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SENATE BILL 871

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

INTRODUCED BY

Pete Campos

AN ACT

RELATING TO PRESCRIPTION DRUGS; CREATING THE PHARMACY BENEFITS
MANAGER REGULATION ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Pharmacy Benefits Manager Regulation Act".

Section 2. DEFINITIONS.--As used in the Pharmacy Benefits
Manager Regulation Act:

A. "board" means the board of pharmacy;

B. "claims processing services" means the
administrative services performed in connection with the
processing and adjudication of claims relating to pharmacist
services, including, but not limited to, making payments to
pharmacists and pharmacies;

C. "maintenance drug" means a drug prescribed by a

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1 prescribing practitioner authorized to prescribe drugs and used
2 to treat a medical condition for a period greater than thirty
3 days;

4 D. "multi-source drug" means a drug that is stocked
5 and available from three or more suppliers;

6 E. "other prescription drug or device services"
7 means services other than claims processing services, provided
8 directly or indirectly by a pharmacy benefits manager, whether
9 in connection with or separate from claims processing services,
10 including:

11 (1) negotiating rebates, discounts or other
12 financial incentives and arrangements with drug companies;

13 (2) disbursing or distributing rebates;

14 (3) managing or participating in incentive
15 programs or arrangements for pharmacist services;

16 (4) negotiating or entering into contractual
17 arrangements with pharmacists or pharmacies;

18 (5) developing formularies;

19 (6) designing prescription benefit programs;

20 or

21 (7) advertising or promoting claims processing
22 services or other prescription drug or device services;

23 F. "pharmacist" means an individual licensed as a
24 pharmacist by the board;

25 G. "pharmacist services" means the practice of

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1 pharmacy or the scope of practice of a pharmacist as defined in
2 the Pharmacy Act;

3 H. "pharmacy" means a licensed place of business
4 where drugs are compounded or dispensed and pharmacist services
5 are provided;

6 I. "pharmacy benefits manager" means a person or
7 business and a wholly or partially owned or controlled
8 subsidiary of a pharmacy benefits manager that provides claims
9 processing services or other prescription drug or device
10 services to third parties but does not include licensed health
11 care facilities, pharmacies, licensed health care
12 professionals, insurance companies, unions or health
13 maintenance organizations;

14 J. "single-source drug" means a drug that is not a
15 multi-source drug;

16 K. "superintendent" means the superintendent of
17 insurance; and

18 L. "usual and customary price" means the price that
19 a pharmacist or pharmacy would have charged a patient,
20 excluding a patient for whom reimbursement rates are set by
21 contract, for the same service on the same date.

22 Section 3. CERTIFICATE OF AUTHORITY. --

23 A. A person or organization shall not establish or
24 operate as a pharmacy benefits manager without a certificate of
25 authority from the superintendent in accordance with the

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1 Pharmacy Benefits Manager Regulation Act and applicable federal
2 and state laws.

3 B. A pharmacy benefits manager doing business in
4 the state shall obtain a certificate of authority from the
5 superintendent within one hundred twenty days of the effective
6 date of the Pharmacy Benefits Manager Regulation Act and every
7 two years thereafter.

8 C. A nonrefundable application fee of three hundred
9 dollars (\$300) shall accompany each application for a
10 certificate of authority and each application for renewal of a
11 certificate of authority.

12 D. The superintendent shall not issue a certificate
13 of authority to a pharmacy benefits manager unless the pharmacy
14 benefits manager:

15 (1) holds a current license to transact
16 business in the state;

17 (2) is ready and able to arrange for
18 pharmacist services in the state;

19 (3) meets the requirements of and the rules
20 adopted pursuant to the Pharmacy Benefits Manager Regulation
21 Act; and

22 (4) is in compliance with applicable state and
23 federal laws and rules.

24 E. The superintendent may suspend or revoke a
25 certificate of authority issued to a pharmacy benefits manager,

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1 deny an application for a certificate of authority to an
2 applicant or deny an application for renewal of a certificate
3 of authority if:

4 (1) the pharmacy benefits manager is operating
5 materially in contravention of:

6 (a) its application or other information
7 submitted as a part of its application for a certificate of
8 authority or renewal of its certificate of authority; or

9 (b) a condition imposed by the
10 superintendent with respect to the issuance or renewal of its
11 certificate of authority;

12 (2) the pharmacy benefits manager does not
13 arrange for pharmacist services;

14 (3) the pharmacy benefits manager has failed
15 to continuously meet or substantially comply with the
16 requirements for issuance of a certificate of authority;

17 (4) the continued operation of the pharmacy
18 benefits manager adversely affects the public health and
19 safety; or

20 (5) the pharmacy benefits manager has failed
21 to substantially comply with applicable state or federal laws
22 or rules.

23 F. If the certificate of authority of a pharmacy
24 benefits manager is revoked, the manager shall proceed,
25 immediately following the effective date of the order of

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1 revocation, to wind up its affairs and conduct no further
2 business except as may be essential to the orderly conclusion
3 of its affairs. The superintendent may permit further
4 operation of the pharmacy benefits manager if the
5 superintendent finds it to be in the best interest of patients
6 to obtain pharmacist services.

7 Section 4. RULES. --

8 A. The board may adopt rules not inconsistent with
9 the Pharmacy Benefits Manager Regulation Act regulating
10 pharmacy benefits managers with respect to professional, public
11 health and safety issues.

12 B. The superintendent may adopt rules not
13 inconsistent with the Pharmacy Benefits Manager Regulation Act
14 regulating pharmacy benefits managers with regard to business
15 and financial issues.

16 Section 5. ANNUAL STATEMENT. --

17 A. A pharmacy benefits manager doing business in
18 this state shall file a statement with the superintendent
19 annually by March 1. The statement shall be verified by at
20 least two principal officers of the pharmacy benefits manager
21 and shall cover the preceding calendar year.

22 B. The statement shall be on forms prescribed by
23 the superintendent and shall include:

24 (1) a financial statement of the organization,
25 including its balance sheet and income statement for the

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1 preceding calendar year;

2 (2) the number and dollar value of claims for
3 pharmacist services processed by the pharmacy benefits manager
4 during the preceding calendar year with respect to patients who
5 are residents of this state; and

6 (3) other information relating to the
7 operations of the pharmacy benefits manager required by the
8 superintendent.

9 C. If a pharmacy benefits manager is audited
10 annually by an independent certified public accountant, a copy
11 of each certified audit report shall be promptly filed with the
12 superintendent.

13 D. The superintendent may extend the time
14 prescribed for a pharmacy benefits manager for filing annual
15 statements or other reports or exhibits for good cause shown,
16 provided that the superintendent may not extend the time for
17 filing an annual statement beyond sixty days after the time
18 prescribed in this section. Until the annual statement is
19 filed, the superintendent may revoke or suspend the certificate
20 of authority of a pharmacy benefits manager that fails to file
21 its annual statement within the time prescribed by this
22 section.

23 Section 6. FINANCIAL EXAMINATION. --

24 A. The superintendent shall regularly conduct a
25 financial examination of each pharmacy benefits manager doing

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1 business in this state pursuant to a schedule and in a manner
2 established by rule. The examination shall verify:

3 (1) the financial ability of the pharmacy
4 benefits manager to meet its full obligations to pharmacies and
5 pharmacists;

6 (2) information submitted to the
7 superintendent as a part of an application for a certificate of
8 authority or renewal of a certificate of authority; and

9 (3) compliance with the Pharmacy Benefits
10 Manager Regulation Act.

11 B. In lieu of, or in addition to, making the
12 financial examination of a pharmacy benefits manager, the
13 superintendent may accept the report of a financial examination
14 of the pharmacy benefits manager under the laws of another
15 state certified by its insurance superintendent, similar
16 regulatory agency or state health agency, to the extent that
17 the report of financial examination covers the minimum
18 requirements specified in Subsection A of this section.

19 C. The superintendent shall coordinate financial
20 examinations of pharmacy benefits managers to ensure an
21 appropriate level of regulatory oversight and to avoid undue
22 duplication of effort or regulation. The pharmacy benefits
23 manager being examined shall pay the cost of the examination.
24 The cost of the examination shall be deposited in the pharmacy
25 benefits manager fund to provide expenses for the regulation,

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1 supervision and examination pursuant to the Pharmacy Benefits
2 Manager Regulation Act.

3 Section 7. ASSESSMENT. --

4 A. Except as provided in Subsection C of this
5 section, the expense of administering the Pharmacy Benefits
6 Manager Regulation Act incurred by the superintendent shall be
7 assessed annually by the superintendent against all pharmacy
8 benefits managers operating in this state.

9 B. The superintendent shall assess each pharmacy
10 benefits manager annually for its share of the estimated
11 expenses of the insurance division of the public regulation
12 commission in proportion to the business done in this state, as
13 determined by the superintendent in the superintendent's
14 reasonable discretion.

15 C. The superintendent shall give each pharmacy
16 benefits manager notice of the assessment, which shall be paid
17 to the superintendent before March 2 of each year. A pharmacy
18 benefits manager that fails to pay the assessment before March
19 2 of each year shall be subject to a fine equal to ten percent
20 of the assessment plus interest for the period between the due
21 date and the date of full payment.

22 D. The certificate of authority of a defaulting
23 pharmacy benefits manager may be revoked or suspended by the
24 superintendent until the pharmacy benefits manager has paid the
25 assessment.

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1 E. All fees assessed pursuant to the Pharmacy
2 Benefits Manager Regulation Act and paid to the superintendent
3 shall be deposited in the pharmacy benefits manager fund.

4 F. If a pharmacy benefits manager becomes insolvent
5 or ceases to do business in this state in an assessable year,
6 the pharmacy benefits manager shall remain liable for the
7 payment of the assessment for the period in which it operated
8 as a pharmacy benefits manager in this state.

9 Section 8. PHARMACY BENEFITS MANAGER CONTRACTS. --

10 A. A pharmacy benefits manager that contracts with
11 a pharmacy or pharmacist to provide pharmacist services in this
12 state shall first inform the pharmacy or pharmacist in writing
13 of the number of, and other relevant information concerning,
14 patients to be served by the pharmacy or pharmacist under the
15 contract. There shall be a separate contract with each
16 pharmacy or pharmacist for each of the pharmacy benefits
17 manager's provider networks. Contracts providing for indemnity
18 of the pharmacy or pharmacist shall be separate from contracts
19 providing for cash discounts. A pharmacy benefits manager
20 shall not require that a pharmacy or pharmacist participate in
21 one contract in order to participate in another contract.

22 B. Each pharmacy benefits manager shall provide
23 contracts to the pharmacies and pharmacists that are written in
24 plain English, using terms that will be generally understood by
25 the general public.

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1 C. A contract between a pharmacy benefits manager
2 and a pharmacy or pharmacist shall provide specific time limits
3 for the pharmacy benefits manager to pay the pharmacy or
4 pharmacist for pharmacist services rendered.

5 D. A pharmacy benefits manager contract shall not
6 mandate that any pharmacy or pharmacist change a patient's
7 maintenance drug unless the prescribing practitioner so orders.

8 E. In handling money received by the pharmacy
9 benefits manager for pharmacist services, the pharmacy benefits
10 manager acts as a fiduciary of the pharmacy or pharmacist who
11 provided the pharmacist services. A pharmacy benefits manager
12 shall distribute all money the pharmacy benefits manager
13 receives for pharmacist services to the pharmacy and the
14 pharmacist who provided the pharmacist services and shall do so
15 within a time established by the superintendent. A pharmacy
16 benefits manager that contracts with a pharmacy or pharmacist
17 to provide pharmacist services in this state shall file the
18 contract forms with the superintendent thirty days before the
19 execution of the contract. The contract forms shall be deemed
20 approved unless the superintendent disapproves the contract
21 forms within thirty days after filing with the superintendent.
22 Disapproval shall be in writing, stating the reasons for the
23 disapproval, and a copy shall be delivered to the pharmacy
24 benefits manager. The superintendent shall develop formal
25 criteria for the approval and disapproval of pharmacy benefits

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1 manager contract forms.

2 F. A pharmacy benefits manager that initiates an
3 audit of a pharmacy or pharmacist under the contract shall
4 limit the audit to methods and procedures that are recognized
5 as fair and equitable for both the pharmacy benefits manager
6 and the pharmacy or pharmacist. Extrapolation calculations in
7 an audit are prohibited. A pharmacy benefits manager may not
8 recoup any money due from an audit by setoff from future
9 remittances until the results of the audit are finalized.

10 G. Before terminating a pharmacy or pharmacist from
11 a pharmacy benefits manager's provider network, the pharmacy
12 benefits manager shall give the pharmacy or pharmacist a
13 written explanation of the reason for the termination thirty
14 days before the actual termination unless the termination is
15 taken in reaction to:

16 (1) loss of certificate of authority;

17 (2) loss of professional liability insurance;

18 or

19 (3) conviction of fraud or misrepresentation.

20 H. A pharmacy or pharmacist shall not be held
21 responsible for acts or omissions of a pharmacy benefits
22 manager. A pharmacy benefits manager shall not be held
23 responsible for the acts or omissions of a pharmacy or
24 pharmacist.

25 Section 9. ENFORCEMENT. --

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1 A. Enforcement of the Pharmacy Benefits Manager
2 Regulation Act shall be the responsibility of the board and the
3 superintendent. The board or the superintendent shall take
4 action to bring a non-complying pharmacy benefits manager into
5 full compliance with the Pharmacy Benefits Manager Regulation
6 Act or shall terminate the pharmacy benefits manager's
7 certificate of authority. The board and the superintendent
8 shall each adopt procedures for formal investigation of
9 complaints concerning the failure of a pharmacy benefits
10 manager to comply with the Pharmacy Benefits Manager Regulation
11 Act.

12 B. The superintendent may refer a complaint
13 received under the Pharmacy Benefits Manager Regulation Act to
14 the board if the complaint involves a professional or patient
15 health or safety issue. The board may refer a complaint
16 received to the superintendent if the complaint involves a
17 business or financial issue.

18 C. If the board or the superintendent has reason to
19 believe that there may have been a violation of the Pharmacy
20 Benefits Manager Regulation Act, the board or superintendent
21 shall issue and serve upon the pharmacy benefits manager a
22 statement of the charges and a notice of a hearing. The
23 hearing shall be held at a time and place fixed in the notice,
24 and not be less than thirty days after the notice is served.
25 At the hearing, the pharmacy benefits manager shall have an

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1 opportunity to be heard and to show cause why the board or the
2 superintendent should not:

3 (1) issue a cease and desist order against the
4 pharmacy benefits manager; or

5 (2) take other action, including termination
6 of the pharmacy benefits manager's certificate of authority.

7 D. The board may conduct an investigation
8 concerning the quality of services of a pharmacy benefits
9 manager or a pharmacy or pharmacist with which the pharmacy
10 benefits manager has a contract, as the board deems necessary
11 for the public health and safety.

12 Section 10. MEDICATION REIMBURSEMENT COSTS. --

13 A. Pharmacy benefits managers shall use a current
14 nationally recognized benchmark to base reimbursements for
15 medications and products dispensed by pharmacies or pharmacists
16 with whom the pharmacy benefits manager contracts as follows:

17 (1) for brand single-source drugs and brand
18 multi-source drugs, either the average wholesale price as
19 listed in *First Data Bank* or *Facts and Comparisons* shall be
20 used as an index;

21 (2) for generic multi-source drugs, maximum
22 allowable costs shall be established by referencing the
23 baseline price as listed in either *First Data Bank* or *Facts and*
24 *Comparisons*;

25 (3) only products that are in compliance with

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1 pharmacy laws as equivalent and generically interchangeable
2 with a United States food and drug administration orange book
3 rating of A-B may be reimbursed from a maximum allowable cost
4 price methodology; and

5 (4) if a generic multi-source drug product has
6 no baseline price, it shall be treated as a brand single-source
7 drug for the purpose of valuing reimbursement.

8 B. If the publications specified in Subsection A of
9 this section cease to be nationally recognized benchmarks used
10 to base reimbursement for medications and products dispensed by
11 pharmacies and pharmacists, other current nationally recognized
12 benchmarks, as are then current and in effect, may be utilized
13 so long as the benchmark is established and published by a
14 person or business with which no pharmacy benefits manager has
15 a financial or business interest or connection.

16 Section 11. PROHIBITED PRACTICES. --

17 A. A pharmacy benefits manager, or representative
18 of a pharmacy benefits manager, shall not cause or knowingly
19 permit the use of an advertisement, promotion, solicitation,
20 proposal or offer that is untrue, deceptive or misleading.

21 B. A pharmacy benefits manager shall not
22 discriminate on the basis of race, creed, color, gender or
23 religion in the selection of pharmacies or pharmacists with
24 whom the pharmacy benefits manager contracts.

25 C. A pharmacy benefits manager shall not

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1 unreasonably discriminate against or between pharmacies or
2 pharmacists.

3 D. A pharmacy benefits manager shall be entitled to
4 access a pharmacy's or pharmacist's usual and customary price
5 only for comparison to specific claims for payment made by the
6 pharmacy or pharmacist to the pharmacy benefits manager. Usual
7 and customary pricing is confidential, and any other use or
8 disclosure by the pharmacy benefits manager is prohibited. A
9 pharmacy benefits manager shall not, directly or indirectly,
10 overtly or covertly, in cash or in kind, receive or accept a
11 rebate, kickback or special payment, favor or advantage of any
12 valuable consideration or inducement for influencing or
13 switching a patient's drug product unless the rebate, kickback,
14 payment, favor, valuable consideration or inducement is
15 specified in a written contract that has been filed with the
16 superintendent.

17 E. Claims for pharmacist services paid by a
18 pharmacy benefits manager may not be retroactively denied or
19 adjusted after adjudication of the claims, unless:

- 20 (1) the original claim was submitted
21 fraudulently;
- 22 (2) the original claim payment was incorrect
23 because the pharmacy or pharmacist had already been paid for
24 the pharmacist services; or
- 25 (3) the pharmacist services were not, in fact,

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1 rendered by the pharmacy or pharmacist.

2 F. An acknowledgment of eligibility shall not be
3 retroactively reversed.

4 G. A pharmacy benefits manager shall not terminate
5 a contract with a pharmacy or pharmacist, or terminate, suspend
6 or otherwise limit the participation of a pharmacy or
7 pharmacist in a pharmacy benefits manager's provider network
8 because the pharmacy or pharmacist:

9 (1) expresses disagreement with the pharmacy
10 benefits manager's decision to deny or limit benefits to a
11 patient;

12 (2) discusses with a patient an aspect of the
13 patient's medical condition or treatment alternatives;

14 (3) makes personal recommendations regarding
15 selecting a pharmacy benefits manager based on the pharmacist's
16 personal knowledge of the health needs of the patient;

17 (4) protests or expresses disagreement with a
18 decision, policy or practice of the pharmacy benefits manager;

19 (5) has in good faith communicated with or
20 advocated on behalf of any patient related to the needs of the
21 patient regarding the method by which the pharmacy or
22 pharmacist is compensated for services provided under the
23 contract with the pharmacy benefits manager;

24 (6) complains to the board or superintendent
25 that the pharmacy benefits manager has failed to comply with

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1 the Pharmacy Benefits Manager Regulation Act; or

2 (7) asserts rights under the contract with the
3 pharmacy benefits manager.

4 H. Termination of a contract between a pharmacy
5 benefits manager and a pharmacy or pharmacist or termination of
6 a pharmacy or pharmacist from a pharmacy benefits manager's
7 provider network shall not release the pharmacy benefits
8 manager from the obligation to make a payment due to the
9 pharmacy or pharmacist for pharmacist services rendered.

10 I. A pharmacy benefits manager shall not intervene
11 in the delivery or transmission of prescriptions from the
12 prescriber to the pharmacist or pharmacy to:

13 (1) influence the prescriber's choice of
14 therapy;

15 (2) influence the patient's choice of
16 pharmacist or pharmacy; or

17 (3) alter the prescription information,
18 including switching the prescribed drug without the express
19 written authorization of the prescriber.

20 J. A pharmacy benefits manager shall not engage in
21 or interfere with the practice of medicine or intervene in the
22 practice of medicine between prescribing practitioners and
23 their patients.

24 K. A pharmacy benefits manager shall not engage in
25 any activity that violates a provision of the Pharmacy Benefits

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