EXPRESS SCRIPTS®

March 13, 2013

Representative Mitch Greenlick, Chair
House Health Care Committee
900 Court St. NE
Salem, Oregon 97301

Re: House Bill 2123 and -1 amendments: Opposed

Dear Representative Greenlick:

I am writing to inform you that Express Scripts respectfully opposes House Bill 2123. Express Scripts administers prescription drug benefits on behalf of our clients – employers, health plans, unions and government health programs — for approximately 109 million Americans, including over 170,000 Oregonians. We provide integrated pharmacy benefit management services including pharmacy claims processing, home delivery, specialty benefit management, benefit-design consultation, drug-utilization review, formulary management, medical and drug data analysis services, as well as extensive cost-management and patient-care services.

Section 2: BOP Licensure

PBMs provide plan sponsors two primary services: pharmacy benefit management services and home delivery of prescription drugs. In order to dispense drugs to residents of Oregon, PBM-owned home delivery pharmacies are licensed and regulated by the Board of Pharmacy exactly like a retail or community pharmacy operating in the state. Express Scripts follows the state of Oregon laws and rules regarding labeling, substitution, drug utilization review, counseling, recordkeeping, etc. We are also subject to state and federal laws regarding the dispensing of controlled substances.

HB 2123 seeks to expand the Board of Pharmacy's licensure and regulation to include the benefit management provided to plan sponsors. The proponents are disingenuous in their claim that "this legislation only requires the completion of an application and payment of a small fee". What they fail to tell you is that Section 2 specifically requires that PBMs be licensed by the Board of Pharmacy for the purpose of granting them specific authority to take action against a PBM for violations relating to Sections 3 and 4 of the bill.

Furthermore, Section 2 grants the Board unprecedented, extraordinary and unbridled power over a PBM, allowing a license to be denied, suspended or revoked if the PBM "engages in conduct likely to mislead, deceive or defraud the general public or the board." They extend that power to include if a PBM "engages in unfair or deceptive business practices."

In a March, 2011 letter the Federal Trade Commission provided the following comments on a similar proposal, stating, "Allowing the Pharmacy Board to regulate PBMs will likely undermine the PBM's ability to negotiate lower prices for prescription drugs, which in turn, will raise those prices for both insurers and

consumers covered by insurance." They further state, "Because pharmacists and PBMs have a competitive, and at times, adversarial relationship, we are concerned that giving the pharmacy board regulatory power over PBMs may create tensions and conflicts of interest for the pharmacy board. Indeed, the antitrust laws recognize that there is a real danger that regulatory boards composed of market participants may pursue their own interests rather than those of the state."

Section 3: Pharmacy Audits

Second, Section 3, as reflected in the -1 amendment, creates impediments to plan sponsor's ability to recover overpayments to pharmacies. Audits of the pharmacies within our network are critical to the prevention and capture of fraud, waste and abuse. Our clients not only expect, but require us to audit the pharmacies in our network and to recover any overpayments. The proponents claim that they "support the need for audits" yet propose in the -1 amendment to limit the number of claims that can be reviewed in an on-site audit. This arbitrary restriction would make it much more difficult to detect fraud, waste, or abuse. Additionally, they want more than two weeks advance notice of an audit, again, providing ample time to those engaged in fraudulent activity to either (1) close the store or (2)

The true goal of an effective pharmacy audit program is to prevent fraudulent claims submissions from occurring. Express Scripts performs both desk and field audits of retail pharmacies. Desk audits include a daily targeted review of point of sale claims for potential errors in the quantity submitted. They complement on-site field audits, where claims are evaluated against the pharmacy's prescription records. Together, desk and field audits provide us with a consistent, timely, and accurate approach to managing the pharmacy benefit plan, allowing both proactive concurrent and retrospective claim review. On average, each year we conduct onsite audits of approximately two percent of the more than 60,000 pharmacies in our network.

Similarly, this legislation limits the number of prescriptions available to audit to 200, which would also impede the ability of auditors to detect fraudulent prescriptions. Such a major restriction would allow pharmacies acting illegally to beat the system easily and not get caught.

Section 4: MAC

Section 4 relating to MAC (Maximum Allowable Cost) lists not only requires PBMs to divulge proprietary information severely limits the use of a proven cost-saving tool. As a pharmacy benefit manager, we use the maximum allowable cost reimbursement methodology to ensure a fair reimbursement to pharmacies for generic drugs. MAC pricing was originally developed by state Medicaid programs as they realized that were overpaying for generic medications. Today, 46 Medicaid programs, multiple federal programs, and most private payers use a MAC benchmark.

There is no single publisher of a MAC price. All of the other pricing methodologies that exist are useful for brand drugs, but none are flexible or broadly applicable enough for the generic drug market. As the marketplace changes, because manufacturers discontinue production of a product, there is a shortage, the FDA imposes a sanction on a manufacturer or any other reason, MAC prices will fluctuate.

One of the ways that Express Scripts serves patients in Oregon is as a mail order and specialty pharmacy. At each of these businesses, we recognize the importance of maximum allowable cost pricing to ensure that the pharmacy industry doesn't include members that try to overcharge patients for generic medicines. It keeps us constantly working to make sure we're purchasing products at the lowest possible cost for our plans and patients. Different manufacturers will charge different amounts for equally interchangeable generic drugs. If a pharmacy buys the higher-priced product, it will not make as large a spread or could lose

money, but if it buys the cheapest generic drug it will make more. MAC pricing keeps the economic incentives in the right place.

Critics of MAC pricing often do not acknowledge that maximum allowable cost prices increase frequently. This year, the MAC prices for certain drugs that treat high blood pressure, arthritis, pain and infections all increased for various reasons. In several cases, the wholesalers raised their price. In others, there were issues with nationwide availability for the product. In another, the MAC price increased because of a pharmacy complaint.

It is important to understand that many pharmacies in Oregon do not directly contract with pharmacy benefit managers. Rather, they use group purchasing organizations called pharmacy services administrative organizations (PSAOs) who collectively contract with PBMs. Simultaneously, the PSAOs are serving as the wholesaler to the pharmacies and selling them the drugs for their pharmacies. Simply put, the PSAO sells the pharmacy the inventory AND administers the contract for reimbursement at the pharmacy. If there is an egregious difference between the amounts a pharmacy pays to procure and drug and the amount they are reimbursed in return, we cannot have a complete dialogue without having the PSAO present to address their dual role in the supply chain. According to a recently released study by the Government Accountability Office at least 75% of the country's independent pharmacies contract with a PSAO.

If MAC information is publicized, it would have an anti-competitive effect on insurers and employers, as well as PBMs. Competing plans, wholesalers, pharmacies and others would have access to others' pricing information. According to the FTC, this would drive up drug prices for employers and consumers. In a letter to the Mississippi House of Representatives in 2011 about a similar type of disclosure, the FTC warned that "pharmacies and manufacturers will be less likely to offer "deals" when they know that everyone they do business with can see the terms of the deal and will likely demand the same terms."

It's true – sometimes pharmacies are reimbursed less than their acquisition costs. It's also true that Express Scripts often has to pay pharmacies more than we can contractually bill our clients. No industry or company is guaranteed a profit on every sale.

For these reasons, and the fact that this legislation will increase prescription drug costs for our plan sponsor and patients, we must respectfully oppose HB 2123.

Sincerely,

CYNTHIA M. LAUBACHER