

## BUSINESS ASSOCIATE AGREEMENT

Express Scripts, Inc. (“ESI”) and Sponsor are parties to an agreement (“PBM Agreement”) whereby ESI provides certain pharmacy benefit management services to the Sponsor’s prescription drug plan (Sponsor and Sponsor’s prescription drug plan collectively referred to hereinafter as “Plan”). This Business Associate Agreement addresses the parties’ rights and obligations concerning the use and disclosure of patients’ protected health information. The HIPAA Rules (as defined below) require ESI and the Plan to enter into a “business associate agreement” to comply with applicable sections of the HIPAA Rules as of the applicable Compliance Dates. If Sponsor or a third party authorized by Sponsor provides health information related to Sponsor’s medical plan to ESI to perform PBM Services, and to the extent such information constitutes PHI, the parties agree that the terms of this Business Associate Agreement shall also apply with respect to such medical plan PHI.

### 1. Definitions.

(a) “Breach” shall mean the unauthorized acquisition, access, use, or disclosure of Protected Health Information that compromises the security or privacy of such information, except where an unauthorized person to whom such information is disclosed would not reasonably have been able to retain such information. “Breach” shall not include:

- (i) any unintentional acquisition, access, or use of PHI by an employee or individual acting under the authority of Plan or ESI, as long as such acquisition, access, or use was made in good faith and within the course and scope of the employment or other professional relationship of such employee or individual with Plan or ESI and such information is not further acquired, accessed, used, or disclosed by any person; or
- (ii) an inadvertent disclosure from an individual who is otherwise authorized to access PHI at a facility operated by Plan or ESI to another similarly situated individual at the same facility, provided that any such information received as a result of such disclosure is not further acquired, accessed, used, or disclosed by any person.

(b) “Compliance Date(s)” shall mean the date established by HHS or the United States Congress for effective date of applicability and enforceability of the HIPAA Rules and HITECH Standards.

(c) “Designated Record Set” shall mean a group of records maintained by or for Plan that is (i) the medical records and billing records about individuals maintained by or for Plan, (ii) the enrollment, payment, claims adjudication, and case or medical management record systems maintained by or for a health plan; or (iii) used, in whole or in part, by or for Plan to make decisions about individuals.

(d) “Electronic Health Record” shall mean an electronic record of health-related information on an individual that is created, gathered, managed, and consulted by authorized health care clinicians and staff.

(e) “Electronic PHI” shall have the same meaning as the term “electronic protected health information” in 45 C.F.R. § 160.103.

(f) “Health Plan” or “Plan” shall have the same meaning as the term “Health Plan” in 45 C.F.R. § 160.103.

(g) “HIPAA Rules” means the collective privacy, transaction and code sets, and security regulations promulgated pursuant to the Health Insurance Portability and Accountability Act, as codified at 45 C.F.R. Parts 160, 162 & 164.

(h) “HITECH Standards” means the privacy, security and security Breach notification provisions applicable to a Business Associate under Subtitle D of the Health Information Technology for Economic and Clinical Health Act (“HITECH”), which is Title XIII of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5), and any regulations promulgated thereunder.

(i) “Individual” shall have the same meaning as the term “individual” in 45 C.F.R. § 160.103 and shall include a person who qualifies as a personal representative in accordance with 45 C.F.R. § 164.502(g).

(j) “Protected Health Information” or “PHI” shall have the same meaning as the term “protected health

information” in 45 C.F.R. § 160.103, limited to the information created or received by ESI from or on behalf of Plan.

(k) “Privacy Rule” shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 C.F.R. Part 160 and 45 C.F.R. Part 164, Subpart A and Subpart E, as they exist now or as they may be amended.

(l) “Required by Law” shall have the same meaning as the term “required by law” in 45 C.F.R. § 164.103.

(m) “Secretary” shall mean the Secretary of the Department of Health and Human Services or his designee.

(n) “Security Incident” shall have the same meaning as “security incident” in 45 C.F.R. § 164.304

(o) “Security Standards” shall mean the Security Standards, 45 C.F.R. Part 160 and 45 C.F.R. Part 164, Subpart A and Subpart C, to be effective no later than April 20, 2005, as they exist now or as they may be amended.

(p) “Transactions Standards” shall mean the Standards for Electronic Transactions, 45 C.F.R. Parts 160 and 162, as they exist now or as they may be amended.

Terms used, but not otherwise defined, in this Business Associate Agreement shall have the same meaning as those terms in the HIPAA Rules and the HITECH Standards.

**2. General Use and Disclosure Provisions.** ESI and Plan acknowledge and agree as follows:

(a) *Use or Disclosure.* ESI agrees not to use or further disclose PHI other than as expressly permitted or required by this Business Associate Agreement or as Required by Law.

(b) *Minimum Necessary.* ESI will take reasonable efforts to limit requests for, use and disclosure of PHI to the minimum necessary to accomplish the intended request, use or disclosure.

(c) *Specific Use or Disclosure Provisions.* Except as otherwise limited in this Business Associate Agreement, ESI may use and disclose PHI to properly provide, manage and administer the PBM Services required under the PBM Agreement and consistent with applicable law to assist the Plan in its operations, as long as such use or disclosure would not violate the HIPAA Rules if done by the Plan, or such use or disclosure is expressly permitted in (i) through (iii) below:

(i) ESI may use PHI for the proper management and administration of ESI or to carry out ESI’s legal responsibilities.

(ii) ESI may disclose PHI to third parties for the proper management and administration of ESI or to carry out the legal responsibilities of ESI provided that the disclosures are Required by Law, or ESI obtains reasonable assurances from the person to whom the information is disclosed that: (A) the information will remain confidential, (B) the information will be used or further disclosed only as Required by Law or for the purpose for which it was disclosed to the person, and (C) the person notifies ESI of any instances of which it is aware in which the confidentiality of the information has been breached.

(iii) ESI may use PHI to perform Data Aggregation services on behalf of the Plan as permitted by 45 C.F.R. § 164.504(e)(2)(i)(B).

(d) *Reporting.* ESI agrees to promptly notify Plan if ESI has knowledge that PHI has been used or disclosed by ESI in a manner that violates this Business Associate Agreement. To the extent that ESI creates, receives, maintains or transmits Electronic PHI, ESI agrees to report promptly to Plan any Security Incident, as determined by ESI, involving PHI of which ESI becomes aware. Effective thirty (30) calendar days after the effective date of applicable regulations issued by the Secretary, ESI shall, following the discovery of a Breach of Unsecured PHI, notify Plan of such Breach without unreasonable delay and in no event later than sixty (60) calendar days after the discovery, including the identification of each individual whose Unsecured PHI has been, or is reasonably believed to have been, accessed, acquired or disclosed during the Breach. A Breach shall be treated as discovered as of the first day on which such Breach is known or reasonably should have been known by ESI.

(e) *Safeguards.* ESI agrees to use appropriate safeguards, consistent with applicable law, to prevent use or disclosure of PHI in a manner that would violate this Business Associate Agreement. ESI shall provide Plan with such information concerning such safeguards as Plan may reasonably request from time to time. To the extent that ESI creates, receives, maintains or transmits Electronic PHI, ESI agrees to use appropriate administrative, physical and technical safeguards to protect the confidentiality, integrity and availability of the Electronic PHI that ESI creates, receives, maintains or transmits on behalf of the Plan as required by the Security Standards.

(f) *Mitigation.* ESI agrees to mitigate, to the extent practicable, any harmful effect that is known to ESI of a use or disclosure of PHI by ESI in violation of this Business Associate Agreement or the PBM Agreement.

(g) *Subcontractors and Agents.* ESI agrees to ensure that any agent, including a subcontractor, to whom it provides PHI received from, or created or received by ESI on behalf of the Plan, agrees to the same restrictions, terms and conditions that apply through this Agreement to ESI with respect to such information, including the requirement that it implement reasonable and appropriate safeguards to protect any Electronic PHI that is disclosed to it by ESI.

(h) *Access.* Within fifteen (15) business days of a request by the Plan, ESI shall provide access to Plan to PHI in a Designated Record Set in order to meet the requirements under 45 C.F.R. § 164.524. If ESI receives a request directly from an Individual, or if requested by the Plan that access be provided to the Individual, ESI shall provide access to the Individual to PHI in a Designated Record Set within thirty (30) days in order to meet the requirements under 45 C.F.R. § 164.524.

(i) *Amendment.* Within sixty (60) days of a request by the Plan or subject Individual, ESI agrees to make any appropriate amendment(s) to PHI in a Designated Record Set that Plan directs or agrees to pursuant to 45 C.F.R. § 164.526.

(j) *Accounting.* Within thirty (30) days of a proper request by the Plan, ESI agrees to document and make available to Plan, for a reasonable cost-based fee (under conditions permitted by HIPAA if an Individual requests an accounting more than once during a twelve month period), such disclosures of PHI and information related to such disclosures necessary to respond to such request for an accounting of disclosures of PHI, in accordance with 45 C.F.R. § 164.528. Within sixty (60) days of proper request by subject Individual, ESI agrees to make available to the Individual the information described above. ESI shall retain copies of any accountings for a period of six (6) years from the date the accounting was created.

(k) *Restrictions on Use or Disclosure.* Within fifteen (15) business days of a request of the Plan, ESI agrees to consider restrictions on the use or disclosure of PHI agreed to by the Plan on behalf of an Individual in accordance with 45 C.F.R. § 164.522.

(l) *Audit and Inspection.* ESI agrees to make internal practices, books, and records relating to the use and disclosure of PHI received from, or created or received by ESI on behalf of the Plan, available to Plan within ten (10) business days, or at the request of the Plan or the Secretary, to the Secretary in a time and manner directed by the Secretary, for purposes of the Secretary determining the Plan's compliance with the HIPAA Rules. Any release of information regarding ESI's practices, books and records is proprietary to ESI and shall be treated as confidential and shall not be further disclosed without the written permission of ESI, except as necessary to comply with the HIPAA Rules.

(m) *Compliance with the HITECH Standards.* Notwithstanding any other provision in this Business Associate Agreement, no later than February 17, 2010, unless a separate effective date is specified by law or this Business Associate Agreement for a particular requirement (in which case the separate effective date shall be the effective date for that particular requirement), ESI shall comply with the HITECH Standards, including, but not limited to: (i) compliance with the requirements regarding minimum necessary under HITECH § 13405(b); (ii) requests for restrictions on use or disclosure to health plans for payment or health care operations purposes when the provider has been paid out of pocket in full consistent with HITECH § 13405(a); (iii) the prohibition of sale of PHI without authorization unless an exception under HITECH § 13405(d) applies; (iv) the prohibition on receiving remuneration for certain communications that fall within the exceptions to the definition of marketing under 45 C.F.R. § 164.501 unless permitted by this Agreement and Section 13406 of HITECH; (v) the requirements relating to the provision of access to certain information in electronic access under HITECH § 13405(e); (vi) compliance with each of the Standards and Implementation Specifications of 45 C.F.R. §§ 164.308 (Administrative Safeguards), 164.310 (Physical Safeguards), 164.312 (Technical Safeguards) and 164.316 (Policies and Procedures and Documentation Requirements); and (vii) as of the separate compliance date set forth in regulations promulgated under HITECH on this topic, the requirements regarding accounting of certain disclosures of PHI maintained in an Electronic Health

Record under HITECH § 13405(c) to the extent that ESI discloses any PHI maintained in an Electronic Health Record on behalf of the Plan pursuant to this Business Associate Agreement.

**3. Plan Obligations.**

(a) Plan shall notify ESI of any limitation(s) in the notice of privacy practices of Plan in accordance with 45 C.F.R. § 164.520, to the extent that such limitation may affect ESI's use or disclosure of PHI.

(b) Plan shall notify ESI of any changes in, or revocation of, permission by an Individual to use or disclose PHI, to the extent that such changes may affect ESI's use or disclosure of PHI.

(c) Plan shall notify ESI of any restriction to the use or disclosure of PHI that Plan has agreed to in accordance with 45 C.F.R. § 164.522, to the extent that such restriction may affect ESI's use or disclosure of PHI.

(d) Plan shall not request that ESI use or disclose PHI in any manner that would exceed that which is minimally necessary under the HIPAA Rules or that would not be permitted by a Covered Entity.

(e) Plan agrees that it will have entered into "Business Associate Agreements" with any third parties (e.g., case managers, brokers or third party administrators) to which Plan directs and authorizes ESI to disclose PHI.

**4. Transactions Standards.** The HIPAA Rules provide for certain Transactions Standards for transfer of data between trading partners. While certain of the standards may or may not be adopted by the Plan (e.g., for eligibility), ESI will be prepared to accept the following in accordance with 45 C.F.R. Part 162.1502: ASC X12N 834 – Benefit Enrollment and Maintenance. In addition, to the extent applicable, ESI shall comply with other applicable transactions standards for claims processing functions between ESI and provider pharmacies. Each party hereby agrees that it shall not change any definition, data condition or use of a data element or segment in a standard, add any data elements or segment to the maximum defined data set, use any code or data elements that are either marked "not used" in the standard's implementation specification or are not in the implementation specification, or change the meaning or intent of the implementation specification.

**5. Breach; Termination.**

(a) Without limiting the termination rights of the parties pursuant to the PBM Agreement, upon Plan's knowledge of a material breach by ESI of this Business Associate Agreement, Plan shall notify ESI of such breach and ESI shall have thirty (30) days to cure such breach. In the event ESI does not cure the breach, or cure is infeasible, Plan shall have the right to immediately terminate this Business Associate Agreement and the PBM Agreement. If cure of the material breach is infeasible, Plan shall report the violation to the Secretary.

(b) As of February 17, 2010 and without limiting the termination rights of the parties pursuant to the PBM Agreement, upon ESI's knowledge of a material breach by the Plan of this Business Associate Agreement, ESI shall notify Plan of such breach and the Plan shall have thirty (30) days to cure such breach. In the event the Plan does not cure the breach, or cure is infeasible, ESI shall have the right to immediately terminate this Business Associate Agreement and the PBM Agreement. If cure of the material breach is infeasible, ESI shall report the violation to the Secretary.

(c) To the extent feasible, upon termination of the PBM Agreement for any reason, ESI shall, and shall cause any subcontractors and agents to, return or destroy and retain no copies of all PHI received from, or created or received by ESI on behalf of, the Plan. If ESI determines, in its sole discretion, that return or destruction of such information is not feasible, ESI shall continue to limit the use or disclosure of such information as set forth in this Agreement as if the PBM Agreement had not been terminated.

**6. Indemnification.** Each party (the "Indemnifying Party") shall indemnify and hold the other party and its officers, directors, employees and agents (each an "Indemnified Party") harmless from and against any claim, cause of action, liability, damage, cost or expense ("Liabilities") to which the Indemnified Party becomes subject to as a result of third party claims (including reasonable attorneys' fees and court or proceeding costs) brought against the Indemnified Party, which arise as a result of: (i) the material breach of this Business Associate Agreement by the Indemnifying Party; or (ii) the gross negligence or willful misconduct of the Indemnifying Party, except to the extent such Liabilities were caused by the Indemnified Party. A party entitled to indemnification under this Section 6 shall give prompt written notification to the Indemnifying Party of the commencement of any action, suit or proceeding relating to a third party claim for which indemnification is sought, subject to applicable confidentiality constraints. The

Indemnifying Party shall be entitled to assume control of the defense of such action, suit, proceeding or claim with competent counsel of its choosing. Indemnification shall not be required if any claim is settled without the Indemnifying Party's consent, which such consent shall not be unreasonably withheld. **NOTWITHSTANDING THE FOREGOING PROVISIONS OF THIS SECTION 6, IN NO EVENT WILL AN INDEMNIFYING PARTY BE LIABLE TO AN INDEMNIFIED PARTY UNDER CONTRACT, TORT, OR ANY OTHER LEGAL THEORY FOR INCIDENTAL, CONSEQUENTIAL, INDIRECT, PUNITIVE, OR SPECIAL LOSSES OR DAMAGES OF ANY KIND.**

7. **Miscellaneous.**

(a) **Amendment.** The parties acknowledge that the foregoing provisions are designed to comply with the mandates of the HIPAA Rules and HITECH Standards. ESI shall provide written notice to Plan to the extent that any final regulation or amendment to final regulations promulgated by the Secretary under HITECH requires changes to this Business Associate Agreement. Such written notice shall include any additional amendment required by any such final regulation and the Business Associate Agreement shall be automatically amended to incorporate the changes set forth in such amendment provided by ESI to Plan, unless Plan objects to such amendment in writing within fifteen (15) days of receipt of such written notice. In the event that Plan objects timely to such amendment, the parties shall work in good faith to reach agreement on an amendment to the Business Associate Agreement that complies with the final regulations. If the parties are unable to reach agreement regarding an amendment to the Business Associate Agreement within thirty (30) days of the date that ESI receives any written objection from the Plan, either ESI or Sponsor may terminate this Business Associate Agreement upon ninety (90) days written notice to the other party. Any other amendment to this Business Associate Agreement unrelated to compliance with applicable law and regulations shall be effective only upon execution of a written agreement between the parties.

(b) **Effect on PBM Agreement.** Except as relates to the use, security and disclosure of PHI and electronic transactions, this Business Associate Agreement is not intended to change the terms and conditions of, or the rights and obligations of the parties under, the PBM Agreement.

(c) **No Third-Party Beneficiaries.** Nothing express or implied in the PBM Agreement or in this Business Associate Agreement is intended to confer, nor shall anything herein confer, upon any person other than the parties and the respective successors or assigns of the parties, any rights, remedies, obligations or liabilities whatsoever.

(d) **Interpretation.** Any ambiguity in this Business Associate Agreement shall be resolved in favor of a meaning that permits the Plan to comply with the HIPAA Rules and the HITECH Standards.

(e) **Effective Date.** This Business Associate Agreement shall be effective as of the applicable Compliance Dates or the effective date of the PBM Agreement, whichever is later.