MISSISSIPPI LEGISLATURE REGULAR SESSION 2003

By: Representative Howell To: Insurance

HOUSE BILL NO. 402

1 AN ACT TO CREATE THE PHARMACY BENEFIT MANAGEMENT REGULATION
2 ACT; TO PROVIDE DEFINITIONS; TO REQUIRE THAT PHARMACY BENEFIT
3 MANAGERS RECEIVE A LICENSE FROM THE COMMISSIONER OF INSURANCE AND
4 A CERTIFICATE OF AUTHORITY FROM THE STATE BOARD OF PHARMACY BEFORE
5 OPERATING IN THIS STATE; TO REQUIRE THE FILING OF CERTAIN ANNUAL
6 STATEMENTS; TO PROVIDE FOR FINANCIAL EXAMINATIONS; TO PROVIDE FOR
7 CERTAIN ASSESSMENTS AND FEES; TO PROVIDE THAT CONTRACTS BETWEEN
8 PHARMACIES AND PHARMACY BENEFIT MANAGERS SHALL BE FILED WITH THE
9 COMMISSIONER OF INSURANCE BEFORE EXECUTION; TO PROVIDE FOR
10 ENFORCEMENT; AND FOR RELATED PURPOSES.

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

12 **SECTION 1.** This act shall be known and cited as the
13 "Pharmacy Benefit Management Regulation Act."

14 **SECTION 2.** This act establishes standards and criteria for
15 the regulation and licensing of pharmacy benefit managers. The
16 purpose of this act is to promote, preserve and protect the public
17 health, safety and welfare by and through effective regulation and
18 licensing of pharmacy benefit managers.

19 **SECTION 3.** For purposes of this act:

20 (a) "Board of Pharmacy" or "board" means the State
21 Board of Pharmacy empowered to regulate pharmacy benefit managers
22 including granting a certificate of authority to a company.

23 (b) "Cease and desist" is an order of the board
24 prohibiting a pharmacy benefit manager or other person or entity
25 from continuing a particular course of conduct, which violates
26 this act or its rules and regulations.

27 (c) "Commissioner" means the State Insurance
28 Commissioner.

29 (d) "Enrollee" means an individual who has been
30 enrolled in a pharmacy benefit management plan.

31 (e) "Insolvent" or "insolvency" means a financial
32 situation in which, based upon the financial information required
33 by this act for the preparation of the pharmacy benefit manager's
34 annual statement, the assets of the pharmacy benefit manager are
35 less than the sum of all of its liabilities and required reserves.
36 (f) "Maintenance drug" means a drug prescribed by a
37 practitioner who is licensed to prescribe drugs and used to treat
38 a medical condition for a period greater than thirty (30) days.
39 (g) "Multi-source drug" means a drug that is stocked
40 and is available from the three (3) or more suppliers.
41 (h) "Pharmacist's services" includes drug therapy and
42 other patient care services provided by a licensed pharmacist
43 intended to achieve outcomes related to the cure or prevention of
44 a disease, elimination or reduction of a patient's symptoms or
45 arresting or slowing of a disease process as defined in the rules
46 of the board.
47 (i) "Pharmacist" means any individual properly licensed
48 as a pharmacist by the State Pharmacy Board.
49 (j) "Pharmacy" means any appropriately licensed place
50 within this state where drugs are dispensed and pharmacist
51 services are provided.
52 (k) "Pharmacy benefits manager" or "PBM" means a
53 business that administers the prescription drug/device portion of
54 health insurance plans on behalf of plan sponsors, insurance
55 companies, unions and health maintenance organizations.
56 (l) "Pharmacy benefit management plan" means an
57 arrangement for the delivery of pharmacist services in which a
58 pharmacy benefit manager undertakes to pay for, or reimburse, any
59 of the costs of pharmacist services for an enrollee on a prepaid
60 or insured basis which (i) contains one or more incentive
61 arrangements intended to influence the cost or level or pharmacist
62 services between the plan sponsor and one or more pharmacies with
63 respect to the delivery of pharmacists services; and (ii) requires

64 or creates benefit payment differential incentives for enrollees
65 to use under contract with the pharmacy benefit manager. A
66 pharmacy benefit plan does not mean any employee welfare benefit
67 plan (as defined in Section 3(1) of the Employee Retirement Income
68 Security Act of 1974, 29 USCS Section 1002(1), which is
69 self-insured or self-funded.

70 (m) "Plan sponsors" means the employers, insurance
71 companies, unions and health maintenance organizations that
72 contract with a PBM for delivery of prescription services.

73 (n) "Usual and customary price" means the price the
74 pharmacists would have charged a cash paying (not a patient where
75 reimbursement rates are set by a contract) patient for the same
76 services on the same date inclusive of any discounts applicable.

77 **SECTION 4.** No person or organization shall establish or
78 operate a pharmacy benefit manager in this state to provide
79 pharmacy benefit management plans without obtaining a certificate
80 of authority from the State Board of Pharmacy in accordance with
81 this act and all applicable federal and state laws. All PBMs
82 providing pharmacy benefit management plans in this state shall
83 obtain a certificate of authority from the State Board of Pharmacy
84 every four (4) years.

85 Any organization or person may apply to the board to obtain a
86 certificate of authority to establish and operate a PBM in
87 compliance with this act if the organization obtains from the
88 commissioner an annual license to do business in this state. A
89 nonrefundable application fee of Five Hundred Dollars ($500.00)
90 shall accompany each application for a certificate of authority.

91 The board may suspend or revoke any certificate of authority
92 issued to a pharmacy benefit manager under this act or deny an
93 application for a certificate of authority if it finds:

94 (a) That the pharmacy benefit manager is operating
95 significantly in contravention of its basic organizational
96 document.

97 (b) The pharmacy benefit manager does not arrange for
98 pharmacist's services.
99 (c) That the pharmacy benefit manager has failed to
100 meet the requirements for issuance of a certificate of authority
101 as set forth in this act and all applicable federal and state
102 laws.
103 (d) That the pharmacy benefit manager is unable to
104 fulfill its obligation to furnish pharmacist's services as
105 required under its pharmacy benefit management plan.
106 (e) The pharmacy benefit manager is no longer
107 financially responsible and may reasonably be expected to be
108 unable to meet its obligations to enrollees or prospective
109 enrollees.
110 (f) The pharmacy benefit manager, or any person on its
111 behalf, has advertised or merchandised its services in an untrue,
112 misrepresentative, misleading, deceptive or unfair manner.
113 (g) The continued operation of the pharmacy benefit
114 manager would be hazardous to its enrollees.
115 (h) The pharmacy benefit manager has failed to file an
116 annual statement with the commissioner in a timely manner.
117 (i) The pharmacy benefit manager has otherwise failed
118 to substantially comply with this act and any rules and
119 regulations under this act.
120 When the certificate of authority of a pharmacy benefit
121 manager is revoked, such organization shall proceed, immediately
122 following the effective date of the order of revocation, to wind
123 up its affairs and shall conduct no further business except as may
124 be essential to the orderly conclusion of the affairs of such
125 organization. The board may permit such further operation of the
126 organization as the board may find to be in the best interest of
127 enrollees to the end that the enrollees will be afforded the
128 greatest practical opportunity to obtain pharmacist's services.

129 **SECTION 5.** The commissioner shall not issue an annual PBM
130 license to do business in this state to any PBM providing pharmacy
131 benefit management plans until he is satisfied that the pharmacy
132 benefit manager:
133 (a) Has paid all fees, taxes and charges required by
134 law;
135 (b) Has made any deposit required by this act;
136 (c) Has the minimum capital and surplus requirements
137 specified by the commissioner;
138 (d) Has filed a financial statement or statements and
139 any reports, certificates or other documents the commissioner
140 considers necessary to secure a full and accurate knowledge of its
141 affairs and financial condition;
142 (e) Is solvent and its financial condition, method of
143 operation and manner of doing business are such as to satisfy the
144 commissioner that it can meet its obligations to all enrollees;
145 and
146 (f) Has otherwise complied with all the requirements of
147 law.
148 This PBM license shall be in addition to the certificate of
149 authority required by the board. A nonrefundable license
150 application fee of Five Hundred Dollars ($500.00) shall accompany
151 each application for a license to transact the business in this
152 state. The fee shall be collected by the commissioner and paid
153 directly into a special fund that shall provide expenses for the
154 regulation, supervision and examination of all entities subject to
155 regulation under this act.
156 The PBM license shall be signed by the commissioner or a duly
157 authorized agent of the commissioner and shall expire on the next
158 June 30 after the date on which it becomes effective.
159 All PBMs providing pharmacy benefit management plans shall
160 obtain an annual renewal of its PBM license from the commissioner.
161 The commissioner may refuse to renew the PBM license of any

162 pharmacy benefit manager or may renew the license, subject to any
163 restrictions considered appropriate by the commissioner, if it
164 finds an impairment of required capital and surplus or if it finds
165 that the pharmacy benefit manager has not satisfied all the
166 conditions set forth in this act. The commissioner shall not fail
167 to renew the license of any pharmacy benefit manager transacting
168 business in this state without giving the pharmacy benefit manager
169 ten (10) days' notice and giving it an opportunity to be heard.
170 The hearing may be informal, and the commissioner and the pharmacy
171 benefit manager may waive the required notice.

172 **SECTION 6.** (1) Each PBM providing pharmacy management
173 benefit plans in this state shall file a statement with the
174 commissioner annually by March 1. The statement shall be verified
175 by at least two (2) principal officers and shall cover the
176 preceding calendar year. Each pharmacy benefit manager shall also
177 send a copy of the statement to the board.

178 (2) The statement shall be on forms prescribed by the
179 commissioner and shall include:

180 (a) A financial statement of the organization,
181 including its balance sheet and income statement for the preceding
182 year;

183 (b) The number of persons enrolled during the year, the
184 number of enrollees as of the end of the year and the number of
185 enrollments terminated during the year; and

186 (c) Any other information relating to the operations of
187 the pharmacy benefit manager required by the commissioner under
188 this act.

189 (3) If the pharmacy benefit manager is audited annually by
190 an independent certified public accountant, a copy of the
191 certified audit report shall be filed annually with the
192 commissioner by June 30.

193 (4) The commissioner may extend the time prescribed for any
194 pharmacy benefit manager for filing annual statements or other

195 reports or exhibits of any kind for good cause shown. However,
196 the commissioner shall not extend the time for filing annual
197 statements beyond sixty (60) days after the time prescribed by
198 subsection (1) of this section. Any pharmacy benefit manager
199 which fails to file its annual statement within the time
200 prescribed by this section may have its license revoked by the
201 commissioner or its certificate of authority revoked or suspended
202 by the board until the annual statement is filed. The
203 commissioner may waive the requirements for filing financial
204 information for the PBM if an affiliate of the PMB is already
205 required to file such information under current law.

206 **SECTION 7.** (1) In lieu of or in addition to making its own
207 financial examination of a pharmacy benefit manager, the
208 commissioner may accept the report of a financial examination of
209 other persons responsible for the pharmacy benefit manager under
210 the laws of another state certified by the insurance supervisory
211 official, similar regulatory agency or the state health
212 commissioner of another state.

213 (2) The commissioner shall coordinate financial examinations
214 of a PBM that provides pharmacy management benefit plans in this
215 state to ensure an appropriate level of regulatory oversight and
216 to avoid any undue duplication of effort or regulation. The
217 pharmacy benefit manager being examined shall pay the cost of the
218 examination. The cost of the examination shall be deposited in a
219 special fund that shall provide all expenses for the regulation,
220 supervision and examination of all entities subject to regulation
221 under this act.

222 **SECTION 8.** (1) The expense of administering this act,
223 including the cost incurred by the commissioner and the board,
224 shall be assessed annually by the commissioner against all
225 pharmacy benefit managers operating in this state. Before
226 determining the assessment the commissioner shall request from the
227 board an estimate to all expenses for the regulation, supervision

228 and examination of all entities subject to regulation under this
229 act. The assessment shall be in proportion to the business done
230 in this state.

231 (2) All fees assessed under this act and paid to the
232 commissioner shall be deposited in a special fund that shall
233 provide all expenses for the regulation, supervision and
234 examination of all entities subject to regulation under this act.

235 The commissioner shall assess each PBM annually for its just
236 share of expenses. The assessment shall be in proportion to the
237 business done in this state. The commissioner shall provide the
238 board an amount from the special fund to cover all expenses
239 incurred by the board for the regulation under this act.

240 The commissioner shall give each PBM notice of the
241 assessment, which shall be paid to the commissioner on or before
242 March 1 of each year. Any PBM that fails to pay the assessment on
243 or before the date herein prescribed shall be subject to a penalty
244 imposed by the commission. The penalty shall be ten percent (10%)
245 of the assessment and interest for the period between the due date
246 and the date of full payment. If a payment is made in an amount
247 later found to be in error, the commissioner shall, (a) if an
248 additional amount is due, notify the company of the additional
249 amount and the company shall pay the additional amount within
250 fourteen (14) days of the date of the notice, or, (b) if an
251 overpayment is made, order a refund.

252 If an assessment made under this act is not paid to the
253 commissioner by the prescribed date, the amount of the assessment,
254 penalty and interest may be recovered from the defaulting company
255 on motion of the commissioner made in the name and for the use of
256 the state in the appropriate circuit court after ten (10) days'
257 notice to the company. The license of any defaulting company to
258 transact business in this state may be revoked or suspended by the
259 commissioner until it has paid such assessment.

260 **SECTION 9.** Any PBM that contracts with a pharmacy or
261 pharmacist to provide pharmacist's services through a pharmacy
262 management plan for enrollees in this state shall file such
263 contract forms with the commissioner thirty (30) days before the
264 execution of such contract. The contract forms shall be deemed
265 approved unless the commissioner disapproves such contract forms
266 within (30) days after filing with the commissioner. Disapproval
267 shall be in writing, stating the reasons therefor and a copy
268 thereof delivered to the PBM. The commissioner shall develop
269 formal criteria for the approval and disapproval of PBM contract
270 forms.

271 The PBM is required to provide a contract to the pharmacy
272 that is written in plain English, using terms that will be
273 generally understood by pharmacists.

274 Any PBM that contracts with a pharmacy or pharmacist to
275 provide pharmacist's services through a pharmacy management plan
276 for enrollees in this state on behalf of any health plan sponsors
277 shall be identified as the agent of such health plan sponsors.
278 The health plan fiduciary responsibilities shall transfer to the
279 contracting PBM.

280 Each contract shall apply the same coinsurance, co-payment
281 and deductible to covered drug prescriptions filled by a pharmacy
282 provided who participates in the network.

283 Nothing in this section shall be construed to prohibit a
284 contract from applying different coinsurance, co-payment and
285 deductible factors between generic and brand name drugs that an
286 enrollee may obtain with a prescription, unless such limit is
287 applied uniformly to all pharmacy providers in the insurance
288 policy's network.

289 No pharmacy benefit management plan shall mandate any
290 pharmacist to change an enrollee's maintenance drug unless the
291 prescribing physician and the enrollee agree to such plan.

292 A pharmacy's participation in any plan or network offered by
293 a PBM is at the option and the discretion of the pharmacy. The
294 pharmacy's participation or lack of participation in one (1) plan
295 shall not effect their participation in any other plan or network
296 offered by the PBM.
297 Any PBM that initiates an audit of a pharmacy under the
298 provisions of the contract shall limit methods and procedures that
299 are recognized as fair and equitable for both the PBM and the
300 pharmacy. Extrapolation calculations in an audit are prohibited.
301 PBMs shall not recoup any monies due from an audit by setoff from
302 future remittances until the results of the audit are resolved and
303 finalized by both the PBM and the pharmacy. In the event the
304 findings of an audit cannot be finalized and agreed to by both
305 parties, then the commissioner shall establish an independent
306 review board to adjudicate unresolved grievances.
307 Prior to the terminating a pharmacy from the network the PBM
308 must give the pharmacy a written explanation of the reason of
309 termination thirty (30) days before the actual termination unless
310 contract termination action is taken in reaction to (a) loss of
311 the pharmacy's license to practice pharmacy or loss of
312 professional liability insurance; or (b) conviction of fraud or
313 misrepresentation in the contract. The pharmacy may request and
314 receive within thirty (30) days a review of the proposed
315 termination by the board before such termination.
316 The pharmacy shall not be held responsible for actions of the
317 PBM or plan sponsors and the PBM or plan sponsors shall not be
318 held responsible for the actions of the pharmacy.
319 **SECTION 10.** The board and the commissioner shall develop
320 formal investigation and compliance procedures with respect to
321 complaints by plan sponsors, pharmacists or enrollees concerning
322 the failure of a pharmacy benefit manager to comply with the
323 provisions of this act. The commissioner may refer complaints
324 received under Section 13 of this act to the board. If the board

325 or the commissioner has reason to believe that there is a
326 violation of this act, it shall issue and serve upon the pharmacy
327 benefit manager concerned, a statement of the charges and a notice
328 of a hearing to be held at a time and place fixed in the notice,
329 which shall not be less than thirty (30) days after notice is
330 served. The notice shall require the pharmacy benefit manager to
331 show cause why an order should not be issued directing the alleged
332 offender to cease and desist from the violation. At such hearing,
333 the pharmacy benefit manager shall have an opportunity to be heard
334 and to show cause why an order should not be issued requiring the
335 pharmacy benefit manager to cease and desist form the violation.
336 The board may make an examination concerning the quality of
337 services of any pharmacy benefit manager and pharmacists with whom
338 the pharmacy benefit manager has contracts, agreements or other
339 arrangements pursuant to its pharmacy benefit management plan as
340 often as the board deems necessary for the protection of the
341 interests of the people of this state. The pharmacy benefit
342 manager being examined shall pay the cost of the examination.
343 **SECTION 11.** PBMs shall use a current and nationally
344 recognized benchmark to base reimbursements for medications and
345 products dispensed by provider pharmacies as follows:
346 (a) For brand (single source) products the average
347 wholesale price (AWP) as listed in First Data Bank (Hearst
348 publications) or Facts and Comparisons (formerly Medispan) correct
349 and current on the date of service provided shall be used as an
350 index.
351 (b) For generic drug (multi-source) products, maximum
352 allowable cost (MAC) shall be established by referencing First
353 Data Bank/Facts and Comparisons Baseline Price (BLP). Only
354 products that are compliant with pharmacy laws as equivalent and
355 generically interchangeable with a federal FDA Orange Book rating
356 of "A-B" will be reimbursed from a MAC price methodology. In the
357 event a multi-source product has no BLP price, then it shall be

358 treated as a single source branded drug for the purpose of valuing
359 reimbursement.
360 **SECTION 12.** (1) No PBM or its representative may cause or
361 knowingly permit the use of (a) advertising that is untrue or
362 misleading; (b) solicitation that is untrue or misleading; or (c)
363 any form of evidence of coverage that is deceptive.
364 (2) No pharmacy benefit manager, unless licensed as an
365 insurer, may use in its name, contracts or literature (a) any of
366 the words "insurance," "casualty," "surety," "mutual"; or (b) any
367 other words descriptive of the insurance, casualty or surety
368 business or deceptively similar to the name or description of any
369 insurance or fidelity and surety insurer doing business in this
370 state.
371 (3) No PBM shall discriminate on the basis of race, creed,
372 color, sex or religion in the selection of pharmacies for
373 participation in the organization.
374 (4) No pharmacy benefit manager shall unreasonably
375 discriminate against pharmacists when contracting for pharmacist
376 services.
377 (5) The PBM shall be entitled to access to usual and
378 customary pricing only for comparison to the reimbursement of a
379 specific claims payment made by the PBM. Usual and customary
380 pricing is confidential and any other use or disclosure by the PBM
381 is prohibited.
382 (6) A PBM may not move a plan to another payment network
383 unless it receives written consent from the plan sponsor.
384 (7) No PBM shall receive or accept any rebate, kickback or
385 any special payment or favor or advantage of any valuable
386 consideration or inducement for switching a patient's drug product
387 unless it is specified in a written contract that has been filed
388 with the commissioner thirty (30) days before the execution of
389 such contract.

390 (8) Claims paid by the PBM shall not be retroactively denied
391 or adjusted after seven (7) days from adjudication of such
392 claims. In no case shall acknowledgement of eligibility be
393 retroactively reversed. The PBM shall be allowed for retroactive
394 denial or adjustment in the event (a) the original claim was
395 submitted fraudulently; (b) the original claim payment was
396 incorrect because the provider was already paid for services
397 rendered; or (c) the services were not rendered by the
398 pharmacists.
399 (9) No PBM shall terminate a pharmacy from a network because
400 (a) they express disagreement with a PBM's decision to deny or
401 limit benefits to an eligible person; (b) a pharmacist discusses
402 with a current, former or prospective eligible person any aspect
403 of such person's medical condition or treatment alternatives
404 whether a covered service or not; (c) of the pharmacist's personal
405 recommendations regarding selecting a PBM based on the
406 pharmacist's personal knowledge of the health needs of such
407 person; (d) of the pharmacy's protesting or expressing
408 disagreement with a medical decision, medical policy or medical
409 practice of a PBM; (e) the pharmacy has in good faith communicated
410 with or advocated on behalf of one or more of the pharmacy's
411 current, former or prospective person regarding the provisions,
412 terms or requirements of the PBM's health benefit plans as they
413 relate to the needs of such persons regarding the method by which
414 the pharmacy is compensated for services provided under such
415 agreement with the PBM.
416 (10) No PBM shall terminate a pharmacy from a network or
417 otherwise penalize a pharmacy solely because of the pharmacy's
418 invoking of the pharmacy's right under this agreement or
419 applicable law or regulation.
420 (11) Termination from a network for reason of competence and
421 professional behavior shall not release the PMB from the
422 obligation to make any payment due to the pharmacy for services

423 provided in special circumstances post-termination to the eligible
424 persons at less than agreed upon rates.
425 (12) Participation or lack of participation by a pharmacy in
426 a plan or network cannot effect participation in any other plan or
427 network offered by the PBM.
428 **SECTION 13.** Any disclosures from the PBM to the enrollees
429 shall be written in plain English, using terms that will be
430 generally understood by lay readers and a copy of the disclosure
431 shall be provided to all pharmacies that are members of the
432 network. The following shall be provided to the PBM's enrollees
433 of a pharmacy benefit management plan at the time of enrollment or
434 at the time the contract is issued and shall be made available
435 upon request or at least annually:
436 (a) A list of the names and locations of all affiliated
437 providers.
438 (b) A description of the service area or areas within
439 which the PBM shall provide pharmacist's services.
440 (c) A description of the method of resolving complaints
441 of covered persons, including a description of any arbitration
442 procedure, if complaints may be resolved through a specified
443 arbitration agreement.
444 (d) A notice that the pharmacy benefit manager is
445 subject to regulation in this state by both the State Board of
446 Pharmacy and the Commissioner of Insurance.
447 (e) A prominent notice included within the evidence of
448 coverage, providing substantially the following: "If you have any
449 questions regarding an appeal or grievance concerning the
450 prescription coverage that you have been provided, which have not
451 been satisfactorily addressed by your plan, you may contact the
452 Insurance Commissioner." Such notice shall also provide the
453 toll-free telephone number, mailing address and electronic mail
454 address of the Insurance Commissioner.

455 **SECTION 14.** The enrollee in a pharmacy benefit management
456 plan has the right to privacy and confidentiality in regard to
457 pharmacist's services. This right may be expressly waived in
458 writing by the enrollee or the enrollee's guardian.
459 **SECTION 15.** (1) If a PBM becomes insolvent or ceases to be
460 a company in this state in any assessable or license year, the
461 company shall remain liable for the payment of the assessment for
462 the period in which it operated as a PBM in this state.
463 (2) In the event of an insolvency of a PBM, the commissioner
464 may, after notice and hearing, levy an assessment on pharmacy
465 benefit managers licensed to do business in this state. Such
466 assessments shall be paid quarterly to the commissioner, and upon
467 receipt by the commissioner shall be paid over into an escrow
468 account in the special fund. This escrow account shall be solely
469 for the benefit of enrollees of the insolvent PBM.
470 **SECTION 16**. This act shall take effect and be in force from
471 and after July 1, 2003.

ST: Pharmacy Benefit Management Regulation Act; create.