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PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2013

WEDNESDAY, FEBRUARY 27, 2013
3:30 P.M.

TESTIMONY ON HOUSE BILL NO. 62, H.D. 1
RELATING TO PHARMACY BENEFITS MANAGERS.

TO THE HONORABLE ANGUS L.K. MCKELVEY, CHAIR,
AND TO THE HONORABLE DEREK S.K. KAWAKAMI, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("DCCA"), Office of Consumer Protection ("OCP") appreciates the opportunity to appear today and testify on H.B. 62, H.D. 1, Relating to Pharmacy Benefits Managers. My name is Bruce B. Kim and I am the Executive Director of OCP. **OCP takes no position on the merits of H.B. 62, HD1 but submits the following comments:**

OCP agrees that the practice of pharmacy benefits managers using a patient's private prescription drug claims information to market the services of a preferred pharmacy provider that is owned by the pharmacy benefits manager is a concern.

OCP currently has no enforcement jurisdiction over this protected health information issue. In and of itself the act of sharing protected health information does not seem to rise to the level of “unfair” or “deceptive”. Prohibiting this practice by adding it to HRS Chapter 481B would make it an Unfair or Deceptive Act or Practice, and thus OCP would be responsible for enforcing these protected health information privacy issues which do not fall within the scope of OCP’s jurisdiction under HRS Chap. 487.

OCP lacks the staff and requisite technical expertise to provide regulatory oversight on matters related to the sharing of private health information by out of state pharmacy benefits managers doing business in Hawaii. Given the topic of the prohibition, that is, dissemination of protected health information without the consent of the patient, this matter may already be subject to the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”).

In addition, federal law may preempt state regulation of employee benefit plans and practices under the Employee Retirement Income Security Act of 1974 (“ERISA”). Before passing a law which implicating private health information sharing and/or employee benefit plans, further study should be done to determine whether the claimed practices are already prohibited by HIPAA or ERISA, as the penalties provided for by HIPAA and ERISA are easily severe enough to dissuade entities regulated by HIPAA or ERISA from violating them.

Thank you for the opportunity to testify on H.B. 62, H.D. 1. I will be happy to answer any questions that the members of the Committee may have.

**Testimony of
Gary M. Slovin / Mihoko E. Ito
on behalf of
Walgreens**

DATE: February 26, 2013

TO: Representative Angus McKelvey
Chair, Committee on Consumer Protection & Commerce
Submitted Via CPCtestimony@capitol.hawaii.gov

RE: **H.B. 62 HD1 – Relating to Pharmacy Benefits Managers**
Hearing Date: Wednesday, February 27, 2013 at 3:30 pm
Conference Room 325

Dear Chair McKelvey and Members of the Committee on Consumer Protection & Commerce:

We submit this testimony on behalf of Walgreen Co. (“Walgreens”).

Walgreens operates more than 8,200 locations in all 50 states, the District of Columbia and Puerto Rico. In Hawai`i, Walgreens now has 11 stores on the islands of Oahu, Maui and Hawai`i.

Walgreens **supports the intent of H.B. 62 HD1**, which prohibits a pharmacy benefits manager from using a patient's prescription drug benefits claim information to market to that patient the services of a preferred pharmacy network that is owned by the pharmacy benefits manager, unless use of the information is medically necessary to the health and safety of the individual or the individual has consented to use of the information.

Walgreens believes that transparency is an important part of the pharmacy industry, and that patients should be in control of their choices when filling their prescriptions. PBMs that own preferred pharmacy networks can seek to limit patients from accessing their pharmacy of choice, by utilizing drug benefits claim information to market to these patients.

Walgreens supports state efforts to regulate pharmacy benefits managers, and believes this parity in the industry is important. For these reasons, Walgreens supports H.B. 62 HD1 and respectfully requests that you pass this measure.

Gary M. Slovin
Mihoko E. Ito
Tiffany N. Yajima
Nicole A. Velasco

1099 Alakea Street, Suite 1400
Honolulu, HI 96813
(808) 539-0840

Mahalo for the opportunity to testify on this measure.



Honorable Angus L. K. McKelvey, Chair
Honorable Derek S. K. Kawakami, Vice Chair
House Committee on Consumer Protection & Commerce

Wednesday, February 27, 2013; 3:30 p.m.
Hawaii State Capitol; Conference Room 325

RE: HB 62 HD1 – Relating to Pharmacy Benefits Managers – In Opposition

Chair McKelvey, Vice Chair Kawakami, and Members of the Committee:

My name is Todd Inafuku, testifying on behalf of CVS Caremark Corporation (“CVS Caremark”) in opposition to HB 62 HD1, Relating to Pharmacy Benefits Managers. The plan sponsors, including self-insured employer plans, commercial health plans, Medicare Part D plans, state government employee plans such as the Employer Union Trust Fund (EUTF), union plans, and the Federal Employees Health Benefits Program (FEHBP) determine the pharmacy benefit plan for their beneficiaries and employees.

Plan Sponsors Determine Savings, Benefit Plan Design, and PBM Contract Terms

- Plan sponsors - not pharmacy benefit managers (PBMs) – determine how the pharmacy benefits they offer their beneficiaries and employees are managed. They also determine formulary coverage, copayment tiers, utilization management, and pharmacy channel options including mail order, specialty and preferred or limited pharmacy networks. In making these choices, plan sponsors weigh many factors, including clinical quality, cost, and member satisfaction.
- Plan sponsors contract with the PBM that best meets their goal, budget, and philosophy to administer their desired pharmacy benefit plan for their beneficiaries and employees.
- Often times, when plan sponsors want to provide their beneficiaries and employees with notification of changes to their pharmacy benefit plan, plan sponsors may communicate those changes through their PBM. Plan sponsors through their contracts with their PBMs determine, direct, and approve all communication by the PBMs to their beneficiaries and employees.

Plan Sponsors Determine Pharmacy Channel Options Including Mail Order, Specialty and Preferred or Limited Pharmacy Networks

On April 8, 2004 the Federal Trade Commission (FTC) commented on the competitive effects of seven Rhode Island bills (Bills), that although differ in their details, all included “freedom of choice” provisions for patients who require pharmaceutical services, and “any willing provider” provisions directed at health insurers and employee benefit plans that contract with pharmacies.¹

- The FTC concluded - By eliminating an important form of competition in the market for pharmaceutical services, the Bills are likely to increase the cost of those services. These cost increases are likely to undermine the ability of some consumers to obtain the pharmaceutical services they need at a price they can afford. As a recent article in *Health Affairs* noted, “when costs are high, people who cannot afford something find substitutes or do without. The higher the cost of health insurance, the more people are uninsured. The higher the cost of pharmaceuticals, the more people skip doses or do not fill their prescriptions.”² Although the Bills

¹ This letter expresses the views of the FTC’s Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the Commission or of any individual Commissioner. The Commission has, however, voted to authorize us to submit these comments. The specific General Assembly Bills are 2004-H 7042, 2004-H 7047, 2004-H 7129, 2004-H 7131, 2004-H 7417, 2004-S 2015, and 2004-S 2140. We note that the Bills were introduced after the U.S. District Court declined to find Blue Cross’ restricted network for the delivery of pharmaceutical services in Rhode Island a violation of the antitrust laws. *See Stop & Shop Supermarket v. Blue Cross & Blue Shield of Rhode Island*, 239 F. Supp. 2d 180 (D. R.I. 2003).

² Sage, Hyman, & Greenburg, “Why Competition Law Matters to Health Care Quality” *Health Affairs*, 22:2 at 35



appear intended to broaden access to pharmaceutical services, there is a significant probability they will have the opposite effect.

PBM Ownership of a Mail Order Pharmacy Does Not Result in Higher Cost to the Consumer

- In August of 2005 the FTC conducted a comprehensive study on the effects that PBM ownership of a mail service pharmacy can have on the overall prescription drug costs.³ The FTC determined that PBM ownership does not result in higher cost to the consumer.

This legislation would impose unwarranted restrictions on the plan sponsors in their selection of the most cost effective pharmacy channel options and takes away the ability of plan sponsors to design a cost effective pharmacy benefit plan that best suits their needs and the needs of their beneficiaries and employees.

This legislation will also prohibit CVS Caremark from administering the terms of its contract with plan sponsors to provide the pharmacy benefit plan for their beneficiaries and employees. For the reasons stated above, CVS Caremark respectfully requests this bill be held.

Thank you for the opportunity to testify on this matter of importance,

Todd K. Inafuku

Cell – (808) 620-2288

(March/April 2003).

³Federal Trade Commission, Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies, August 2005.



EXPRESS SCRIPTS®

Cynthia M. Laubacher
Senior Director, State Affairs
(916) 771-3328
Cynthia_Laubacher@express-scripts.com

February 26, 2013

To: Representative Angus McKelvey, Chair
Members of the House Consumer Protection & Commerce Committee

Fr: Cynthia Laubacher, Senior Director, State Government Affairs
Express Scripts Holding Company

Re: House Bill 62 HD 1
Hearing: February 27, 2013 3:30pm

On behalf of Express Scripts I am writing to express our opposition to House Bill 62. Express Scripts administers prescription drug benefits on behalf of our clients – employers, health plans, unions and government health programs — for approximately 109 million Americans. 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.

Our clients, the plan sponsors, design their pharmacy benefit to meet their needs and then contract with a pharmacy benefits manager to administer that benefit. HB 62 proposes two things: first, it would require PBMs to contract with all pharmacies in the state and, second, would prohibit our clients from designing a benefit that includes only the mail service pharmacy owned and operated by the contracting PBM.

On the first issue, the Federal Trade Commission has written extensively about the anti-competitive effects of any willing provider legislation, stating it will lead to reduced competition and higher prices. PBMs lower costs and encourage quality care by developing a network of retail pharmacies willing to accept discounted pricing in exchange for access to a plan's members. A PBM must establish a network of retail pharmacies so that consumers with prescription drug insurance can fill their prescriptions. Plan sponsors want members to have convenient access to pharmacies providing high quality service. A consumer with a prescription drug benefit plan must utilize a pharmacy that accepts payment for that plan. Therefore, retail pharmacies must compete to be part of the retail pharmacy network for a particular PBM or risk losing access to the consumer. Store-based retail pharmacies enter

into contracts with a PBM to participate in the PBM's retail network and provide prescriptions to a plan's beneficiaries. A GAO study confirmed that PBMs reimburse pharmacies at levels below cash-paying customers, but above the pharmacies' estimated drug acquisition costs. A consumer's out-of-pocket costs and co-payments are typically identical regardless of which pharmacy in the network dispenses the prescription. Therefore, network pharmacies compete on service, convenience, and quality to attract consumers within a particular plan. This is good for our plan sponsors and for their members/employees.

Regarding this issue of mail service pharmacies addressed in HB 62, during the debate leading up to the passage of the Medicare Modernization Act of 2003, the retail pharmacy lobby sought to convince Congress that the use of PBM-owned mail-order pharmacies could result in higher costs. In response to these allegations, the Federal Trade Commission (FTC) was charged with answering a number of very specific questions about the effects that PBM ownership of a mail-order pharmacy can have on overall prescription drug costs. The results of the FTC report were released in August 2005. In short, the FTC determined that allegations of PBMs' conflict of interest were "without merit," and that PBM-owned mail-order pharmacies:

- o Offer lower prices on prescription drugs than retail pharmacies and non-PBM owned mail pharmacies;*
- o Are very effective at capitalizing on opportunities to dispense generic medications; and*
- o Have incentives closely aligned with their customers: the third-party payors who fund prescription drug care*

In short, enactment of HB 62 will serve only to increase prescription drug costs for our Hawaii-based clients and patients. For these reasons we must respectfully oppose HB 62.

Thank you for the opportunity to provide testimony on this measure.

HMSA



An Independent Licensee of the Blue Cross and Blue Shield Association

February 27, 2013

The Honorable Angus L. K. McKelvey, Chair
The Honorable Derek S. K. Kawakami, Vice Chair

House Committee on Consumer Protection and Commerce

Re: HB 62, HD1 – Relating to Pharmacy Benefits Managers

Dear Chair McKelvey, Vice Chair Kawakami, and Members of the Committee:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on HB 62, HD1, which prohibits a pharmacy benefits manager (PBM) from using a patient's benefits claim information to promote the services of a preferred pharmacy network owned by the PBM. HMSA opposes this Bill.

HMSA's goal in the provision of outpatient pharmacy services is to ensure our members have access to affordable, high quality medication. HMSA believes that optimal drug therapy results in positive medical outcomes, which helps to manage overall health care costs.

There seems to be a misconception that PBMs dictate pharmacy benefits such as restrictive network, mandatory mail order and copayments. This is not the case. The employer groups or other payers are the entities that make these benefit design decisions. We believe that allowing the purchaser of the benefit to have that decision-making authority is imperative to balancing the needs of the employees with the cost to the health care system. This Bill may restrict that goal.

Thank you for the opportunity to testify on this measure.

Sincerely,

A handwritten signature in black ink that reads "Mark K. Oto".

Mark K. Oto
Director, Government Relations



HAWAII FOOD INDUSTRY ASSOCIATION (HFIA)
1050 Bishop St. PMB 235
Honolulu, HI 96813
Fax: 808-791-0702
Telephone : 808-533-1292

DATE: Feb 27, 2013 TIME: 3:30 PM PLACE: CR 325

TO: COMMITTEE ON CONSUMER PROTECTION & COMMERCE

Representative Angus L.K. McKelvey, Chair
Representative Derek S.K. Kawakami, Vice Chair

FROM: Hawaii Food Industry Association - Lauren Zirbel, Executive Director

Re: HB 62- Relating to Pharmacy Benefit Managers **Strong Support**

The Hawaii Food Industry Association is comprised of two hundred member companies representing retailers, suppliers, producers and distributors of food and beverage related products in the State of Hawaii.

I am writing on behalf of HFIA members across the State of Hawaii regarding Pharmacy Benefit Managers, (PBM's) and the importance of increasing oversight as it relates to their use of prescription claims information to directly market the services of an affiliated of wholly owned pharmacy provider.

CVS/Caremark as of January 2013 has become the dominate PBM/Pharmacy/Mail order business in the State of Hawaii. HFIA has calculated that CVS/Caremark either fills, or adjudicates over 80% of the pharmacy claims in the state. Across the United States CVS Caremark fills or manages more than 1.2 billion prescriptions annually. The information from these prescriptions is not simply used to process prescription claims. It is compiled by CVS Caremark to form a complete medical picture of the patient. As described in a CVS Caremark publication, CVS Caremark then utilizes these complete medical pictures for its own financial gain to market products and services to (or "engage") the patients. The engagement engine shown below is a graphic example of how this information is processed.

Comprehensive Participant Engagement — Operationalized Identifies Potential Savings and Health Improvement Opportunities for Plan Participants

We Know:

- Your plan participants
- Their demographics and drug histories
- Their prescribers
- Their plan design
- Their health and purchasing behavior



We Engage:

- At the right time
- Per participant preferences
- Coordinated across CVS Caremark
 - Face-to-face
 - By mail
 - By phone
 - By e-mail, text, online
 - Via MDs with iScribe®

Evidence-Based Foundation

CVS Caremark collects proprietary patient information it receives from non-CVS pharmacies and transfers that same information to its own CVS pharmacies and other business segments and otherwise uses the information for CVS Caremark's own financial benefit. CVS Caremark accepts payments from drug companies for directly marketing to those patients who are likely candidates for a drug because of their prescription history. CVS Caremark also directly targets non-CVS patients and solicits their business to CVS-owned retail stores and their purchase of CVS-branded over-the-counter products.

The importance of this act HB62 can not be over stated. By preventing CVS from using patients claims information to manipulate their choice of pharmacy provider we protect the most vulnerable in our society. This act would prevent call centers from repeatedly calling patients with offers of 20% discounts on other goods if they will only fill their prescriptions at a CVS/Longs store. By implying that the member must purchase their pharmacy services from a CVS store during a series of calls is not in the best interest of our patients and is oriented toward bigger profits not better care. For these reason

HFIA respectfully asks that HB-62 be passed intact from this committee with the blessings of its members.

Thank you for the opportunity to provide this testimony.

Re: H.B. No. 62
H.D. 1

February 27th, 2012

Honorable Angus L.K. McKelvey
Chair Consumer Protection Committee
Honorable Derek S.K. Kawakami
Vice Chair Consumer Protection Committee
Twenty-Seventh State Legislature
Regular Session of 2013
State of Hawaii

Sir:

Hawaii Community Pharmacists Association, (HCPA) wishes to provide this letter of **STRONG SUPPORT** for this bill.

Pharmacy Benefit Managers such as CVS/Caremark and Express Scripts routinely utilize patients claims and or medical information to market the goods and services of their wholly owned mail order pharmacies as well as wholly owned brick and mortar pharmacies. Programs such as CVS/Caremarks' "Customer Engagement Engine" gather claims information that is then used to steer patients to their own pharmacies. In addition PBM's utilize a variety of inducements up to and including developing closed networks of pharmacies often excluding the patients community pharmacy in order to boost their profits at the expense of patient choice.

Hawaii Community Pharmacists Association feels strongly that patients medical claims information is protected health information and should only be utilized for medically necessary purposes. In addition when this claims information originates from a non PBM owned pharmacy HCPA believes that the information is proprietary business information and its use for marketing purposes anticompetitive.

For the reasons stated above HCPA strongly supports this bill and the restrictions it would place on the use of protected patient information.

Sincerely,

Kevin Glick, R.Ph.
HCPA Chair
Hawaii Community Pharmacists Association
3-3295 Kuhio Hwy, Ste. 102
Lihue, HI 96766



HO'OLA LĀHUI HAWAI'I
P.O. Box 3990; Līhu'e, Hawai'i
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COMMITTEE ON CONSUMER PROTECTION & COMMERCE

Rep. Angus L.K. McKelvey, Chair

Rep. Derek S.K. Kawakami, Vice Chair

Testimony in Support of House Bill 62, HD1

Ho`ola Lahui Hawaii the only Federally Qualified Health Center and Native Hawaiian Health Care System on Kauai is strongly **SUPPORTING** this bill to regulate pharmacy benefit management companies (PBM).

It is very important that patients have local access to pharmacy services at multiple points of entry, not just limited to mail order.

It is challenging to compete with mail order pharmacies when the same discount cannot be offered for multiple months' supply. A competitive market place is an important consideration so that small businesses can continue to compete fairly in the open market.

Therefore we support the continued movement of this important bill.

Respectfully Requested,

David Peters
Chief Executive Officer

Testimony Presented Before the
House Committee on Consumer Protection & Commerce
Wednesday, February 27, 2013 at 3:30 p.m.

By
John Pezzuto, Ph.D.
Dean, College of Pharmacy, UH Hilo

HB62 HD1 RELATING TO PHARMACY BENEFITS MANAGERS

Chair McKelvey, Vice Chair Kawakami and Members of the Committee:

My name is Dr. John Pezzuto and I am the Dean of the College of the College of Pharmacy at UH Hilo. I am testifying in support of the enactment of HB62 HD1. I am testifying as a private citizen and not as a representative of UH Hilo.

This bill will prohibit pharmacy benefit managers from engaging in exploitive marketing practices. The role of the pharmacy benefit manager is to serve as an intermediate to negotiate services and costs between pharmaceutical companies and third party payers. It is not their function nor within their purview to utilize privileged patient information to manipulate how and where patients receive prescription drug benefits, nor to exploit this information for profit or any other motivation that has little to do with the welfare of the patient.

By using this information to direct business to their chain stores and mail order operations, consumer choice is compromised and competition is eliminated. This bill prohibits such activities, which frankly are unconscionable.

Thank you for considering this testimony.