STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES
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The Honorable John Carney
Governor

John A. McNeal
Director

MEMORANDUM

DATE: May 30, 2019

TO: All Members of the Delaware State Senate
and House of Representatives

FROM: Mr. J. Todd Webb, Chairperson
State Council for Persons with Disabilities

RE: S.B. 71 (Pharmacy Benefit Managers and Pharmacy Ownership)

The State Council for Persons with Disabilities (SCPD) has reviewed S.B. 71, which proposes to amend Title 18 and Title 24 of the Delaware Code to: 1) prohibit a pharmacy benefit manager from requiring or providing an incentive for an insured individual to use a pharmacy in which the pharmacy benefit manager has an ownership interest; and 2) require that a pharmacy be owned by a pharmacist or by a majority of pharmacists if owned by an artificial entity. Current pharmacy operators and hospital pharmacies that only serve patients and employees would be exempt from this rule. The SCPD has the following observations.

Pharmacy Benefit Managers

Pharmacy Benefit Managers (PBMs) are companies that contract with health plans, large employers, and government programs like Medicare and Medicaid to administer their pharmacy benefits. Among other things, PBMs negotiate discounts with drug manufacturers, negotiate costs between pharmacies and health plans, organize a plan's pharmacy network, design formularies, and establish co-pays. They therefore have a significant impact on consumers and determine the availability and prices of prescription drugs. PBMs have come under scrutiny in recent years because of concerns about conflicts of interest, including potential conflicts that arise due to pharmacies owning PBMs or PBMs owning pharmacies. For example, CVSHealth, one of the nation's three major PBMs, operates its own CVS retail pharmacies and mail-order pharmacy. RiteAid owns EnvisionRx, another major PBM. And the largest PBM in the country, ExpressScripts, owns various types of pharmacies.

A PBM merged with a pharmacy is problematic because the PBM has an incentive to steer plan members to its affiliated pharmacies while facing a disincentive to contract with as many pharmacies as possible to create a broad pharmacy network for the benefit of its members. This problem may also increase the costs of medication for consumers. An issue brief by Applied Policy points out that a PBM that owns a specialty pharmacy, for example, may be incentivized to classify more drugs as "specialty" drugs, which are generally subject to higher cost-sharing and can be filled by the PBM's specialty pharmacy. Experts have also characterized combined PBMs-pharmacies as "sweetheart deals" because the entities no longer have an incentive to negotiate with each other or with drug manufacturers in a way that would result in lower prices for consumers.

S.B. 71 would help curb the ability of PBMs to drive consumers to its own affiliated pharmacies and engage in self-dealing. S.B. 71 prohibits PBMs from requiring or providing an incentive to an insured individual to use any type of pharmacy in which the PBM has an ownership interest or that has an ownership interest in the PBM.

Requirements for a Permit to Operate a Pharmacy

This bill would also encourage the establishment of independent pharmacies and prevent additional corporate-owned chains from operating pharmacies in Delaware. Section 2 of S.B. 71 limits who is allowed to obtain a permit to operate a pharmacy. Permit holders must be licensed pharmacists or entities (including partnerships, corporations, and limited liability companies) that are majority-owned by licensed pharmacists. This part of the bill is modeled after North Dakota's unique Pharmacy Ownership Law and mirrors the language of that legislation. As a result of this law, which was enacted in 1963, North Dakota is the only state that generally has no national chain store pharmacies.

Proponents of North Dakota's Pharmacy Ownership Law argue that it benefits consumers because it has resulted in lower drug prices, more personalized care, and more pharmacies per capita and in rural areas. A 2014 report analyzing the law from the Institute for Local Self-Reliance seems to support these claims. The report notes that for the preceding five years, North Dakota ranked 13th on average in lowest prescription prices among all states. It also describes customer surveys that reveal independent pharmacies tend to receive higher satisfaction scores. Finally, the report highlights that North Dakota has 30% more pharmacies per person than the national average, and these pharmacies are distributed more evenly throughout the state than pharmacies in neighboring South Dakota. This distribution allows for greater pharmacy access, particularly for those in rural and less populated areas. On the other hand, critics of the Pharmacy Ownership Law have maintained that it decreases choice, convenience, and competition that could lead to lower drug prices.

Here in Delaware, it is unclear how much of an impact S.B. 71 would have because current pharmacy permit holders would not be subject to the new rules. Unlike the situation in North Dakota, national chain pharmacies already operate in Delaware and would continue to do so.

Therefore, all the benefits of North Dakota's Pharmacy Ownership Law that are seen in that state may not materialize in Delaware if it passes a similar law. The presence of corporate-owned pharmacies in Delaware may result in different market dynamics and consequences if a pharmacy ownership law were to go into effect here.

Further, although the bill exempts hospital pharmacies from the ownership requirement, the bill makes no mention of Federally Qualified Health Centers (FQHCs) or other similar community health clinics. Some of these centers may want to offer pharmacy services in the future – and they should be encouraged to do so. Recent studies on "pharmacy deserts" in minority and underserved communities have recommended the integration of pharmacies into community clinics as a way to alleviate pharmacy access barriers. Pharmacy access problems contribute to disparities in health outcomes given the critical role of medications in preventing and treating chronic conditions.

SCPD endorses Section 1 of S.B. 71, but is requesting an additional explanation regarding Section 2 and the rationale behind the pharmacy ownership requirement. For example, it would be helpful to know if the bill's sponsors have any evidence or projections about how this new requirement would affect prescription drug prices or geographic distribution of pharmacies in Delaware. Lastly, the SCPD is asking that the bill also address the needs of FQHCs and other community health clinics to ensure that these centers do not face obstacles in providing pharmacy services.

Thank you for your consideration and please contact SCPD if you have any questions regarding our position or observations on the proposed legislation.

cc: Ms. Laura Waterland, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council

P&L/SB 71 pharmacy benefit managers and pharmacy ownership 5-28-19