



EXECUTIVE CHAMBERS
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SENATE COMMITTEE ON WAYS AND MEANS
The Hon. David Y. Ige, Chair
The Hon. Michelle N. Kidani, Vice Chair

March 28, 2014, 9:20 a.m., Room 211

House Bill 2529, HD 3, SD 1: RELATING TO HEALTH

Comments

Presented by Beth Giesting, Healthcare Transformation Coordinator, Office of the Governor

Thank you for the opportunity to comment on HB 2529, HD 3, SD 1: Relating to Health. We appreciate the Legislature's concerns for ensuring the viability and success of the Hawaii Health Connector and its role in facilitating insurance enrollment. In proposing changes to the Connector our foremost goals are to support functionality that leads to universal coverage and preserves the benefits of the Prepaid Health Care Act.

We have no recommendations about the specifics detailed in HB 2529, HD 3, SD 1 but note that:

- We are working across State agencies and with the Connector to develop sustainable solutions that support Prepaid, are scaled to Hawaii's market, improve cost-effectiveness, and are compliant with the Affordable Care Act.
- There is general agreement on some methods that will reduce operating costs, including having one system that functions for individual determination of Medicaid and Advance-Premium Tax Credit eligibility and developing effective small business enrollment options
- We believe structure, functions, and funding may change as we develop an Innovation Waiver under the Affordable Care Act for 2017.

Thank you for the opportunity to comment.



To: Committee on Ways and Means
Senator David Y. Ige, Chair

Date: March 28, 2014, Conference Room 211, 9:20 a.m.

Re: **HB 2529 HD3 SD1 – RELATING TO HEALTH**
Testimony - Comments

Chair Ige and Committee Members:

AARP is a membership organization of people 50 and older with nearly 150,000 members in Hawaii. AARP fights on issues that matter to Hawaii families, including the high cost of long-term care; access to affordable, quality health care for all generations; providing the tools needed to save for retirement; and serving as a reliable information source on issues critical to Americans age 50+.

AARP provides comments on portions of HB 2529 HD3 SD1 - Relating to Health

Section 2 of this bill adds sections to Chapter 435H, Hawaii Revised Statutes and we have the following comments:

§435H-A Connector Legislative Oversight Committee

AARP supports the establishment of the Committee and recommends that:

1. Committee meetings shall be open to the public and a meeting notice should be posted on the connector's website.
2. Connector sustainability, financial, and operational plans provided to the committee shall be posted on the connector's website.
3. Committee meeting minutes shall be posted on the connector's website

AARP also requests that the Consumer, Patient, Business, and Health Care Advisory Group; Health Insurers Advisory Group; and the Insurance Producers Advisory Group be established as provided in the HB 2529 HD 3 version of this bill. These groups would provide input and recommendation to the Board.

§435H-D Budget Requests; Annual Appropriations

AARP supports the requirement for the Connector board to submit a fully documented sustainability plan budget. The Connector has received approximately \$205 million in federal tax dollars for the development and implementation of the Connector, and Hawaii residents should not be responsible for Connector expenses until it provides the Legislature with an acceptable and detailed sustainability plan.

Section 6 of this bill amends section 435H-4, Hawaii Revised Statutes and we have the following comments:

§435H-4 Board of Directors; Composition; Operation

AARP supports the exclusion of insurers and dental benefit providers from the board whether they are voting or nonvoting members. Insurers and dental benefit providers should only serve in a nonvoting advisory capacity on an insurer and dental benefit provider subcommittee or advisory group. This subcommittee or group should only have access to publically available information, and not have access to confidential information, board documents, contracts, and vendor negotiations discussed in executive sessions.

Thank you for the opportunity to provide testimony.

TESTIMONY OF THE AMERICAN COUNCIL OF LIFE INSURERS
COMMENTING ON HOUSE BILL 2529, SD 1, RELATING TO HEALTH

March 28, 2014

Via e mail

Honorable David Y. Ige, Chair
Committee on Ways and Means
State Senate
Hawaii State Capitol, Conference Room 211
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Ige and Committee Members:

Thank you for the opportunity to comment on HB 2529, SD 1, relating to Health.

Our firm represents the American Council of Life Insurers (“ACLI”), a Washington, D.C., based trade association with approximately 300 member companies operating in the United States and abroad. ACLI advocates in federal, state, and international forums for public policy that supports the industry marketplace and the 75 million American families that rely on life insurers’ products for financial and retirement security. ACLI members offer life insurance, annuities, retirement plans, long-term care and disability income insurance, and reinsurance, representing more than 90 percent of industry assets and premiums. Two hundred twenty-five (225) ACLI member companies currently do business in the State of Hawaii; and they represent 92% of the life insurance premiums and 90% of the annuity considerations in this State.

In 2011, Hawaii enacted Act 205 (now HRS Chapter 435H). Act 205 established the Hawaii Health Insurance Exchange which under Hawaii’s law is known as the Hawaii health connector. The Act defines an insurer subject to its provisions to mean “. . . any person or entity that issues a policy of accident and health or sickness insurance subject to article 10A of chapter 431, or chapters 432 or 432D.” HRS Section 435H-1.

By its terms, Article 10A of the Insurance Code (by reference to HRS §431:1-205) defines “accident and health or sickness insurance” to include disability insurance (“DI”).

ACLI submits that the intent of Hawaii’s Health Insurance Exchange Act was to subject “health insurance” and “dental insurance” – not limited benefit health insurance, such as DI – to its provisions.

The purpose and role of Hawaii’s health connector is set forth in HRS Section 435H-2, which states in relevant part:

- (b) The purposes of the connector shall include:
 - (1) Facilitating the purchase and sale of qualified plans and qualified dental plans . . .

(c) The connector shall serve as a clearinghouse for information on all qualified plans and qualified dental plans listed or included in the connector . . .

(g) The connector shall make qualified plans and qualified dental plans available to qualified individuals and qualified employers

Hawaii's Health Insurance Exchange Act limits the "plans" it provides to consumers to qualified health plans ("QHPs") described in section 1311(c) of the federal Patient Protection and Affordable Care Act ("ACA") and dedicated/stand-alone qualified dental plans ("QDPs") described in Section 1311(d)(2)(B)(ii) of the ACA. HRS Section 435H-1.

Medicare supplement, accident-only, specified disease, hospital indemnity, or other limited benefit hospital insurance policies issued by insurers, including DI issued by life insurers, are neither QHPs or QDPs described in the ACA as contemplated by Hawaii's Health Insurance Exchange Act.

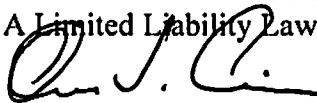
In recognition that all insurers issuing limited benefit health insurance policies, including life insurers issuing DI under Article 10A are not issuers of QHPs - they do not sell QHPs either through or independent of Hawaii's health connector – the prior Committee hearing HB 2529 amended the definition of an "insurer" which Chapter 435H is intended to apply, as set forth below:

"Insurer" means any person or entity that issues a policy of accident and health or sickness insurance subject to article 10A of chapter 431, or chapters 432 or 432D, other than an accident-only, specified disease, hospital indemnity, medicare supplement, disability income, or other limited benefit hospital insurance policies." Section 3, HB 2529, SD 1, at pg. 9, at lines 18-21, and pg. 10, at lines 1-2.

ACLI believes that the revised language in HB 2529, SD 1, insures that only "health insurers" and "dental insurers" and not insurers issuing DI and other limited benefit health policies will be included in Hawaii's Health Insurance Exchange Act and any future legislative changes to that Act. The revised language in the bill should, therefore, be retained.

Again, thank you for the opportunity to comment on HB 2529, SD 1, relating to Health.

LAW OFFICES OF
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MCCORRISTON MILLER MUKAI MACKINNON LLP

ATTORNEYS AT LAW

March 27, 2014

Honorable David Ige, Chair
Honorable Michelle N. Kidani, Vice Chair
Committee on Ways and Means
The Senate
State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Re: H.B. NO. 2529, H.D.3, S.D.1 RELATING TO HEALTH

Dear Chair Ige, Vice Chair Kidani, and Committee Members:

On behalf of the American Family Life Assurance Company of Columbus (AFLAC), we respectfully submit the following written comments on House Bill No. 2529, House Draft 3, Senate Draft 1, relating to health, which is to be considered for decision-making by your Committee on Ways and Means on March 28, 2014.

Proposed section 435H-C(a) would require the Hawaii Insurance Commissioner to impose a sustainability fee “a sustainability fee of no greater than .345 per cent of the premiums derived from the sale of *comprehensive medical insurance plans*, including dental plans, in the State” (italics added).

There are certain types of limited benefit health insurance policies, such as accident-only, specified disease, hospital indemnity, long-term care, disability, vision and medicare supplement, that do not offer comprehensive benefits. Limited benefit health insurance policies not only are not sold via the Connector, but not are even eligible for sale via the Connector because they are not “qualified plans” as defined in section 435H-1, Hawaii Revised Statutes.

We believe that the intent of House Bill No. 2529, House Draft 3, Senate Draft 1, is not to subject such limited benefit health insurance policies to the sustainability fee. However, for the sake of clarification, we respectfully request that subsection (a) of the new section 435H-C to be added by Section 2 of House Bill No. 2529, House Draft 3, Senate Draft 1, be amended as follows:

(a) Beginning January 1, 2015, and each January 1 thereafter, the commissioner shall assess a Hawaii health insurance exchange sustainability fee of no greater than .345 per cent of the premiums derived from the sale of comprehensive medical insurance plans, including dental plans, in the State; provided that the final amount of the Hawaii health insurance exchange sustainability fee shall be based on the sustainability plan budget request submitted to the connector legislative oversight committee pursuant to section 435H-D. As used in this section, “comprehensive medical insurance plans” does not include accident-only, specified disease, hospital indemnity, long-term care,

Honorable David Ige, Chair
Honorable Michelle N. Kidani, Vice Chair
Committee on Ways and Means
March 27, 2014
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disability, vision, medicare supplement, or other limited benefit health insurance contracts.”

(Additional language underscored.)

Thank you for your consideration of the foregoing.

Very truly yours,

MCCORRISTON MILLER MUKAI MACKINNON LLP



Peter J. Hamasaki

PJH:fk



HPCA

HAWAII PRIMARY CARE ASSOCIATION

Senate Committee on Ways and Means

Senator David Y. Ige, Chair

Senator Michelle N. Kidani, Vice Chair

Testimony on House Bill 2529, HD 3, SD1

Relating to Health

Submitted by Robert Hirokawa, Chief Executive Officer

March 28, 2014, 9:20 am, Room 211

The Hawaii Primary Care Association (HPCA), which represents the federally qualified community health centers in Hawaii, would like to offer comments on House Bill 2529 HD3, SD1, which seeks to alter the board composition of the Hawaii Health Connector and create advisory and oversight committees.

The HPCA supports the intent of this measure, which is to keep the Hawaii Health Connector as a free standing non-profit organization and create advisory and oversight committees. However, the HPCA has concerns about the financial sustainability of the Hawaii Health Connector and would ask that additional measures be implemented to assess and plan for such considerations moving forward.

The HPCA thanks you for the opportunity to offer these comments and urges you to move the bill forward for further consideration.



Community Alliance for Mental Health

March, 28, 2014

Board of Directors

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To: Senate Committee on Ways and Means
Re: HB2529, HD3, SD 1

Aloha Chair Ige and the members of the committee,

On behalf of the Community Alliance for Mental Health along with United Self Help we strongly support the passage of HB 2529, HD3, SD 1.

We feel that the Hawai'i Health Connector's brief life as a quasi-non-profit was an error from the beginning and that the only option the State has is to start fresh.

We also believe that the creation of permanent advisory groups is necessary.

Scott Wall
Vice President for Policy
Community Alliance for Mental Health



**Testimony to the Senate Committee on Ways and Means
Friday, March 28, 2014 at 9:20 A.M.
Conference Room 211, State Capitol**

RE: HOUSE BILL 2529 HD3 SD1 RELATING TO HEALTH

Chair Ige, Vice Chair Kidani, and Members of the Committee:

The Chamber of Commerce of Hawaii ("The Chamber") **opposes** HB 2529 HD3 SD1, which establishes the connector legislative oversight committee and the Hawaii health insurance exchange special fund, and provides other specifications pertaining to the Hawaii Health Connector.

The Chamber is the largest business organization in Hawaii, representing over 1,000 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The Chamber's main concern is the large operational cost to sustain this – a cost that businesses will be forced to bear. It presently costs about \$15 million to maintain operations. In addition to the other mandated costs to businesses, this large cost will be another burden. We do think legislative oversight might be one way to control costs.

We oppose the fee to maintain the connector. We would like to see cost reductions before assessing the fee to businesses. This additional fee, along with the many other mandated healthcare costs, would harm many businesses. Also, we support the efforts to use existing funds – it is our understanding that there is a possibility of utilizing existing federal appropriations to fund the Health Connector through 2015.

Thank you for the opportunity to testify.



Hawaii Independent Insurance Agents

ASSOCIATION

March 27, 2014

To: Senator David Ige, Chair
Senator Michelle N. Kidani, Vice-Chair
Committee on Ways and Means

From: Sonia M. Leong, Executive Director
Hawaii Independent Insurance Agents Association

Re: HB 2529 HD3, SD1 Relating to Health
Hearing: Friday, March 28, 2014 9:20 am Conference Room 211

My name is Sonia M. Leong and I am the Executive Director of the Hawaii Independent Insurance Agents Association, a non profit trade association of the Independent Agents & Brokers. HIIA would like to submit comments on HB 2529 HD3, SD1

We are concerned that the latest version SD1 deleted Section 435H-E pertaining to Agents & Brokers. We request that the language from the House draft be reinstated. The House draft included language that would have permitted certified insurance agents and brokers to be compensated for enrollments through the Hawaii Health Connector.

We would like to reiterate that the Agents & Brokers work on behalf of the consumer and have their best interest in mind. We sincerely believe that we should be a part of the equation to help the Hawaii Health Connector remain operational. We believe with our training and our understanding of the markets we could help the consumer and business owners evaluate the various plans. Navigators and Assisters who are being compensated are not allowed to give recommendations nor may they have the experience on the various nuances of the health coverage offerings especially deductibles and out of pocket expenses.

We ask the Committee on Ways and Means re-insert Section 435H-E :
{Certified Insurance agents and brokers may enroll individuals and employers in applying for applicable premium tax credits and cost-sharing reductions for which they may be eligible and shall be compensated for these activities in a manner determined by the board. The commissioner shall adopt rules for certifying insurance agents and brokers pursuant to this section; provided that the rules shall include qualifications and educational requirements for agents and brokers comply with the federal act.}

Thank you for the opportunity to provide testimony.

TAXBILLSERVICE

126 Queen Street, Suite 304

TAX FOUNDATION OF HAWAII

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: MISCELLANEOUS, Hawaii health insurance exchange sustainability fee

BILL NUMBER: HB 2529, SD-1

INTRODUCED BY: Senate Committees on Commerce and Consumer Protection and Health

EXECUTIVE SUMMARY: Permits the insurance commissioner to impose a Hawaii health insurance exchange sustainability fee of 0.345% on the sale of comprehensive medical insurance plans, including dental plans, to provide financial support and ensure the sustainability of the Hawaii health insurance exchange. Unfortunately, it appears that the connector is going to need a cash infusion and a fee on all insurance products seems to be a reasonable way to spread the burden. Any fee imposed should be assessed equitably upon both insurers selling their products through the connector and those who sell their products outside the connector.

BRIEF SUMMARY: Adds a new section to HRS chapter 435H to provide that beginning on January 1, 2015, the insurance commissioner shall assess a Hawaii health insurance exchange sustainability fee of 0.345% of the premiums derived from the sale of comprehensive medical plans, including dental plans; provided that the amount of the fee shall be based on the sustainability plan budget request submitted by the connector legislative oversight committee. The total of all revenues collected from the fee shall not exceed \$15 million per year; provided that this amount may be increased by legislative action. The existing 2% surcharge imposed on plans sold through the connector shall terminate when the sustainability fee is imposed.

Establishes a Hawaii health insurance exchange special fund as a separate account within the compliance resolution fund, into which all moneys from the Hawaii health insurance exchange sustainability fee shall be deposited. Moneys from the account shall be used to ensure the sustainability of the Hawaii health insurance exchange.

Makes nontax amendments and appropriations to the Hawaii health insurance exchange and provides that the general fund appropriation in this measure shall be reimbursed over a five-year period after the sustainability fee has been adopted.

EFFECTIVE DATE: July 1, 2012

STAFF COMMENTS: Act 205, SLH 2011, established the Hawaii Health Connector (HHC) as a nonprofit corporation.

This measure would allow the insurance commissioner to impose a fee of 0.345% of the premiums derived from the sale of comprehensive medical insurance plans including dental plans beginning on January 1, 2015. Currently, it appears that the HHC has authorized a 2% increase on all health plans sold to individuals through the connector and an additional 2% increase on all plans sold to small businesses on July 1, 2014. Once the sustainability fee is adopted, the 2% fee will cease to be

imposed. It is unfortunate, but the truth of the matter is that HHC is now unsustainable. That means it needs to be bailed out by taxpayers, namely us.

It should be noted that a request by a legislator called for the disclosure of how the \$204 million that Hawaii has received from the federal government in Affordable Care Act grants were expended.

Digested 3/27/14

**America's Health
Insurance Plans**

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South Building
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Washington, DC 20004

202.778.3200
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March 27, 2014

Honorable Senator David Y. Ige
Committee on Ways and Means, Chair
Senate District 16
Hawaii State Capitol, Room 208
415 South Beretania Street
Honolulu, HI 96813

Re: HI HB 2529 Hawaii Health Connector Sustainability Fee

Dear Senator Ige and Members of the Committee,

On behalf of America's Health Insurance Plans (AHIP), I am writing to comment on 2014 HB 2529, as passed by the House and amended by the Senate Committees on Health and Commerce and Consumer Protection, regarding the Hawaii Health Connector sustainability fee.

AHIP is the national trade association representing the health insurance industry. AHIP's members provide health and supplemental benefits to more than 200 million Americans through employer-sponsored coverage, the individual and small group insurance markets, and public programs such as Medicare and Medicaid. Our members offer a broad range of health insurance products in the commercial marketplace and also have demonstrated a strong commitment to participation in public programs.

This bill creates a new Section HRS §435H-C that would require the insurance commissioner to annually assess a fee of 0.345 percent of premiums derived from the sale of comprehensive medical insurance plans and dental plans selling plans in Hawaii, both inside and outside the exchange. While we find the language improved, we offer the following comments in response to the amended version of HB 2529.

AHIP appreciates the amendments that establish a defined assessment limit of 0.345 percent as opposed to an open-ended assessment amount. Undefined assessments are difficult to administer and can cause unstable fluctuations in premiums. We are also encouraged by the Senate amendments that cap the appropriation at \$15 million and discontinue the existing two percent surcharge on Exchange participants. A cap on assessments in conjunction with requiring the Connector Board to submit an annual sustainability plan and budget, encourages responsible and efficient operations and financing of the Connector. It will be important that the funding cap be viewed as the upper-most limit that may be collected from the premium tax assessment and not the expected amount as the Connector should continue to evaluate how efficient it must be to use resources in a responsible and prudent manner.

While the funding mechanism for the exchange is improved, we strongly suggest that the legislature explore innovative funding sources that will not contribute to increased premiums for consumers. The Exchange provides coverage for the uninsured populations in Hawaii previously served by safety net programs such as QUEST, CHIP, and community or federally-facilitated health centers. As these individuals obtain coverage through the Exchange, they reduce the burden on state safety net programs; and so as utilization of safety net programs decreases, the existing funding for those programs should be redirected to fund the Exchange.

Additionally, the Exchange performs many functions that benefit more than just Exchange participants. For example, whereas Medicaid used to staff and conduct all of its eligibility and enrollment processes, the Exchange now shares that responsibility. Also, by enrolling previously uninsured individuals, many of whom were foregoing care or receiving care that providers would not be compensated for, the Exchange increases the number of individuals seeking care from health care providers and manufacturers of pharmaceuticals and medical devices who will now be reimbursed for such care.

We suggest that the legislature seek innovative ways of funding the Exchange where the burden of funding is borne by all stakeholders that benefit from the presence of the Exchange. We also support the legislature's consideration of the broadest funding base possible, such as general revenues as being considered under other legislation on this matter (SB 2470), and advertising as is included in 435H-3(b).

We also applaud the amendment of the definition of "insurer" to specifically exclude HIPAA excepted benefits (i.e. accident-only, disability income, etc). The federal insurance and market reforms established under the Affordable Care Act (ACA) apply to comprehensive, major medical coverage, and exclude excepted benefit products from these requirements. By excluding these products, the legislature will ensure that purchasers of specific insurance products unrelated to the Connector are not unfairly targeted. We would request that clarification be added regarding application of the fee to dental plans in Section 435H-C, as follows:

*“(a) Beginning January 1, 2015, and each January 1 thereafter, the commissioner shall assess a Hawaii health insurance exchange sustainability fee of no greater than .345 per cent of the premiums derived from the sale of comprehensive medical insurance plans, including dental plans **subject to Chapter 432G**, in the State; provided that the final amount of the Hawaii health insurance exchange sustainability fee shall be based on the sustainability plan budget request submitted to the connector legislative oversight committee pursuant to section 43 5H-D.”*

We suggest that the legislature add language omitted in this most recent version of HB 2529 that excludes Medicaid plans from the assessment base. As noted above, we believe it is inappropriate to include in the assessment base the premiums of products not offered through Hawaii Health Connector, including Medicaid plans. It is important to note that federal law


March 27, 2014
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requires state Medicaid agencies to reimburse plans for the value of the assessment. Section 1903(m)(2)(A)(iii) of the Social Security Act mandates that MCO rates must be determined on an “actuarially sound basis,” and federal regulations under Section 42 CFR §438.6(c)(1)(i)(A) require that rates be “developed in accordance with generally accepted actuarial principles and practices.” The American Academy of Actuaries has determined that actuarially sound rates for Medicaid MCOs are to include “any state-mandated assessments and taxes.”¹ Including Medicaid plans in the assessment base would result in increased costs to the state.

We also continue to note concerns that insurers and dental benefit providers were removed from Exchange Board membership. Insurers and dental plans have unique insight into how the insurance marketplace works and as Board participants they can make a significant contribution to the success of the Hawaii Health Connector. If participation on the Board is restricted, health plans and dental plans must play an important advisory role which would allow them to bring expertise on enrollment and other operational functions that the Exchange must fulfill.

AHIP believes the language in this current version of HB 2529 is significantly improved, but more changes need to be made. We share your goal for a successful, financially sustainable health insurance market and stand ready to work with the Hawaii legislature and the Hawaii Health Connector to find a solution that will ensure a robust marketplace. We appreciate your time and consideration of our comments and recommendations. If you have any questions or would like additional clarification of these comments, please contact me directly at (562) 429-7493 (email: Lgassaway@ahip.org) or Grace Campbell at 425-223-5686 (email gcampbell@ahip.org).

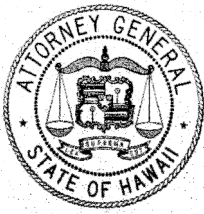
Sincerely,


Leanne Gassaway
Vice President, State Affairs


Grace Campbell
Regional Director

cc: Members of Senate Committee on Ways and Means

¹ American Academy of Actuaries, Health Practice Council Practice Note, Actuarial Certification of Rates for Medicaid Managed Care Programs, August 2005.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2014**

ON THE FOLLOWING MEASURE:

H.B. NO. 2529, H.D. 3, S.D. 1, RELATING TO HEALTH.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Friday, March 28, 2014

TIME: 9:20 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): David M. Louie, Attorney General, or
Lili A. Young, Deputy Attorney General

Chair Ige and Members of the Committee:

The Department of the Attorney General provides the following comments.

The federal Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, as amended by the federal Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (ACA), enabled the State of Hawaii to establish a health insurance exchange known as the Hawaii Health Connector (Connector). The purposes of this measure are to: (1) clarify the status of the Connector as the official health insurance exchange for the State; (2) provide for greater transparency and legislative oversight in the Connector; (3) ensure the sustainability of the Connector; and (4) ensure competition amongst health plans. Below we have identified general areas of the bill that raise legal concerns.

1. Setting the sustainability fee

There are inconsistencies within this draft relating to who sets the sustainability fee. In section 2, on page 6, lines 13-20, the bill proposes that the newly created Connector Legislative Oversight Committee (CLOC) review the Connector's sustainability plan budget request and make its recommendations to the House Committee on Finance and the Senate Committee on Ways and Means of the amount of the sustainability fee. In addition to authorizing the appropriation amount for the Connector, the Legislature is setting the sustainability fee based on the CLOC's recommendations. However, in section 2 on page 7, lines 19-22, through page 8, lines 1-7, the bill proposes that the Insurance Commissioner assess a sustainability fee with the discretion to assess the fee up to .345 per cent of premiums of medical and dental insurance plans sold in the State, provided that the fee shall be based on the sustainability plan budget request submitted by the Connector to the CLOC. It should be clarified who or what entity establishes

the sustainability fee and under what circumstances. As provided in our prior testimony, there could be a potential constitutional problem if the Insurance Commissioner (executive branch) must somehow consider a recommendation from the CLOC (legislative branch) before making a decision on the amount of the sustainability fee. In *Chaffin v. Arkansas Game & Fish Comm'n*, 757 S.W.2d 950 (Ar. 1988), the Arkansas Supreme Court held that a statute establishing the legislative council's practice of "review and advice" to state agencies on the intent of legislative appropriation violated the separation of powers doctrine and held that it was unconstitutional. The court provided that "[i]t is unreasonable to expect any state agency to defy such a body which has the power to determine its well-being. The 'advice' offered by the [legislative] committee to an agency is tantamount to a legislative order on how to execute a contract." *Id.* at 956. (Citations omitted).

If it is the Legislature's intent that the Insurance Commissioner set the sustainability fee, the wording of the new section 435H-C(a), Hawaii Revised Statutes (HRS), on page 7, lines 19-22, through page 8, lines 1-7, could be revised to provide that, if the sustainability plan budget request presented by the Connector to the Legislature requires a sustainability fee of up to .345 percent of premiums, the Insurance Commissioner has the discretion to set the sustainability fee up to the .345 percent level. Any amendments to clarify this section would depend upon the Committee's or Legislature's intent regarding the setting of the sustainability fee.

2. Changes to the Connector board's structure and operations

Section 6, page 13, line 7, through page 16, line 21, proposes amendments to section 435H-4, HRS, relating to the Connector's board of directors, composition, and operation. In our prior testimony to the House and Senate subject matter Committees, we explained that any changes the Legislature makes to the Connector's board composition will not be effective unless and until the Connector board adopts the changes. The Connector has the sole authority to make amendments related to the Connector board as provided in its articles and bylaws consistent with chapter 414D, HRS. See, e.g., chapter 414D, HRS, part VIII (sections 414D-132 (qualifications), 414D-133 (number of directors), 414D-134 (election, designation, and appointment), 414D-138 (removal), 414D-135 (terms), and 414D-136 (staggered terms)). Chapter 435H, HRS, is clear that the Connector is a non-governmental nonprofit corporation. Section 435H-2, HRS, specifically provides that "the connector shall not be an agency of the

State and shall not be subject to laws or rules regulating rulemaking, public employment, or public procurement. The connector shall be a Hawaii nonprofit corporation organized and governed pursuant to chapter 414D, the Hawaii nonprofit corporations act.”

Currently, the Connector’s Amended Articles of Incorporation, in Article VIII, filed on April 19, 2013, with the Department of Commerce and Consumer Affairs (see attached) provides at Section 8.1: “There shall be a Board of Directors, the size and composition of which shall be fixed in accordance with the requirements of Act 205, Session Laws of Hawaii 2011.” The articles limit any changes to the board’s size and composition. In addition to amending the size and composition of the board, this bill seeks to make amendments relating to the qualifications and appointment of the board members. We are unsure whether these articles have been amended since the filing on April 19, 2013.

If the Connector amends its articles or bylaws consistent with the legislative intent of this bill, the Connector should add the requirements of chapter 435H, HRS, and any amendments thereto.

Alternatively, considering that the Connector may first want to consult with its own counsel regarding these amendments and their impact on the corporation, the changes could be made contingent upon the Connector board's amending its articles or bylaws. To accomplish this we suggest replacing what is currently section 11 of the bill (governing its effective date) to read as follows:

SECTION 11. This Act shall take effect on [date], except that section 5 shall take effect upon the date on which the amendments to section 435H-4, Hawaii Revised Statutes, made in section 5 are adopted by the connector board or the date on which the connector articles of incorporation or bylaws are amended to incorporate those amendments, whichever is sooner, but under no circumstances shall the effective date of section 5 be a date before the effective date of the remainder of this Act.

We also note that even if these changes were adopted by the Connector’s board, the Connector is not prohibited from making future amendments to its articles or bylaws as they relate to its board structure and governance. If the Legislature is concerned about this, the Legislature could condition its efforts to implement the purposes of this bill (which include the sustainability of the Connector through appropriations), upon the Connector’s adoption of

provisions consistent with chapter 435H, HRS, and any amendments thereto, regarding the board of directors.

3. Funding

Section 5 on page 12, lines 16-19, of this draft includes new wording referring to the surcharge on “plans” sold through the Connector. As used here, “plans” means the insurance plans being assessed a surcharge. There is also reference to the term “plans” in section 5 on page 13, lines 3-4, which when used in that context means the methods or tactics for generating revenue. Because of this addition, it would be less confusing if the reference to “plans” on page 13, lines 3-4, were changed to reflect the following:

(c) ~~[All plans]~~ Any means to generate revenue for the connector shall be in compliance with federal law.

4. Expending agency designation necessary for appropriation

Section 7 on page 17, lines 1-5, appropriates general funds to be deposited into the newly established special fund. However, there is no wording identifying the expending agency for the appropriation. We recommend adding the following wording as the last sentence in section 7: “The sum appropriated shall be expended by the department of commerce and consumer affairs for the purposes of this Act.”

We respectfully request this Committee consider our comments.