

112TH CONGRESS
1ST SESSION

H. R. 1946

To ensure and foster continued safety and quality of care and a competitive marketplace by exempting independent pharmacies from the antitrust laws in their negotiations with health plans and health insurance insurers.

IN THE HOUSE OF REPRESENTATIVES

MAY 23, 2011

Mr. MARINO (for himself and Mr. GOHMERT) introduced the following bill;
which was referred to the Committee on the Judiciary

A BILL

To ensure and foster continued safety and quality of care and a competitive marketplace by exempting independent pharmacies from the antitrust laws in their negotiations with health plans and health insurance insurers.

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 “Preserving Our Home-
5 town Independent Pharmacies Act of 2011”.

1 **SEC. 2. APPLICATION OF THE ANTITRUST LAWS TO INDE-**
2 **PENDENT PHARMACIES NEGOTIATING WITH**
3 **HEALTH PLANS.**

4 (a) **IN GENERAL.**—Any independent pharmacies who
5 are engaged in negotiations with a health plan regarding
6 the terms of any contract under which the pharmacies pro-
7 vide health care items or services for which benefits are
8 provided under such plan shall, only in connection with
9 such negotiations, be treated under the antitrust laws as
10 an employee engaged in concerted activities and shall not
11 be regarded as having the status of an employer, inde-
12 pendent contractor, managerial employee, or supervisor.

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

18 (c) **NO CHANGE IN NATIONAL LABOR RELATIONS**
19 **ACT.**—Nothing in this section shall be construed as chang-
20 ing or amending any provision of the National Labor Rela-
21 tions Act, or as affecting the status of any group of per-
22 sons under that Act.

23 (d) **EFFECTIVE DATE.**—The exemption provided in
24 subsection (a) shall apply to conduct occurring beginning
25 on the date of the enactment of this Act.

1 (e) LIMITATIONS ON EXEMPTION.—Nothing in this
2 section shall exempt from the application of the antitrust
3 laws any agreement or otherwise unlawful conspiracy
4 that—

5 (1) would have the effect of boycotting any
6 independent pharmacy or group of independent
7 pharmacies, or would exclude, limit the participation
8 or reimbursement of, or otherwise limit the scope of
9 services to be provided by, any independent phar-
10 macy or group of independent pharmacies with re-
11 spect to the performance of services that are within
12 the scope of practice as defined or permitted by rel-
13 evant law or regulation;

14 (2) allocates a market among competitors;

15 (3) unlawfully ties the sale or purchase of one
16 product or service to the sale or purchase of another
17 product or service; or

18 (4) monopolizes or attempts to monopolize a
19 market.

20 (f) LIMITATION BASED ON MARKET SHARE OF
21 GROUP.—This section shall not apply with respect to the
22 negotiations of any group of independent pharmacies with
23 a health plan regarding the terms of any contract under
24 which such pharmacies provide health care items or serv-
25 ices for which benefits are provided under such plan in

1 a PDP region (as defined in subsection (j)(4)) if the num-
2 ber of pharmacy licenses of such pharmacies within such
3 group in such region exceeds 25 percent of the total num-
4 ber of pharmacy licenses issued to all retail pharmacies
5 (including both independent and other pharmacies) in
6 such region.

7 (g) NO EFFECT ON TITLE VI OF CIVIL RIGHTS ACT
8 OF 1964.—Nothing in this section shall be construed to
9 affect the application of title VI of the Civil Rights Act
10 of 1964.

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

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

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

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

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

1 (5) Chapter 89 of title 5, United States Code
2 (relating to the Federal employees' health benefits
3 program).

4 (6) The Indian Health Care Improvement Act
5 (25 U.S.C. 1601 et seq.).

6 (7) Part C or D of title XVIII of the Social Se-
7 curity Act.

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

9 (1) ANTITRUST LAWS.—The term “antitrust
10 laws”—

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

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

19 (2) HEALTH PLAN AND RELATED TERMS.—

20 (A) IN GENERAL.—The term “health
21 plan”—

22 (i) means a group health plan or a
23 health insurance issuer that is offering
24 health insurance coverage;

1 (ii) includes any entity that con-
2 tracts with such a plan or issuer for the
3 administering of services under the plan or
4 coverage; and

5 (iii) does not include a Medicare Ad-
6 vantage plan offered under part C of title
7 XVIII of the Social Security Act or a pre-
8 scription drug plan offered under part D of
9 such title.

10 (B) HEALTH INSURANCE COVERAGE;
11 HEALTH INSURANCE ISSUER.—The terms
12 “health insurance coverage” and “health insur-
13 ance issuer” have the meanings given such
14 terms under paragraphs (1) and (2), respec-
15 tively, of section 733(b) of the Employee Retire-
16 ment Income Security Act of 1974 (29 U.S.C.
17 1191b(b)).

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

23 (3) INDEPENDENT PHARMACY.—The term
24 “independent pharmacy” means a pharmacy that
25 has a market share of—

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

3 (B) less than 1 percent in the United
4 States.

5 For purposes of the preceding sentence, all phar-
6 macies that are members of the same controlled
7 group of corporations (within the meaning of section
8 267(f) of the Internal Revenue Code of 1986) and
9 all pharmacies under common control (within the
10 meaning of section 52(b) of such Code but deter-
11 mined by treating an interest of more than 50 per-
12 cent as a controlling interest) shall be treated as 1
13 pharmacy.

14 (4) PDP REGION.—The term “PDP region”
15 has the meaning given such term in section 1860D–
16 11(a)(2) of the Social Security Act (42 U.S.C.
17 1395w–111(a)(2)).

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

24 (k) GENERAL ACCOUNTABILITY OFFICE STUDY AND
25 REPORT.—The Comptroller General of the United States

1 shall conduct a study on the impact of enactment of this
2 section during the 6-month period beginning with the 5th
3 year of the 5-year period described in subsection (j). Not
4 later than the end of such 6-month period, the Comptroller
5 General shall submit to Congress a report on such study
6 and shall include in the report such recommendations on
7 the extension of this section (and changes that should be
8 made in making such extension) as the Comptroller Gen-
9 eral deems appropriate.

10 (l) OVERSIGHT.—Nothing in this section shall pre-
11 clude the Federal Trade Commission or the Department
12 of Justice from overseeing the conduct of independent
13 pharmacies covered under this section.

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