

# Legislative Analysis

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## EXEMPTIONS FROM BAN ON DRUG KICKBACKS

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**House Bill 5947 (Substitute H-3)**  
**Sponsor: Rep. Brian Palmer**

**House Bill 5970 (Substitute H-2)**  
**Sponsor: Rep. Gary A. Newell**

**Committee: Health Policy**  
**First Analysis (6-17-04)**

**BRIEF SUMMARY:** The bills would create an exemption to the ban on giving or receiving bribes and kickbacks in connection with the delivery of health care services for certain rebates or discounts offered to consumers by drug or medical equipment manufacturers or distributors.

**FISCAL IMPACT:** The bills would have no direct fiscal impact on the state or local units of government.

### **THE APPARENT PROBLEM:**

There is a lot of competition between manufacturers and distributors of drugs and medical equipment for a share of the market. More recently, these companies have been marketing directly to consumers via ads in the media and by offering discounts or rebates on purchases of their products. For example, the makers of a popular heartburn medication currently are distributing rebate coupons good for up to \$25 on a purchase of the medication. If a person has health insurance with prescription drug coverage, the coupon is only good for the consumer's actual out-of-pocket expense. Such rebates and discounts cannot be used by a person who is an enrollee in Medicaid, Medicare, or other public program that reimburses for prescription drugs. They also cannot be used in Michigan by persons with health insurance with prescription drug coverage.

Michigan residents with health insurance are excluded by a state law that prohibits kickbacks and bribes for giving or receiving health care services that could be paid by health insurance. The Health Care False Claim Act provides to health care insurers and health care corporations the same protections against fraud that are afforded to the Department of Community Health in the Medicaid False Claim Act. Currently, under the act, it is a felony offense to pay or receive kickbacks or bribes in connection with furnishing goods or services for which payment is or could be covered by a health care insurer or health care corporation or for receiving a rebate or a fee or charge for referring an individual to another person for the furnishing of health care benefits. A violation is punishable by a maximum term of imprisonment of four years, a fine of not more than \$50,000, or both.

Some of the drug companies have interpreted this statute as applying to the use by consumers of discount coupons or rebates to purchase prescription drugs, even if the amount reimbursed does not exceed the person's insurance copayment or deductible. As a result, Michigan residents with insurance cannot avail themselves of these discounts and rebates. Apparently, Michigan is the last state to keep such a law without offering exclusion for campaigns marketed directly to consumers.

### ***THE CONTENT OF THE BILLS:***

Section 4 of the Health Care False Claim Act prohibits giving or receiving a kickback or bribe in connection with the furnishing of health care goods or services covered by health insurance or receiving a rebate or fee for referring one person to another in order to receive health care benefits. The bills would add new sections to the act to create an exemption for certain rebates offered by drug and medical equipment companies to consumers. The bills are tie-barred to each other, meaning that neither bill could take effect unless the other one was also enacted.

House Bill 5947 would amend the act (MCL 752.1004b) to specify that a rebate or discount from a medical supply or device manufacturer or from a company that licensed or distributed medical supplies or devices for a company to a consumer for his or her use of that product or device would not violate the ban on kickbacks and bribes in Section 4.

The bill would not alter any copayment, deductible, coinsurance, or other cost-sharing requirements under a contract, certificate, or policy issued by a health care corporation or health care insurer.

House Bill 5970 would place a nearly identical provision in the act (MCL 752.1004a), except that it would apply to rebates and discounts from a drug manufacturer or from a company that licensed or distributed the drugs of a drug manufacturer.

[“Health care corporation” is defined under the Health Care False Claim Act as meaning a nonprofit dental care corporation incorporated under Public Act 125 of 1963; a hospital service corporation, medical care corporation, or a consolidated hospital service corporation and medical care corporation incorporated or reincorporated under Public Act 350 of 1980 or incorporated or consolidated under Public Act 108 or 109 (a reference to Blue Cross and Blue Shield of Michigan); or an HMO licensed by the state. A “health care insurer” is defined as any insurance company authorized to provide health insurance in Michigan or any legal entity which was self-insured and providing health care benefits to its employees. “Health care benefit” is the right under a contract or a certificate or policy of insurance to have a payment made by a health care corporation or health care insurer for a specified health care service.]

## ***ARGUMENTS:***

### ***For:***

Michigan is the only remaining state that does not allow persons with insurance to avail themselves of discounts or rebates given directly to consumers by manufacturers and distributors of prescription drugs and medical equipment (i.e., blood pressure monitors, blood sugar testing devices, etc.). The bills make good sense and would aid low income persons and those on fixed incomes. Prescription drug costs are very high, and some insurance deductibles, copayments, and coinsurance amounts can be as high as 50 percent of the cost of the product. Even saving \$10 or \$20 on a few prescriptions a year can benefit some. Moreover, patients may be reluctant to try a new medication because of not wanting to waste money on copays in case the medication didn't work well for them. Therefore, they may stick with a known entity even if it also wasn't providing the desired benefit, or worse, go without the medication altogether. The bills would enable these consumers to try a month's supply of a new medication or piece of equipment without any (or with reduced) out-of-pocket costs.

In short, the bills would enable all Michigan consumers to utilize discounts and rebates offered by drug and medical equipment companies, should their health care provider agree that use of the medicine or medical device was appropriate.

### ***Against:***

Some are concerned that allowing persons with health insurance that covers prescription drugs to use rebates and discounts to recoup all or part of their out-of-pocket expense will encourage these people to demand from their health care providers prescriptions for those medications. This could increase costs to employers, or increase the cost of providing drug benefits to employees, because the discounts and rebates are for name brand drugs which are more expensive than generics. Also, a physician's decision regarding whether or not to specify a prescription as DAW (dispense as written) instead of allowing the pharmacist to fill it with a generic is supposed to be based on the health needs or sensitivity to drugs of the patient, not whether the patient could save on a copay.

## ***POSITIONS:***

AARP supports the bills. (6-16-04)

The Department of Community Health supports the bills. (6-15-04)

A representative of Navartis indicated support for the bills. (6-15-04)

A representative of the Michigan Association of Health Plans indicated support for the bills. (6-15-04)

A representative of the Michigan Pharmacists Association indicated support for the bills. (6-15-04)

A representative of the American Diabetes Association indicated support for the bills. (6-15-04)

A representative of the Michigan Chamber of Commerce indicated a position of neutrality on the bills. (6-15-04)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.