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MEMORANDUM OF OPPOSITION

FOR IMMEDIATE RELEASE: JANUARY 22, 2021

Re: A.1396 (Gottfried) / S.3762 (Breslin) – AN ACT to amend the public health law, in relation to pharmacy benefit managers; to amend the insurance law, in relation to registration and licensing of pharmacy benefit managers; and to repeal certain provisions of the public health law relating thereto

The New York Health Plan Association (HPA), which represents 28 health plans that provide coverage to 8 million New Yorkers, expresses concerns with A.1396/S.3762. HPA and its member health plans have long been advocates of increased transparency around the cost and quality of health care, and are supportive of measures to ensure that conflicts of interest are disclosed and that financial and utilization information is provided to health plans so that they are in compliance with state and federal statutes and regulations. **While the legislation would set licensure and transparency standards for pharmacy benefit managers (PBMs), it includes unnecessary and problematic provisions that will increase costs for employers and consumers.**

Although the bill attempts to address concerns raised in previous sessions concerning the duty and accountability of PBMs, the concerns remain as the language essentially creates a fiduciary relationship between health plans and PBMs. While the legislation does not include a specific reference to “fiduciary relationship,” the elements of a fiduciary relationship – care, skill, prudence, diligence, and professionalism – remain, which has the practical effect of creating a fiduciary relationship. This has significant legal and operational implications that underlies every fiduciary relationship: A fiduciary must act solely in the interest of the other party and must put the other party’s interests above its own. There is new language in Section 2 attempting to clarify that, “when there is a conflict in the pharmacy benefit manager’s duty or obligation under this paragraph to the covered individual and any other party, the duty or obligation to the covered individual shall be primary.” However, this does not solve the problem of conflicting fiduciary relationships; in fact, it further complicates the fiduciary responsibility landscape.

Further, the bill includes conflicting contractual obligations on PBMs that extends beyond the goal of transparency. For example, Section 2 requires the PBM to act in the best interest of the covered individual and also the health plan or provider. This raises questions as to whether the PBM owes a duty to the individual, the health provider or the health plan. In many instances, these duties will be irreconcilable tension with one another. Specifying that the relationship to the covered individual would take precedence over the other relationships raises new questions about how this would work in practice. Further, Subsection (h) deems health care providers and covered individuals to be third-party beneficiaries of the duties, obligations and requirements of the PBM. This would create a third party right of action that would allow a pharmacy or physician, among others, to bring a lawsuit whenever they disagree with any decision of the PBM related to coverage or reimbursement. Inevitably, these lawsuits will involve health plans, adding expense and administrative complexity with little benefit to the consumer from a cost or quality perspective. How does this really protect the consumer?

Ensuring compliance and that the fiduciary duties are fulfilled will result in additional administrative, legal and regulatory expenses, increasing the costs associated with pharmacy benefits and resulting in higher premiums for employers and consumers. Moreover, PBMs would likely have to assume exposure to new, unfamiliar types of legal risks, especially tort lawsuits, further adding to costs. PBMs, health plans, and

The New York Health Plan Association represents 28 managed care health plans that provide comprehensive health care services to more than 8 million New Yorkers.

employer and union sponsors will lose flexibility in structuring their financial arrangements with one another as their arrangements will have to account for and comply with the PBM's fiduciary obligations. Further, imposing a new "fiduciary obligation" where no such obligation arises is in direct conflict with provisions in ERISA and will be disruptive to the administration of employee benefit plans. A PBM will be less willing to innovate with and negotiate the terms of its arrangements to avoid adopting provisions that violates its fiduciary duty, and could lead to a "one-size-fits-all approach."

The bill includes other numerous costly provisions unrelated to PBM licensure and registration. The bill would prohibit substitution of a prescription drug without the approval of the provider. This has the potential to conflict with the state's generic substitution law and is unnecessary as doctors can already put "Dispense as Written" on a script to prevent substitution if they have a clinical concern, and pharmacies already are required to consult with prescribers prior to substitution. The limitations on substitution could add to the length of time to fill prescriptions, creating delays for patients. Further, the provisions related to pharmacy appeals would have the effect of creating a right for pharmacies to reopen contracting negotiations, leading to higher costs.

The legislation is unnecessary and does nothing to address the real reason for rising pharmaceutical costs: the high prices drug companies charge. Health plans continue to be subject to more transparency and scrutiny than most other parts of the health care continuum: health plans' forms, rates, networks, formularies are all subject to review and approval by state regulators. The same cannot be said for hospitals, facilities such as urgent care or ambulatory surgery centers, providers, or pharmaceutical manufacturers. Focusing on PBM licensure and regulation distracts from addressing the unchecked high prices and price increases of pharmaceutical manufacturers'.

The rapid increase in the prices pharmaceutical companies charge for prescription drugs is a major factor for rising health care costs, and measures to limit the ability of PBMs to rein in these costs does nothing to address increases in the cost of prescription drugs. A licensing statute should not be used to impose substantive requirements on coverage, particularly requirements that may undermine quality and increase cost.

Before proceeding with this bill, it would be important to address these issues to ensure the licensure and transparency of PBMs does not result in additional costs on health plans that will increase premiums for employers and consumers. For these reasons, HPA opposes A.1396/S.3762.