

To whom it may concern,

My name is Clinton Knight, I am a pharmacist and own and operate an independent pharmacy here in Washington State. I have been very active and involved in trying to utilize the OIC's small pharmacy appeals process since it was instated in 2017. I have submitted and won hundreds of underpayment appeals over the years and was the pharmacist responsible for the appeals that finally resulted in the OIC issuing civil penalties to PBMs in 2021. Thank you for your consideration of my suggestions in the following. If you have any questions or would like clarification on anything I have presented please contact me directly, my contact information is included at the end of this document.

We have had Pharmacy Benefit Manager reform laws since 2017 and the problems still exist. I am sure the new laws will strengthen the enforcement action, but we also need to make the system better and more streamlined to enforce the laws. The bad actors are the PBMs, they are the reason these laws have been put in place and the onus needs to be on them and taken off of the pharmacies. We as pharmacists are not lawyers, we are health care professionals and want to spend our time taking care of patients.

- RCW 48.200.030(2)(b) The fees for each registration must be set by the commissioner in an amount that ensures the registration, renewal, and **oversight activities are self-supporting**.
  - Increase the registration and renewal fees to the PBMs and hire more staff to manage PBM oversight, may I suggest 1 or 2 pharmacists who have run an independent pharmacy. Many other state's insurance commissions now have pharmacists on staff. The medication market is very complex and convoluted and having pharmacists on staff that understand the ins and outs of the system would be invaluable to ensure the state laws are implemented and upheld as intended by the law makers of our state to protect the public interests.
- It is obvious that the legislators of our state want the PBMs regulated to protect public interests.
- Our early PBM reform laws have already been challenged and have held up in our State Superior Court. See; PRIME THERAPEUTICS LLC V. WASHINGTON STATE OFFICE OF INSURANCE COMMISSIONER filed 02/21/2023, Court of Appeals, Division 1.
  - Please read the published opinion of the 3 Judges.
- We need a process for pharmacists and patients to notify the OIC when PBM's are violating our laws, not just underpayment appeals.
  - The current OIC complaint process is geared toward health carriers not PBM's.
  - It should be a publicly visible platform so we can follow along with the enforcement activity of individual complaints
  - The OIC needs to enforce the laws to their full authority as spelled out in RCW 48.200.290 for each violation of the chapter, not just underpayment appeals.
  - These civil penalties go back to the State for further support. The big 3 PBMs are #5,6 and 15 in our fortune 500. They are the ones violating our laws and stealing from the people of our state.
- The current underpayment appeals process puts too much work on the pharmacies. This is not the intent of the law, the onus needs to be put on the PBM to ensure they are abiding by our laws and the onus needs to be on the OIC to enforce our laws in a proactive manner.
  - **Emphasis added to this suggestion: standardized 1<sup>st</sup> tier appeal form**

- Make the 1<sup>st</sup> tier appeal, the initial appeal from the pharmacy to the PBM, a standardized form for all the PBMs registered in Wa State. This way the OIC can use our state law to guide the possible outcomes of the 1<sup>st</sup> tier appeal and curb many of the unlawful tactics the PBMs are using, right there in the 1<sup>st</sup> tier appeal saving everyone undo time and argument.
- Our law is quite simple.
- RCW 48.200.280(3) *The pharmacy benefit manager shall uphold the appeal of a pharmacy with fewer than fifteen retail outlets, within the state of Washington, under its corporate umbrella if the pharmacy or pharmacist can demonstrate that it is unable to purchase a therapeutically equivalent interchangeable product from a supplier doing business in Washington at the pharmacy benefit manager's list price.*
- RCW 48.200.280(4)(b) If the appeal is denied, the reason for the denial and **the national drug code of a drug that has been purchased by other network pharmacies located in Washington at a price that is equal to or less than the predetermined reimbursement cost** for the multisource generic drug.
- The PBM only has 2 options in a 1<sup>st</sup> tier appeal, either uphold our appeal and pay a fair price, or give proof that the medication can be purchased at the rate they are reimbursing. The law spells out how they are to do that, give NDC and proof it was purchased by other WA state network pharmacies at that price.
- So, if the OIC makes all PBMs use a standardized 1<sup>st</sup> tier appeal form they can make it so the PBM only has those choices. They would have to follow our law. Then if the PBM has reason not to follow the law, the appeal can be moved to the 2<sup>nd</sup> tier within the OIC where the playing field is leveled because now the PBM is subject to civil penalties if found to be violating the law.
- The stipulation put on the pharmacist is to “demonstrate that it is unable to purchase a therapeutically equivalent interchangeable product from a supplier doing business in Washington at the PBM’s list price” so on the standardized form define how that must be done. My suggestion would be an attestation from the pharmacist saying they have done their due diligence based on standards of practice of medication purchasing for small pharmacies and that they will be able to supply documentation of such during the 2<sup>nd</sup> tier appeal if necessary. You cannot require the pharmacy’s invoice at this 1<sup>st</sup> tier because it is a proprietary trade secret and the PBM could use that information to set their list prices and undermine our state laws. But, if necessary, during the 2<sup>nd</sup> tier appeal the invoice can be required because the PBM may now be subject to civil penalties for violating our laws.
  - Note on the standards of practice of medication purchasing. Every pharmacy must have a contract with one of the 3 major primary wholesalers in our country to ensure that they will have access to a reliable supply of medications throughout the year. A pharmacy can only have a contract with one of the primary wholesalers to ensure best pricing because pricing is based on total yearly volume. Then there are multiple secondary wholesalers in the country that sometimes have

discounted prices on certain medications. The secondary wholesalers do not have all medications available at all times, they may have a better deal today that is not available tomorrow based on things like short dated products or overproduction by manufacturers. Pharmacy software systems are able to receive updated electronic price files from all the secondary wholesalers and perform real-time searches to identify the best prices for certain medications at that time. To stay viable a pharmacy must utilize the most up to date technology and follow these standards of practice, so by default just being in business is proof that a pharmacy is doing their due diligence to purchase medications at an acceptable market rate.

- When a PBM registers with our state they need to ensure that there is a standardized way pharmacists and the OIC can identify whether a claim is subject to an ERISA or self-funded plan based on the information that would be available to the pharmacy on a patient's insurance card. Currently the OIC has taken the stance they have no jurisdiction over ERISA and/or self-funded plans, I first argue that you in fact do and ask that you review the Supreme court case *Rutledge V. PCMA* and consider revising your stance to include these types of claims. If you choose to hold your current stance on this issue, something needs to be done so pharmacies can identify these plans prior to issuing appeals. As it is now the pharmacy does all the work to issue an appeal and the PBM comes back claiming an ERISA exemption and the case is dismissed with the pharmacies and OIC's time and resources being wasted. Furthermore, actual proof of ERISA and/or self-funding needs to be required and investigated by the OIC, this is due to the fact that PBMs have been caught by the OIC providing false ERISA exemption in the past.
- Things the OIC needs to define for the current underpayment appeals process
  - Can PBMs put a time limit on how old of a claim can be appealed? Many PBMs are adding a 30 day limit stipulation in order to even submit a 1<sup>st</sup> tier appeal.
    - I argue that our state law has no such time limit for 1<sup>st</sup> tier appeals. I argued this in a 2<sup>nd</sup> tier appeal in the matter of *Whole Health Pharmacy, V. Optumrx INC*, and the OIC found in my favor. See ORDER NO. 20-0002 NPI NO. 1790242576 WAOIC NO. 501155 INITIAL ORDER. Conclusion of Law: 2. *In its initial determination, the PBM stated that the appeal was too old. The PBM stated that the Pharmacy Manual provides that for Washington MAC appeals, the Network Pharmacy Provider must submit the MAC form to the PBM within 30 calendar days from the date of the initial claim submission. The Network Pharmacy's prescription was filled on October 31, 2019 and the claim was submitted to the PBM on December 2, 2019. However, RCW 19.340 and WAC 284-180 do not require the Network Pharmacy to file an appeal within 30 days of the prescription fill date.*

- Can a PBM force a pharmacy to give them their invoice cost during the 1<sup>st</sup> tier appeal? Many PBMs are requiring it to be able to submit a 1<sup>st</sup> tier appeal.
  - I argue that our state law does not require this and cannot require this because our invoice prices are a proprietary trade secret. Furthermore, this tactic by the PBMs would allow them to completely undermine our state laws because a pharmacist can only appeal “underpayments” to the 2<sup>nd</sup> tier within the OIC. So, if we give a PBM our invoiced cost during the 1<sup>st</sup> tier appeal they could simply increase reimbursement up to where the pharmacy is breakeven and then the pharmacy could not move the appeal to the 2<sup>nd</sup> tier within the OIC. A business cannot operate and stay viable at breakeven; our invoice prices have to be kept confidential in the 1<sup>st</sup> tier, just so we can get to the 2<sup>nd</sup> tier within the OIC where the invoices can then be revealed and the PBM is subject to civil penalties. These penalties then go to the State and the pharmacy is still only paid to the breakeven price, which is still a loss due to overhead, but at least hopefully it will effect change and deter the PBM from continuing to violate the law and underpay pharmacies. It is the PBMs responsibility to understand the drug market and drug prices and pay at fair rates. It is not up to the pharmacies who are in direct competition with them to give them invoice prices.
- What is a reasonable adjustment? RCW 48.200.280(5)(a) *If an appeal is upheld under this section, the pharmacy benefit manager shall make a reasonable adjustment on a date no later than one day after the date of determination.*
  - Is it reasonable to just adjust that claim for that month then underpay again the next month?
  - Is it reasonable to not adjust that claim but state it will be adjusted in the following months?
  - Is it reasonable to expect that PBM to now adjust payment for that medication for all claims previous and moving forward? For just that pharmacy or all pharmacies?
- What is fair and equitable? RCW 48.200.280(6)(a) all relevant information from the parties may be presented to the commissioner, and the commissioner may enter an order directing the pharmacy benefit manager to make an adjustment to the disputed claim, deny the pharmacy appeal, or take other actions deemed fair and equitable.
  - To this point, the OIC has only ordered PBMs to pay pharmacies the breakeven invoice price, when they win an underpayment appeal. I argue that ordering a PBM to pay a pharmacy only this breakeven price is not fair and equitable. You must take into consideration the cost of overhead, vials, labels, labor, etc. Yearly the NCPA publishes the national average of the “cost to dispense” a prescription, this usually falls in the \$13 to \$18 range. So, I would argue the OIC should order the PBM to make an adjustment to include the drug invoice price + cost to dispense + dispensing fee. The invoice price and cost to dispense are just covering the pharmacy’s cost and the dispensing fee is the profit or the payment for the pharmacy’s services. It is not unreasonable to think a business needs to make some profit to stay viable and keep their doors open and continue to take

care of patients. Especially in a state that has the following “any willing provider law.”

- **RCW 48.39.003** *The legislature finds that Washington state is a provider friendly state within which to practice medicine. As part of health care reform, Washington state endeavors to establish and operate a state-based health benefits exchange wherein insurance products will be offered for sale and add potentially three hundred thousand patients to commercial insurance, and to expand access to medicaid for potentially three hundred thousand new enrollees. Such a successful and new insurance market in Washington state will require the willing participation of all categories of health care providers. **The legislature further finds that principles of fair contracting apply to all contracts between health care providers and health insurance carriers offering insurance within Washington state and that fair dealings and transparency in expectations should be present in interactions between all third-party payors and health care providers.***
- If we consult a lawyer to help process our underpayment appeals, can we be awarded lawyer fees if we win the appeal and present an invoice from the lawyer?
  - See OIC Docket No. 05-2021-INS-00156, in this appeal I did consult a lawyer and was charged a fee. The OIC did not grant the lawyer fees. The hearings officer said the lawyer did not have enough involvement. What is enough involvement? Our law does not specify for lawyer fees, nor does it specify against lawyer fees. Other administrative hearing proceedings in our state do award lawyer fees so there is no reason we should not be awarded these lawyer fees. I am a healthcare professional and should be spending my time taking care of patients, not fighting with PBMs for what is rightfully owed to me. Awarding lawyer fees would take the burden off of pharmacies and place it back on the PBMs where the legislators and law intended it.
- What is the OIC doing to proactively investigate PBMs and ensure our state laws are being respected? Is there some sort of audit like protocol in place?
  - RCW 48.200.280(2)(k) A pharmacy benefit manager: May not reimburse a pharmacy in the state an amount less than the amount the pharmacy benefit manager reimburses an affiliate for providing the same pharmacy services.
    - Throughout the country there have been some big cases on this where PBMs have been found to be doing this very thing. This is not something, as a pharmacy, I would have evidence of to where I could issue a complaint. Our current law gives the OIC the authority to request whatever information they need to enforce our laws. Furthermore, our new law 48.200.050(3) gives the OIC oversight authority of PBMs if they have violated laws in other states.
- OIC needs to be prepared to protect Pharmacies from retaliation. It is believed that some PBMs are increasing audits on pharmacies who are appealing underpayments or submitting complaints

to the OIC. It is believed some PBMs are triggering audits on every claim that an underpayment appeal is filed.

- RCW 48.200.280(6)(d) A pharmacy benefit manager may not retaliate against a pharmacy for pursuing an appeal under this subsection (6)

### **Current law that PBMs are violating**

The following is a list of laws that I personally have evidence that various PBMs are violating.

- RCW 48.200.280(2)(h) *A pharmacy benefit manager: May not cause or knowingly permit the use of any advertisement, promotion, solicitation, representation, proposal, or offer that is untrue, deceptive, or misleading.*
  - My patients have brought me letters sent to them by their pbm to trying to steer them away from my pharmacy and to their wholly owned mail order pharmacies. I have attached one such letter. In this letter the PBM makes it seem as if my pharmacy is not a preferred provider when in fact my pharmacy has a contract with this PBM as a preferred provider.
  - My patients are always telling me that their PBMs are calling them and verbally trying to confuse them and coerce them to transfer to PBM owned mail order pharmacies. This is hard for me to prove but I'm sure I can get signed letters from some of my patients stating this.
- RCW 48.200.280(2)(i) *A pharmacy benefit manager: May not charge a pharmacy a fee related to the adjudication of a claim, credentialing, participation, certification, accreditation, or enrollment in a network including, but not limited to, a fee for the receipt and processing of a pharmacy claim, for the development or management of claims processing services in a pharmacy benefit manager network, or for participating in a pharmacy benefit manager network.*
  - Have proof my pharmacy has been charged over \$7,000 in transaction fees since this law was instated.
  - I am currently starting a long-term care pharmacy, and Express Scripts is requiring a \$500 setup fee and application fee just to set up contracts with them.
- RCW 48.43.430(2) *A health carrier or pharmacy benefit manager may not require a pharmacist to dispense a brand name prescription medication when a less expensive therapeutically equivalent generic prescription medication is available.*
  - I have lots of examples of this
  - How is this affecting the health care system and stealing money
    - A patient has to pay a brand name copay.
    - A patient reaches donut hole faster costing more money in the long run.
    - The PBM is forcing the Brand drug manufacturer to give them a kickback increasing manufacturers cost to bring drugs to market

- Employers who pay the insurance bill for a large percentage of our population are being scammed to think their insurance spend is higher and the insurance company will increase their premiums.
  
- RCW 48.200.280(4)(a) *A pharmacy benefit manager must provide as part of the appeals process established under subsection (3) of this section: A telephone number at which a network pharmacy may contact the pharmacy benefit manager and speak with an individual who is responsible for processing appeals*
  - I do not know of any PBM that has this available. Please try to find such phone number or such person or just try to contact one of these PBMs and see for yourself the run around we get.

The following is an example of an argument I submitted as a response to a PBMs appeal of initial decision in 2021. I thought I would include it so you can see the type of things we have to deal with as a pharmacist and the time and effort it takes with the current appeal process. The case is Docket No. 05-2021-INS-00156.

To whom it may concern:

This is in response to the appeal of initial decision by OptumRx for Docket numbers 05-21-INS-00154, 00155, and 00156.

In this appeal of initial decision, OptumRX says they increased the reimbursement. Again, I assert that they did not, and I presented evidence in the 2<sup>nd</sup> tier appeal (EX. C) in the form of a screen shot from my pharmacy dispensing system showing the exact claim details which shows the reimbursement. In all 3 of these claims the PBM's response to the 1<sup>st</sup> tier appeal was "increase", you can clearly see from the evidence I submitted that they absolutely did not increase the reimbursement and in fact with the latest claim they actually decreased the reimbursement rate!

In this appeal of initial decision OptumRx is trying to say that since the pharmacy did not include the invoiced rate in the 1<sup>st</sup> tier appeal that they need not abide by the law. First, the 1<sup>st</sup> tier appeal process that OptumRx has set up, does not allow for nor asks for the pharmacies requested reimbursement rate. Washington State Law does not require the pharmacy to give the invoiced rate in the 1<sup>st</sup> tier appeal and that would go against all business sense. Why should I show them my cards in this business deal? They need to use their, and I quote, "de-identified market pricing benchmark data, wholesaler information on market availability and pharmacy information from inquiries" and make a **reasonable adjustment**. Or simply follow the law RCW 19.340.100(4)(B) and give proof that the medication was purchased by other Washington State Pharmacies at the rate they are reimbursing. If the PBM simply followed this law the pharmacy would have no ground to stand on. The issue here is that it is impossible for the pharmacy to purchase the medication at the rate the PBM is reimbursing. The pharmacy has done their due diligence and given proof that they have made a reasonable effort to purchase the medication at the cheapest rate possible. This is a business and as a reseller the pharmacy has to purchase its products at the

cheapest rates possible to stay viable, it is very unreasonable to assume any business is not making an effort to purchase at the best rates possible. This being a common fact of business in general, our law RCW 19.340.100 puts the onus on the PBM to prove that the products in question are available at the rates they are reimbursing, it is that simple. It is in plain language in the law. Over and over again with OptumRx in these appeal cases I have asked that they simply follow this law and if they can't and/or don't the pharmacy's appeal should be upheld. Over and over again OptumRx has refused to follow this law, at this point it is without a shadow of a doubt that this is a knowing and willful violation of our state law.

It really should be this simple. In the 1<sup>st</sup> tier appeal, I let the PBM know they are not covering my cost. The PBM should either, truly increase the reimbursement or give proof that the medication can be purchased in our state at the rate they are reimbursing. If the latter is true, then case closed, the pharmacy needs to figure out how to purchase better. If the PBM does make an increase but it still does not cover the pharmacies' cost, then the 2<sup>nd</sup> tier appeal comes in. The pharmacy gives evidence of the invoiced rate it had to pay for the medication and again the PBM has a chance to present to the OAH/OIC evidence that the medication is available to Washington state pharmacies at their rate of reimbursement. In all the hundreds of appeal cases Whole Health Pharmacy has brought to the OAH/OIC against OptumRx, never once have they been able to or even tried to follow this law. Since this initial decision is being appealed, I ask that the OIC reconsider the civil penalty and issue the penalty of \$5000. With all the evidence in this case and hundreds of previous appeals, it is very apparent that OptumRx is and should be aware of this law and they continue to violate it, knowing and willfully. *RCW 19.340.110 (2) Any person, corporation, third-party administrator of prescription drug benefits, pharmacy benefit manager, or business entity which violates any provision of this chapter shall be subject to a civil penalty in the amount of one thousand dollars for each act in violation of this chapter or, **if the violation was knowing and willful, a civil penalty of five thousand dollars** for each violation of this chapter.* In my email to OptumRx which is include in the 2<sup>nd</sup> tier appeal evidence (EX. F), I even directly ask them to follow the law and give them the exact RCW 19.340.100(4)(B) and they still did not. Your Honor, if you do not find the actions of OptumRx to be knowing and willful in these cases will you please indicate why and what you believe would constitute a knowing and willful action in this instance. I ask this of you because this same thing keeps happening over and over and the OAH/OIC has found in the pharmacies favor over and over and the \$1000 civil penalty has been issued to this PBM on several occasions but the civil penalty for a knowing and willful offense has never been issued. Please help me understand how this can't be knowing and willful when it keeps repeating over and over. Especially in this case where OptumRx has so blatantly lied under oath to the OAH/OIC saying that they increased reimbursement when the Pharmacy has presented hard true facts as evidence showing the subsequent claims were paid at the same underwater rate or even lowered after the first appeal.

Let me also present some information on how medication purchasing happens in our country. There are 3 main major wholesalers in our country, AmerisourceBergen, McKesson, and Cardinal Health. These 3 wholesalers go to drug manufacturers and contract to buy so much of a medication at a certain price and then set their prices to the pharmacies. The drug manufactures then commit to producing enough medication to fill the needs of those major wholesalers. Then as time goes on if the manufacturers have a little extra or one of the major wholesalers is not able to sell all the drug as it nears its expiration date they will sell to secondary wholesalers, of which there are many, for a discounted rate. To stay viable a pharmacy must have a contract with one of the major wholesalers to ensure that they will be able to



procure all the various medications for their patients at any given time. Secondary wholesalers do not have a wide variety of medications available at all times since they are only getting the surplus or near outdated medications. To get the best deals and prices from one of the major wholesalers a pharmacy must contract to purchase a benchmark dollar amount of medications from one major wholesaler. For this reason, it is impossible for a pharmacy to be able to purchase medications from more than one of the major wholesalers. I have a deal with AmerisourceBergen to be my primary wholesaler. To get the competitive rates that I get, I have to meet certain dollar purchasing benchmarks. I cannot just call up McKesson or Cardinal Health and ask for a medication, even if I had a contract to purchase from them I would not be able to purchase enough from each different wholesaler to meet the benchmark purchasing dollars to procure competitive rates. We are able to find better deals on certain medications from secondary wholesalers from time to time, but this is not a reliable source of all medications at all times. We have done extensive market analysis and found that overall, on average we obtain the best medication rates by doing business with AmerisourceBergen and shopping secondary wholesalers when necessary. With each of these appeals I always check with multiple wholesalers to be sure the rate that I am appealing for is truly the going market rate. Due to the nature of the drug manufacturer, wholesaler, pharmacy relationship it is usually my primary wholesaler that can offer the best rates.

In this appeal of initial decision OptumRx states the pharmacy states that they checked with 3 different wholesalers but then only produced one invoice rather than 3 invoices. This is a ridiculous point the PBM is trying to make. Of course I do not have an invoice from each of the wholesalers because I did not purchase from all of the wholesalers. I purchased from the one wholesaler that gave me the cheapest rate, so that is the invoice I have to present to the OIC/OAH.

Since the initial decision is being reviewed, I would like to ask that the OIC reconsider the pharmacies request for attorney fees. Processing these appeals is a huge burden on me as a healthcare professional and small business owner. These appeals take a lot of time to track and manage, if I were to pay an attorney to manage the whole thing it would cost an inordinate amount at an attorney hourly rate. Due to this I have negotiated with Mr. Swartz to counsel me on certain aspects of the law as needed for the various appeals and he charges the pharmacy a flat fee per appeal for his services. I have included his invoice as evidence in the 2<sup>nd</sup> tier appeal. (EX. I). As I have shown in each of these appeals as well as many previous cases, OptumRx as part of United Health (#8 in the fortune 500), is violating our state law repeatedly and trying to put my small independently owned pharmacy out of business. OptumRx is underpaying Whole Health Pharmacy on an average of just over 100 claims per month, over the last year Whole Health Pharmacy has been underpaid on a total of 1209 claims equaling a monetary loss of \$26,357. This is an immense hardship for our small business. As a result of OptumRx's blatant disregard for the law the burden has been put on myself and my business to defend what is right. I ask that the burden be placed back on them, they should have to incur the costs that they are causing not my small business. I remind you that when the OAH/OIC finds in the pharmacies favor and awards the pharmacy the underpayment amount, it is just that "the underpayment amount", just the amount that means I provided my services to the PBM's customer for free. I am not being compensated for my time and effort it takes to manage all these appeals and it is of no fault of the pharmacies, it is the fault of OptumRX who repeatedly knowing and willfully continues to violate Washington State Law. Please Your Honor, if you do not have what you need to award lawyers fees, please contact me and let me know what you do need so I can present it to you.

Please Your Honor, put the burden where it belongs, award the pharmacy the underpayment amount, issue the \$5000 civil penalty, and award the \$500 lawyer fees.

Thank you for your time and consideration,

Clinton Knight PharmD., Whole Health Pharmacy,

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Hello,

I am a pharmacist practicing here in Washington State. I am the co-owner of an independent pharmacy operating in a rural community in eastern Washington.

I am writing this to plead with the OIC to make some major changes during this current rulemaking session in how they are enforcing the PBM reform laws that have been enacted in our state over the last several years. Our state legislators first enacted PBM reform laws in 2014, then revised and added provisions in 2017, 2020, and 2024. Among other things, these laws gave oversight and enforcement authority to the OIC. While I commend the efforts of your office to this point, we are still falling short of the intentions of the laws. Which is evident with nearly daily headlines coming out across the country pointing out the egregious predatory practices of the PBM's that lead to negative impact on the healthcare system and directly harming patients of our country.

For example,

*"Ohio Attorney General Sues Express Scripts, Prime Therapeutics and 5 Others, Blaming Exorbitant Drug Prices on Their Collusion,"*

*"Ohio Auditor releases stunning Medicaid PBM audit report showing PBMs pocketed \$224 million in spread pricing,"*

*"Kentucky saved \$282 million with single PBM,"*

*"OIG audit of federal employee pharmacy benefits plan reveals express scripts retained \$44.9 million in overpayments and unreported rebates,"*

*"Tyson Foods drops CVS for startup to manage staff pharmacy benefits."*

Here in Washington State, *"Attorney General Bob Ferguson and the Washington State Health Care Authority announced today that managed health care giant Centene will pay \$19 million to Washington state. The payment resolves allegations that the Fortune 50 company overcharged the state Medicaid program for pharmacy benefit management services."*

A study recently released that was conducted by 3 Axis Advisors titled "Understanding Drug Pricing from Divergent Perspectives, State of Washington Prescription Drug Pricing Analysis" examined the reimbursement experiences of Washington community pharmacies and the cost experiences of Washington commercial plan sponsors. Among other things, this study found:

- Plan sponsor (employer) costs increased by 30% while commercial pharmacy reimbursement decreased by 3% between 2020-2023.
- PBM-affiliated mail-order pharmacies had prescription markups that were more than three times higher than the markups at retail pharmacies.
- For a subset of claims comprised mostly of costly "specialty drugs," plan sponsors were charged more than \$1,000 in markups per prescription at PBM-affiliated mail-order pharmacies despite retail pharmacies typically filling those medicines at a loss.

While the OIC has taken steps to implement the intended protections of the laws, the current system is being under-utilized because it puts too much of the onus on small pharmacies, who are being taken advantage of by the PBM's, to be the ones who must identify where the PBM's are violating our laws and report it to the OIC in hopes that actions will be taken. While pharmacist appreciate that we have some sort of a reprieve, it is not the intention of law that our cry for help is the only thing that Initiates the enforcement of the laws.

*RCW 48.200.030(2)(b) To apply for registration under this section, a health care benefit manager must: Pay an initial registration fee and annual renewal registration fee as established in rule by the commissioner. The fees for each registration must be set by the commissioner in an amount that ensures the registration, renewal, and **oversight activities are self-supporting.***

I am pleading with you to develop a PBM compliance department within the OIC including qualified individuals with insight into the industry. Mainly at least one pharmacist who has experience navigating the current convoluted, PBM controlled, medication purchasing system. The aforementioned RCW was specifically enacted to ensure the OIC would have the financial resources necessary to conduct the needed oversight activities. The people of our state will greatly benefit if the OIC actively seeks violators of the PBM reform laws and take the necessary steps to enforce them. Many of the current laws provide protections for things that a pharmacist would not be able prove are happening, and blow the whistle on, like one of the findings from the 3 Axis Advisors study. PBM's are directly violating RCW 48.200.280(2)(k) and reimbursing their affiliate pharmacies at higher rates than other pharmacies. If the OIC had a dedicated PBM compliance department to audit and investigate the PBMs things like this would be curbed.

The current process in place for pharmacists to appeal underpayments is much too onerous and time consuming for a busy healthcare professional to manage at scale. I just ran a report, and my pharmacy has been underpaid by PBMs, in the first five months of 2024, on 8,697 claims. With the current OIC system there is no way I could submit and track all of these claims as appeals.

I know it is a heavy lift, but the OIC is the agency that has been tasked with enforcing our PBM reform laws. The OIC should be charging the PBMs high enough registration fees that they can hire sufficient staff and data analysis experts to work with pharmacies to gather claims information and ensure pharmacies are being paid fairly. The bulk of this lift needs to be shouldered by the OIC and funded by the PBM's registration fees and civil penalties levied.

Another reason the OIC needs to take some of the burden off the pharmacies is that many pharmacies are fearful of retaliation by the PBMs. Many pharmacies are not utilizing the current OIC appeals and complaint processes. The PBMs are huge companies with limitless resources, and they already take advantage of small pharmacies but we need to be in contract with them because of the monopoly they hold on the medication market. The 3 big PBMs hold over 80% of the market share of pharmacy claims. As a small independent pharmacy if I were to lose one of these contracts it would put me out of business within months. I know we have RCW 48.200.280(6)(d) which states PBMs can not retaliate against pharmacies, but in all honesty, I am a small business struggling to stay viable and I could not afford the lawyer fees to bring a case against a PBM if they were to retaliate against me.

The current rule, WAC 284-180-505, implemented by the OIC, says that a pharmacy must first complete a 1<sup>st</sup> tier appeal with the PBM and get an unsatisfactory response before the pharmacy can move the

appeal on to the 2<sup>nd</sup> tier, within the OIC. The PBMs are using this rule to circumvent our laws and prevent pharmacists from being able to even get their cases heard by the OIC. A couple examples of this;

1. Nearly all PBMs have statements on their 1<sup>st</sup> tier appeal process that says for Washington State Pharmacies claims older than 30 days cannot be appealed. This is not a requirement of our state law and I have argued this in a case within the OIC appeals process and the OIC Judge agreed with me, but the PBMs are still trying to enforce it in the 1<sup>st</sup> tier appeals process.
2. PBMs require that to submit a 1<sup>st</sup> tier appeal, the pharmacy must include a copy of their invoice. This is not a requirement of our state law and would be a stark violation of antitrust provisions were it required. PBMs are the ones making our “take it or leave it” contracts and they also are under the same ownership of parent companies that own retail and mail order pharmacies that are our direct industry competition. Pharmacy’s invoice costs are proprietary trade secrets and pricing information in this industry is confidential and proprietary due to the competitive nature of the business, pharmacies and wholesalers must enter into non-disclosure agreements to not share pharmacy specific pricing information with PBMs for a number of reasons, including antitrust concerns.

Furthermore, every PBM has a different portal or form that they want the pharmacy to use to submit 1<sup>st</sup> tier appeals. This non standardized process just adds to the already burdensome process for the pharmacist. They purposely make this process convoluted, time consuming, and difficult, to dissuade busy pharmacists from even attempting to submit 1<sup>st</sup> tier appeals.

My first suggestion would be to completely strike WAC 284-180-505 from the rule and allow pharmacists to appeal directly to the OIC where the PBMs are subject to civil penalties for violating our laws. Or if the current rule stays in place, the OIC should require all PBMs registered in the state to use the same, OIC designed, standardized 1<sup>st</sup> tier appeal form. The OIC can use the current law to guide what fields must be present on this form, only requiring the necessary information from the pharmacies in an easily downloadable format. Through this simple standardized process, the OIC could basically force the PBMs to follow the law and either approve the appeal or provide proof that the medication was purchased by other Washington State Pharmacies at the price they are reimbursing. This would eliminate all the burdensome bickering back and forth between pharmacies and PBM’s.

The burden of the law that the pharmacy must satisfy is the pharmacy must *demonstrate that it is unable to purchase a therapeutically equivalent interchangeable product from a supplier doing business in Washington at the pharmacy benefit manager's list price.* With the standardized form the OIC can dictate how a pharmacy must meet this requirement. Requiring an invoice is not a viable option for the reasons I detailed above. My suggestion here would be to have the pharmacy affirm that they have some sort of process in place that ensures they are doing a reasonable market analysis and procuring medication based on this information. We must remember that my small pharmacy does not enjoy the same purchasing concessions that say CVS pharmacy does with its hundreds of retail and mail order

pharmacies. The following is for your information on how my pharmacy would be able to satisfy this requirement.

- Due to the fact that my invoice costs are proprietary trade secret, confidential, and subject to non-disclosure agreements I cannot present them here in the 1<sup>st</sup> tier appeal. So, to satisfy this requirement, in the following I outline that I have done my due diligence to procure the medications at the best rates available to my small pharmacy. My pharmacy holds an account with AmerisourceBergen one of the three primary medication wholesalers in the country, this ensures a reliable supply of all the available medications patients may need. To obtain the best prices from a primary wholesaler a pharmacy must only hold a contract with one primary, because the wholesaler requires certain volume purchases to obtain the best pricing. If we tried to spread our bulk purchases over all three of the primary wholesalers, we would not meet criteria and prices would be higher. Let me point out that our invoice price is the price we pay already taking this into account, meaning the wholesaler does not give an additional NDC specific discount after invoice. It is industry standard that pharmacies must only do business with one of the primary wholesalers. Secondary Wholesalers do bring cheaper prices to the market at times, but they are not a reliable source that always has access to certain medication. Furthermore, the secondary market is a place with higher risk of bringing counterfeit medications into the supply. A pharmacy must be cognizant of this and ensure they are doing business with quality accredited suppliers. My pharmacy holds accounts with multiple accredited secondary wholesalers throughout our country, we have done extensive market analysis to narrow down our secondary wholesalers to about 10 trustworthy secondaries who consistently offer competitive prices to the market. My pharmacy software system automatically interfaces with all our wholesalers, making their medication price files electronically available to me in real time. My pharmacy software uses set electronic smart parameters to take all things into account such as minimum order requirement and shipping cost to selectively order medications from the wholesaler that can provide it to me at the least cost at the time of order. Therefore, by default, every day when we place our medication order, an algorithm that identifies the best market pricing throughout our country is leveraged to ensure my pharmacy gets the best price available to a pharmacy of my size and scope.

I have been navigating the OIC's current appeal process since 2017 when it was instated. I have won hundreds of appeals proving the PBMs were violating our laws, and it wasn't until 2021 the OIC issued the \$1000 civil penalty to one of the PBMs. Since, 2021 I have won hundreds more appeals and the OIC has never issued the harsher \$5000 civil penalty even when the PBM was found to violate the same law repeatedly.

*RCW 48.200.290 (2) Any person, corporation, third-party administrator of prescription drug benefits, pharmacy benefit manager, or business entity which violates any provision of this chapter shall be subject to a civil penalty in the amount of one thousand dollars for each act in violation of this chapter or, if the violation was knowing and willful, a civil penalty of five thousand dollars for each violation of this chapter.*

During this rule-making session please outline what constitutes a knowing and willfull violation.

Thank you for your time and consideration,

Clinton Knight PharmD.

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