

BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
OFFICE OF THE MONTANA STATE AUDITOR

In the matter of the adoption of New Rule I pertaining to Pharmacy Benefit Manager Definitions and New Rule II pertaining to Pharmacy Benefit Manager Network Adequacy) NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION))))

TO: All Concerned Persons

1. On November 12, 2021, at 10:00 a.m., the Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI) will hold a public hearing in the basement conference room of the commissioner's office at 840 Helena Avenue, in Helena, Montana, to consider the proposed adoption of the above-stated rules. Details for remote participation in the hearing via Zoom are available at www.csimt.gov/events.

2. CSI will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact CSI no later than 5:00 p.m. on November 5, 2021, to advise us of the nature of the accommodation that you need. Please contact Sam Loveridge, Communications Director, 840 Helena Avenue, Helena, Montana, 59601; telephone (406) 444-2040 or 1-800-332-6148; fax (406) 444-3497; TDD (406) 444-3246; or e-mail csi@mt.gov.

3. The rules as proposed to be adopted provide as follows:

NEW RULE I DEFINITIONS (1) The following definitions apply to this subchapter:

(a) "Mail-order pharmacy" means a pharmacy that provides pharmacist services and primarily dispenses and delivers covered drugs via common carrier.

(b) "Pharmacy network" means a group of pharmacies contracted with a PBM to provide pharmacist services at negotiated prices to an enrollee or an injured worker of workers' compensation insurance carriers.

(c) "Preferred pharmacy network" means a subset, group, or tier of pharmacies within a pharmacy network that agree to charge an enrollee or an injured worker of workers' compensation insurance carriers a reduced copay or coinsurance for pharmacist services or to accept a lower reimbursement rate than other pharmacies in the pharmacy network.

(d) "Retail pharmacy" means any pharmacy that actively provides pharmacist services to the walk-in general public from which an enrollee or an injured worker of workers' compensation insurance carriers could purchase a covered drug without being required to receive medical services from a provider or institution affiliated with that pharmacy.

AUTH: 33-1-313, 33-2-2409, MCA

IMP: 33-2-2402, 33-2-2403, 33-2-2409, MCA

NEW RULE II NETWORK ADEQUACY (1) A PBM must establish and maintain pharmacy networks that include at least 90% of the retail pharmacies actively providing pharmacist services in this state.

(2) A PBM's pharmacy network must include a sufficient and adequate number of retail pharmacies to ensure that all pharmacist services are accessible without unreasonable delay, within a reasonable proximity, and with sufficient provider choice.

(a) A PBM must submit the following reports and information for each pharmacy network and preferred pharmacy network as part of its license or license renewal application to demonstrate to the commissioner a sufficient and adequate pharmacy network:

(i) a report in a form and in a manner prescribed by the commissioner that designates the number and location of all retail pharmacies, mail-order pharmacies, and specialty pharmacies, if any, in each PBM pharmacy network and preferred pharmacy network; and

(ii) a network accessibility report that includes:

(A) the access standard or standards the PBM establishes to determine network adequacy based on the number of miles between the enrollees or injured workers of workers' compensation insurance carriers and nearest retail pharmacy in the pharmacy network;

(B) the number of enrollees or injured workers of workers' compensation insurance carriers with access to a retail pharmacy in the pharmacy network using the access standard established by the PBM;

(C) the average number of miles between the enrollees and injured workers of workers' compensation insurance carriers identified in (B) and the nearest retail pharmacy in the pharmacy network;

(D) the number of enrollees and injured workers of workers' compensation insurance carriers without access to a retail pharmacy in the pharmacy network using the access standard established by the PBM;

(E) the average number of miles between the enrollees and injured workers of workers' compensation insurance carriers identified in (D) and the nearest retail pharmacy in the pharmacy network; and

(F) the ratios of retail pharmacies in the pharmacy network to an enrollee or an injured worker of workers' compensation insurance carriers;

(iii) the PBM's process for monitoring and ensuring on an ongoing basis a sufficient and adequate pharmacy network to meet the pharmacist services needs of enrollees and injured workers of workers' compensation insurance carriers; and

(iv) the specific, measurable criteria used by the PBM to build its pharmacy network, including:

(A) a description of the criteria the PBM used to build its pharmacy network, including the criteria used to select pharmacies for participation in the network;

(B) if applicable, a description of the criteria the PBM used to build its preferred pharmacy network, including the criteria used to place pharmacies in subsets, groups, or tiers; and

(C) if applicable, a description of the criteria used by the PBM to select pharmacies to dispense specialty drugs in its pharmacy network.

(b) A PBM may identify, and must report to the commissioner, other reasonable criteria or standards it uses to establish the sufficiency and adequacy of its pharmacy networks, including the willingness of retail pharmacies in the service area to contract with the PBM under reasonable and relevant standard terms and conditions specific to the pharmacy's business practice and delivery model. The commissioner may require the PBM to submit credible evidence documenting a retail pharmacy's refusal to contract based upon reasonable and relevant standard terms and conditions specific to the pharmacy's business practice and delivery model.

(c) The commissioner may consider other reasonable criteria or standards to determine the sufficiency and adequacy of each PBM pharmacy network; and

(d) A PBM must file and update the report required in (a)(i) with the commissioner if the number of pharmacies in the pharmacy network decreases by more than 5% during the year.

(3) If a PBM does not have a sufficient and adequate pharmacy network, regardless of whether adequacy was determined by a threshold percentage of retail pharmacies in (1), the PBM must ensure that the enrollee or the injured worker of workers' compensation insurance carriers obtains pharmacist services from a retail pharmacy within reasonable proximity of the enrollee or the injured worker of workers' compensation insurance carriers at no greater level of cost sharing to the enrollees or the injured workers of workers' compensation insurance carriers than if the service were obtained from a pharmacy in the pharmacy network with the most favorable cost sharing to the enrollees the injured workers of workers' compensation insurance carriers. The cost sharing paid by the enrollees or injured workers of workers' compensation insurance carriers must accumulate toward the enrollee's plan's deductibles and maximum out-of-pocket amounts.

(4) A PBM must monitor, on an ongoing basis, the ability and capacity of its pharmacy network to furnish pharmacist services to the enrollee or the injured worker of workers' compensation insurance carriers.

(5) A PBM may not use mail-order pharmacies to meet network adequacy requirements for its pharmacy network.

(6) A PBM may not require an enrollee or an injured worker of workers' compensation insurance carriers to use any pharmacy, including a mail-order pharmacy, in which the PBM has an ownership interest, either directly or indirectly through an affiliate, holding company, or subsidiary, for prescriptions, refills, or specialty drugs regardless of day supply.

(7) A PBM may decline to select a pharmacy to be in the pharmacy network if the pharmacy fails to meet legitimate and reasonable selection criteria of the PBM.

(8) A PBM must post electronically a current, accurate, and searchable directory of pharmacies for each of its pharmacy networks.

(a) In making the directory available electronically, the PBM must ensure that the general public is able to view all pharmacies included in its pharmacy network and preferred pharmacy network through a clearly identifiable link or tab, without creating an account or entering a policy or contract number.

(b) A PBM must clearly identify in its electronic directories the pharmacies that are in each of its pharmacy networks.

(c) A PBM must include in its electronic directory a customer service email address and telephone number or electronic link that enrollees, injured workers of workers' compensation insurance carriers, or the general public may use to notify the PBM of inaccurate directory information.

(9) A PBM may use a restricted pharmacy network as long as the PBM otherwise meets the network adequacy requirements set forth in these rules. A PBM may place legitimate and reasonable requirements on pharmacies with whom it contracts.

AUTH: 33-1-313, 33-2-2409, MCA

IMP: 33-2-2402, 33-2-2403, 33-2-2409, MCA

REASON: The commissioner proposes to adopt the network adequacy rules to comply with the requirements of Senate Bill 395 (2021). The proposed rules are intended to ensure adequate and sufficient access to pharmacies and pharmacist services and to provide transparency for consumers to make fully informed decisions.

The proposed rules are in addition to any other network adequacy requirements that may apply to the provision of pharmacist services, including ARM 6.6.5902.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Sam Loveridge, CSI Communications Director, 840 Helena Avenue, Helena, Montana, 59601; telephone (406) 444-2040 or 1-800-332-6148; fax (406) 444-3497; TDD (406) 444-3246; or e-mail CSI@mt.gov, and must be received no later than 5:00 p.m., November 19, 2021.

5. Robert Stutz, legal counsel for CSI, has been designated to preside over and conduct this hearing.

6. CSI maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list must make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by CSI.

7. An electronic copy of this proposal notice is available through the Secretary of State's website at <http://sosmt.gov/ARM/Register>.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor, Senator Greg Hertz, was contacted by e-mail on October 12, 2021.

9. With regard to the requirements of 2-4-111, MCA, CSI has determined that the adoption of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Robert Stutz
Robert Stutz
Rule Reviewer

/s/ Mary Belcher
Mary Belcher
Deputy Auditor
Commissioner of Securities and Insurance,
Office of the Montana State Auditor

Certified to the Secretary of State October 12, 2021.