TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013

ON THE FOLLOWING MEASURE:
S.B. NO. 1337, S.D. 2, RELATING TO HEALTH WELLNESS PROGRAMS.

BEFORE THE:
HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

DATE: Monday, March 11, 2013 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Laura Maeshiro, Deputy Attorney General

Chair McKelvey and Members of the Committee:

The Department of the Attorney General respectfully opposes this bill.

The purpose of this bill is to clarify that participation in a "health wellness program" does not constitute illegal gambling. To accomplish this, the bill amends definitions of Hawaii's gambling laws under section 712-1220, Hawaii Revised Statutes (HRS), to create an exception for group health plans, insurers, mutual benefit societies, and health maintenance organizations who provide incentive programs in a "health wellness program."

The Department is cognizant of the importance of preventive health care and supporting healthier workplaces, but has grave concerns about the broad exception being carved out of the current gambling laws for a particular entity or class of persons, and opposes this bill for the following reasons:

1. This bill is not needed to address the concerns that prompted its introduction.

The Department understands that this bill was initiated by the Hawaii Medical Service Association (HMSA) to address concerns that certain conduct it was planning to engage in violated state gambling laws. Representatives from the Department, the Honolulu Police Department, and HMSA met to clarify the purpose of this bill. It became clear that HMSA was concerned about a very specific scenario. HMSA wants to provide an incentive to it members, who pay health insurance premiums, to participate in health and wellness programs, by entering the names of members, who complete a health assessment form, into a drawing promotion that gives them an opportunity to win prizes. Members do not pay money or other consideration to

enter the drawing. They only need to fill out the health assessment form. This specific conduct would not violate the state gambling laws. Therefore, this bill appears to be attempting to do something that is not even necessary.

Under section 712-1220(4), HRS, a person engages in "gambling" if the person: (1) stakes or risks something of value; (2) upon the outcome of a contest of chance or future contingent event; (3) upon an understanding that something of value will be received by someone in the event of a certain outcome.

In the proposed scenario by HMSA, while the drawing would be a "contest of chance," there is nothing of value being paid by members to enter the drawing. The act of filling out a health assessment form is not "something of value."

Members do pay something of value – premiums – in order to receive HMSA health benefits, but the definition of "gambling," under section 712-1220(4), HRS, expressly excludes "agreements to compensate for loss caused by the happening of chance, *including . . . health . . . insurance*."(Emphasis added). Health insurance premiums are exempt.

Since the specific conduct posed by HMSA does not appear to be a violation of the gambling laws, this bill is unnecessary.

2. The bill carves out an excessively broad exception to the State gambling laws.

The bill proposes to exclude from the definition of gambling the following:

> [A]ny payment for or participation in a wellness program, as defined in section 2705(j) of the Public Health Service Act, that is sponsored by:
> (1) A group health plan, as defined in section 2791(a) of the Public Health Service Act;
> (2) An insurer subject to article 10A of chapter 431;
> (3) A mutual benefit society subject to chapter 432; or
> (4) A health maintenance organization subject to chapter 432D.

It is understood that the federal Patient Protection and Affordable Care Act (Act) enacted in 2010 is one of the bases for promoting a healthier workplace by giving incentives to employees. The language in this bill, however, is both broad and vague, and does not set clear guidelines for what it is trying to accomplish, even if it references definitions from the Act itself.

The bill uses sections of the federal Act to reference definitions. The Act has been codified at 42 U.S.C. § 300gg-4(j). Section 42 U.S.C. § 300gg-4(j)(1)(A) provides:

> For purposes of subsection (b)(2)(B), a program of health promotion or disease prevention (referred to in this subsection as a "wellness program") shall be a program

> offered by an employer that is designed to promote health or prevent disease that meets the applicable requirements of this subsection.

After that definition of a "wellness program," the federal law provides for different scenarios, including wellness programs subject to requirements and wellness programs not subject to requirements. Simply put, a "wellness program" is not concisely defined.

To date, the Department of Health and Human Services is still undergoing its rules process relating to wellness programs and incentives. There are no finalized rules yet, and therefore, limited information and/or guidance. See Federal Register, Vol. 77, No. 227 dated November 26, 2012, Department of Health and Human Services Incentives for Nondiscriminatory Wellness Programs in Group Health Plans; Proposed Rule.

The Department notes that 42 U.S.C. § 300gg-91(a)(1) is the appropriate citation for "section 2791(a)" on page 4, line 13, and page 5, line 8.

The Department is concerned that this bill seeks to exclude participation in a "wellness program," sponsored by certain entities, from state gambling laws. The exclusion is based more on specified entities than on specific conduct. The conduct is simply identified as a "wellness program." The breadth and vagueness of the proposal is of great concern to the Department.

Gambling is illegal in Hawaii. Any criminal offense within the penal code needs to be clear and concise to afford proper notice to the public and also to be effective for enforcement. Changing a criminal statute, absent a compelling reason, compromises the law and may lead to various interpretations and/or conduct to get around criminal culpability. This may be especially true for the gambling laws, as various schemes arise that claim to not violate the gambling laws, but law enforcement ultimately finds that they do.

Accordingly, the Department of the Attorney General respectfully requests that this bill be held.

HMSA Blue Cross Blue Shield of Hawaii

An Independent Licensee of the Blue Cross and Blue Shield Association

March 11, 2013

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

House Committee on Consumer Protection and Commerce

Re: SB 1337, SD2 – Relating to Health Wellness Programs

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

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to comment on SB 1337, SD2 which would clarify that participation in a health or wellness program does not constitute illegal gambling. While HMSA supported this Bill, we will defer to the Attorney General's opinion that it is not necessary.

HMSA believes that preventive health is critical to our efforts to create an efficient and effective health care system. U.S. employers—and their employees—pick up the tab for a significant portion of health care costs, the largest portion of which is associated with potentially modifiable lifestyle-related chronic illnesses (e.g., smoking, obesity, diabetes). To address this, employers and health plans have developed an intense interest in implementing results-oriented wellness programs in the workplace. But, as reported by the Wellness Council of America, while six in ten employees believe worksite wellness programs are a good idea, only three in ten actually participate in these programs.

This has driven employers to find new and novel ways of engaging employees (i.e., incentives) to try to get employees actively involved. These incentives include promotional items such as tee-shirts. But, they also include items of higher value, such as discounts at health clubs and health insurance premium discounts.

The federal Affordable Care Act (ACA) acknowledges the need for such incentives. The ACA authorizes incentives - or "rewards" - to promote employer wellness programs and encourage opportunities to support healthier workplaces. "Participatory wellness programs" generally are available without regard to an individual's health status. They include programs that reward participants by reimbursing them for the cost of membership in a fitness center; that provide a reward to employees for attending a monthly, no-cost health education seminar; that provide a reward for participating in a smoking cessation program; or that provide a reward to employees who complete a health risk assessment without requiring them to take further action.

"Health-contingent wellness programs," generally require individuals to meet a specific standard related to their health to obtain a reward. Examples include programs that provide a reward to those who do not use, or decrease their use of, tobacco, or programs that provide a reward to those who achieve a specified cholesterol level or weight, as well as to those who fail to meet that biometric target but take certain additional required actions. Regulations increase a maximum permissible reward under a health-contingent wellness program from 20 percent to 30 percent of the cost of health coverage, and that further increase the maximum reward to as much as 50 percent for programs designed to prevent or reduce tobacco use.

While it is evident that providing rewards or incentives to employees to participate in wellness programs is critical to the national effort to improve people's health status, we were concerned that State gambling and lottery statutes may hinder that effort. Our laws provide that someone engages in gambling if that person pays "something of value" for the opportunity to receive "something of value." That may suggest that, at an employer's promotion, an employee registering for a health club in anticipation that he/she is eligible for a reward may be engaging in illegal gambling.

Such situations certainly could not have been contemplated when the gambling statutes were enacted. The amendment in SB 1337, SD2 simply would have exempted anyone participating in a health or wellness promotional program that is defined under federal law and sponsored by an insurer from the gambling and lottery statutes.

Since the Bill's introduction, we have been in discussions on this Bill with representatives of the Honolulu Police Department and the Department of the Attorney General where we posed the scenario where our members who sign-up for a wellness program were given the opportunity to receive a reward. As a result of those discussions, the Attorney General submitted testimony to the February 25, 2013, Senate Committee on Judiciary and Labor hearing on SB 1337, SD1. In his testimony, the Attorney General reported that this Bill is unnecessary as follows:

> In the proposed scenario by HMSA, while the drawing would be a "contest of chance," there is nothing of value being paid by members to enter the drawing. The act of filling out a health assessment form is not "something of value."
>
> Members do pay something of value – premiums – in order to receive HMSA health benefits, but the definition of "gambling" under section 712-1220(4), HRS, expressly excludes "agreements to compensate for loss caused by the happening of change, *including…health insurance*." (Emphasis added.) Health insurance premiums are exempt.
>
> Since the specific conduct posed by HMSA does not appear to be a violation of the gambling laws, this bill is unnecessary.

We sincerely appreciate the Chair and the Committee affording us the opportunity to raise this issue for discussion. However, given the opinion by the Attorney General that this Bill is unnecessary, we suggest that this Bill be deferred.

Thank you very much.

Sincerely,

Jennifer Diesman
Vice President
Government Relations