

112TH CONGRESS
1ST SESSION

H. R. 1839

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 (including health plans under parts C and D of the Medicare Program) in the same manner as such laws apply to protected activities under the National Labor Relations Act.

IN THE HOUSE OF REPRESENTATIVES

MAY 11, 2011

Mr. WEINER introduced the following bill; which was referred to the
Committee on the Judiciary

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 (including health plans under parts C and D of the Medicare Program) in the same manner as such laws apply to protected activities under the National Labor Relations Act.

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

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Community Pharmacy
3 Fairness Act of 2011”.

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

7 (a) **IN GENERAL.**—Any independent pharmacies who
8 are engaged in negotiations with a health plan regarding
9 the terms of any contract under which the pharmacies pro-
10 vide health care items or services for which benefits are
11 provided under such plan shall, in connection with such
12 negotiations, be entitled to the same treatment under the
13 antitrust laws as the treatment to which bargaining units
14 which are recognized under the National Labor Relations
15 Act are entitled in connection with activities described in
16 section 7 of such Act. Such a pharmacy shall, only in con-
17 nection with such negotiations, be treated as an employee
18 engaged in concerted activities and shall not be regarded
19 as having the status of an employer, independent con-
20 tractor, managerial employee, or supervisor.

21 (b) **PROTECTION FOR GOOD FAITH ACTIONS.**—Ac-
22 tions taken in good faith reliance on subsection (a) shall
23 not be the subject under the antitrust laws of criminal
24 sanctions nor of any civil damages, fees, or penalties be-
25 yond actual damages incurred.

1 (c) NO CHANGE IN NATIONAL LABOR RELATIONS
2 ACT.—This section applies only to independent phar-
3 macies excluded from the National Labor Relations Act.
4 Nothing in this section shall be construed as changing or
5 amending any provision of the National Labor Relations
6 Act, or as affecting the status of any group of persons
7 under that Act.

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

11 (e) LIMITATIONS ON EXEMPTION.—Nothing in this
12 section shall exempt from the application of the antitrust
13 laws any agreement or otherwise unlawful conspiracy
14 that—

15 (1) would have the effect of boycotting any
16 independent pharmacy or group of independent
17 pharmacies, or would exclude, limit the participation
18 or reimbursement of, or otherwise limit the scope of
19 services to be provided by, any independent phar-
20 macy or group of independent pharmacies with re-
21 spect to the performance of services that are within
22 the scope of practice as defined or permitted by rel-
23 evant law or regulation;

24 (2) allocates a market among competitors;

1 (3) unlawfully ties the sale or purchase of one
2 product or service to the sale or purchase of another
3 product or service; or

4 (4) monopolizes or attempts to monopolize a
5 market.

6 (f) LIMITATION BASED ON MARKET SHARE OF
7 GROUP.—This section shall not apply with respect to the
8 negotiations of any group of independent pharmacies with
9 a health plan regarding the terms of any contract under
10 which such pharmacies provide health care items or serv-
11 ices for which benefits are provided under such plan in
12 a PDP region (as defined in subsection (j)(4)) if the num-
13 ber of pharmacy licenses of such pharmacies within such
14 group in such region exceeds 25 percent of the total num-
15 ber of pharmacy licenses issued to all retail pharmacies
16 (including both independent and other pharmacies) in
17 such region.

18 (g) NO EFFECT ON TITLE VI OF CIVIL RIGHTS ACT
19 OF 1964.—Nothing in this section shall be construed to
20 affect the application of title VI of the Civil Rights Act
21 of 1964.

22 (h) NO APPLICATION TO SPECIFIED FEDERAL PRO-
23 GRAMS.—Nothing in this section shall apply to negotia-
24 tions between independent pharmacies and health plans
25 pertaining to benefits provided under any of the following:

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

3 (2) The State Children’s Health Insurance Pro-
4 gram (SHIP) under title XXI of the Social Security
5 Act (42 U.S.C. 1397aa et seq.).

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

9 (4) Chapter 17 of title 38, United States Code
10 (relating to Veterans’ medical care).

11 (5) Chapter 89 of title 5, United States Code
12 (relating to the Federal employees’ health benefits
13 program).

14 (6) The Indian Health Care Improvement Act
15 (25 U.S.C. 1601 et seq.).

16 (i) DEFINITIONS.—For purposes of this section:

17 (1) ANTITRUST LAWS.—The term “antitrust
18 laws”—

19 (A) has the meaning given it in subsection
20 (a) of the first section of the Clayton Act (15
21 U.S.C. 12(a)), except that such term includes
22 section 5 of the Federal Trade Commission Act
23 (15 U.S.C. 45) to the extent such section 5 ap-
24 plies to unfair methods of competition; and

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

3 (2) HEALTH PLAN AND RELATED TERMS.—

4 (A) IN GENERAL.—The term “health
5 plan”—

6 (i) means a group health plan or a
7 health insurance issuer that is offering
8 health insurance coverage;

9 (ii) includes any entity that con-
10 tracts with such a plan or issuer for the
11 administering of services under the plan or
12 coverage; and

13 (iii) includes a prescription drug plan
14 offered under part D of title XVIII of the
15 Social Security Act and a Medicare Advan-
16 tage plan offered under part C of such
17 title.

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

9 (A) less than 10 percent in any PDP re-
10 gion; and

11 (B) less than 1 percent in the United
12 States.

13 For purposes of the preceding sentence, all phar-
14 macies that are members of the same controlled
15 group of corporations (within the meaning of section
16 267(f) of the Internal Revenue Code of 1986) and
17 all pharmacies under common control (within the
18 meaning of section 52(b) of such Code but deter-
19 mined by treating an interest of more than 50 per-
20 cent as a controlling interest) shall be treated as 1
21 pharmacy.

22 (4) PDP REGION.—The term “PDP region”
23 has the meaning given such term in section 1860D-
24 11(a)(2) of the Social Security Act (42 U.S.C.
25 1395w-111(a)(2)).

1 (j) 5-YEAR SUNSET.—The exemption provided in
2 subsection (a) shall only apply to conduct occurring during
3 the 5-year period beginning on the date of the enactment
4 of this Act and shall continue to apply for 1 year after
5 the end of such period to contracts entered into before
6 the end of such period.

7 (k) GENERAL ACCOUNTABILITY OFFICE STUDY AND
8 REPORT.—The Comptroller General of the United States
9 shall conduct a study on the impact of enactment of this
10 section during the 6-month period beginning with the 5th
11 year of the 5-year period described in subsection (j). Not
12 later than the end of such 6-month period, the Comptroller
13 General shall submit to Congress a report on such study
14 and shall include in the report such recommendations on
15 the extension of this section (and changes that should be
16 made in making such extension) as the Comptroller Gen-
17 eral deems appropriate.

18 (l) OVERSIGHT.—Nothing in this section shall pre-
19 clude the Federal Trade Commission or the Department
20 of Justice from overseeing the conduct of independent
21 pharmacies covered under this section.

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