



An Independent Licensee of the Blue Cross and Blue Shield Association

February 11, 2015

The Honorable Rosalyn H. Baker, Chair
The Honorable Brian T. Taniguchi, Vice Chair
Senate Committee on Commerce and Consumer Protection

Re: SB 1338 – Relating to the Hawaii Health Connector

Dear Chair Baker, Vice Chair Taniguchi and Members of the Committee:

The Hawaii Medical Service Association (HMSA) appreciates the opportunity to testify on SB 1338, which requires (1) a plan with at least 20 percent of the small group market to participate in the Hawaii Health Connector (Connector); (2) changes to the definition of “small group” to include businesses with up to 100 employees; (3) end transitional health plans effective January 1, 2016; (4) requires additional notification requirements for plans; and (5) authorizes the Connector to offer large group insurance coverage beginning January 1, 2017. HMSA opposes the portion of this Bill that relates to mandated issuer participation in the Connector.

The provision of this Bill requiring participation in the Connector by a plan with at least 20 percent of the small group market seems to be modeled against a provision affecting plans in federally facilitated exchanges (FFE). HMSA is aware that the federal HHS has issued a regulation which would prohibit plans with more than a 20 percent share of the small group market from participating in the individual market of an FFE unless the plan also offers at least one small group market plan through the federally-facilitated SHOP. However, that is very different from what the provision of SB 1338. The federal regulation gives the insurer a choice – the insurer is only forced to participate in the SHOP if it chooses to participate in the individual marketplace. SB 1338 does not provide the issuer the choice of not offering individual plans through the Connector.

Given the 20 percent threshold in the Bill, SB 1338 would require HMSA to return to participate in the SHOP. In so doing, it would place us in a competitive disadvantage with other issuers who are not subject to the 20 percent market share threshold and are able to offer health insurance coverage without being encumbered by the administrative, technical, and financial burdens of participating in the SHOP.

As you may be aware, HMSA chose not to participate in the SHOP because the costs of working around the largely inoperable information technology functions were significant, and were not offset by any benefit to the plan. Small businesses by a wide margin were choosing to buy directly from the plans rather than going through the SHOP. HMSA’s members were frustrated by the problems they experienced with the Connector, and HMSA was not readily able to resolve their concerns because the files were owned by the Connector. HMSA staff was also distracted from other major, priority projects to continually try to work out problems with file transfers.

We are advised that forcing us to participate in the SHOP, as well as the individual exchange, raises constitutional issues.

- First, the uncompensated economic impact on HMSA of being forced to participate in the SHOP may be an unconstitutional regulatory taking. The takings clause provides that private property shall not “be taken for public use, without just compensation.” [*Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005)]. One of the primary justifications for the takings clause is to prevent government from “forcing some people alone to bear public burdens which, in all fairness and



An Independent Licensee of the Blue Cross and Blue Shield Association

justice, should be borne by the public as a whole.” [Armstrong v. United States, 364 U.S. 40, 49 (1960); see also Monongahela Nav. Co. v. United States, 148 U.S. 312, 325 (1893)].

- HMSA’s decision to leave the SHOP was driven by serious business concerns. The right to join or leave groups of a person’s own choosing has been held to be an essential part of the freedom of speech under the First Amendment to the U.S. Constitution. A plan should not be compelled to engage in speech in the form of marketing its small group plans on the Connector. By compelling HMSA’s participation in the SHOP marketplace, SB 1338 also violates HMSA’s freedom of association.
- HMSA is not the only plan which has chosen not to participate in the SHOP. However, by focusing solely on HMSA – which is the effect of the 20 percent market share trigger in Hawaii – this legislation is singling out one insurer to bear the burden of financing the Connector’s sustainability. We believe that may constitute a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, which provides that no state shall deny to any person within its jurisdiction “the equal protection of its laws.

Thank you for the opportunity to testify in opposition to SB 1338.

Sincerely,

Mark K. Oto
Director
Government Relations