

**SB591,SD1**

**Testimony**



NEIL ABERCROMBIE  
GOVERNOR

BRIAN SCHATZ  
LT. GOVERNOR

STATE OF HAWAII  
OFFICE OF THE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
335 MERCHANT STREET, ROOM 310  
P.O. Box 541  
HONOLULU, HAWAII 96809  
Phone Number: 586-2850  
Fax Number: 586-2856  
www.hawaii.gov/dcca

KEALI'I S. LOPEZ  
DIRECTOR

EVERETT KANESHIGE  
DEPUTY DIRECTOR

TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR  
TWENTY-SIXTH LEGISLATURE  
Regular Session of 2011

Wednesday, February 23, 2011  
9 a.m.

**WRITTEN TESTIMONY ONLY**

**TESTIMONY ON SENATE BILL NO. 591, S.D. 1 – RELATING TO PHARMACY  
BENEFIT MANAGEMENT COMPANIES.**

TO THE HONORABLE CLAYTON HEE, CHAIR, AND MEMBERS OF THE  
COMMITTEE:

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

The Department opposes this bill, which creates a regulatory scheme for  
pharmacy benefit management companies enforced by the Commissioner. The  
Department does not oppose the regulation of pharmacy benefit managers, but does  
not believe that pharmacy benefit managers should be regulated by the Commissioner  
since the Commissioner does not have staff with the expertise or experience in this  
subject matter.

The primary justification for regulation of insurance companies is that they are  
risk-bearing and that therefore potential insolvencies can be harmful to consumers and  
disruptive to the market. Pharmacy benefit management companies do not present  
these issues. Simply put, the regulation contemplated by this bill is not insurance  
regulation and therefore does not belong under the Commissioner.

We thank this Committee for the opportunity to present testimony on this matter.

State of Hawaii,

I support SB591 SD1 and HB275 HD1 , Pharmacy Benefits Management Companies.

Peter Jo

Pharm D. Candidate 2012

President-NCPA

National Community Pharmacist Association

Univ. Hawaii-Hilo College of Pharmacy



**EXPRESS SCRIPTS®**

6625 West 78<sup>th</sup> Street  
Mail Route BL0220  
Bloomington, MN 55439

To: Senator Clayton Hee, Chair and Members of the  
Senate Judiciary Committee

From: David M. Dederichs, Director, State Government Affairs  
Express Scripts, Inc.

Re: SB 591 – Opposed  
Senate Judiciary Committee: Hearing 2/23/11 9:00 A.M.

Thank you for the opportunity to comment on Senate Bill 591. Express Scripts, Inc. ("ESI"), one of the nation's largest pharmacy benefit managers providing prescription benefits to approximately 70 million Americans, respectfully opposes Senate Bill 591. ESI administers prescription drug benefits for: Fortune 500 companies, labor unions, government entities, and health insurers. We adjudicate prescription transactions at retail pharmacies, negotiate price discounts on brand name pharmaceuticals, manage formularies for our clients, provide mail-order pharmacy services, encourage utilization of generic drugs where appropriate, and we perform drug utilization reviews for our members to prevent adverse drug interactions from occurring. All of the efforts are geared toward the simple goal of making prescription drugs safer and more affordable for our clients, and in turn, their employees, many of whom are Hawaiians.

Before delving into some of ESI's specific objections to the bill, let me predicate my remarks with the following comments regarding the numerous state and federal regulations already in place to regulate pharmacy benefit managers ("PBM"). PBMs already comply with numerous existing licensure requirements as third party administrators, preferred provider organizations, utilization review organizations, and resident and/or non-resident pharmacies, where required by law. Moreover, when performing services for health plan sponsors, PBMs must comply with state and federal requirements imposed on insurers, HMOs, and other employer-sponsored ERISA plans. PBMs are also held accountable for consumer protections, including grievance and appeals processes, through their contractual obligations with their clients. Finally, the state Board of Pharmacy already regulates PBM activities in the mail-order arena in several different areas of pharmacy services, including prescription drug dispensing and labeling, patient counseling, and generic substitutions. Compliance with additional and potentially conflicting state and federal laws would unnecessarily raise operating costs for PBMs and would diminish their ability to pass on cost-savings to their clients, and ultimately the consumer.

While ESI opposes almost every section of this bill, our remarks will be limited to a few topics: disclosure, mail-order pharmacy services, and pharmacy auditing practices.

First, ESI objects to Section B of SB 591, which requires a PBM to disclose proprietary contract information to a purchaser before and after entering into a contract. This bill would also require a PBM to disclose this information to the Insurance Commissioner on a quarterly and yearly basis. Not only would disclosing this information destroy any competitive edge utilized and motivated by the forces of the free market, but it would also tip-off brand-name pharmaceutical companies about sensitive pricing strategies designed to lower drug costs for our clients. In a March 2009 analysis of similar legislative provisions proposed in another state, the FTC stated that such disclosure mandates would "preclude health plans and PBMs from entering into efficient (*i.e.*,

cost-effective) contracts for the administration of pharmacy benefits," which will "have the unintended consequence of publicizing proprietary business information in a way that could foster collusion among [pharmaceutical manufacturers]." Finally, if clients truly want "transparent" disclosure principles in their PBM contracts, then they are free to negotiate these terms into their contract; PBM clients do not need the state to mandate these types of provisions into their contracts – in fact, there are already some PBMs in today's market that operate with these parameters already established in their business models.

Second, ESI opposes Section C of SB 591, which takes choices away from consumers, forcing one-size-fits-all copayments. Mail-service pharmacies are able to keep prescription drug costs down because they have greater efficiency and lower overhead costs than independent pharmacies. Health plans and employers frequently choose to provide their members and employees with the option of a lower copayment on a 90-day supply of their medications through the use of mail-service pharmacies. This provides significant cost savings, particularly for medications prescribed for chronic conditions. A recent study found a highly automated mail-service pharmacy dispensed prescriptions with 23-times greater accuracy than retail pharmacies. The mail-service error rate was zero in several of the most critical areas, including dispensing the correct drug, dosage, and dosage form. According to a 2003 study by the U.S. General Accounting Office (GAO), the average price of prescriptions through mail-service pharmacies was 27 percent below the average cash price consumers would pay at a retail pharmacy for brand name drugs, and 53 percent below the retail cash price for generic drugs. Anti-mail legislation that restricts the appropriate use of mail-service for long-term prescriptions will raise costs for health plans, employers, and consumers.

Third, the "auditing" provisions of the legislation, although appearing to help pharmacies, will actually have the unintended consequence of opening the door to fraud, abuse, and wasteful spending in health care. Health plans and employers with pharmacy benefit plans rely on audits of their network pharmacies to recoup monies incorrectly paid for claims with improper quantity, improper days supply, improper coding, duplicative claims, and other irregularities. Health plans and employers should have the right to ensure that the pharmacy claims that they are paying for are legitimate. In a time of rising health care costs, preventing fraudulent activity is an important tool to keeping health care costs down. This legislation severely restricts the ability of health plans and employers to make sure they are getting what they pay for. Auditing is part of the cost of doing business, and pharmacies should not be an exception to the rule.

Thus, for the aforementioned reasons, Express Scripts respectfully opposes SB 591. Thank you for your time and consideration.



**Cynthia Laubacher**  
Senior Director,  
Western Region

Medco Health Solutions, Inc.  
1100 Kimberly Court  
Roseville, CA 95661

tel 916-771-3328  
fax 916-771-0438  
cynthia\_laubacher@medco.com  
www.medco.com

February 21, 2011

To: Senator Clayton Hee Chair and Members of the Senate Judiciary and Labor Committee

Fr: Cynthia Laubacher, Senior Director, State Government Affairs  
Medco Health Solutions, Inc.

Re: Senate Bill 591 S.D. 1 – Oppose  
Hearing: February 23, 2011 9:00am

---

On behalf of Medco Health Solutions, Inc., I regret to inform you that we must respectfully oppose Senate Bill 591 relating to regulation of pharmacy benefits and pharmacy audits. Medco is one of the nation's largest pharmacy benefits managers, serving nearly 650,000 residents of Hawaii.

#### **PBMs are Regulated**

- PBMs comply with numerous already existing regulatory requirements as third party administrators, preferred provider organizations, utilization review organizations, resident and non-resident pharmacies, etc., where required by law. In the state of Hawaii, the Medco enterprise holds 37 licenses with the Hawaii Board of Pharmacy.
- Through contracts with health plans and insurers, PBMs are required to comply with the same consumer protection laws and regulations governing utilization review and prior approval, timely claims payment, and dispute resolution systems, among others.
- State boards of pharmacy regulate PBM activities including dispensing, labeling, counseling, generic substitutions, controlled substances, etc.

#### **S.B. 591 Increases Costs for Employers, Plans and Consumers**

- Section B would require a PBM to disclose proprietary contract information to a purchaser before and after entering into a contract. The Federal Trade Commission (FTC) has warned several states that legislation requiring PBM disclosure could increase costs and “undermine the ability of some consumers to obtain the pharmaceuticals and health insurance they need at a price they can afford.”
- Section C takes choices away from consumers and would force one-size-fits-all copayments. Mail-service pharmacies are able to keep prescription drug costs down because they have greater efficiency and lower overhead costs than independent pharmacies.

- Health plans and employers frequently choose to provide their members and employees with the option of a lower copayment on a 90-day supply of their medications through the use of mail-service pharmacies. This provides significant cost savings, particularly for medications prescribed for chronic conditions.
- Section C mandates that a PBM would have to contract with any provider that wants to join their pharmacy network, regardless of whether they have committed illegal activities or are not as competitive in service or quality as other pharmacies.
- PBMs build networks of pharmacies to provide consumers convenient access to prescriptions at discounted rates. It is important to have pharmacies compete to be part of the pharmacy network for a particular PBM in order to keep the rising costs of prescription drugs down. Network pharmacies compete on service, convenience, and quality to attract consumers within a particular plan.
- Section E, although it appears to help pharmacies, will actually have the unintended consequence of opening the door to fraud, abuse, and wasteful spending in health care.
- Health plans and employers with pharmacy benefit plans rely on audits of their network pharmacies to recoup monies incorrectly paid for claims with improper quantity, improper days supply, improper coding, duplicative claims, and other irregularities.
- Health plans and employers should have the right to ensure that the pharmacy claims that they are paying for are legitimate. In a time of rising health care costs, preventing fraudulent activity is an important tool to keeping health care costs down.
- S.B. 591 severely restricts the ability of health plans and employers to make sure they are getting what they pay for. Auditing is part of the cost of doing business. That goes for any type of business – pharmacies should not be an exception to the rule.
- Legislation that requires entities to provide pharmacies/pharmacists with an advanced notice of two weeks before an audit would give individuals ample time to hide evidence of fraudulent activities or evade authorities altogether.
- PBMs look for errors, irregularities, and suspicious patterns over time. Claims are compared with historical information as well as claims submitted by similarly situated pharmacies. Substantial changes in the volume of claims or the dollar amount of claims from particular pharmacies can indicate fraudulent activity.
- In 2010 alone, a joint health care fraud prevention effort between the Department of Justice and the Department of Health and Human Services resulted in the recovery of more than \$4 billion in taxpayer dollars. Some of the recovered money came from uncovering pharmacy fraud schemes that included fraudulent billing practices and illegal dispensing of medications.

For these reasons, Medco must respectfully oppose Senate Bill 591. Please feel free to contact me with any questions. Thank you.

Thank you for the opportunity to testify regarding SB 591, SD 1 relating to Pharmaceutical Benefit Managers (PBMs).

Many, if not most, insurance companies routinely hire a PBM to manage their prescription benefits. The PBM has a great influence on the choice of medication that a patient receives. Many times contracts with manufacturers provide a rebate driving the market share to their product. PBMs enter into these contracts and receive these rebates, usually without passing the savings on to the insurer.

Most plans develop formularies, a list of preferred medications, that have different levels of reimbursement. For example, Company A's product would have a co-pay of \$20 to the patient because they have a contract with the PBM. Company B produces an equally effective but chemically different product. Because Company B did not enter into a rebate contract with the PBM, the co-pay to the patient might be \$60 or higher. Obviously the patient will want the \$20 medication even though the physician might feel Company B's product is superior. Essentially, this organization is changing a physician's prescription order through discriminatory co-pays.

Our state regulates the insurance industry, the pharmaceutical industry, physicians and pharmacies. There is no current regulation of the PBMs in Hawai'i. Yet these companies routinely force therapy to be changed to a product other than what the pharmacist or physician might feel is superior.

This practices puts your constituents at risk as patients and as providers of health care. Regulation of this multibillion dollar industry by the state is necessary for that state to protect its citizens. SB 591 was an excellent step in that direction.

While this bill was in another committee, the effective date was set back to July 1, 2050 by amendment. This would allow corporations in other states to continue dictating how your citizens' health care is provided for almost 40 more years. This is totally unacceptable!

This bill provides for the protection, both monetarily and medically, of citizens of your state. To delay implementation by almost 40 years is not only imprudent, it is irresponsible to those who elected you to protect them!

Again, thank you for the honor of allowing my testimony.

Larry S. Quimby, R.Ph.