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Via Federal eRulemaking Portal at www.regulations.gov

Secretary Lori Chavez-DeRemer
Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: Improving Transparency Into Pharmacy Benefit Manager Fee Disclosure [RIN 1210-AB37]

Dear Secretary Chavez-DeRemer:

The undersigned bipartisan group of state attorneys general submit this comment letter in support of the proposed rulemaking by the U.S. Department of Labor entitled "Improving Transparency into Pharmacy Benefit Manager Fee Disclosure," and promulgated pursuant to the Department's authority under the Employee Retirement Income Security Act of 1974 (ERISA) governing self-funded employer health plans. This proposed rule represents an important step toward increasing transparency in the business practices of pharmacy benefit managers (PBMs). PBMs serve as third-party administrators of prescription drug benefits for almost every American who receives healthcare through health plans offered by self-insured employers, state employee health plans, Medicare Part D plans, Medicaid managed care, and commercial health plans. The state attorneys general offer comments on, and a proposed clarification of, the rule as requested by the Department.[1]

[1] Improving Transparency Into Pharmacy Benefit Manager Fee Disclosure, 91 Fed. Reg. 4348, 4421 (Jan. 30, 2026).

I. Background on PBMs

Over the past several decades, PBMs have significantly expanded their role in the healthcare system.[2] In addition to processing prescription drug claims, PBMs negotiate pharmacy reimbursement amounts and manufacturer rebates, conduct drug utilization review, and design and manage drug formularies.[3] PBMs' central position in the pharmaceutical supply chain has enabled them to establish a complex and interdependent web of relationships across manufacturers, pharmacies, insurers, and plan sponsors. Today, the top three PBMs manage approximately eighty percent of prescription drug claims.[4] In addition to the high degree of horizontal concentration, PBMs have become vertically integrated within large conglomerates operating across multiple segments of the industry.[5] PBMs have been reported to exert significant leverage over reimbursement rates paid to independent pharmacies, structure rebate arrangements that may influence formulary placement and financial incentives, and rely on contractual provisions that limit transparency into their business practices.[6] Due to the power imbalance held by the PBMs and the negative effects of such power on drug pricing, all fifty states in the union, the District of Columbia, and Puerto Rico have enacted laws to rein in PBMs.[7]

II. State Regulation of PBMs

To limit PBM power, state legislatures have enacted a variety of laws. Common provisions include limits on patient cost-sharing, prohibitions on gag clauses, anti-discrimination protections for non-affiliated pharmacies, reporting and transparency requirements, and standards governing reimbursement methodologies and maximum allowable cost lists.[8] As the Department correctly identifies, the black box nature of PBM practices is a critical concern, and dozens of states have passed PBM transparency laws. For example, Oklahoma's PBM transparency law requires PBMs to make mandatory disclosures to PBM clients and the Attorney General. Okla. Stat. tit. 36, §§ 6962(D)-(E). Similarly, California requires PBMs, upon request, to disclose purchaser-specific financial information concerning prescription drug benefits, including but not limited to aggregate drug costs, rebates and manufacturer fees, exclusive arrangements and related economic

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[2] Suzanne G. Bollmeier & Scott Griggs, *The Role of Pharmacy Benefit Managers and Skyrocketing Cost of Medications*, Nat'l Ctr. for Biotechnology Info, https://pmc.ncbi.nlm.nih.gov/articles/PMC11482839/ (last visited Mar. 30, 2026).
[3] *Id.*
[4] Adam J. Fein, *The Top Pharmacy Benefit Managers of 2023: Market Share and Trends for the Biggest Companies–And What' Ahead*, Drug Channels (Apr. 9, 2024), https://www.drugchannels.net/2024/04/the-top-pharmacy-benefit-managers-of.html.
[5] *Id.*
[6] *See* Fed. Trade Comm'n, *Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies* 55–56, 66–68 (July 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/pharmacy-benefit-managers-staff-report.pdf.
[7] *See* U.S. Gov't Accountability Off., *Prescription Drugs: Selected States' Regulation of Pharmacy Benefit Managers* (Apr. 15, 2024), https://www.gao.gov/products/gao-24-106898; Nat'l Academy for State Law Policy, State Laws Passed to Lower Prescription Drug Costs: 2017–2025, https://nashp.org/state-tracker/state-drug-pricing-laws-2017-2025/ (last visited Mar. 30, 2026).
[8] *See* U.S. Gov't Accountability Off., *supra* n.6 at pp. 11-16.

benefits, payments to affiliated and non-affiliated pharmacies, network pharmacy fees, and utilization data. Cal. Bus. & Prof. Code § 4441(e). These transparency laws serve two important functions. First, they allow plan sponsors, including government entities, to see how money is spent and if they are getting the best deal possible for drugs. Second, they allow government regulators and enforcers to see whether PBMs are following the law.

III. The Proposed Rule

The proposed rule is being included in ERISA's prohibited transaction framework.[9] ERISA's prohibited transaction framework prohibits plan fiduciaries from engaging in self-interested transactions with a "party in interest," which is defined to include entities providing services to plans.[10] Contracts and arrangements between a plan and a party in interest where the party in interest provides various services "necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor" are exempted from the prohibited transaction restrictions.[11] The proposed rule seeks to amend the Department's existing prohibited transaction regulation to require disclosures from PBMs to plan fiduciaries for the plan-PBM agreement to qualify for an exemption from the prohibited transaction restriction.

IV. Federalism Implications

The Department claims "[t]he proposed rule does not have federalism implications," but stated that "the proposed rule may have some implications for States, particularly if the proposed rule is found to preempt State laws affecting PBMs providing services to self-insured group health plans."[12] The undersigned explain below why they contend the proposed rule does not preempt state law. The undersigned also propose ways to further cooperative federalism.

A. ERISA Preemption

ERISA has an express preemption provision. It provides that ERISA "shall supersede any and all State laws" that "relate to" covered employee benefit plans. 29 U.S.C. § 1444(a). Although interpreted by the Supreme Court in the 1980s in broad fashion, the Court has since retreated from that approach.[13] Despite this narrowing, at least one current Supreme Court Justice has raised serious constitutional concerns with the breadth of Section 1444(a).[14]

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[9] 91 Fed. Reg. at 4348 ("These disclosure requirements would apply for purposes of ERISA's statutory prohibited transaction exemption for services arrangements); 91 Fed. Reg. at 4421-22 (proposing amendment of 29 C.F.R. § 2550.408b-2 and addition of 29 C.F.R. § 2550.408b-22).

[10] *Cunningham v. Cornell Univ.*, 604 U.S. 693, 697 (2025) (discussing 29 U.S.C. §1106); 91 Fed. Reg. at 4355.

[11] *Cunningham*, 604 U.S. at 697 (quoting 29 U.S.C. § 1108(b)(2)(A).)

[12] 91 Fed. Reg. at 4421.

[13] *Greenbrier Hotel Corp. v. Unite Here Health*, 719 F. App'x 168, 176 (4th Cir. 2018).

[14] *Gobeille v. Liberty Mut. Ins. Co.,* 577 U.S. 312, 329-30 (2016) (Thomas, J. concurring) ("Until we confront whether Congress had the constitutional authority to pre-empt such a wide array of state laws in the first place, the

Under current jurisprudence, a state law "relates to" ERISA plans if it either has a "reference to" or a "connection with" ERISA plans.[15] The Supreme Court's decision in *Rutledge v. Pharmaceutical Care Management Association*—an opinion which rejected an argument that ERISA preempted a state PBM law—provides the most recent Court guidance on these two prongs.[16] In *Rutledge*, the Court explained that a state law makes a "reference to" ERISA plans if it applies directly and exclusively to such plans or if the existence of an ERISA plan is essential to the law's operation.[17] The Court further explained that to determine if a state law has an impermissible "connection with" an ERISA plan, courts "considers ERISA's objectives," which were to "ensure that plans and plan sponsors would be subject to a uniform body of benefits law."[18] Thus, a state law would have an impermissible "connection with" an ERISA plan if it "governs a central matter of plan administration or interferes with nationally uniform plan administration."[19] A state law would also have an impermissible "connection with" ERISA plans if it requires "providers to 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," or if its "acute, albeit indirect, economic effects" force an ERISA plan "to adopt a certain scheme of substantive coverage."[20] However, there is no preemption if a state law "merely increase costs or alter incentives for ERISA plans."[21] Such law's connection to ERISA plans is too "tenuous, remote, or peripheral" to support preemption.[22]

In addition, the Supreme Court recognizes that, when a plaintiff uses a state law as an alternative to ERISA's exclusive civil enforcement mechanism, 29 U.S.C. § 1132, the plaintiff's state law cause of action is preempted.[23] With respect to state law causes of action asserted against service providers to plans, state law causes of action survive if the "claims could succeed even if the premiums that defendants charged constituted 'reasonable compensation' under ERISA."[24]

There can be no reasonable arguments state PBM transparency laws (a) govern core aspects of plan structure and benefit design (such as, e.g., by imposing any obligations on plans regarding who is a beneficiary or what benefits must be provided), or (b) constitute an alternative enforcement mechanism to 29 U.S.C. § 1132. Consequently, the relevant question to determining whether the proposed rule preempts state law is whether the proposed rule implicates a matter of substantive plan administration. It does not. Plan

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Court—and lower courts—will continue to struggle to apply § 1144. It behooves us to address whether Article I gives Congress such power and whether § 1144 may permissibly be read to avoid unconstitutional results.").

[15] *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995).

[16] *Rutledge v. Pharm. Care Mgmt. Ass'n*, 592 U.S. 80, 88 (2020).

[17] *Id.* at 88.

[18] *Id.* at 86 (citation omitted).

[19] *Id.* at 87.

[20] *Id.* (citations omitted).

[21] *Id.* at 88.

[22] *Travelers*, 514 U.S. at 661 (quotation omitted).

[23] *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 57 (1987).

[24] *Depot, Inc. v. Caring for Montanans, Inc*., 915 F.3d 643, 666 (9th Cir. 2019); *Feeney Bros. Excavation LLC v. Morgan Stanley & Co. LLC*, 2020 WL 2527851, at *7 (D. Mass. May 18, 2020).

administration is an ERISA fiduciary function.[25] The reporting contemplated by proposed rule is not being imposed on plan fiduciaries. By including the reporting requirements in the prohibited transaction framework, the proposed rule does not upset the understanding that PBMs are "outside of the intricate web of relationships among the principal players in the ERISA scenario." [26] At most, state PBM transparency laws regulate "a noncentral matter of plan administration with *de minimis* economic effects and impact on the uniformity of plan administration across states."[27]

B. Proposed Clarification to Proposed Rule to Further Cooperative Federalism

When faced with state laws providing oversight of PBMs, PBMs and aligned trade organizations have frequently brought challenges to state PBM law based on a theory that state law is preempted by ERISA. The PBMs' main trade organization, the Pharmaceutical Care Management Association, has sued to enjoin the state PBM laws of Maine, Iowa, Oklahoma, Arkansas, the District of Columbia, and most recently California, based on ERISA preemption.

Consequently, although the undersigned attorneys general support the Department's rulemaking, they would respectively request that the Department clarify that it neither intends that its proposed rule preempt state law nor that its proposed rule in fact preempts state laws such as California and Oklahoma's mentioned above, and other states such as Idaho (41 Idaho Code § 349(j)(6)(a)-(c)) and Montana (Mont. Code Ann. § 33-2-2406) also have comprehensive PBM transparency laws.[28] This clarification would reduce uncertainty and minimize the risk of renewed preemption challenges. It is also consistent with existing case law that provide that business entities that provide services to responsible plan fiduciaries or employee benefit plans are still subject to state law such as prohibitions on misleading advertising, contractual duties of good faith and honest dealing, and other state law requirements.[29] Such clarity recognizes the States' responsibilities and powers with respect to maintaining competitive and fair markets in their States and promoting the health of their citizens in working together with the Department to serve this important goal of ensuring PBM transparency.

C. Proposed Clarification to Proposed Rule for State Enforcement

In addition to the clarification regarding non-preemption, the undersigned attorneys general further urge the Department to clarify in the final rule, or in the final rule's preamble, that the Department contemplates and welcomes cooperative enforcement with state attorneys general where appropriate. In particular, while the Department has statutory authority to regulate violations of the PBM fee disclosure requirements under this rulemaking, there should be mention that nothing in the rule is intended to prevent the

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[25] 29 U.S.C. § 1002(21)(A).
[26] *Pharm. Care Mgmt. Ass'n v. Rowe,* 429 F.3d 294, 305 (1st Cir. 2005) (cleaned up).
[27] *Pharm. Care Mgmt. Ass'n v. Wehbi*, 18 F.4th 956, 968 (8th Cir. 2021) (cleaned up).
[28] Similar language is already found in existing ERISA regulations, see, e.g. 29 C.F.R. § 2550.408b-2(c)(1)(x)
[29] See, e.g. *Paulsen v. CNF Inc.,* 559 F.3d 1061, 1083 (9th Cir. 2009).

Department from referring matters to state attorneys general, requesting their investigative or enforcement assistance, or coordinating with them when the Department discovers violations of state law.

To that end, the undersigned respectfully propose that the Department include language substantially similar to the following in the final rule commentary:

> The Department recognizes that state attorneys general play an important role in overseeing pharmacy benefit manager practices under applicable state law. Nothing in this rule is intended to preclude the Department from consulting, coordinating, sharing information as permitted by law, or referring matters to state attorneys general where the Department determines that state laws may be violated or that such cooperation would promote effective oversight and enforcement. Nor is this rule intended to displace or limit otherwise applicable, non-preempted state-law authority.

This clarification would promote efficient enforcement. It would ensure that both federal and state laws are equally enforced. Such a statement would ensure that PBMs cannot evade scrutiny through jurisdictional ambiguity or enforcement gaps.

V. Consolidated Appropriations Act of 2026

The Department requested comment on rulemaking pursuant to the Consolidated Appropriation Act's amendment to ERISA regarding PBM pass through pricing. The state attorneys general have reviewed and considered the Department's request. There is a strong interplay between this rulemaking regarding PBM transparency and potential rulemaking regarding PBM audits. Given this overlap, the state attorneys general believe that rulemaking pursuant to the Consolidated Appropriations Act should be done separately as informed by the effects of the implementation of this rule.

VI. Conclusion

The undersigned state attorneys general support the proposed rulemaking by the Department and recognize it as a tremendous step in increasing PBM transparency and reducing drug costs to Americans. By also explicitly stating that these regulations do not implicate matters of plan administration, state and federal regulators and enforcers can best work together to ensure that PBMs are following the law and reducing the cost of drugs. We look forward to rulemaking so that we can, working together, prevent the PBMs from avoiding accountability.

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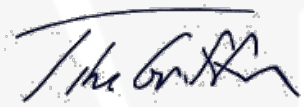

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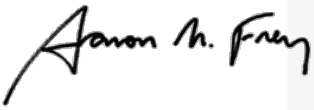

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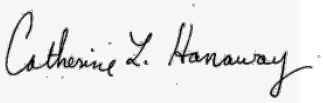

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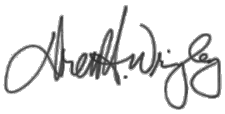

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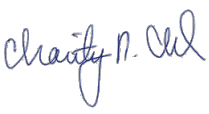

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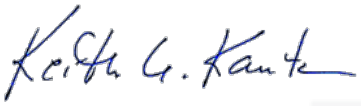

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