

108TH CONGRESS  
2D SESSION

# H. R. 5278

To ensure and foster continued patient safety and quality of care by making the antitrust laws apply to negotiations between groups of independent pharmacies and health plans and health insurance issuers in the same manner as such laws apply to collective bargaining by labor organizations under the National Labor Relations Act, to ensure integrity in the operation of pharmacy benefit managers, and to preserve access standards to community pharmacies under the Medicare outpatient prescription drug program.

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## IN THE HOUSE OF REPRESENTATIVES

OCTOBER 7, 2004

Mr. WEINER (for himself and Mr. MORAN of Kansas) introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committees on the Judiciary and Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## A BILL

To ensure and foster continued patient safety and quality of care by making the antitrust laws apply to negotiations between groups of independent pharmacies and health plans and health insurance issuers in the same manner as such laws apply to collective bargaining by labor organizations under the National Labor Relations Act, to ensure integrity in the operation of pharmacy benefit managers, and to preserve access standards to

community pharmacies under the Medicare outpatient prescription drug program.

1        *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4        This Act may be cited as the “Community Pharmacy  
5 Preservation Act of 2004”.

6 **SEC. 2. APPLICATION OF THE ANTITRUST LAWS TO INDE-**  
7 **PENDENT PHARMACIES NEGOTIATING WITH**  
8 **HEALTH PLANS.**

9        (a) IN GENERAL.—Any independent pharmacies who  
10 are engaged in negotiations with a health plan regarding  
11 the terms of any contract under which the pharmacies pro-  
12 vide health care items or services for which benefits are  
13 provided under such plan shall, in connection with such  
14 negotiations, be entitled to the same treatment under the  
15 antitrust laws as the treatment to which bargaining units  
16 which are recognized under the National Labor Relations  
17 Act are entitled in connection with such collective bar-  
18 gaining. Such a pharmacy shall, only in connection with  
19 such negotiations, be treated as an employee engaged in  
20 concerted activities and shall not be regarded as having  
21 the status of an employer, independent contractor, mana-  
22 gerial employee, or supervisor.

23        (b) PROTECTION FOR GOOD FAITH ACTIONS.—Ac-  
24 tions taken in good faith reliance on subsection (a) shall

1 not be the subject under the antitrust laws of criminal  
2 sanctions nor of any civil damages, fees, or penalties be-  
3 yond actual damages incurred.

4 (c) LIMITATION.—

5 (1) NO NEW RIGHT FOR COLLECTIVE CES-  
6 SATION OF SERVICE.—The exemption provided in  
7 subsection (a) shall not confer any new right to par-  
8 ticipate in any collective cessation of service to pa-  
9 tients not already permitted by existing law.

10 (2) NO CHANGE IN NATIONAL LABOR RELA-  
11 TIONS ACT.—This section applies only to inde-  
12 pendent pharmacies excluded from the National  
13 Labor Relations Act. Nothing in this section shall be  
14 construed as changing or amending any provision of  
15 the National Labor Relations Act, or as affecting  
16 the status of any group of persons under that Act.

17 (d) EFFECTIVE DATE.—The exemption provided in  
18 subsection (a) shall apply to conduct occurring beginning  
19 on the date of the enactment of this Act.

20 (e) LIMITATION ON EXEMPTION.—Nothing in this  
21 section shall exempt from the application of the antitrust  
22 laws any agreement or otherwise unlawful conspiracy that  
23 excludes, limits the participation or reimbursement of, or  
24 otherwise limits the scope of services to be provided by  
25 any independent pharmacy or group of independent phar-

1 macies with respect to the performance of services that  
2 are within their scope of practice as defined or permitted  
3 by relevant law or regulation.

4 (f) NO EFFECT ON TITLE VI OF CIVIL RIGHTS ACT  
5 OF 1964.—Nothing in this section shall be construed to  
6 affect the application of title VI of the Civil Rights Act  
7 of 1964.

8 (g) NO APPLICATION TO FEDERAL PROGRAMS.—  
9 Nothing in this section shall apply to negotiations between  
10 independent pharmacies and health plans pertaining to  
11 benefits provided under any of the following:

12 (1) The Medicaid Program under title XIX of  
13 the Social Security Act (42 U.S.C. 1396 et seq.).

14 (2) The SCHIP program under title XXI of the  
15 Social Security Act (42 U.S.C. 1397aa et seq.).

16 (3) Chapter 55 of title 10, United States Code  
17 (relating to medical and dental care for members of  
18 the uniformed services).

19 (4) Chapter 17 of title 38, United States Code  
20 (relating to Veterans' medical care).

21 (5) Chapter 89 of title 5, United States Code  
22 (relating to the Federal employees' health benefits  
23 program).

24 (6) The Indian Health Care Improvement Act  
25 (25 U.S.C. 1601 et seq.).

1 (h) DEFINITIONS.—For purposes of this section:

2 (1) ANTITRUST LAWS.—The term “antitrust  
3 laws”—

4 (A) has the meaning given it in subsection  
5 (a) of the first section of the Clayton Act (15  
6 U.S.C. 12(a)), except that such term includes  
7 section 5 of the Federal Trade Commission Act  
8 (15 U.S.C. 45) to the extent such section 5 ap-  
9 plies to unfair methods of competition; and

10 (B) includes any State law similar to the  
11 laws referred to in subparagraph (A).

12 (2) HEALTH PLAN AND RELATED TERMS.—

13 (A) IN GENERAL.—The term “health plan”  
14 means a group health plan or a health insur-  
15 ance issuer that is offering health insurance  
16 coverage.

17 (B) HEALTH INSURANCE COVERAGE;  
18 HEALTH INSURANCE ISSUER.—The terms  
19 “health insurance coverage” and “health insur-  
20 ance issuer” have the meanings given such  
21 terms under paragraphs (1) and (2), respec-  
22 tively, of section 733(b) of the Employee Retire-  
23 ment Income Security Act of 1974 (29 U.S.C.  
24 1191b(b)).

1           (C) GROUP HEALTH PLAN.—The term  
2           “group health plan” has the meaning given that  
3           term in section 733(a)(1) of the Employee Re-  
4           tirement Income Security Act of 1974 (29  
5           U.S.C. 1191b(a)(1)).

6           (3) INDEPENDENT PHARMACY.—The term  
7           “independent pharmacy” means a pharmacy which  
8           is not owned (or operated) by a publicly traded com-  
9           pany. For purposes of the previous sentence, the  
10          term “publicly traded company” means a company  
11          that is an issuer within the meaning of section  
12          2(a)(7) of the Sarbanes-Oxley Act of 2002 (15  
13          U.S.C. 7201(a)(7)).

14 **SEC. 3. REQUIREMENTS RELATING TO PHARMACY BENEFIT**  
15 **MANAGERS.**

16          (a) PROHIBITION ON CROSS OWNERSHIP.—

17               (1) IN GENERAL.—No pharmaceutical drug  
18               manufacturer may have a controlling interest in an  
19               entity that is a pharmacy benefit manager.

20               (2) PENALTY.—The Secretary of Health and  
21               Human Services may issue such civil penalties for a  
22               violation of paragraph (1) as the Secretary of  
23               Health and Human Services determines necessary.

24          (b) DRUG INTERCHANGE.—

25               (1) PROHIBITIONS.—

1 (A) COST INCREASE.—A pharmacy benefit  
2 manager shall not make any drug interchange  
3 proposal for an individual who is served by such  
4 manager where the net cost of the drug to  
5 which the prescription would be changed ex-  
6 ceeds that of the drug from which the prescrip-  
7 tion would be changed.

8 (B) DISCLOSURE TO INDIVIDUAL.—A  
9 pharmacy benefit manager shall not make any  
10 drug interchange for an individual who is  
11 served by such manager unless the pharmacy  
12 benefit manager discloses to the individual, in a  
13 clear and conspicuous manner, the savings to  
14 the individual associated with such interchange.

15 (C) GENERICS.—A pharmacy benefit man-  
16 ager shall not make any drug interchange pro-  
17 posal for an individual who is served by such  
18 manager if the drug from which the prescrip-  
19 tion would be changed has generic equivalents  
20 and the drug to which the prescription would be  
21 changed has no generic equivalents, unless the  
22 drug to which the prescription would be  
23 changed has a lower net cost to the individual  
24 than does each of the generic equivalents of the

1 drug from which the prescription would be  
2 changed.

3 (2) PENALTY.—A pharmacy benefit manager  
4 that violates subparagraph (A), (B), or (C) of para-  
5 graph (1) with respect to an individual and presents  
6 a claim for payment to the United States Govern-  
7 ment as reimbursement for services to such indi-  
8 vidual, shall be considered in violation of section  
9 3729 of title 31, United States Code.

10 (c) DISCLOSURE OF COMPENSATION FROM DRUG  
11 MANUFACTURERS.—

12 (1) QUARTERLY AND ANNUAL DISCLOSURES.—  
13 At the end of each fiscal year quarter, each phar-  
14 macy benefit manager shall disclose—

15 (A) to the client plans of such manager  
16 and to the Antitrust Division of the Depart-  
17 ment of Justice, all compensation and remu-  
18 neration that the pharmacy benefit manager re-  
19 ceived during such fiscal year quarter from a  
20 pharmaceutical drug manufacturer, including,  
21 regardless of how categorized, market share in-  
22 centives, commissions, mail service purchase  
23 discounts, and administrative or management  
24 fees; and

1 (B) to the client plans of such manager,  
2 any fees received for sales of utilization data to  
3 a pharmaceutical drug manufacturer.

4 (2) DISCLOSURE AT CONTRACTING STAGE.—

5 Each pharmacy benefit manager shall disclose to  
6 each client plan and prospective client plan of such  
7 manager, in advance of executing an agreement with  
8 such plan, information relating to the pharmacy ben-  
9 efit manager’s methodology of soliciting and receiv-  
10 ing payments from pharmaceutical drug manufac-  
11 turers.

12 (d) DEFINITIONS.—For purposes of this section:

13 (1) CLIENT PLAN.—The term “client plan”  
14 means a pharmaceutical plan in which the entity  
15 that offers such plan to its beneficiaries contracts di-  
16 rectly with a pharmacy benefit manager to provide  
17 or administer such plan.

18 (2) DRUG INTERCHANGE.—The term “drug  
19 interchange” means any change from one prescrip-  
20 tion drug to another prescription drug that is in-  
21 tended to address or treat the same illness or condi-  
22 tion.

1 **SEC. 4. COMMUNITY PHARMACY ACCESS STANDARDS**  
2 **UNDER THE MEDICARE OUTPATIENT PRE-**  
3 **SCRIPTION DRUG PROGRAM.**

4 In establishing rules under subparagraph (C) of sec-  
5 tion 1860D–4(b)(1) of the Social Security Act, as added  
6 by the Medicare Prescription Drug, Improvement, and  
7 Modernization Act of 2003 (Public Law 108–173), for  
8 convenient access to non-mail-order pharmacies consistent  
9 with the application of standards under clause (ii) of such  
10 subparagraph, the Secretary of Health and Human Serv-  
11 ices shall provide for application of the following stand-  
12 ards:

13 (1)(A) In each urban area, at least 90 percent  
14 of Medicare beneficiaries in a plan’s service area, on  
15 average, live within 2 miles of a retail pharmacy par-  
16 ticipation in the prescription drug plan’s or MA–PD  
17 plan’s network.

18 (B) In each suburban area, at least 90 percent  
19 of Medicare beneficiaries in a plan’s service area, on  
20 average, live within 5 miles of a retail pharmacy par-  
21 ticipation in the prescription drug plan’s or MA–PD  
22 plan’s network.

23 (C) In each rural area, at least 70 percent of  
24 Medicare beneficiaries in a plan’s service area, on  
25 average, live within 15 miles of a retail pharmacy

1 participation in the prescription drug plan's or MA-  
2 PD plan's network.

3 (D) There shall be no averaging of such dis-  
4 tances across or among urban, suburban, and rural  
5 areas.

6 (2) The rules shall require plans to measure  
7 traveling distances from beneficiaries' homes to com-  
8 munity pharmacies based on commonly traveled  
9 routes.

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