

## Ensuring a Plan Sponsor's Fiduciary Status Under the Consolidated Appropriations Act (CAA)



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*Use of this employer communication assumes that your PBM contract does not currently address the CAA reporting obligations. If your contracts address the CAA, then your communication to the PBM may need substantial revision and specificity based on the details of your contract. Please note, this letter contains general suggestions and is not legal advice by MBGH or by Frier Levitt. If you decide to use any portion of this letter, you should have it reviewed and revised by your General Counsel and/or retain counsel to handle the issue. Additional information about Frier Levitt's ability to offer these services using a flat fee is provided below. You can also find more information about Frier Levitt's Plan Sponsor Practice Group [here](#).*

This [article](#) describes a complaint recently filed by the Osceola School District Plan (Florida) against a benefits broker in which the Plan/district accused them of breaching the pharmacy benefits contract and getting paid more than \$2 million in "secret commissions from insurance carriers it recommended to the board," the Judge's court order stated in denying a motion to dismiss the claims. The Court went on to state:

"(the broker) sold itself as a company that was well-positioned to provide consulting and brokerage services to the Board. It also stated that it would (remain) impartial during all business transactions, disclose all compensation received,' and represent the Board's best interests in all ongoing interactions." The judge ruled the Plan/district's lawsuit against (the broker) can continue. This is a reminder that, *particularly now under the CAA*, benefits brokers that connected plans to PBMs should not be conducting the PBM audits as they have conflicts, potential secret arrangements to hide and do not owe Plans a fiduciary duty.

### Draft Letter to PBM

Dear [\[insert PBM or benefits consultant\]](#):

As you know, [\[INSERT NAME OF PLAN\]](#) is a self funded plan (Plan) governed by The Employee Retirement Income Security Act of 1974 ("ERISA"). Plan has entered into a [\[IDENTIFY THE PRECISE NAME AND DATE OF THE PHARMACY BENEFIT SERVICES AGREEMENT BETWEEN PLAN AND PBM\]](#). The U.S. Department of Treasury ("DOT"), Department of Law ("DOL") and the Department of Health and Human Services ("HHS") (collectively, "Agencies") have released an Interim Final Rule ("IFR") obligating Plans to provide robust data to Agencies under the Consolidated Appropriations Act ("CAA"). The CAA requires Plans to submit data on multiple drug and medical benefit data sets,



all of which are itemized on Exhibit "A" to this letter. Among other data points, the IFR obligations include [PLAN] to report to Agencies the cost of prescription drugs as well as drug rebate data. Under ERISA, our Plan must comply with the IFR, and non-compliant Plans will be subject to substantial penalties, including exposure to plan participants. The fast approaching deadline for Plans to submit data is December 27, 2022 for reference years 2020 and 2021. We are writing to open the dialogue surrounding CAA compliance.

[PLAN] is not currently in possession of sufficient drug and healthcare data to adequately submit the required reporting to Agencies. We have "outsourced" to [INSERT PBM] management of our pharmacy benefits. Historically, we have not obtained transparent medical benefit and drug cost data from PBMs. We have limited ability to audit PBMs as to drug cost and rebates, under our [Pharmacy Benefits Agreement-insert actual name of contract]. While our contract does not specifically address the reporting obligations under the CAA [VERIFY by looking at your PBM contract], the CAA statutorily compels [insert PBM] to provide drug cost data to Plan. That is the purpose of this letter.

We are concerned that, to date, [INSERT NAME OF PLAN] may not have received fulsome information from [PBM] regarding rebates and the possible use by PBM of a rebate aggregator. CAA requires that we transparently reveal financial data surrounding the impact of manufacturer rebates and similar amounts paid by drug manufacturers to Agencies, and potentially any amounts retained by PBM or its sub-contracted rebate aggregators. Among other healthcare and drug data points, we will need to know the total dollar amount, if any, paid by drug manufacturers to [PBM OR SUBSIDIARY NAME] that were not passed through to Plan. We have no current knowledge as to retained rebates. [INSERT DISCUSSION OF REBATE PROVISION to be analyzed by counsel; also "compliance with law" and other PBM Contract provisions to be analyzed].

We appreciate your prompt attention to this matter.

#### **(Exhibit A)**

1. General information regarding the plan or coverage, such as:
  - a. the beginning and end dates of the plan year
  - b. the number of participants, beneficiaries, or enrollees,
  - c. each state in which the plan or coverage is offered
2. Enrollment and premium information, including average monthly premiums paid by employees versus employers
3. The 50 brand name prescription drugs for which the plan most frequently paid claims and the total number of claims paid for each of those drugs
4. The 50 prescription drugs for which the plan had the greatest expenditures and the amount paid for each of those drugs
5. The 50 prescription drugs for which the amount of expenditures increased the most over the previous year and the amount of the increase for each drug
6. The total amount spent on health care, broken down in various ways, such as:
  - a. Type of cost (hospital, primary care, specialty care, prescription drugs, and other costs)
  - b. Prescription drug expenditures by the plan and by enrollees



- c. Average monthly premiums paid by participants, beneficiaries, and enrollees and paid by employers on behalf of participants, beneficiaries, and enrollees
7. The impact of rebates and similar amounts paid by drug manufacturers, including the amounts paid for each therapeutic class of drugs and for the 25 drugs for which the amounts paid were the largest
8. Reduction in premiums and out of pocket costs associated with drug manufacturer rebates and similar payments.

Thank you to Frier Levitt (FL) for providing this information. Any employers requiring council on these issues may reach out Jonathan E. Levitt, Esq. (telephone: 973-618-1660, email: [jlevitt@...](mailto:jlevitt@...)) or Dae Y. Lee, Pharm.D., Esq., CPBS (telephone: 973-852-1867; email: [dlee@...](mailto:dlee@...)) who co-chair the firm's Plan Sponsor Practice Group. FL offers an alternative fee arrangements including "Flat Fees" to Plans to handle this issue that includes a comprehensive version of the letter above, outlining the PBM and Plan's obligations under the CAA as well as under the contract between the Plan and PBM, along with requesting drug cost and other relevant CAA data. FL will request the PBM provide the data and follow up in an effort to compel compliance. FL will draft an amendment to the Plan's current pharmacy benefit services agreement that sets a contractual commitment of the PBM to provide all data sufficient to meet the CAA's reporting requirements. Failure to comply with the CAA carries substantial penalties. Plans must enhance their PBM contracts to transfer liability to protect against the PBM's failure to provide accurate or timely data. FL drafts provisions accomplish this objective.

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