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STATEMENT OF BRAD SMOOT  
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SENATE FINANCIAL INSTITUTIONS AND INSURANCE COMMITTEE  
REGARDING SENATE BILL 382  
MARCH 8, 2012

Madam Chair and members:

On behalf of Blue Cross Blue Shield of Kansas, thank you for this opportunity to comment on 2012 Senate Bill 382. BCBSKS is a mutual insurance company owned by its policyholders, which provides a variety of health insurance policies to serve nearly 900,000 of your fellow Kansans in 103 Kansas counties.

SB 382 would void longstanding contract provisions commonly known as “most favored nation” clauses. These contract provisions are designed to enable purchasers of goods and services to get the best prices from sellers of goods and services. They are common in our industry and in international agreements from which the name is derived. In the health insurance industry, these negotiated provisions enable our customers to get the best possible rates from contracting providers and thus help reduce out of pocket expenses and monthly premiums for Kansas employers and families.

As you all know, health insurers generally subsidize the inadequate reimbursement levels paid by the uninsured, Medicaid and Medicare. A portion of every premium dollar you and our other customers pay goes to cover the under payments suffered by hospitals, doctors and other providers of health care services. Hence, we are not anxious to subsidize other insurers and their customers by paying any more than we have to for services. We try to negotiate rates that are fair, rates which enable us to have a comprehensive network of providers to care for our insureds, and which help premiums remain affordable. This is no small task.

To help us get better rates and lower premiums for our customers, BCBSKS contracts contain a provision that simply requires that if a provider gives a lower rate than what we have been negotiated, we are to be notified by the provider and may renegotiate the original rates. While these contractual provisions are rarely if ever enforced, they give us some confidence that we are doing the best by our customers. Section 1(e)(1)(c) & (D) are the sections of this bill that would prohibit the provider contract provision we use. Copies of our standard provisions for doctors and hospitals are attached.

We anticipate that you will be told a lot of derogatory things about these contract provisions by the bill’s supporters. Those criticisms may include the following: These

provisions violate the law. These provisions create a pricing “floor.” Other carriers can’t use these provisions. Or, that MFN provisions enable us to get lower prices than anyone else. Such complaints are untrue and deserve individual comment.

\*Contrary to proponents claims, these provisions do not violate the law. Absent a law, like SB 382, we are aware of no court of law which has declared such provisions to violate law or public policy. In fact, courts usually speak of such clauses with favor, declaring that such clauses provide significant flexibility in determining pricing and are standard devices that promote the kind of competitive environment that anti trust laws seek to encourage. Citations available.

\*Such provisions don’t create a pricing “floor” that no other insurer can negotiate. Nothing in these provisions says that no other carrier can have the same rate or even a lower rate. What they say is that if a lower rate is given, we may consider to renegotiation of our rates. Someone else can establish the “floor.” We just want our customers to join them with that same good rate.

\*Other carriers can place similar provisions in their contracts. None of our contracts prohibit that.

\* Most importantly, please don’t let anyone lead you to believe that we are insisting on a rate lower than anyone else. That is not the case. Anyone can get the same rate we get if the provider agrees to it.

Blue Cross Blue Shield of Kansas contracts with all hospitals in its service area, including numerous specialty hospitals. We contract with 99 percent of the physicians. We want a large network of providers so that our customers have choice and access to quality care. We are willing to pay fairly to get it. Most providers, like most other people, realize that volume purchasing means the person or company that buys the most, usually gets the best prices. Whether you are buying goods in bulk at Costco, a fleet of vehicles from a Ford dealership or directing patients and payments to a hospital or other provider, volume usually drives prices downward. It is true in the health insurance industry as it is in other parts of the U.S. marketplace. As a mutual insurer, BCBSKS does not seek lower prices to enhance stock value or corporate profits. We do what we do to keep our plans competitive; to keep insurance rates as affordable for our members as possible and to keep hospitals, doctors and other providers in business to care for our customers. SB 382, by removing our ability to utilize MFN provisions in our contracts with providers, will reduce our ability to accomplish these objectives on behalf of our customers and your constituents. Thank you for consideration of our views.

## HOSPITAL

Our MFN clause is in the **base hospital** Agreement (not the Policies and Procedures):

Hospital shall promptly inform Blue Cross and Blue Shield of payment agreements with other parties (including capitation agreements, per diem arrangements, and other forms of payment as well as cash discounts or arrangements for waiving deductibles or copayments) and to provide details as to the financial effect thereof as might be requested by Blue Cross and Blue Shield. Such arrangements may result in changes to the MAP by Blue Cross and Blue Shield staff rather than its Board, as follows:

- a) The staff **may** adjust such maximum allowable payments only in circumstances in which the staff becomes aware, through independent investigation or as a result of information provided by a Contracting Provider, that a Contracting Provider has a payment agreement with another payor or offers a discount or other financial arrangement, the effect of which is that such Contracting Provider accepts from another payor as payment in full an amount less than such Contracting Provider would accept from Blue Cross and Blue Shield as payment in full;
- b) Such adjustment shall be approved in writing by the Senior Vice-President, External Affairs, or by the President of Blue Cross and Blue Shield.
- c) Such adjustment shall be communicated in writing to the Contracting Provider. Such communication shall be considered a change in policy adopted by the Board of Directors, and the Contracting Provider shall have such advance notice of the change and such rights to cancel the Contracting Provider Agreement rather than abide by the change as are afforded for other amendments to Policies and Procedures. The Board of Directors of Blue Cross and Blue Shield shall be informed by the staff of any such adjustments to MAPs so made at the next meeting of the Board of Directors immediately following such adjustment.
- e) The Board of Directors of Blue Cross and Blue Shield shall have the ability to make subsequent changes in adjustments to MAPs so made, which changes shall be prospective only and shall be effective as any other amendment to Policies and Procedures after communication. If a change in such adjustments would have the effect of inducing a party which terminated its Contracting Provider Agreement as a result of the staff adjustment to MAPs to wish to contract anew with this corporation, a contract shall be tendered to such party and shall become effective on the date of execution by such party.

## PROVIDER

MFN clause is in the **base provider** Agreement (not the Policies and Procedures):

### Maximum Allowable Payment System

Blue Cross and Blue Shield will reimburse the physician's usual charge up to the maximum allowable payment (MAP).

- A. At least annually, the Blue Cross and Blue Shield Board of Directors will establish the MAP for each procedure.
- B. The physician agrees to fully and promptly inform Blue Cross and Blue Shield of the existence of agreements under which such physician agrees to accept an amount for any and all services as payment in full which is less than the amount such physician accepts from Blue Cross and Blue Shield as payment in full for such services. Blue Cross and Blue Shield staff is authorized to adjust maximum allowable payments for the physician in light of such agreements, under the following terms:
  1. The Blue Cross and Blue Shield staff **may** adjust the maximum allowable payment only in circumstances in which the staff becomes aware through independent investigation or as a result of information provided by a contracting provider, that a contracting provider has a payment agreement with another payor or offers a discount or other financial arrangement, the effect of which is that such contracting provider accepts from payor as payment in full an amount less than such contracting provider would accept from this corporation as payment in full;
  2. Such adjustment shall be approved in writing by the executive vice president or by the president of this corporation.
  3. Such adjustment shall be communicated in writing to the contracting provider. Such communication shall be considered a change in policy adopted by the board of directors, and the contracting provider shall have such advance notice of the change and such rights to cancel the Contracting Provider Agreement rather than abide by the change as are afforded for other amendments to policies and procedures under Section III.A.2. of this agreement.
  4. The board of directors of Blue Cross and Blue Shield shall be informed by the staff of any such adjustments to MAP's so made, at the next meeting of the board of directors immediately following such adjustment.
  5. The board of directors of this corporation shall have the ability to make subsequent changes in adjustments to MAP's so made, which changes shall be prospective only and shall be effective as any other amendment to policies and procedures after communication. If a change in such adjustments would have the effect of inducing a party which terminated its Contracting Provider Agreement as a result of the staff adjustment to MAP's to which to contract anew with Blue Cross and Blue Shield, a contract shall be tendered to such party and shall become effective on the date of execution by such party.