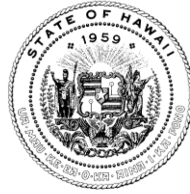

DAVID Y. IGE
GOVERNOR

JOSH GREEN
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Testimony of the Department of Commerce and Consumer Affairs

Before the
Senate Committee on Ways and Means
Thursday, February 21, 2019
10:00 a.m.
State Capitol, Conference Room 211

On the following measure:
S.B. 1401, S.D. 1, RELATING TO PHARMACY BENEFIT MANAGERS

WRITTEN TESTIMONY ONLY

Chair Dela Cruz and Members of the Committee:

My name is Colin Hayashida, and I am the Insurance Commissioner of the Department of Commerce and Consumer Affairs' (Department) Insurance Division. The Department offers comments on this bill.

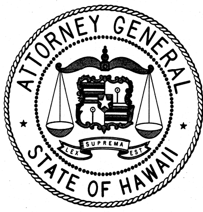
The purposes of this bill are to: (1) prohibit pharmacy benefit managers (PBMs) from engaging in self-serving business practices; (2) replace a registration requirement with a license requirement; (3) increase PBM reporting requirements to the Insurance Commissioner; and (4) to increase application fees, renewal fees, and penalties for failing to renew.

Implementation of this bill would be difficult, as the Insurance Division lacks the requisite expertise to assess qualifications of PBMs for licensure.

Additionally, there may be a problem with the publication of transparency reports. Subsection (b) on page 3, lines 13 to 18 provides that information submitted in transparency reports that is “identifiable to an individual pharmacy benefit manager shall not be disclosable under chapter 92F[.]” However, subsection (c) on page 3, line 19 to page 4, line 3 requires publication of transparency reports on the Insurance Division’s website. Publication of the transparency reports may be impracticable, given that their contents are protected from disclosure under Hawaii Revised Statutes chapter 92F.

Finally, this bill may present issues regarding the Employee Retirement Income Security Act (ERISA), given that some PBMs may be servicing ERISA-covered benefit plans.

Thank you for the opportunity to testify on this bill.



WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019

ON THE FOLLOWING MEASURE:
S.B. NO. 1401, S.D. 1, RELATING TO PHARMACY BENEFIT MANAGERS.

BEFORE THE:
SENATE COMMITTEE ON WAYS AND MEANS

DATE: Thursday, February 21, 2019 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Daniel K. Jacob,
Deputy Attorney General, at 808-586-1190)

Chair Dela Cruz and Members of the Committee:

The Department of the Attorney General makes the following comments about the bill.

The purposes of this bill are to: (1) prohibit pharmacy benefit managers from engaging in self-serving business practices; (2) increase the pharmacy benefit managers' annual reporting requirements; and (3) replace the registration requirement for pharmacy benefit managers with a licensure requirement.

This bill may be subject to an Employee Retirement Income Security Act (ERISA) preemption challenge. ERISA is a comprehensive federal legislative scheme that "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C.A. § 1144(a).[1] A state law relates to an ERISA plan and is preempted if it has either an impermissible connection with an ERISA plan or an impermissible reference to an ERISA plan. This bill may be preempted because of an arguably impermissible connection with an ERISA plan or impermissible reference to an ERISA plan.

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[1] The subsection, in full, provides as follows:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

A state law has an impermissible connection with ERISA plans when it governs a central matter of plan administration or interferes with nationally uniform plan administration. *Pharmaceutical Care Management Association v. Gerhart*, 852 F.3d 722, 730 (8th Cir. 2017). The concern here arises from the fact this bill would prohibit pharmacy benefit managers from engaging in self-serving business practices, increase the pharmacy benefit managers' annual reporting requirements, and replace the registration requirement for pharmacy benefit managers with a licensure requirement. One or more of these mandates may be found to implicate areas central to plan administration.

An impermissible reference to an ERISA plan is also problematic. In *Gerhart*, the United States Court of Appeals for the Eighth Circuit found that an Iowa law had an implicit reference to ERISA and ERISA plans because the Iowa law regulated PBMs that administer benefits for health benefit plans, employers, and other groups that provide health coverage. 852 F.3d at 729-730. PBMs are subject to ERISA regulation, and the Eighth Circuit found that the law affected benefits provided by these ERISA programs and that the law was preempted by ERISA. *Id*. at 732. This bill may be similarly challenged as containing an impermissible reference to ERISA.

We note, however, that the United States Court of Appeals for the First Circuit upheld a law regulating PBMs as not preempted by ERISA. *Pharmaceutical Care Management Association v. Rowe*, 429 F.3d 294 (1st Cir. 2005). Therefore, there may be a split between the Circuit Courts of Appeals. Nevertheless, this bill may be subject to a court challenge.

Thank you for the opportunity to comment.

SB-1401-SD-1
Submitted on: 2/20/2019 12:25:30 AM
Testimony for WAM on 2/21/2019 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Melodie Aduja	Testifying for O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Support	No

Comments:

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To: Senate Committee on Ways and Means

From: Cheryl Kakazu Park, Director

Date: February 21, 2019, 10:00 a.m.
State Capitol, Conference Room 211

Re: Testimony on S.B. No. 1401, S.D. 1
Relating to Pharmacy Benefit Managers

Thank you for the opportunity to submit testimony on this bill, which would add regulations for pharmacy benefit managers. The Office of Information Practices (OIP) takes no position on the substance of this bill. The Senate Committee on Commerce, Consumer Protection, and Health included an amendment OIP recommended in the S.D. 1 version of this bill to clarify that information identifiable to a pharmacy benefit manager was not disclosable as a public record, but that the Insurance Commissioner could publish nonidentifiable aggregate information of multiple pharmacy benefit managers. This amendment fully addressed OIP's concern to clarify what information is or is not public.

Based on discussion with the Insurance Commissioner, OIP understands the transparency report of each individual pharmacy benefit manager, which the Insurance Commissioner would be required to publish online in redacted form by proposed section 431S-__(c), HRS, will likely be redacted beyond the point of usefulness after applying the public disclosure standard now more clearly set forth in proposed section 431S-__(b), HRS. (These sections are at bill page 3 line 13 through page 4 line 3.) OIP would suggest that a requirement in subsection (c) for

periodic publication of aggregated information about pharmacy benefit managers, as explicitly permitted by subsection (b), would be more useful to the public than heavily redacted individual reports. OIP defers to the Insurance Commissioner as to the frequency with which such aggregated information should be published.

Thank you for the opportunity to testify.

DAVID Y. IGE
GOVERNOR

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TESTIMONY BY DEREK MIZUNO
ADMINISTRATOR, HAWAII EMPLOYER-UNION HEALTH BENEFITS TRUST FUND
DEPARTMENT OF BUDGET AND FINANCE
STATE OF HAWAII
TO THE SENATE COMMITTEE ON WAYS AND MEANS
ON SENATE BILL NO. 1401 S.D. 1

February 21, 2019
10:00 a.m.
Room 211

RELATING TO PHARMACY BENEFIT MANAGERS

Chair Dela Cruz, Vice Chair Keith-Agaran, and Members of the Committee:

The Hawaii Employer-Union Health Benefits Trust Fund (EUTF) Board of Trustees opposes Section 2, §431S- Pharmacy benefit manager business practices – relating to the prohibition from penalizing, requiring or providing financial incentives for members to use a retail or mail order service pharmacy in which a pharmacy benefit manager has an ownership interest. The EUTF Board has not taken a position on the rest of the bill.

The EUTF plans currently charge members a copayment of 2X the 30-day copayment for a 90-day prescription if the member uses a pharmacy in the Retail 90 network or mail order. Copayments for 90-day prescriptions at non-Retail 90 pharmacies are 3X the 30-day copayment. Approximately 93% of the CVS network pharmacies have joined the Retail 90 network. It is important to note that the Retail 90

network is open to all CVS network pharmacies and the CVS network is open to all pharmacies.

If this bill becomes law and the EUTF is no longer able to incentivize the Retail 90 network and mail order pharmacies, annual claims are estimated to increase $3.2 million and $1.1 million for the employee and retiree plans, respectively. Such an increase in annual retiree claims is estimated to increase the State and counties unfunded liability by $22.1 million.

Thank you for the opportunity to testify.

Cynthia M. Laubacher
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LATE

February 21, 2019

To: The Honorable Donovan M. Dela Cruz, Chair
Members of the House Committee on Ways and Means

Fr: Cynthia Laubacher, Senior Director, State Affairs

Re: Senate Bill 1401 HD1: February 21, 2019 10:00am

Thank you for the opportunity to submit comments on Senate Bill 1401 S.D. 1. Cigna recently completed its purchase of a pharmacy benefits manager ("PBM"), Express Scripts, one of the nation's largest PBMs. Senate Bill 1401 SD1 contains several problematic provisions that could increase the cost of prescription drugs for residents of the state of Hawaii.

Section 2. Pharmacy benefit manager business practices. This section contains two problems. First, PBM clients, not PBMs, determine benefit structure. Second, this provision will increase plan costs by prohibiting plan sponsors from incentivizing their members to use local independent, chain or mail pharmacies that offer lower costs in exchange for being in a preferred network resulting in more business. This provision eliminates plan sponsor flexibility to design their benefit in a manner that lowers their costs and, ultimately member costs.

Section 2. Transparency Report. This section requires the reporting to the state of proprietary and highly confidential rebate and fee information. While the language speaks to "aggregate" rebates, it also speaks to the reporting to the state of client level data. Government agencies - including the Congressional Budget Office ("CBO") and the Federal Trade Commission ("FTC") – have long cautioned that PBM disclosure mandates could raise costs.

- The CBO has noted that disclosure requirements could allow firms to "observe the prices charged by their rivals, which could lead to reduced competition." According to CBP, the "disclosure of rebate data would probably cause the variation in rebates among purchasers to decline" leaded to a compression in rebates."[1]
- The FTC has warned that "whenever competitors know the actual prices charged by other firms, tacit collusion – and thus higher prices – may be more likely." FTC concluded that

[1] Letter to Rep. Joe Barton and Rep. Jim McCrery, U.S. House of Representatives, Congressional Budget Office, March 12, 2007.

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> PBM disclosure mandates could "undermine the ability of some consumers to obtain the pharmaceuticals and health insurance they need at a price they can afford.[2]

Of particular concern with this section is the requirement to disclose rebate and fee information relating to "each covered entity client." Disclosure of competitively sensitive information, including information relating to federal plan sponsors and entities that do not do business with or within the state, is outside the state's jurisdiction. More troubling, this required disclosure lacks sufficient confidentiality protections for this highly proprietary information that could lead to higher prices for Hawaii plan sponsors and their members.

The Federal Trade Commission, in a letter to the Advisory Council on Employee Welfare and Pension Benefit Plans regarding issues related to PBM Compensation and Fee Disclosure, noted a particular concern with mandatory disclosure that publicly reveal previously proprietary and private information about discounts negotiated with PBMs, disclosure may result in less aggressive pricing by, or even collusion among, pharmaceutical manufacturers."

Adam B. Jaffe, the Dean of Arts and Sciences at Brandeis University and the Fred C. Hecht Professor in Economics, discussed the issue of PBM disclosure in a declaration prepared for PCMA v. Rowe, the lawsuit filed by PCMA which sought to enjoin Maine from enforcing a law that would require PBM transparency, among other provisions. The U.S. District Court in Maine granted PCMA's request for an injunction and the law was later repealed.

> "Disclosure of commercially sensitive contract terms will tend to short-circuit this competitive dynamic. Sellers will know exactly what their competitors are offering, and will also know that the granting of any concession will likely lead to pressure for its widespread adoption. The effect will be to handicap competition, thereby inhibiting its ability to ensure that consumers get the best possible prices and service."

In addition to the disclosure concerns, this section impacts self-insured plans and therefore likely prohibited under ERISA.

<u>Section 5. License Required</u>. We also have numerous concerns with this section as it creates standards for licensure based on vague requirements, such as whether the commissioner is "satisfied" that the requirement were met, including whether the applicant possessed the "background expertise and financial integrity" to supply the services…These are undefined terms and there are no industry standards. PBMs and their clients are in a business relationship that does not include the traditional accepting of insurance risk that necessitates and examination of financial solvency. Contracts are developed and priced according to the services being performed, all within the boundaries/limits of insurance carrier responsibilities and solvency.

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[2] Letter from FTC to Rep. Patrick T. McHenry, U.S. Congress, July 15, 2005; Letter from FTC to Assemblyman Greg Aghazarian, California State Assembly, Sept. 3, 2004.

Finally, the language regarding revocation is overly broad, with no clear criteria to justify a revocation of a PBM license. The language does not include any regulatory review or provide for an appeal of such a decision. Under this bill, the commissioner could revoke a license, leaving tens of thousands of patients stranded with no access to their prescription drugs/benefit.

Thank you for your consideration of our concerns.

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To: Senate Committee on Ways and Means

From: Cheryl Kakazu Park, Director

Date: February 21, 2019, 10:00 a.m.
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