebates with drug manufacturers.
- Processing and paying prescription drug claims.

While the majority of the prescription drug supply chain is highly regulated, pharmacy benefit managers operate with little to no state or federal oversight. Oregon and many other states have enacted regulation of one type or another, but those laws are not always effectively enforced. While PBMs claim to keep drug costs low, there is mounting evidence many PBM practices are anti-competitive and ultimately drive up health care costs for consumers and plan sponsors while reducing payments to pharmacies. Since 1987, total spending on prescription drugs in the U.S. has increased 1,010 percent from $26.8 billion to $297.6 billion. Overall price inflation in the U.S. during that same period only grew 125.9 percent.

Lack of oversight is just one of the issues associated with PBMs. Others include:
Restrictions on Delivery – PBMs encourage plan sponsors to use mail order and specialty pharmacies which are often owned by the PBM. PBMs write contracts that sometimes restrict the community pharmacy from mailing prescriptions to patients – "snowbirds," for instance – and send warning letters to pharmacies that provide this service.
MACs – There is no transparency into this PBM reimbursement benchmark, known as maximum allowable cost, which is used to determine pharmacy reimbursement for most generic drugs. MAC rates change constantly without notice to pharmacies. MAC-based reimbursement is at times below cost or fails to keep up with price spikes or inflation. Community pharmacies need insight into the basis for MAC reimbursement rates, certainty that they are updated to reflect real-world prices, and an effective appeal process to contest below-cost payments.

Retaliation – Due to the strict nature of PBM contracts, pharmacists and pharmacy owners often fear retaliation for exposing questionable PBM practices or advocating for PBM legislation and regulation. For example, PBMs may exclude a pharmacy from a limited (or "preferred") network or terminate or decline to renew a contract with a pharmacy. These contracts also have "gag clauses which prevent pharmacists from telling consumers when they could save money on prescriptions by paying cash other rather than using their health insurance.
Spread Pricing – PBMs make money on what's called the "spread." That's the practice of reimbursing the pharmacy for one amount for a prescription, charging the plan sponsor a higher price for the same drug, and pocketing the difference since plan sponsors don't know exactly how much more they are being billed for a drug than the pharmacy was reimbursed for it.
Rebates – PBMs negotiate rebates directly with drug manufacturers. These rebates are often based upon preferred placement on a formulary tier or on utilization of the drug. Sometimes that means eliminating a less expensive, comparable medication from the formulary. In theory, these rebates are passed through to plan sponsors, or employers and consumers, lowering the cost of drugs. However, there is growing skepticism regarding whether these rebates are being passed along to customers. Today roughly a third of the net price paid for medications is attributable to those rebates. In other words, a consumer's prescription may cost a good third more than it should due to rebates alone.
Conflict of Interest – PBMs own mail order pharmacies and mail order specialty pharmacies that directly compete with retail pharmacies. They determine payment rates for competing retail pharmacies and their own mail order pharmacies – an inherent conflict of interest.
Direct and Indirect Remuneration – DIR is the latest layer in an increasingly tangled web of payments connecting the Centers for Medicare & Medicaid Services (CMS), Medicare Part D plans, pharmacy benefits managers (PBMs) and independent community pharmacies. Pharmacy price concessions or "DIR fees" are "backdoor fees, chargebacks or other recoupments imposed by PBMs on pharmacy providers after a drug claim is submitted, adjudicated, and even paid out to a pharmacy provider.

The Oregon State Pharmacy Association and the Oregon Society of Health-System Pharmacists are asking the Oregon Legislature to approve legislation in 2019 that would:

1) Prohibit PBMs from requiring an enrolled patient to fill or refill prescriptions at a mail order pharmacy and allow network pharmacies to mail, ship or deliver prescription drugs to patients.
2) Prohibit PBMs from imposing unreasonable requirements with respect to specialty pharmacies and to not limit the filling of a drug to a specialty pharmacy unless it meets the criteria to be defined as a specialty drug. Cost would no longer be the criteria for limiting a drug to a specialty pharmacy. Also, for accreditation purposes, PBMs may require a pharmacy to be accredited as a specialty pharmacy by one, but not more than one, nationally recognized accrediting body.
3) Amends HB 2123 which has never been fully implemented. Approved in 2013, HB 2123 established requirements providing clarity to pharmacies with regard to how MAC (Maximum Allowable Cost) pricing is determined and updated and created an appeals process in which a dispensing provider can contest a listed MAC price. After several

legislative efforts to provide the Department of Consumer and Business Services the enforcement powers, the Legislature approved HB 2338 in 2017. It provided DCBS with oversight and enforcement tools to help ensure compliance. The provisions included critical definitions for implementation of HB 2123 and the process for appealing a MAC pricing reimbursement. While the DCBS hearing officer reported that these provisions were clearly within the Agency's statutory authority and consistent with the legislative intent, they were not adopted. The amendments being proposed will address those provisions which strengthen Oregon's PBM registration law and ensures a fair and transparent medication delivery marketplace.

4) Prohibit PBM from "charging or holding a pharmacist or pharmacy responsible for a fee relating to the adjudication of a claim; recouping claims from a pharmacy in connection with claims for which the pharmacy has already been paid without first complying with the requirements." Pharmacy DIR fees include several types of fee arrangements such as network access fees, administrative fees, or "pay-to-play" fees between health plans or PBMs and pharmacies. These fees can be substantial enough that pharmacies may lose money dispensing a prescription. We encourage the committee to improve transparency and predictability, so pharmacies can anticipate the net reimbursement for a given prescription and look at expanding avenues for pharmacies to appeal pharmacy DIR fees.