Oregon House of Representatives
House Committee on Healthcare
Testimony of the National Community Pharmacists Association
(Matthew J. DiLoreto – NCPA Director of State Government Affairs)
March 15, 2013

Good afternoon Chairman Greenlick, Vice Chair Keny-Guyer and members of the Committee.

My name is Matt DiLoreto and I am the Director of State Government Affairs for the National Community Pharmacists Association. Today I am pleased to provide this testimony in strong support of H.B.2123. This important legislation will achieve three goals. First, it would require Pharmacy Benefit Managers (PBMs) to submit a simple application and be licensed by the Oregon State Board of Pharmacy. Secondly, it would establish fair and reasonable standards over how pharmacy audits can be conducted in Oregon. Third, it would provide a reasonable level of transparency over how Pharmacy Benefit Managers (PBMs) determine reimbursement to pharmacies for multiple source generic drugs.

Before speaking to the specifics of this legislation let me state that some provisions contained in H.B.2131 have a long history of discussion and negotiation between all interested parties. The audit language contained in this bill has been substantially amended from its original form at the request of the PBM industry. In no way do these provisions represent a "model bill" that pharmacy interest groups blindly introduced representing only one side of the issue. In fact, language in H.B. 2123 has been discussed and amended since early in the summer of 2012. Such talks continued regularly until recently when all but one of those representing the PBM industry walked away from the negotiation table. Despite this development, the remaining pharmacy stakeholders still decided to retain the mutually agreed upon amendments in an effort to reach an agreement.

NCPA represents America's independent community pharmacists, including the owners of more than 23,000 community pharmacies, franchises and small chains. Nationwide, NCPA members employ over 300,000 full-time employees and dispense nearly half of the nation's retail prescription medicines. In Oregon alone it is estimated that there are 153 community pharmacies that employ 1,600 citizens. These pharmacist small business owners are responsible for over $586 million in annual revenues. Community pharmacists represent are most trusted of healthcare providers and serve as a vital component of the Nation's "Main Street Economy."

Some of those community pharmacists are in this room today. Please allow me a moment to state the obvious; these pharmacists do not represent a national association, corporate giant, or contracted firm paid from the deep pockets of a multi-billion dollar corporation. They have traveled from various parts of Oregon at their own expense and have had to find individuals to "fill in for them" at the pharmacy counter. As citizens of Oregon they did this to demonstrate their strong support for H.B.2123.

H.B.2123 provides limited but reasonable registration requirements for PBMs. By simply completing an application and paying a small fee, PBMs will then be licensed with the State Board of Pharmacy. Let me be clear, this legislation only requires the completion of an application and payment of a small fee for those PBMs operating in Oregon. NCPA feels this is a reasonable standard to meet especially for corporations as large as most PBMs. One PBM alone recorded profits of $1.33 billion in 2012 and controlled the prescription information for an approximate 90 million patient lives.

In its own words the mission statement of the Oregon State Board of Pharmacy is to *"promote, preserve and protect the public health, safety and welfare by ensuring high standards in the practice of pharmacy and by regulating the quality, manufacture, sale and distribution of drugs."* Through this statement, NCPA feels every PBM and its individual components fall entirely under the Board of Pharmacy's umbrella of registration. PBMs dictate the terms and conditions under which pharmacies dispense medications to patients, operate their own mail order pharmacies where they dispense and substitute alternate treatments of medications for patients, handle sensitive patient information both within and outside their self-owned mail order operations, and have access to patient pharmacy records. Having said that, NCPA simply asks why should the State Board of Pharmacy NOT require these mega-corporations to complete a simple application and pay a small fee?

The second issue which H.B.2123 would address is the reform of PBM pharmacy audits. Recently, the Nation has seen an increase in states taking action to protect pharmacies from abusive PBM audit practices. During the past year, more than 11 states have enacted PBM audit reform legislation. These new laws have increased the national figure to 23 states now having such laws on the books with an additional state in which legislation is on the verge of passage. Some of these laws are better than others based on the PBM industries relative success in weakening the language in certain bills to provide loopholes which allow them to continue their abusive practices. NCPA is here today to respectfully request that Oregon join the other 23 states that have these critical provisions "on the books" and enact the *appropriate* measures outlined in H.B. 2123 to rein in abusive auditing practices while still allowing audits to continue for the intended purpose of catching true fraud and abuse.

Let me be entirely clear, NCPA *fully* supports the need for audits to occur to identify and penalize those "bad apples" that are present in any industry. In fact, within the language of H.B.2123 (Sections 9-10), pharmacy has taken clearly identifiable measures to spell out that when fraud is present, money can and should be recouped. The fact is that rather than legitimately using the audit process to guard and protect against fraud, many PBMs now view the pharmacy audit process as a profitable revenue stream for the company. These audits can claim thousands of dollars for nothing more than basic administrative or typographical mistakes, many not even occurring at the fault of the pharmacist or pharmacy staff.

The PBMs may state that the language community pharmacy supports would result in increased fraud or in a decreased ability for them to identify fraud. This is simply not true. NCPA is now pleased to report that as recently as February 25th, the Centers for Medicare and Medicaid Services (CMS) released a report stating they found that pharmacy audits in the Part D program were not focusing on their intended use to identify fraud and financial harm but instead were targeting *"routine clerical errors"* and that such targeting *"may be related to the incentives in contingency reimbursement arrangements with claim audit vendors."* CMS's findings continued by stating "*therefore, we believe full claim recoupment should only take place if the plan learns that a claim should not have been paid under Part D at all; for example, because it is fraudulent."* NCPA is pleased that CMS has now formally stated the message we conveying to this Committee today…in many cases, audits are not targeting fraud or abuse but are instead targeting simple, honest "errors" where no fraud or financial loss was intended or occurred.

The third issue H.B.2123 attempts to address is the issue of transparency for MAC pricing. Under the current system, pharmacies contract with PBMs in order to participate in pharmacy networks and in order to keep their doors open for business. For independent community pharmacies in particular, most pharmacists are essentially presented with "take it or leave it" contracts. However, these contracts provide no insight or guidance to pharmacies as to how they will be reimbursed for generic drugs.

A “Maximum allowable cost” or “MAC” list refers to a payer or PBM-generated list of products that establishes the upper limit, or maximum amount, that a plan will pay a pharmacy for certain generic drugs. Essentially, no two MAC lists are alike and each PBM has free rein to pick and choose products for their MAC lists. There is no standardization in the industry as to the criteria for the inclusion of drugs on MAC lists or for the methodology as to how the PBM will determine the maximum price or how it’s changed or updated. This process is further complicated by the fact that PBMs frequently maintain multiple MAC lists for the same health plan-- one for the health plan and one for the pharmacy. This provides PBMs with the ability to obtain significant revenues through deceptive practices.

For example, PBMs will typically use an aggressively low MAC price list to reimburse their contracted pharmacies and a different, higher list of prices when they sell to or bill their plan sponsor for the same drugs. Essentially, the PBMs reimburse low (to pharmacies) and charge high (to health plans) with their MAC price lists, pocketing the significant “spread” between the two prices. Most plan sponsors are unaware that multiple MAC lists are being used and have no real concept of how much revenue the PBM retains. PBMs often deny this practice. However, recently during legislative testimony, representatives of the PBM industry directly admitted to this practice while being questioned by state legislators.

PBMs may claim that the provisions of H.B. 2131 infringe upon or would force them to disclose “proprietary” information that could be somehow “damaging” or “expensive” to the overall health care system. However, H.B. 2131 would not require that any disclosures be shared with marketplace competitors of the PBMs. Instead, H.B. 2131 would simply require that the PBM “disclose” needed information to the other interested party to a given contract! In addition, this information could be protected under the terms of the contracts that exist between the PBM and the pharmacy.

To some degree MAC transparency is already occurring in a handful of states. Reporting of MAC pricing is a process that occurs in certain state Medicaid programs. In some cases files with updated MAC prices are made available on states Medicaid websites. Kansas recently required a degree of MAC transparency and reporting within their managed care contracts. Most recently, on March 7th, Kentucky favorably moved MAC Transparency legislation; similar to the language contained in H.B.2123, unanimously though both the state Senate and House.

In conclusion, NCPA urges your support of H.B.2123 —legislation that will provide fair and reasonable standards over how PBMs should operate in the state of Oregon. H.B.2123 does not prevent such activities such as audits from occurring or from PBM’s utilizing MAC pricing. It simply says pharmacies must be treated fairly during an audit and that pharmacies should be given critical information about how they will be reimbursed for the services they provide. Pharmacy has continuously come to the table to attempt to address the concerns of the opposing parties, while receiving no accommodation in return.

Thank you very much for your time and I am happy to answer any questions that you may have…..

The Honorable Mitch Greenlick
900 Court Street NE, H-493
Salem, OR 97301

March 11, 2013

Re: National Community Pharmacist Association Support of H.B. 2123

Dear Chairman Greenlick:

On behalf of the National Community Pharmacists Association (NCPA) I write to express strong support for H.B. 2123. Quite simply, H.B. 2123 will provide a fair and reasonable level of transparency and provide a needed level of reform over an industry that has been permitted to operate virtually unchecked at either the state or federal level. Currently in the state of Oregon, Pharmacy Benefit Managers (PBMs) provide "take it or leave it" non-transparent contracts to health plan sponsors and pharmacies, they use abusive audit practices to increase their bottom line and do not currently fall under the licensure authority of the state board charged with overseeing the proper delivery of pharmacy services. H.B. 2123 will set reasonable standards on such practices, protect patients, support Oregon small business, and provide fair and common sense protections for pharmacies and the patients they serve.

NCPA represents the pharmacy owners, managers and employees of more than 23,000 independent community pharmacies, pharmacy franchises and chains across the United States. NCPA members dispense nearly half of our nation's retail prescription medications. In Oregon, there are 153 independent community pharmacies that employ an estimated 1,600 citizens. It's estimated that these members are responsible for over $586 million in sales. Their concerns should be taken seriously in order to adequately protect the viability of small business health care providers and to safeguard sensitive patient data.

NCPA requests your support of H.B. 2123 for the following reasons:

PBMs control how and under what conditions prescription medications are dispensed to Oregon residents as well as own and operate mail-order pharmacies. Therefore, they clearly fall under the jurisdiction of the Oregon State Board of Pharmacy:

NCPA supports H.B. 2123 and its intent to place PBMs under the licensure authority of the Oregon State Board of Pharmacy. The principal role of a state board of pharmacy or any professional licensing board in any state is that of consumer protection. The Oregon State Board of Pharmacy's mission statement charges the Board with the duty to "promote, preserve and protect the public health, safety and welfare by ensuring high standards in the practice of pharmacy and by regulating the quality, manufacture, sale and distribution of drugs." Through this statement, PBMs clearly fall under the Board of Pharmacy's licensure authority. PBMs dictate the terms and conditions, under which pharmacies dispense medications to patients, operate their own mail order pharmacies where they dispense and substitute alternate treatments of medications for patients, handle sensitive patient information, and have access to patient records. Therefore, the Oregon State Board of Pharmacy should have overall licensing authority over these entities.

PBMs should provide fair and transparent contracting terms and disclose to contracted pharmacies how they will be reimbursed for the products and services they provide:

NCPA fully supports H.B. 2123 and its provisions that would require transparency into the process by which pharmacies are reimbursed. Currently, there is no standardization in the industry regarding the criteria for the inclusion of drugs on "Maximum Allowable Cost" or MAC lists or for the methodology as to how the maximum price is determined, changed or updated. In most cases these lists remain entirely confidential to the client who therefore has no way of knowing how or why they are paying the price for a drug, as well as to the pharmacy that is never sure how much they will be

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reimbursed. All parties involved in the pharmacy supply chain are blind to these prices *except for* the PBM. This provides PBMs with the ability to obtain significant revenues through deceptive practices. For example, PBMs will typically use an aggressively low MAC price list to reimburse their contracted pharmacies and a different, higher list of prices when they sell to or bill their plan sponsor for the same drugs. Essentially, the PBMs reimburse low (to pharmacies) and charge high (to health plans) with their MAC price lists, pocketing the difference.

For pharmacies, the MAC process is analogous to a carpenter contracting to build a house for a customer without knowing how much they will be paid, how much their materials will ultimately cost or how or when those costs will change. NCPA only wishes for those involved in a contract to understand and be aware of what they are agreeing to regarding reimbursement for generic drugs.

Fair and reasonable parameters for pharmacy audits are needed to curb the abusive auditing practices of the PBMs who currently use the audit process as a profitable revenue stream rather than focusing solely on detection of fraud.

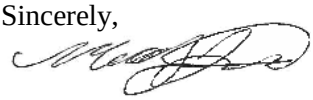
NCPA supports H.B. 2123 and its intent to provide fair and common sense protections for pharmacies against abusive pharmacy audit practices. Rather than legitimately using the audit process to guard and protect against fraud, many PBMs now view the pharmacy audit process as a profitable revenue stream for the company. These audits can claim tens and even hundreds of thousands of dollars for nothing more than basic administrative or typographical mistakes, many not even occurring at the fault of the pharmacist or pharmacy staff. In many cases, if a PBM auditor identifies an administrative error, he or she will "take back" 100% of the value of the prescription and all refills—a severe financial penalty that is out of proportion to the gravity of the offense.

Twenty-three states have now taken steps to protect pharmacist small business owners against these abusive practices. NCPA respectfully requests that Oregon join this list. Also, CMS has now voiced their concern over how PBM auditors are targeting administrative and typographical mistakes where no fraud or financial harm is present in the Part D Program and using these honest mistakes as profit making scheme.

H.B. 2123 takes these and other important steps to address many of the troubling practices of the PBM industry. Such issues need to be addressed as evidenced by the long track record of enforcement actions alleging fraudulent and deceptive conduct against the PBMs. These actions have been taken by both state and private entities due to the lack of reform over the PBM industry. NCPA hopes to work with you and the state pharmacy association to enact fair and reasonable legislation to protect Oregon consumers, small business owners and healthcare professionals against such abusive actions.

Please feel free to contact me at matt.diloreto@ncpanet.org or 703-600-1223 should you have any questions.

Sincerely,



Matthew J. DiLoreto
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Cc: Members of the House Health Care Committee