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HOUSE BILL NO. 1041

Offered January 10, 2024

Prefiled January 10, 2024

A BILL to amend and reenact §§ 38.2-3407.22, 38.2-3465, 38.2-3466, *and* 38.2-3467 *of the Code of Virginia and to amend the Code of Virginia by adding sections numbered* 38.2-3467.1 *and* 38.2-3467.2, *relating to health insurance; ensuring fairness in cost-sharing; pharmacy benefits managers; compensation and duties; civil penalty.*

Patrons—O'Quinn and Runion

Referred to Committee on Labor and Commerce

Be it enacted by the General Assembly of Virginia:

1. That §§ 38.2-3407.22, 38.2-3465, 38.2-3466, and 38.2-3467 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 38.2-3467.1 and 38.2-3467.2 as follows:

§ 38.2-3407.22. Ensuring fairness in cost-sharing.

A. As used in this section:

"Carrier" has the same meaning as set forth in § 38.2-3407.10; however, "carrier" also includes any person required to be licensed pursuant to this title that offers or operates a managed care health insurance plan subject to the requirements of Chapter 58 (§ 38.2-5800 et seq.) or that provides or arranges for the provision of health care services, health plans, networks, or provider panels that are subject to regulation as the business of insurance. ~~"Carrier" also includes any health insurance issuer that offers health insurance coverage, as defined in § 38.2-3431.~~

~~"Enrollee" means any person entitled to health care services from a carrier.~~

~~"Health care services" means items or services furnished to any individual for the purpose of preventing, alleviating, curing, or healing human illness, injury, or physical disability.~~

"Defined cost-sharing" means a deductible payment or coinsurance amount imposed on an enrollee for a covered prescription drug under the enrollee's health plan.

"Health plan" means any individual or group health care plan, subscription contract, evidence of coverage, certificate, health services plan, medical or hospital services plan, accident or sickness insurance policy or certificate, managed care health insurance plan, or other similar certificate, policy, contract, or arrangement, and any endorsement or rider thereto, to cover all or a portion of the cost of persons receiving covered health care services, that is subject to state regulation and that is required to be offered, arranged, or issued in the Commonwealth by a carrier licensed under this title. ~~"Health plan" includes a state or local government employer plan.~~ "Health plan" does not mean (i) *a state or local government employer plan, including the state employee health plan under § 2.2-2818.2; (ii)* coverages issued pursuant to Title XVIII of the Social Security Act, 42 U.S.C. § 1395 et seq. (Medicare), Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (Medicaid), Title XXI of the Social Security Act, 42 U.S.C. § 1397aa et seq. (CHIP), 5 U.S.C. § 8901 et seq. (federal employees), or 10 U.S.C. § 1071 et seq. (TRICARE) ~~or (ii)~~; *(iii)* accident only, credit or disability insurance, long-term care insurance, TRICARE supplement, Medicare Supplement, or workers' compensation coverages*; or (iv) an employee welfare benefit plan, as defined in section 3 (1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002 (1), that is self-insured or self-funded.*

~~"Pharmacy benefits manager" has the same meaning as set forth in § 38.2-3407.15:4.~~

"Price protection rebate" means a negotiated price concession that accrues directly or indirectly to the carrier, or other party on behalf of the carrier, in the event of an increase in the wholesale acquisition cost of a drug above a specified threshold.

"Rebate" means (i) negotiated price concessions, including base price concessions and reasonable estimates of any price protection rebates and performance-based price concessions, *whether described as a rebate or otherwise,* that may accrue directly or indirectly to a carrier~~, health plan, or pharmacy benefits manager~~ during the coverage year from a manufacturer, dispensing pharmacy, or other party in connection with the dispensing or administration of a prescription drug and (ii) reasonable estimates of any negotiated price concessions, fees, or other administrative costs that are passed through, or are reasonably anticipated to be passed through, to the carrier~~, health plan, or pharmacy benefits manager~~ and serve to reduce the liability of ~~a~~ *the* carrier~~, health plan, or pharmacy benefits manager~~ for a prescription drug.

B. ~~When contracting with a carrier or health plan to administer pharmacy benefits, a pharmacy benefits manager shall offer the carrier or health plan the option of extending point-of-sale rebates to enrollees of the plan.~~ *An enrollee's defined cost-sharing for each prescription drug shall be calculated at the point of sale based on a price that is reduced by an amount equal to at least 80 percent of all rebates received or expected*

to be received based on information known to the carrier at the time of the transaction in connection with the dispensing or administration of the prescription drug.

C. ~~The provisions of this section shall only apply to a carrier, health plan, or pharmacy benefits manager~~ *Nothing in this section shall preclude a carrier from decreasing an enrollee's defined cost-sharing for each prescription drug by an amount greater than that required under subsection B.*

D. In implementing the requirements of this section, the Commission shall only regulate a carrier to the extent permissible under applicable law.

~~D.~~ *E.* In complying with the provisions of this section, a carrier~~, health plan, pharmacy benefits manager,~~ or its ~~respective~~ agents shall not publish or otherwise reveal information regarding the actual amount of rebates a carrier~~, health plan, or pharmacy benefits manager~~ receives *on a product or therapeutic class of products* on a product-specific, manufacturer-specific, or pharmacy-specific basis. Such information shall be protected as a trade secret ~~and~~, shall not be public record *as defined by the Virginia Public Records Act (§ 42.1-76 et seq.),* or disclosed, directly or indirectly, *in a manner that would allow for the identification of an individual product, therapeutic class of products, or manufacturer, or in a manner that has the potential to compromise the financial, competitive, or proprietary nature of the information.* A carrier~~, health plan, or pharmacy benefits manager~~ shall require any vendor or third party ~~with which the carrier, health plan, or pharmacy benefits manager contracts for~~ *that performs* health care or administrative services on behalf of the carrier~~, health plan, or pharmacy benefits manager that~~ *and* may receive or have access to rebate information to comply with the *confidentiality* provisions of this subsection ~~related to protection of information regarding the amount of rebates a carrier, health plan, or pharmacy benefits manager receives on a product-specific, manufacturer-specific, or pharmacy-specific basis~~.

~~E. The Commission may, pursuant to the provisions of § 38.2-223, adopt such rules and regulations as may be necessary to implement and enforce the provisions of this section.~~

§ 38.2-3465. Definitions.

A. As used in this article, unless the context requires a different meaning:

"Carrier" has the same meaning ascribed thereto in subsection A of § 38.2-3407.15. However, "carrier" does not include a nonprofit health maintenance organization that operates as a group model whose internal pharmacy operation exclusively serves the members or patients of the nonprofit health maintenance organization.

"Claim" means a request from a pharmacy or pharmacist to be reimbursed for the cost of administering, filling, or refilling a prescription for a drug or for providing a medical supply or device.

"Claims processing services" means the administrative services performed in connection with the processing and adjudicating of claims relating to pharmacist services that include (i) receiving payments for pharmacist services, (ii) making payments to pharmacists or pharmacies for pharmacist services, or (iii) both receiving and making payments.

"Contract pharmacy" means a pharmacy operating under contract with a 340B-covered entity to provide dispensing services to the 340B-covered entity, as described in 75 Fed. Reg. 10272 (March 5, 2010) or any superseding guidance published thereafter.

"Covered entity" means an entity described in § 340B(a)(4) of the federal Public Health Service Act, 42 U.S.C. § 256B(a)(4). "Covered entity" does not include a hospital as defined in § 32.1-123 or 37.2-100.

"Covered individual" means an individual receiving prescription medication coverage or reimbursement provided by a pharmacy benefits manager or a carrier under a health benefit plan.

"Defined cost-sharing" means a deductible payment or coinsurance amount imposed on an enrollee for a covered prescription drug under the enrollee's health benefit plan.

"Enrollee" means any person entitled to health care services from a carrier.

"Health benefit plan" has the same meaning ascribed thereto in § 38.2-3438. *"Health benefit plan" does not include a state or local government employer plan, including the state employee health insurance plan under § 2.2-2818.2.*

"Health care services" means items or services furnished to any individual for the purpose of preventing, diagnosing, alleviating, curing, or healing human illness, injury, or physical disability.

"Mail order pharmacy" means a pharmacy whose primary business is to receive prescriptions by mail or through electronic submissions and to dispense medication to covered individuals through the use of the United States mail or other common or contract carrier services and that provides any consultation with covered individuals electronically rather than face-to-face.

"Pharmacy benefits management fee" means a fee that covers the cost of providing one or more pharmacy benefits management services and that does not exceed the value of the service actually performed by the pharmacy benefits manager.

"Pharmacy benefits management *services*" means ~~the administration or management of prescription drug benefits provided by a carrier for the benefit of covered individuals~~ *(i) negotiating the price of prescription drugs, including negotiating and contracting for direct or indirect rebates, discounts, or other price concessions; (ii) managing any aspect of a prescription drug benefit, including the processing and payment*

of claims for prescription drugs, the performance of drug utilization reviews, the processing of drug prior authorization requests for prescription drugs, the adjudication of appeals or grievances related to the prescription drug benefit, contracting with network pharmacies, controlling the cost of covered prescription drugs, or the provision of services related thereto; (iii) performing any administrative, managerial, clinical, pricing, financial, reimbursement, or billing service; and (iv) providing such other services as the Commissioner may define by regulation. "Pharmacy benefits management *services*" does not include any service provided by a nonprofit health maintenance organization that operates as a group model, provided that the service ~~is~~ furnished through the internal pharmacy operation exclusively serves the members or patients of the nonprofit health maintenance organization.

"Pharmacy benefits manager" or "PBM" means an entity that ~~performs~~*, pursuant to a written agreement with a carrier or health benefit plan, either directly or indirectly provides one or more* pharmacy benefits management *services on behalf of the carrier or health benefit plan and any agent, contractor, intermediary, affiliate, subsidiary, or related entity that facilitates, provides, directs, or oversees the provision of pharmacy benefits management services*. "Pharmacy benefits manager" includes an entity acting for a PBM in a contractual relationship in the performance of pharmacy benefits management *services* for a carrier, nonprofit hospital, or third-party payor under a health program administered by the Commonwealth.

"Pharmacy benefits manager affiliate" means a business, pharmacy, or pharmacist that directly or indirectly, through one or more intermediaries, owns or controls, is owned or controlled by, or is under common ownership interest or control with a pharmacy benefits manager.

"Pharmacy benefits manager duty" means the duty of a pharmacy benefits manager to perform pharmacy benefits management services with care, skill, prudence, diligence, fairness, transparency, and professionalism, and for the best interests of the enrollee, the health benefit plan, and the provider, in accordance with § 38.2-3467.2 and any Commission regulations. "Pharmacy benefits manager duty" includes duties of care and good faith and fair dealing.

"Price protection rebate" means a negotiated price concession that accrues directly or indirectly to the carrier, or other party on behalf of the carrier, in the event of an increase in the wholesale acquisition cost of a drug above a specified threshold.

"Rebate" means ~~a discount or other price concession, including without limitation incentives, disbursements, and reasonable estimates of a volume-based discount, or a payment that is (i) based on utilization of a prescription drug and (ii) paid by a manufacturer or third party, directly or indirectly, to a pharmacy benefits manager, pharmacy services administrative organization, or pharmacy after a claim has been processed and paid at a pharmacy~~ *(i) negotiated price concessions, including base price concessions, whether described as a rebate or otherwise, and reasonable estimates of any price protection rebates and performance-based price concessions, that may accrue directly or indirectly to a carrier or health benefit plan during the coverage year from a manufacturer, dispensing pharmacy, or other party in connection with the dispensing or administration of a prescription drug and (ii) reasonable estimates of any negotiated price concessions, fees, or other administrative costs that are passed through, or are reasonably anticipated to be passed through, to the carrier or health benefit plan and serve to reduce the liability of the carrier or health benefit plan for a prescription drug.*

"Retail community pharmacy" means a pharmacy that is open to the public, serves walk-in customers, and makes available face-to-face consultations between licensed pharmacists and persons to whom medications are dispensed.

"Spread pricing" means the model of prescription drug pricing in which the pharmacy benefits manager charges a health benefit plan a contracted price for prescription drugs, and the contracted price for the prescription drugs differs from the amount the pharmacy benefits manager directly or indirectly pays the pharmacist or pharmacy for pharmacist services.

§ 38.2-3466. License required to provide pharmacy benefits management services; requirements for a license, renewal, and revocation or suspension.

A. Unless otherwise covered by a license as a carrier, no person shall provide pharmacy benefits management services or otherwise act as a pharmacy benefits manager in the Commonwealth without first obtaining a license in a manner and in a form prescribed by the Commission.

B. Each applicant for a license as a pharmacy benefits manager shall make application to the Commission, in the form and containing the information listed in subsection C and any other information the Commission prescribes. The Commission may require any documents reasonably necessary to verify the information contained in an application. Each applicant shall, at the time of applying for a license, pay a nonrefundable application processing fee in an amount and in a manner prescribed by the Commission. The fee shall be collected by the Commission and paid directly into the state treasury and credited to the "Bureau of Insurance Special Fund — State Corporation Commission" for the maintenance of the Bureau of Insurance as provided in subsection B of § 38.2-400.

C. An applicant for a license as a pharmacy benefits manager shall provide the Commission the following information:

1. The name, address, and telephone contact number of the pharmacy benefits manager;

2. The name and address of each person with management or control over the pharmacy benefits manager;

3. The name and address of each person with a beneficial ownership interest in the pharmacy benefits manager; and

4. If the pharmacy benefits manager registrant (i) is a partnership or other unincorporated association, a limited liability company, or a corporation and (ii) has five or more partners, members, or stockholders, the registrant shall specify its legal structure and the total number of its partners, members, or stockholders who, directly or indirectly, own, control, hold with the power to vote, or hold proxies representing 10 percent or more of the voting securities of any other person.

D. An applicant shall provide the Commissioner with a signed statement indicating that, to the best of its knowledge, no officer with management or control of the pharmacy benefits manager has been convicted of a felony or has violated any of the requirements of state law applicable to pharmacy benefits managers, or, if the applicant cannot provide such a statement, a signed statement describing the relevant conviction or violation.

E. Except where prohibited by state or federal law, by submitting an application for a license, the applicant shall be deemed to have appointed the clerk of the Commission as the agent for service of process on the applicant in any action or proceeding arising in the Commonwealth out of or in connection with the exercise of the license. Such appointment of the clerk of the Commission as agent for service of process shall be irrevocable during the period within which a cause of action against the applicant may arise out of transactions with respect to subjects of pharmacy benefits management *services* in the Commonwealth. Service of process on the clerk of the Commission shall conform to the provisions of Chapter 8 (§ 38.2-800 et seq.).

F. Each applicant that has complied with the provisions of this article and Commission regulations is entitled to and shall receive a license in the form the Commission prescribes.

G. Each pharmacy benefits manager shall renew its license annually and shall, at the time of renewal, pay a renewal fee in an amount and in a manner prescribed by the Commission. The fee shall be collected by the Commission and paid directly into the state treasury and credited to the "Bureau of Insurance Special Fund — State Corporation Commission" for the maintenance of the Bureau of Insurance as provided in subsection B of § 38.2-400.

H. The Commission may refuse to issue or renew a license or may revoke or suspend a license if it finds that the applicant or license holder has not complied with the provisions of this article or Commission regulations.

§ 38.2-3467. Prohibited conduct by carriers and pharmacy benefits managers; civil penalty.

A. No carrier on its own or through its contracted pharmacy benefits manager or representative of a pharmacy benefits manager shall:

1. Cause or knowingly permit the use of any advertisement, promotion, solicitation, representation, proposal, or offer that is untrue;

2. Charge a pharmacist or pharmacy a fee related to the adjudication of a claim other than a reasonable fee for an initial claim submission;

3. Reimburse a pharmacy or pharmacist an amount less than the amount that the pharmacy benefits manager reimburses a pharmacy benefits manager affiliate for providing the same pharmacist services, calculated on a per-unit basis using the same generic product identifier or generic code number and reflecting all drug manufacturer's rebates, direct and indirect administrative fees, and costs and any remuneration;

4. Penalize or retaliate against a pharmacist or pharmacy for exercising rights provided pursuant to the provisions of this article;

5. Impose requirements, exclusions, reimbursement terms, or other conditions on a covered entity or contract pharmacy that differ from those applied to entities or pharmacies that are not covered entities or contract pharmacies on the basis that the entity or pharmacy is a covered entity or contract pharmacy or that the entity or pharmacy dispenses 340B-covered drugs. Nothing in this subdivision shall (i) apply to drugs with an annual estimated per-patient cost exceeding $250,000 or (ii) prohibit the identification of a 340B reimbursement request; or

6. Interfere with a covered individual's right to choose a pharmacy or provider, based on the pharmacy or provider's status as a covered entity or contract pharmacy.

B. No carrier, on its own or through its contracted pharmacy benefits manager or representative of a pharmacy benefits manager, shall restrict participation of a pharmacy in a pharmacy network for provider accreditation standards or certification requirements if a pharmacist meets such accreditation standards or certification standards.

C. No carrier, on its own or through its contracted pharmacy benefits manager or representative of a pharmacy benefits manager, shall include any mail order pharmacy or pharmacy benefits manager affiliate in calculating or determining network adequacy under any law or contract in the Commonwealth.

D. No carrier, on its own or through its contracted pharmacy benefits manager or representative of a pharmacy benefits manager, shall conduct spread pricing in the Commonwealth.

E. Each carrier on its own or through its contracted pharmacy benefits manager or representative of a

pharmacy benefits manager shall comply with the provisions of this section in addition to complying with the provisions of § 38.2-3407.15:1.

F. No pharmacy benefits manager shall derive income from pharmacy benefits management services provided to a carrier or health benefit plan in the Commonwealth except for income derived from a pharmacy benefits management fee. The amount of any pharmacy benefits management fees shall be set forth in the agreement between the pharmacy benefits manager and the carrier or health benefit plan. The pharmacy benefits management fee charged by or paid to a pharmacy benefits manager from a carrier or health benefit plan shall not be directly or indirectly based or contingent upon (i) the acquisition cost or any other price metric of a drug; (ii) the amount of savings, rebates, or other fees charged, realized, or collected by or generated based on the activity of the pharmacy benefits manager; or (iii) the amount of premiums, deductibles, or other cost-sharing or fees charged, realized, or collected by the pharmacy benefits manager from enrollees or other persons on behalf of an enrollee. Annually by December 31, each pharmacy benefits manager operating in the Commonwealth shall certify to the Commission that it has fully and completely complied with the requirements of this section. Such certification shall be signed by the chief executive officer or chief financial officer of the pharmacy benefits manager. The Commission shall impose a civil penalty not to exceed §1,000 per claim for a violation of this section.

§ 38.2-3467.1. Ensuring fairness in cost-sharing.

A. An enrollee's defined cost-sharing for each prescription drug shall be calculated at the point of sale based on a price that is reduced by an amount equal to at least 80 percent of all rebates received or expected to be received based on information known to the pharmacy benefits manager at the time of the transaction in connection with the dispensing or administration of the prescription drug.

B. Nothing in this section shall preclude a pharmacy benefits manager from decreasing an enrollee's defined cost-sharing for each prescription drug by an amount greater than that required under subsection A.

C. In complying with the provisions of this section, a pharmacy benefits manager or its agents shall not publish or otherwise reveal information regarding the actual amount of rebates a pharmacy benefits manager receives on a product or therapeutic class of products on a product-specific, manufacturer-specific, or pharmacy-specific basis. Such information shall be protected as a trade secret, shall not be public record as defined by the Virginia Public Records Act (§ 42.1-76 et seq.), or disclosed, directly or indirectly, in a manner that would allow for the identification of an individual product, therapeutic class of products, or manufacturer, or in a manner that has the potential to compromise the financial, competitive, or proprietary nature of the information. A pharmacy benefits manager shall require any vendor or third party that performs health care or administrative services on behalf of the pharmacy benefits manager or contracts for health care or administrative services on behalf of the pharmacy benefits manager that may receive or have access to rebate information to comply with the confidentiality provisions of this subsection.

§ 38.2-3467.2. Pharmacy benefit manager duty.

A. A pharmacy benefits manager shall owe the pharmacy benefits manager duty to any enrollee, health benefit plan, or provider that receives pharmacy benefits management services from the pharmacy benefits manager or that furnishes, covers, receives, or is administered a unit of a prescription drug for which the pharmacy benefits manager has provided pharmacy benefits management services. The Commission shall adopt regulations defining the scope of the duties, which shall include the obligation of a pharmacy benefits manager to:

1. Provide all pharmacy benefits management services to enrollees related to formulary design, utilization management, and grievances and appeals in a transparent manner that is consistent with the best interest of the enrollees;

2. Provide transparency to providers and health benefit plans regarding the amounts charged or claimed by the pharmacy benefits manager including identifying all instances of spread pricing; and

3. Disclose all conflicts of interest to enrollees, health benefit plans, and providers.

B. If any conflict of interest exists between the pharmacy benefits manager duties owed to enrollees, providers, and health plans, the duty to an enrollee shall be primary over the duty owed to any other party and the duty owed to a provider shall be primary over the duty owed to a health benefit plan.

C. Any person who is aggrieved by the breach of the pharmacy benefits manager duty by a pharmacy benefits manager may bring an action in a court of competent jurisdiction.

D. For the purposes of this section, "provider" means any person that furnishes, provides, dispenses, or administers one or more units of a prescription drug.