

# SB3105

**Measure Title:** RELATING TO HEALTH CARE REFERRALS.

**Report Title:** Health Care Providers; Financial Interest; Referral Practices; Disclosure

**Description:** Requires that health care providers who refer patients to facilities in which the provider has a financial interest disclose the financial incentives associated with the referral to patients, and establishes that failure to do so is an unfair or deceptive trade act or practice. Effective retroactively to January 1, 2008.

**Companion:**

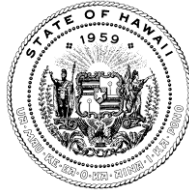
**Package:** None

**Current Referral:** CPH, JDL

**Introducer(s):** KIDANI, BAKER, IHARA, KEITH-AGARAN, NISHIHARA, Espero, Shimabukuro, Slom, Wakai

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TO THE SENATE COMMITTEE ON  
COMMERCE, CONSUMER PROTECTION, AND HEALTH

TWENTY-EIGHTH LEGISLATURE  
Regular Session of 2016

Friday, February 5, 2016  
9:00 a.m.

**TESTIMONY ON SENATE BILL NO. 3105 – RELATING TO HEALTH CARE  
REFERRALS.**

TO THE HONORABLE ROSALYN H. BAKER, CHAIR, AND MEMBERS OF THE  
COMMITTEE:

My name is Gordon Ito, State Insurance Commissioner, testifying on behalf of the Insurance Division ("Division"). The Division supports the intent of the bill promoting transparency and the imposition of health care provider self-referral disclosure requirements, and submits the following comments.

Chapter 431, article 10C, Hawaii Revised Statutes ("HRS"), regulates motor vehicle insurance, including personal injury protection benefits and payment of health care providers associated with motor vehicle accidents. In that context, section 431:10C-308.7, HRS, regulates attorney and health care provider referral conduct, requiring a health care provider to disclose a financial interest in any entity to which the patient may be referred. The disclosure must be made in advance and in writing, and the patient must be advised that she or he is free to choose a different health care provider. The patient must sign the disclosure form, which the provider must retain for two years.

Except for the limited provision mentioned above, the Division does not regulate the activities of health care providers.

We thank this Committee for the opportunity to present testimony on this matter.



**Friday February 5, 2016**  
**9:00 AM.**  
**Capitol Rm. 229**

**To: SENATE COMMITTEE ON CONSUMER PROTECTION AND HEALTH**  
Sen. Rosalyn Baker, Chair  
Sen. Michelle Kidani, Vice Chair

**From: Hawaii Medical Association**  
Dr. Scott McCaffrey, MD, President  
Dr. Linda Rasmussen, MD, Legislative Co-Chair  
Dr. Ronald Keinitz, MD, Legislative Co-Chair  
Dr. Christopher Flanders, DO, Executive Director  
Lauren Zirbel, Community and Government Relations

**Re: SB3105 - RELATING TO HEALTH CARE REFERRALS**

## **IN OPPOSITION**

Chair, Vice Chair, and Committee Members:

The Hawaii Medical Association opposes SB 3105 which would serve to discourage the continued formation of these efficient, high quality facilities in Hawaii.

Physician owned facilities are often the most efficient, state-of-the-art facilities in the area, the result of doctor's desire to be involved in making detailed decisions about the staff, equipment, training, and procedures that can best serve their patients.

Physician owned facilities often charge less for the same procedures as their non-physician owned counterparts. An analysis by Avalon Health Economics said that physician-owned facilities are saving Medicare \$3.2 billion over 10 years. They also provide more charity care than not-for-profit hospitals and clinics which receive subsidies and tax exemptions. A CMS study found that physician owned facilities spend nearly 6% of their total revenue on community benefits compared to less than 1% for other facilities.

The HMA would additionally question the legality of establishing a retroactive effective date.

### **OFFICERS**

**PRESIDENT – D. SCOTT MCCAFFREY, MD, PRESIDENT ELECT – BERNARD ROBINSON, MD**  
**IMMEDIATE PAST PRESIDENT – ROBERT SLOAN, MD, SECRETARY – THOMAS KOSASA, MD,**  
**TREASURER – MICHAEL CHAMPION, MD, EXECUTIVE DIRECTOR – CHRISTOPHER FLANDERS, DO**

Thank you for the opportunity to provide this testimony.

February 5, 2016

Senate Committee on Commerce, Consumer Protection, and Health

Hon. Rosalyn H. Baker, Chair

Hon. Michelle N. Kidani, Vice Chair

**RE: Testimony Supporting S.B. 3105, Relating to Health Care Referrals**

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

My name is Claire Wong Black. I am Hawai'i-licensed attorney and provide this testimony in my personal capacity only. Thank for you for the opportunity to submit this testimony. I **strongly support** S.B. 3105 (Relating to Health Care Referrals) and provide **comments** with respect to the form of the bill.

S.B. 3105 provides important safeguards to *all* Hawai'i patients when doctors refer them for services or treatments at facilities in which the doctor has a financial interest ("Self-Referral"). S.B. 3105 requires doctors to (1) disclose their financial interests; (2) document the disclosure; and (3) inform patients of the option to seek a different health care provider. These disclosures allow patients to make informed choices about their health care. It is hard to imagine that anyone would oppose the general principles stated in, and protections provided by, S.B. 3105.

**Hazards of Self-Referrals**

Self-Referrals raise questions about financial and medical conflicts of interest: Government reports and medical studies have shown that financial factors may influence the types of treatment that doctors recommend.<sup>1</sup> In other words, patients are being steered to the treatment that provides the most profit for the doctor, rather than that which best serves the patient.<sup>2</sup> Self-Referral business

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<sup>1</sup> July 2013 U.S. Government Accountability Office report entitled HIGHER USE OF COSTLY PROSTATE CANCER TREATMENT BY PROVIDERS WHO SELF-REFER WARRANTS SCRUTINY, available online at <http://www.gao.gov/assets/660/656026.pdf> and New England Journal of Medicine article Urologists' Use of Intensity-Modulated Radiation Therapy for Prostate Cancer at <http://www.nejm.org/doi/pdf/10.1056/NEJMsa1201141>.

<sup>2</sup> American Society for Radiation Oncology News Release, NEW STUDY IN NEJM EXPOSES OVERUSE OF RADIATION THERAPY SERVICES WHEN UROLOGISTS PROFIT THROUGH SELF-REFERRAL, at <https://www.astro.org/News-and-Media/News-Releases/2013/NEJM-exposes-overuse-of-radiation-therapy-services-when-urologists-profit-through-self-referral.aspx> (discussing overuse of cancer treatment when physicians Self-Refer).

models run counter to crucial health care policy goals, including informed patient choice, quality of care, and access to services.<sup>3</sup>

Self-Referrals also lead to overutilization of expensive treatments and services and therefore increase the cost of insurance.<sup>4</sup> For example, a 2013 U.S. Government Accountability Office (“GAO”) report found that doctors who owned treatment centers were far more likely to send their patients to their own treatment centers instead of recommending less-expensive therapies. *See* FN1. The GAO made clear that financial incentives were a **primary driver** of Self-Referrals, noting that factors such as age, geographic location, and even patient health did not explain the “large” differences between Self-Referring doctors’ more frequent use of expensive treatments when compared to non-Self-Referring doctors and urged Congress to require doctors to disclose their financial interests to patients. FN1.

Professional societies warn that Self-Referring physicians are “so heavily incentivized to refer their patients” to lucrative services that “their clinical decision-making becomes biased.” FN3. Simply put, Self-Referral denies patients the “independent clinical judgment and choice they need and deserve.” FN3 at “Consequences of Self Referral”.

Because patients inherently trust their doctors, they are inclined to follow their doctors’ recommendations. A patient who is unaware of the financial incentives that drive treatment recommendations is deprived of the opportunity to make meaningful, informed choices about their health care. Patients must be “protect[ed] from this type of abuse.” FN2 at p.2; FN1 GAO Report at “What GAO Recommends”.

## Laws Prohibiting Self-Referrals

Currently, there is a patchwork system of Self-Referral laws. Federal laws generally prohibit Self-Referrals for services that are reimbursed under Medicare (Stark Law), but do not prohibit Self-Referrals when billed to a non-Medicare payer.

Approximately forty states have enacted general prohibitions against Self-Referrals. Until recently, HRS § 431:10C-308.7(c) was generally considered such a

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<sup>3</sup> American Society for Radiation Oncology SELF-REFERRAL TOOLKIT at: <https://www.astro.org/uploadedFiles/Content/Advocacy/Self%20Referral%20Toolkit.pdf>

<sup>4</sup> New England Journal of Medicine article in FN2, above, which discusses the correlation between Self-Referral and increased use of an expensive radiation therapy that has a high reimbursement rate *despite evidence that all treatments yield similar outcomes*.

prohibition.<sup>5</sup> However, in late 2014, a Hawaiʻi federal court ruled that HRS § 431:10C-308.7's disclosure requirements **only** applied to doctors Self-Referring services and treatments subject to Hawaii's no-fault motor vehicle insurance.<sup>6</sup> This is not consistent with the language of HRS § 431:10C-308.7, which expressly applies to *any* services covered by Hawaii's insurance code, not just no-fault motor vehicle insurance.

As a result of the court's ruling, patients receiving treatment arising from motor vehicle accidents are entitled to more patient protections and more information from their doctors than all other patients. However, concerns about patients' rights to full, objective information in making treatment decisions, professional ethics, and rising health care costs exist regardless of whether the patient was involved in a motor vehicle accident.

Sound public policy requires this clarification of HRS § 431:10C-308.7(c) to ensure continued protection of Hawaiʻi patients.

### Comments With Respect to the Form of the Bill

S.B. 3105 clarifies existing requirements on Hawaii-licensed doctors to provide objective disclosures of their financial interests to patients when making referrals. Because S.B. 3105 regulates doctors, not HMOs or insurers,<sup>7</sup> Chapter 436B (the Professional and Vocational Licensing Act) may be a better place for this provision—and provide further clarity for medical professionals—than the Insurance Code.

Thank you again for the opportunity to testify.

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<sup>5</sup> See, e.g., FN3 (SELF REFERRAL TOOLKIT) at pp. 14-33 (state by state chart of Self-Referral laws, identifying HRS § 431:10C-308.7).

<sup>6</sup> *Pacific Radiation Oncology v. The Queen's Medical Center*, Civil No. 12-00064, November 30, 2014 Order (also ruling that Self-Referrals could constitute unfair competition). My firm represents—and I am one of the counsel of record—in that litigation.

<sup>7</sup> See Section 2 of S.B. 3105, which defines health care providers as “persons” licensed under Chapters 436E, 442, 448, 452, 453, 455, 457G, 459, 461J, 463E and 465 and also limits the definition of “financial interest” to exclude compensation arrangements between doctors or physician groups and health maintenance organizations.