



**MIKE HUNTER**  
**ATTORNEY GENERAL**

February 11, 2021

The Honorable Glen Mulready  
Oklahoma Insurance Commissioner  
400 NE 50<sup>th</sup> Street  
Oklahoma City, OK 73105

The Honorable Marcus McEntire  
Oklahoma House of Representatives  
2300 N. Lincoln Boulevard, Rm 204B  
Oklahoma City, OK 73105

The Honorable Greg McCortney  
Oklahoma State Senate  
2300 N. Lincoln Boulevard, Rm 528.2  
Oklahoma City, OK 73105

**Re: Designation of Preferred Pharmacies under the Patient's Right to Pharmacy Choice Act (36 O.S.Supp.2020, §§ 6958 *et seq.*)**

Dear Commissioner Mulready, Senator McCortney, and Representative McEntire:

I am writing in response to your requests for a legal interpretation of a provision in the Patient's Right to Pharmacy Choice Act, 36 O.S.Supp.2020, §§ 6958 *et seq.* (the "Act"). As you know, the Act regulates the pharmacy benefit management industry and contains numerous provisions that protect patient access and choice, increase transparency, and rein in anti-competitive practices. We have been asked to determine whether the Act also forbids health insurers and pharmacy benefit managers (PBMs)<sup>1</sup> from structuring their pharmacy networks to include "preferred" pharmacies and incentivize consumers to use preferred in-network pharmacies by, for instance, offering lower co-pays. My office has concluded that the Act does not prohibit such use of preferred participation status.

Health insurers or PBMs create pharmacy networks by contracting with various pharmacies to provide prescription drug benefits to beneficiaries. These networks may include retail, mail-order, and institutional pharmacies. *See* 36 O.S.Supp.2020, § 6963(E). In-network pharmacies can also be preferred or non-preferred pharmacies. *See, e.g., id.* § 6961(A). The Act does not define "preferred pharmacy." But it is commonly understood that the key difference between a preferred pharmacy and non-preferred pharmacy is that a preferred pharmacy offers prescription drugs to patients "at lower levels of cost-sharing [including copayments] than apply at a non-preferred pharmacy." 42 C.F.R. § 423.100 (defining "preferred pharmacy" as for Medicare Part D purposes). Pharmacies generally achieve "preferred" status by meeting certain terms and conditions set by the insurer or PBM. In

---

<sup>1</sup> "Generally speaking, PBMs serve as intermediaries between prescription-drug plans and the pharmacies that beneficiaries use." *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 478 (2020).

exchange, lower levels of cost-sharing and co-pays incentivize beneficiaries to use preferred pharmacies thereby increasing volume at those pharmacies.

You have asked whether Section 6963 of the Act forbids such preferred pharmacy arrangements. The specific provisions in question provide as follows:

(D) A health insurer or pharmacy benefits manager (PBM) shall not restrict an individual's choice of in-network provider for prescription drugs.

(E) An individual's choice of in-network provider may include a retail pharmacy or a mail-order pharmacy. A health insurer or PBM shall not restrict such choice. Such health insurer or PBM shall not require or incentivize using any discounts in cost-sharing or a reduction in copay or the number of copays to individuals to receive prescription drugs from an individual's choice of in-network pharmacy.

As an initial matter, we note that the text of these provisions is clear that they apply to both health insurers and PBMs. We understand that it has been contended that these provisions prevent health insurers and PBMs from offering lower co-pays to beneficiaries who fill their prescriptions at preferred pharmacies. Since that difference in cost-sharing is the primary distinction between preferred and non-preferred pharmacies, the contention—if correct—would essentially preclude the designation of preferred pharmacies altogether. We disagree with that contention for several reasons.

To begin, far from forbidding preferred pharmacies, the Act instead contemplates that certain in-network pharmacies may be designated as such. Section 6962 prohibits a PBM from denying “a pharmacy the opportunity to participate in any pharmacy network at preferred participation status if the pharmacy is willing to accept the terms and conditions that the PBM has established for other pharmacies as a condition of preferred network participation status.” 36 O.S.Supp.2020, § 6962(B)(4). This “any willing provider” provision acts to prevent a PBM from arbitrarily discriminating against pharmacies willing to accept the PBM’s standard terms and conditions. Those terms and conditions, including copays, are the product of contract negotiations.<sup>2</sup> The Act does not dictate to health insurers or PBMs what those terms and conditions must be. The contention at issue, if accepted, would render this “any willing provider” provision superfluous—counter to a well-established rule of statutory interpretation. *See, e.g., Moral Ins. Co. v. Cooksey*, 1955 OK 179, 285 P.2d 223, 227 (“The Legislature is never presumed to have done a vain thing.”). It would also render superfluous the many provisions of Section 6961 that refer to preferred pharmacies. *See* 36 O.S.Supp.2020, § 6961(A) (requiring, *inter alia*, PBMs to provide consumers access to preferred pharmacies within certain geographic distances), *id.* § 6961(D) (prohibiting a PBM from including the names of specific pharmacies in its mailings, ID cards, or other materials unless it also lists all preferred and non-preferred pharmacies in its network).

The contention that the final sentence of Section 6963(E), which prohibits certain “discounts in cost-sharing or a reduction in copay,” prohibits all such discounts is also counter to how courts read legal texts. As the Oklahoma Supreme Court has explained “statutory language ... does not occur in isolation from the rest of the statute in which it appears.” *In Re: Initiative Petition No. 397, State Question No. 767*, 2014 OK 23, ¶ 12, 326 P.3d 496. “Words, phrases and sentences of a statute are to be understood as used ... with regard to the context and that sense which best harmonizes with all

---

<sup>2</sup> That is not to say that contractual terms are immune from state regulation. Quite the contrary. *See, e.g.*, 36 O.S. § 6962(B)(2)-(3), (6)-(7).

other parts of the statute.” *Groendyke Transport Inc. v. Gardner*, 1960 OK 153, ¶ 9, 353 P.2d 695, *reversed on other grounds by Garrison v. Bechtel Corp.*, 1995 OK 2, 889 P.2d 273. Applying those principles here leads us to conclude that Section 6963(E) does not regulate the incentives that differentiate preferred and non-preferred pharmacies within a pharmacy network.

Read in context and as a whole, Section 6963(E) does nothing more than forbid health insurers and PBMs from either restricting or incentivizing a beneficiary’s choice between retail or mail-order pharmacies. The first sentence narrows the scope of the subsection to the choice between in-network retail and mail-order pharmacies. Thus, when the final sentence mentions “an individual’s choice of in-network pharmacy,” it is referring only to the choice referenced in the subsection’s opening sentence. The second sentence states that “such choice” cannot be restricted by the PBM or health insurer. The final sentence—the one at issue—then prohibits “[s]uch health insurer or PBM” from providing incentives via co-pay (or cost-sharing) discounts or reductions regarding the choice of in-network pharmacy. Thus, Section 6963(E) read as a whole concerns the choice between retail and mail-order pharmacies, ensuring that consumers (1) have a choice between mail-order and retail, (2) that cannot be restricted, and (3) that cannot be incentivized with cost-sharing discounts. It does not regulate cost-sharing discounts or incentives between non-preferred in-network pharmacies and preferred in-network pharmacies, as clearly contemplated by Sections 6961 and 6962(B)(4).

Finally, Section 6963(D) speaks only of restrictions of choice between in-network pharmacies, not about discounts or incentives. The two are clearly distinct, as evidenced by the latter two sentences in Section 6963(E). Indeed, if the phrase “shall not restrict” (which is present in both subsections (D) and (E) of Section 6963) also forbade incentives and discounts, the final sentence of subsection (E) would have been redundant. Courts avoid reading statutes in such a manner. *See, e.g., Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007).

In sum, the text of the Act does not forbid insurers or PBMs from allowing in-network pharmacies to participate as a “preferred” pharmacy and giving consumers cost-sharing or co-pay discounts when purchasing from those preferred pharmacies. However, all in-network pharmacies must be given equal opportunities by the insurer or PBM to gain preferred status, without discrimination. While such incentives can be provided for preferred pharmacies, PBMs and insurers cannot *restrict* consumers from purchasing from non-preferred in-network pharmacies, nor can they provide such discounts to incentivize the use of mail-order pharmacies over retail pharmacies.<sup>3</sup>

Sincerely,



MIKE HUNTER  
OKLAHOMA ATTORNEY GENERAL

---

<sup>3</sup> This letter does not constitute an official Attorney General Opinion.