LATE

TO: COMMITTEE ON COMMERCE AND CONSUMER PROTECTION
The Honorable Rosalyn H. Baker, Chair
The Honorable Brian T. Taniguchi, Vice Chair

SUBJECT: **SCR 35– REQUESTING THE AUDITOR TO ASSESS THE SOCIAL AND FINANCIAL EFFECTS OF REQUIRING HEALTH INSURERS TO PROVIDE INFERTILITY PROCEDURE COVERAGE.**

Hearing: Friday, March 21, 2014
Time: 9:30 a.m.
Place: Conference Room 229

FROM: Na`unanikinau Kamali`i

This testimony is in **strong support of SCR 35.** The audit will assist the legislature in determining what is myth and what is fact and what amounts to unjust enrichment for the health plans, which have benefitted from an IVF coverage law that created two classes of members, and discriminated, victimized and demeaned women who were diagnosed with infertility by denying the IVF coverage benefit because they were not married. The audit will assist in settling the cost issues that have been raised by the health plans for years as justification for not working with the legislature to fix a law that has not been in compliance with federal and state laws with preclude such discrimination. This financially unjust treatment of women by this antiquated Hawaii Mandated IVF Insurance benefit of 27 years must be addressed.

The Audit is long overdue as it relates to the financial impact based on the law and not based on the health plan's bottom line. Any changes to the mandated benefits will be opposed by health plans, even if the change is to bring the IVF benefit coverage law into compliance and end discriminatory practices. **Health plan testimony received thus far as it relates to the IVF coverage legislation has been in support of an audit.** I urge the legislature to pass SCR 35 and garner the facts it needs to address the IVF coverage law.

Although SCR 35 does not address substantive changes to the current law, it is required if such changes were made and the legislature still has the power and authority to do so. The underlying bills SB 2909 and its companion HB 2355, as amended, which addressed the substantive changes to the IVF coverage laws were held in Ways and Means in the Senate and Finance on the House side. I submitted testimony in **strong support** of both measures with recommended amendments: striking "lifetime" in the measure wherever mentioned and ensuring that it passes this session with an effective date of July 1, 2014 to address immediate compliance and discriminatory concerns. The attachments to testimony provided background which may be informative to this audit.

Both bills SB2909 and HB2355, as amended, provide in vitro fertilization coverage equality for women who are diagnosed with infertility by requiring non-discriminatory coverage and ensuring quality of care in the diagnosis and treatment of infertility. For over 27 years the in vitro fertilization law in Hawaii provided coverage within a discriminatory framework, which must be corrected by the legislature. In vitro fertilization coverage is an Essential Health Benefit (EHB), which was included in Hawaii's essential health benefit plan and accepted by Health and Human Services and as of **January 1, 2014** strict federal prohibitions apply to EHB. Foremost, diagnosis and treatment of infertility disease should be brought in alignment with the national standards of the Center for Disease Control and as an EHB in compliance with ERISA, the American Disabilities Act and the Affordable Care Act.

Summary of changes proffered in underlying bills SB2909 and SB2355:

The measures:

1. Find that infertility is a disease of the reproductive system that impairs and substantially limits an individual's major life activity of reproduction and recognizes infertility as a disability.
2. Require a diagnosis of infertility before treatment.
3. Propose IVF coverage as a "life time" benefit as opposed to a "one time" only benefits, however, the ACA prohibits such lifetime limits with respect to essential health benefits after January 1, 2014 and either old or proposed language must be stricken.
4. Focus on the success of having a child by providing cost effective measurable limitations of three in vitro fertilization cycles or a live birth (see ilinois IVF law).
5. Mandate in vitro fertilization coverage equality for all women diagnosed with a medical condition of infertility by removing discriminatory language based on marital status. EHB may not contain discriminatory provisions.
6. Require a reasonable history of infertility based on national medical standard (ASRM) instead of an arbitrary five-year history.
7. Is consistent with Center for Disease Control national standards of infertility diagnosis categories.
8. Require coverage for other applicable treatments for infertility, unless the individual's physician determines that those treatments are likely to be unsuccessful.
9. Provide the American Society of Reproductive Medicine definition of "infertility".

Expanded Comments expressed in SB2909 and HB2355:

1. A diagnosis of infertility is a disability under the American Disability Act. Courts have held that women suffering from a diagnosis of infertility meet the definition of "disability" set forth in 42 U. S. C. § 12102(2)(A): a physical

or mental impairment that substantially limits one or more major life activities. In examining the definition of physical impairment, the Courts have also concluded that women suffering from a diagnosis of infertility suffer from a physical impairment which is defined as "any physiological disorder, or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body system:....**reproductive** ..." 29 C.F.R. §1630.2 (h)(1).

2. The measures provide a "lifetime" limit for the IVF treatment. However, as of January 1, 2014, the restriction of lifetime dollar limits applies to essential health benefits. Because IVF coverage benefit is one of Hawai`i's essential health benefits (EHB) for Hawai`i as reported by CMS, lifetime and annual dollar limits for must be eliminated in 2014. Thus it holds that "lifetime" in the proposed legislation as well as the "one time only" in the current law must be stricken. The prohibition on lifetime dollar limits applies equally to grandfathered and non-grandfathered plans. Further, the plan must give the individual a written notice that the lifetime limit no longer applies and that the individual, if covered, is eligible for benefits. However, nothing in the rule would appear to prohibit the use of visit limits or other treatment limits. Thus, it would appear that the limitation of "three in vitro fertilization cycles or a live birth" is allowed and is measureable to contain cost.

3. The focus of the measures is on ensuring a live birth and not simply that one "try" is afforded the patient. The benefit becomes available when the patient is diagnosed with infertility disease, irrespective of whether she has had other children. The member becomes eligible upon her physician's diagnosis of infertility to treat her disease of infertility. Other states have also enacted language, which focuses the success of a live birth. Illinois IVF coverage law, for example, contains language similar to SB 2909 and HB2355, as amended, which provides coverage for more than one oocyte retrieval and is limited if a live birth follows. Coverage is required subject to the following conditions: ... "(B) the covered individual has not undergone 4 completed oocyte retrievals, except that if a live birth follows a completed oocyte retrieval, then 2 more completed oocyte retrievals shall be covered".

4. Marital status has no rational relation to the treatment of a medical diagnosis and condition of infertility. The current IVF coverage law wrongfully creates two "classes" of premium paying members and is discriminatory on its face under ERISA, ADA, and ACA. Health plans deliberately upheld discriminatory provisions which called for a member to be married and use her husband`s sperm, reaping a prohibited premium savings from the practice. In application, employed health plan members who are single, divorced, widowed, partnered or otherwise "not married" women pay premiums just like married members diagnosed with infertility yet, ARE NOT eligible for the IVF coverage. The Hawaii legislature has not provided any rational basis for the "marital status" requirement, which rests squarely on moral grounds.

The purpose of the measures is to provide in vitro fertilization insurance coverage equality for women who are diagnosed with infertility by requiring non-discriminatory coverage and ensuring quality of care in the diagnosis and treatment of infertility. The corrective action by the legislature to eliminate the discriminatory marital status requirement is long overdue. The overriding corrective measure should prevail over any cost consideration to address prohibited discriminatory practices. The focus must again be on a diagnosis of infertility as a determinant on whether coverage will be provided.

5. In its guidance to patients, the American Society of Reproductive Medicine defines infertility as the inability to achieve pregnancy after one year of unprotected intercourse. If the individual has been trying to conceive for a year or more, she should consider an infertility evaluation. However, if she is 35 years or older, she should begin the infertility evaluation after about six months of unprotected intercourse rather than a year, so as not to delay potentially needed treatment.

6. The measures also provide for disease conditions that are consistent with national published guidelines and reporting. The Center for Disease Control reports for year 2011 is attached. (Attachment 2). Any age limitations would violate the ACA. (45 CFR §156.125; 45 CFR §156.200 (e))

Affordable Care Act (ACA) Considerations:

Since the enactment of the Affordable Care Act (ACA), the Department of Health and Human Services has issued several implementing regulations and rules, which have since been codified in Title 45 Code of Federal Regulations. The Affordable Care Act adds section 715(a)(1) to the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) to the Internal Revenue Code (the Code) to incorporate the provisions of part A of title XXVII of the PHS Act and ERISA and the Code, and make them applicable to group health plans, and health insurance issuers providing health insurance coverage in connection with group health plans. Because there are general and specific provisions of the ACA which apply to States, general and specific preemption considerations also apply.

In consideration of the underlying measures there appear to be ACA considerations as well that are instructive on the bill as well as statements of HHS or CMS concerning Essential Health Benefits.

1. Essential Health Benefits

In Vitro Fertilization Coverage is an Essential Health Benefit (EHB), which imposes no state liability under the ACA. By way of testimony in March 2011, the Hawaii Association of Health Plans ("HARP") raised the concern of the potential liability that the State would be facing by mandating even more extensive infertility treatments because the ACA is still in flux. This assertion is of no consequence and

concern at this time post January 1, 2014 since the federal government has since issued two regulations and a final regulation at Federal Register, Vol. 78, No. 37, February 25, 2013 which has been codified in 45 CFR §156 which address these concerns. Also, CMS has published on its web site each States' Essential Health Benefits and IVF coverage is included as an EHB.

Generally the ACA provides that if a State requires issuers to cover benefits in excess of EHB, the Affordable Care Act directs the state to defray the costs of these benefits in Qualified Health Plans. States may include as part of their benchmark plan state benefit requirements, avoiding costs associated with these provisions. Because In Vitro Fertilization is a Hawaii State Required Benefit that is an Essential Health Benefit, there is no State liability. Other general considerations regarding the effect of the ACA on states are provided at the CMS or CCIO website at CMS.gov (Attachment 3)

2. **The ACA prohibitions on discrimination.**

The ACA prohibits discrimination as set forth in Title 45 of Code of Federal Regulations Part 156. Two sections in particular, which prohibit discrimination, are 45 CFR §156.125 and §156.200(e) of the subchapter and also in the Federal Register Vol. 78, No. 37(February 25, 2013). The marital status provision in the current IVF coverage law, which requires that the member be married in order to received treatment creates two classes of members and is in violation of the prohibitions on discrimination. Even if you disagree with its violation with any laws, marriage should not be the defining factor, which prohibits access to this benefit for women who have been diagnosed with infertility disability. Equal Access should be afforded to all.

> **45 CFR §156.125 Prohibition on discrimination.**
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> (a) An issuer does not provide EHB if its benefit design, or the implementation of its benefit design, discriminates based on an individual's age, expected length of life, present or predicted disability, degree of medical dependency, quality of life, or other health conditions.
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> (b) An issuer providing EHB must comply with the requirements of §156.200(e) of this subchapter; and
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> (c) Nothing in this section shall be construed to prevent an issuer from appropriately utilizing reasonable medical management techniques.
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> **45 CFR §156.200 (e)** ***Non-discrimination.*** A QHP issuer must not, with respect to its QHP, discriminate on the basis of race, color, national origin, disability, age, sex, gender identity or sexual orientation.

The Hawaii State legislature is a leader in health care with the historic passage of the Prepaid Health Care Act and should also be the same in the implementation of the Affordable Care Act and provision of this Essential Health Benefit for its citizens.

The legislature should not be intimidated or persuaded by insurance companies who will go to any length to make an argument to hold the IVF legislation bills such as: 1) it costs too much, calling for an auditors report to confuse the necessary elimination of discriminatory language, 2) that it needs to be held for further study, when it holds 27 years of claims data on the benefit; or 3) that it would have difficulty administering the benefit even though it is a national health plan or partnered with national health plan networks in states which already administer similar plans or 4) that the State will have to pay for what is an the essential health benefit, which CMS confirms that there is no state liability.

For over 27 years, since the passage of the IVF mandate, the women in Hawaii have been bearing the cost to treat their disease of infertility even with IVF Coverage, the cost financially, the indescribable pain emotionally and left with the lifelong scars that poor legislation creates. For over 27 years the providers of infertility treatment have become leaders in the nation in treatment of assisted reproductive technologies, are highly regulated by CDC and leaders in our state by increasing IVF success rates in Hawaii from about 10% when the IVF coverage law was enacted to over 65% today. It is the legislature`s responsibility to correct discriminatory provisions and treatment provisions for all women diagnosed with infertility. Have the courage to pass out this SCR 35 as an audit is the first step to providing coverage for ALL women suffering from infertility disability equal access to quality affordable treatment.