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TO THE HOUSE COMMITTEE ON JUDICIARY

TWENTY-SIXTH LEGISLATURE  
Regular Session of 2011

Thursday, March 3, 2011  
2:30 p.m.

**TESTIMONY ON HOUSE BILL NO. 613 – RELATING TO HEALTH INSURANCE.**

TO THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR, AND MEMBERS OF  
THE COMMITTEE:

My name is Gordon Ito, State Insurance Commissioner, testifying on behalf of  
the Department of Commerce and Consumer Affairs ("Department").

The Department opposes this bill, which would make permanent the normally  
prohibited practice of requiring consumers to purchase only bundled insurance  
products.

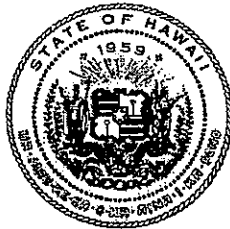
Health insurers with less than five percent of the market have an exemption  
which allows it to limit the consumers' choice and require consumers to purchase only  
bundled insurance products, pursuant to Act 227, Session Laws of Hawaii 2008 ("Act  
227"), which sunsets on June 30, 2011. Removal of the exemption does not prohibit  
insurers from offering bundled products; it only prohibits the mandatory purchase of  
bundled products. Where an insurer offers the consumer the choice to freely select  
individual products or as a bundled package, this practice is not prohibited.

The Department favors consumer choice, where consumers have the option of  
purchasing insurance products separately in addition to bundled insurance products.  
When an insurer offers the choice of purchasing either bundled and unbundled  
products, consumers are freely able to determine whether the pricing is favorable to

purchase it bundled or unbundled. Only offering bundled insurance products is unfair to consumers, because it forces a consumer that wants to buy one product to buy another offered by the same insurer. With the current exemption, this is not only bad for consumers, but also creates an un-level playing field between insurance companies that are competing for business.

The Legislative Auditor released its report on January 27, 2011, which analyzed the effects of Act 227 and Act 120, Session Laws of Hawaii 2008. The Auditor found that Act 227 has had minimal effect on insurers' ability to sell health insurance and on sole proprietors' access to health insurance. Thus, the Auditor recommended that Act 227 be allowed to sunset.

We thank this Committee for the opportunity to present testimony on this matter and respectfully request that this bill be held.



**TESTIMONY OF MARION M. HIGA, STATE AUDITOR,  
ON HOUSE BILL NO. 613, RELATING TO HEALTH INSURANCE**

**House Committee on Judiciary**

**March 3, 2011**

Chair Keith-Agaran and Members of the Committee:

Thank you for this opportunity to testify in opposition to House Bill No. 613. The purpose of this bill is to remove the sunset provisions of Section 5, Act 227, Session Laws of Hawai'i (SLH) 2008, thus making permanent those provisions that permit smaller accident and health insurers with 5 percent or less of the health insurance market share to bundle different classes of benefits in a single policy.

Act 227 also requested that we analyze the effects of the temporary authorization of bundling. We reported our analysis on January 27, 2011 in a letter to the President of the Senate and Speaker of the House. We also analyzed Act 120, SLH 2008, since both laws affect the same group of small businesses with no employees—sole proprietors and independent contractors. We informed all legislators of the posting of the letter on our website. Based on our analysis, we recommend that Act 227 be allowed to sunset for several reasons.

First, the provision has had minimal impact on the insurance market. Only one out of four eligible insurers has utilized the exemption tying health insurance with life insurance into a single policy sold to proprietors and small businesses. In addition, if market share is to be measured by the Insurance Division based on the number of members, the insurer—Hawai'i Medical Assurance Association—may soon be ineligible to bundle policies because its market

share may have reached 5 percent after acquiring the fully insured health insurance membership of Summerlin Life and Health Insurance Company.

Second, Act 227 may be unnecessary since Act 120 requires group health insurers to offer small group health plans to self-employed individuals properly registered with the Department of Commerce and Consumer Affairs. We found that since the passage of Act 120, access to group rate health insurance by sole proprietors has increased overall giving small businesses with no employees more of a choice. In 2010, the Hawai'i Medical Service Association and Kaiser Permanente reported having a total of 463 enrollees in sole proprietor plans. Instead of moving on House Bill No. 613, the Legislature may want to consider making permanent the provisions of Act 120, which sunsets on July 1, 2013.

We have linked for your reference our letter regarding Act 227. I would be happy to answer any questions.



BEFORE THE

**HOUSE COMMITTEE ON JUDICIARY**

Representative Gilbert S.C. Keith-Agaran, Chair  
Representative Karl Rhoads, Vice Chair

**HB 613 RELATING TO INSURANCE**

**TESTIMONY OF  
JOHN HENRY FELIX**

**Chairman of the Board and Chief Executive Officer**

March 3, 2011, 2:30 p.m.  
State Capitol Conference Room 329

Chair Keith-Agaran, Vice Chair Rhoads, and Committee Members:

My name is John Henry Felix, Chairman of the Board and Chief Executive Officer of Hawaii Medical Assurance Association (HMAA). HMAA **STRONGLY SUPPORTS** HB 613, which would enable small insurers that occupy less than five percent of the health insurance market to continue combining different types of health and sickness-related insurance benefits into a single unified policy.

By way of background, HMAA is a non-profit mutual benefit society which provides health insurance to over 40,000 Hawaii residents. HMAA occupies about four percent of Hawaii's health insurance market. As a small insurer, HMAA takes special pride in providing health insurance to sole-proprietors and small businesses, a segment of Hawaii's market which has a difficult time obtaining affordable health related insurance. Because these types of businesses are unable to take advantage of larger risk pools characteristic of larger employers, their insurance premiums tend to be more costly.

Hawaii's previous insurance commissioner changed the insurance division's longstanding interpretation of Hawaii law as now prohibiting combining different types of accident and health or sickness insurance benefits within the same policy, as a violation of anti-tying statutes described in section 431:13-103(a)(4)(B), Hawaii Revised Statutes. In 2008, however, the legislature, recognizing that access to affordable health insurance is one of the State's most pressing concerns, properly found that small accident and health or sickness insurers lack coercive market power and that a prohibition on tying arrangements by small insurers hurts consumers by preventing small insurers from offering different types of benefits in a single unified policy. Accordingly, the legislature passed Act 227, Session Laws of Hawaii 2008, which amended the Insurance Code to permit such bundling.

In enacting Act 227, the legislature found that comparable federal antitrust laws regarding anti-tying only apply as against companies which occupy thirty percent or more of the market. In the seminal decision of *Jefferson Parish Hospital v. Hyde*, 466 U.S. 2 (1984), the United States Supreme Court in applying the Sherman Act concluded that Jefferson Hospital had no market power with an assumed market share of thirty percent and therefore its tying arrangement was not unlawful. See *Hovenkamp*, Federal Antitrust Policy (3d edition, 2005) 402; *Hack v. President and Fellows of Yale College*, 237 F.3d 81 (2d Cir. 2000); *Marts v. Xerox*, 77 F.3d 1109, 1113 n.6 (8th Cir. 1996) (18% too small); *Shafi v. St. Francis Hosp.*, 937 F.2d 603 (4th Cir. 1991) (11% insufficient); *Grappone, Inc. v. Subarus of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (recognizing a general rule of at least 30%).

The intent of Act 227 was to bring Hawaii into compliance with the foregoing well-settled federal standards, and thereby encourage the longstanding practice by smaller accident and health or sickness insurers to "bundle" together different insurance benefits, such as health, dental, and vision, thus continuing the historical acceptance of this practice by small insurers who lack coercive power in the marketplace. In these circumstances, bundling provides broader health care coverage in single unified policies, ultimately resulting in lower overall premiums, fostering greater competition within the Hawaii insurance marketplace, and providing consumers with greater flexibility, coverage and pricing options.

Act 227, however, contains a sunset clause that will repeal Act 227 on June 30, 2011. Consequently, HB 613 removes the sunset clause and keeps in place the specification that it is not an unfair method of competition or an unfair or deceptive act or practice for an accident and health or sickness insurer with a market share of less than 5 percent to refuse to issue or renew a policy with a prospective insured unless the prospective insured contracts for another class or an additional policy of the same class of insurance with the same insurer.

HB 613 will help self-employed workers and small businesses by allowing broader coverage for less cost. Numerous Hawaii laws already permit the combination of various types of health coverages under one policy, and this should be encouraged, not discouraged, to help provide the broadest health coverage possible for Hawaii's residents. Act 227 and HB 613 simply codify into Hawaii law the same rules applicable to similar federal anti-tying laws, though using a far more conservative standard of 5% market share. Without passage of HB 613, hundreds of sole-proprietors, small businesses, and their families currently insured by HMAA could be forced to shop for more expensive individual policies with much less coverage.

**HMAA STRONGLY SUPPORTS** HB 613 and urges the passage of this measure. Thank you for the opportunity to testify.

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# HMSA



An Independent Licensee of the Blue Cross and Blue Shield Association

March 3, 2011

The Honorable Gilbert Keith-Agaran, Chair  
The Honorable Karl Rhoads, Vice Chair  
House Committee on Judiciary

**Re: HB 613 – Relating to Health Insurance**

Dear Chair Keith-Agaran, Vice Chair Rhoads and Members of the Committee:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on HB 613 which would remove the sunset clause in Act 227 passed in 2008. This Act exempts small health plans that occupy less than five per cent of the health care market from adhering to a portion of the Insurance Code dealing with unfair methods of competition and unfair or deceptive acts or practices.

The Hawaii State Auditor's office was requested by the Legislature to analyze the impact on the effects of Act 227 since it is scheduled to sunset on June 30, 2011. On January 27, 2011 the Auditor's office issued a letter addressed to the Speaker of the House and the Senate President on this issue. In this letter the Auditor's office states that the main proponent of the measure believed that it would "provide broader health care coverage, would result in lower overall premiums, foster greater competition and provide consumers with greater flexibility, coverage and pricing options." The report goes on to state that Act 120, passed during the same legislative session has had more of an impact in providing coverage to sole proprietors in the state than Act 227 and in fact the recommendation in the letter states:

*We found that Act 227, SLH 2008, has had a minimal effect on insurers' ability to sell health insurance and sole proprietors' access to health insurance. Furthermore, we found that Act 120, SLH 2008 enacted two months before Act 227, has increased health insurance access and choice for small businesses with no employees and sole proprietors. Therefore, we recommend Act 227, SLH 2008, be allowed to sunset on June 30, 2011.*

We concur with the Auditor's recommendation and believe that the provisions of Act 227 are unnecessary. Thank you for the opportunity to testify today.

Sincerely,

Jennifer Diesman  
Vice President  
Government Relations