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Health Services Coalition (NV)
Healthcare Purchaser Alliance of Maine
HealthCareTN (TN)
Houston Business Coalition on Health
Kansas Business Group on Health
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Lehigh Valley Business Coalition on Healthcare
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Midwest Business Group on Health
Montana Association of Health Care Purchasers
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New Hampshire Purchaser Group on Health
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Northeast Business Group on Health
Pittsburgh Business Group on Health
Public Employer Action Collaborative for Health
Purchaser Business Group on Health
Rhode Island Business Group on Health
San Diego Purchasers Cooperative
Savannah Business Group on Health
Silicon Valley Employers Forum
St. Louis Area Business Health Coalition
The Alliance (WI)
The Economic Alliance for Michigan
Washington Health Alliance
The Oklahoma Business Collective on Health
Valley Health Alliance (CO)

March 15, 2024

The Honorable Virginia Foxx
Chair
Committee on Education and the Workforce
United States House of Representatives
Washington, DC 20515

Submitted via email to: EdandWorkforceRFI@mail.house.gov

RE: ERISA Request for Information

Dear Chairwoman Foxx:

Thank you for this opportunity to provide our input on the critical topic of strengthening ERISA on behalf of the National Alliance of Healthcare Purchaser Coalitions (National Alliance) and our more than 40 national, state, and regional purchaser coalition members. The National Alliance is the only nonprofit, purchaser-led coalition with a national and regional reach. The breadth and diversity of our coalition network aligns to amplify the collective voice of the employer purchaser and accelerate improvements in health, equity, and value across the country. Our members represent private and public sector, nonprofit, and Taft-Hartley and union organizations that provide health benefits for more than 45 million Americans spending over \$400 billion annually.

In our response, we seek to address a few key points of interest for self-insured employers:

- The importance of maintaining ERISA preemption
- Issues around PBM regulation at the state level and the need for federal action
- Policy options at the federal level both within and outside the ERISA framework

Maintain and strengthen ERISA preemption

Across the country, nearly 140 million people receive their health coverage through self-insured ERISA health plans. Particularly for multi-state employers and purchasers, ERISA's preemption of state laws provides self-insured organizations significant flexibility in plan design and places fiduciary responsibility on employer plan sponsors to act in the best interests of their

enrollees. This provides critical accountability in the system. As the cost of healthcare continues to rise, both employer plan sponsors and the families they cover require flexibility to design plans that meet their needs. ERISA preemption provides a strong foundation, especially in the increasingly fluid post-COVID job market where increasing numbers of employees work remotely – often in states different than their employers’ domicile.

Eroding ERISA preemption and allowing states to step into the role of primary regulators of employee health benefits would result in a patchwork of 50+ different regulatory schemes – an unworkable framework that would erode employee benefits for more than four-in-ten American families. Any action Congress takes to eat away at preemption will adversely impact labor markets, disadvantage employees based on where they live or work, cause employers to cut back on benefit coverage, and raise the cost of health insurance, which could ultimately price some employees and their families out of coverage.

ERISA and state regulation of PBMs

While ERISA has been in statute for half a century, threats to ERISA preemption have become more common in recent years due to a recent Supreme Court decision – *Rutledge v. Pharmaceutical Care Management Association (PCMA)* 592 U.S. 80 (2020). In that pivotal case over an Arkansas law, the court unanimously affirmed states’ authority to regulate pharmacy benefit managers (PBMs) and set reimbursement rates for prescription drugs, even in the context of ERISA health plans.

Since that decision, many states have sought to regulate PBMs and health plans offering services to self-insured purchasers. Some of this legislation appears to strike at the heart of ERISA preemption. Emboldened by the *Rutledge* decision, the State of Oklahoma sought to “establish minimum and uniform access to a provider and standards and prohibitions on restrictions of a patient’s right to choose a pharmacy provider” (Okla. Stat. tit. 36, § 6959 (2019)). In a 2023 decision, the 10th Circuit Court of Appeals, (*PCMA v. Mulready* No. 22-6074 (10th Cir. 2023)), the court found that the Oklahoma law violated ERISA preemption. In particular, the court found that the law’s “network restrictions mandate benefit structures ... the Access Standards dictate which pharmacies must be included in a PBM’s network ... the AWP Provision requires that those pharmacies be invited to join the PBM’s preferred network. The Discount Prohibition requires that cost-sharing and copayments be the same for all network pharmacies... *Each provision either directs or forbids an element of plan structure or benefit design* (emphasis added). (Mulready, 2023 WL 5218138). **Put simply, while Arkansas’ law permissibly limits its regulation to the price at which PBMs must pay pharmacies, the Oklahoma law**

impermissibly regulates plan design for self-insured employers – the sole province of ERISA.

Regulation of PBM plans is essential at the federal level

The recent spate of state laws seeking to regulate PBMs is in part caused by the vacuum created by the lack of meaningful action on PBM abuses at the federal level. To ensure uniform standards and meaningfully change the PBM industry across the country, we encourage the committee to examine the appropriate roles for both states and the federal government and advance federal legislation to ensure PBMs providing services to self-insured employers are subject to strong uniform standards, eliminating their ability to evade oversight and accountability. Our goal is not to stop permissible state regulation of PBMs, such as the Arkansas law, but to ensure the federal government is setting strong standards of conduct across the country.

The National Alliance and our members strongly support legislation considered by your committee and others that would enhance PBM price transparency, ban the practice of “spread pricing,” mandating full rebate-pass throughs, and delink PBM compensation from drug prices. **It is past time for Congress to take meaningful action to hold PBMs accountable to their customers.**

Employers and purchasers need congressional action – both within and outside ERISA

Modifications to ERISA can be a tool to help self-insured employers in their ongoing efforts to ensure access to high quality care at a reasonable price. But all-too-often, the structure of ERISA as a regulatory framework – which holds plan sponsors as the responsible fiduciary for ensuring plan assets are spent prudently – puts self-insured employers and purchasers between a rock (federal regulators) and a hard place (third party administrators, PBMs, provider groups and other actors whose primary incentive is to increase their own profitability).

To best help self-insured employers and purchasers in our drive toward affordability, we encourage the committee to consider policy changes both within ERISA and outside of it, where policy changes can more directly drive at the underlying causes for high healthcare prices.

Ensure necessary transparency

As the costs of healthcare continue to rise faster than the overall rate of inflation, employers must have access to cost and quality data to effectively negotiate with vendors when providing administration of healthcare;

employees and their families need to have access to actionable data if they are expected to effectively “shop” for healthcare and seek the best value care for themselves and their families. Efforts at transparency over the past decade have been welcomed by employers, but more needs to be done to ensure *meaningful* data passes back to those paying the bills – both employers and covered employees. **For far too long, ERISA-covered employer plan sponsors have been thwarted at every turn in their attempts to access *their own data* to understand how to better design plans to meet the needs of their enrollees.**

Focus on underlying causes of high prices

Beyond ERISA, Congress must act to address the underlying causes of high healthcare costs throughout the healthcare system. Employer plans are themselves victims of an unsustainably expensive healthcare system. Even very large employers with hundreds of thousands of employees have relatively small market share to successfully negotiate for significantly lower prices for healthcare services in their health plans. Delivery system and payment reform must be addressed in a holistic manner, to include ERISA and federal preemption, among the other levers available to all the congressional committees with jurisdiction over healthcare.

Self-insured employers have developed a keen appreciation for how our fiduciary obligations under ERISA have been dramatically elevated due to the Consolidated Appropriations Act of 2021. We now recognize the only way to demonstrate prudence that is required of them as a fiduciary is to ensure they are paying reasonable prices. But employers cannot do this alone. **We need the Committee and Congress to give us necessary tools to meet our fiduciary responsibility and reduce costs.**

Thank you for the opportunity to provide our input on this important topic. Please contact Shawn Gremminger, president and CEO of the National Alliance if you would like to discuss further.

Sincerely,

National Alliance of Healthcare Purchaser Coalitions

Alabama Employer Health Consortium
The Alliance (Midwest)
Dallas/Fort Worth Business Group on Health
Economic Alliance for Michigan
Employers' Advanced Cooperative on Healthcare

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The Oklahoma Business Collective on Health
Texas Business Group on Health
Texas Employers for Affordable Healthcare
Washington Health Alliance

cc: Rep. Bobby Scott, Ranking Member, Committee on Education and the
Workforce