



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

ON THE FOLLOWING MEASURE:
S.B. NO. 2031, RELATING TO HEALTH.

BEFORE THE:
SENATE COMMITTEES ON HUMAN SERVICES, ON HEALTH, AND ON
ECONOMIC DEVELOPMENT, GOVERNMENT OPERATIONS AND HOUSING

DATE: Thursday, February 13, 2014 **TIME:** 1:00 p.m.

LOCATION: State Capitol, Room 16

TESTIFIER(S): David M. Louie, Attorney General, or
Lori A. Aquino, Deputy Attorney General

Chairs Chun Oakland, Green, and Dela Cruz and Members of the Committees:

The Attorney General opposes this bill because it conflicts with federal law.

This bill would require a physical presence in Hawaii for Medicare suppliers of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) who have been awarded supplier contracts with the Centers for Medicare and Medicaid Services by adding a new section to chapter 346, Hawaii Revised Statutes, which pertains to the Department of Human Services. The bill defines "physical presence" as a physical location or administrative office in the State.

The DMEPOS competitive bidding program is mandated by Congress through the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA). Federal regulation 42 CFR § 424.57 sets forth the standards for DMEPOS suppliers. The regulation requires that a DMEPOS supplier "maintain a physical facility on an appropriate site." 42 CFR § 424.57(c)(7). It does not require a physical presence in every competitive bidding area in which the DMEPOS supplier has been approved. A significant part of the federal program is the National Mail Order program for diabetic testing supplies, which contemplates Medicare beneficiaries accessing suppliers across the country. A physical presence requirement in the State would contravene the intent and purpose of the program.

The bill conflicts with federal law because it imposes on federally approved DMEPOS suppliers the additional requirement of a physical presence in Hawaii. The provision would be preempted by federal law under the Supremacy Clause of the United States Constitution. In addition, section 1856(b)(3) of the MMA broadened the scope of federal preemption of state law governing plans serving Medicare beneficiaries. The only exceptions to this broad preemption

pertain to state laws and regulations regarding licensing and plan solvency. The bill would impermissibly regulate Medicare plans by restricting the ability of federally approved DMEPOS suppliers to supply Hawaii Medicare beneficiaries.

We respectfully recommend that the Committees hold this bill.