Capping Prescription Drug Costs: State Initiatives to the Rescue?

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The ever-rising prescription drug costs in the U.S. constitute an ongoing national challenge that has yet to be addressed by either the executive or legislative branches of the federal government. In recognition of this slow-paced reality, several states have taken to enacting prescription drug pricing transparency laws in the hope of moderating the ever-escalating annual increments.[1] Yet other states elected to affirm the importation of drugs from Canada or to limit the out-of-pocket spending on select medications (e.g., insulin).[1] More recently, however, state legislators set out to impose outright caps on the rising annual state expenditures on prescription drug costs.[1] In this commentary we explore the evolving prescription drug price control strategies at the state level as well as examine the prospects of potential national counterparts thereof.

It has been and remains the implicit policy of the U.S. to grant the pharmaceutical industry a free hand in setting the retail price of prescription drugs absent the advent of negotiation or regulation. Value-based pricing of prescription drugs by a statutorily authorized federal agency, a notion opposed by the pharmaceutical industry, has yet to be taken up by the U.S. Congress. The direct outcome of these hands-off policies has been that the prices assigned to prescription drugs by pharmaceutical companies in the U.S. are uncoupled from both consumer demand and inflation rates. Over the 1980 to 2018 interval, U.S. spending on prescription drugs increased more than tenfold in real terms, that is, independent of inflation.[2] In 2020 alone, the U.S. is estimated to have spent in excess of $350 billion (8.6% of the total national health expenditures) on the procurement of prescription drugs.[2] No other nation comes close to the size of this outlay. Per capita data of the Organisation for Economic Co-operation and Development (OECD) reveal the annual outlays for prescription drugs to be half those incurred by the U.S. The American public is hardly oblivious to these realities. A recent Kaiser Family Foundation poll revealed that "about three in ten say they haven't taken their medicine as prescribed due to costs."[3]

Encouraged and enabled by model legislation from the National Academy for State Health Policy, several states took to introducing legislation that would cap the annual prescription drug price increments.[1] At this time, only one such bill, Maine's LD 1636 (An Act to Reduce Prescription Drug Costs by U.S. International Pricing), was signed into law by Governor Janet T. Mills.[4] Notably, LD 1636 requires the Superintendent of Insurance to create a list of 250 drugs, the price of which is to be "calculated as the lowest cost from official publications of certain Canadian provincial government agencies and the wholesale acquisition cost."[4] The referenced drugs are "to be dispensed or delivered to a consumer of this State at a cost equal to or lower than the referenced rate. Any savings generated as a result must be used to reduce costs to consumers."[4] Rhode Island's Governor Daniel J. McKee, for his part, signed into law legislation which requires insurers to cap the total cost that covered patients pay for insulin at $40 for a 30-day supply.[5] Concurrently, Governor McKee signed into law legislation that prohibits the inclusion of gag orders in pharmacy contracts which preclude pharmacists from offering customers more affordable prescription options.[5] Comparable bills, heretofore introduced in the states of Hawaii, Washington, and Connecticut, have yet to be enacted.[1] The latest example of this legislative trend is the yet-to-be enacted Massachusetts Senate Bill (S. 2774) which seeks to control the state's "year-over-year increases in pharmacy spend."[6] Introduced by Governor Charles D. Baker Jr., S.2774 (An Act Investing in the Future of Our Health) proposes an "inflation cap" on prescription drug price accretion.[6] Specifically, the bill sets out to "hold high-cost drug manufacturers accountable through a framework similar to that currently used for payors and providers that exceed the comparable cost benchmark."[6] In addition, the bill will "penalize manufacturers for excessive drug price increases" and "establish new oversight authority for Pharmacy Benefit Managers (PBMs)."[6] Indications are that the Massachusetts initiative and others like it will be vigorously opposed by the Pharmaceutical Manufacturers of America (PhRMA), the trade group that is representing the U.S. pharmaceutical industry. Early pronouncements of PhRMA relative to the Massachusetts initiative stated that "Massachusetts makes breakthrough medicines. Charlie Baker makes them harder to get."[7]

Concurrent with the aforementioned state initiatives, the White House sought to address the matter of prescription drug pricing as well. On July 9, 2021, President Biden issued an Executive Order that directed the U.S. Food and Drug Administration (FDA) to "work with states and tribes to safely import prescription drugs from Canada, pursuant to the Medicare Modernization Act of 2003." The Executive

Order also directed the U.S. Department of Health and Human Services (HHS) "to increase support for generic and biosimilar drugs, which provide low-cost options for patients." Nary a month later, President Biden called on Congress to lower prescription drug prices by "allowing Medicare to negotiate drug prices, making other needed reforms to lower prices, and building on existing progress to lower the cost of prescription drugs." Finally, on November 2, 2021, President Biden announced a Prescription Drug Pricing Plan that was to be a part of the Build Back Better Act (H.R. 5376). Sponsored by John A. Yarmuth (D-KY), the Build Back Better Act calls for authorizing Medicare to negotiate drug prices, imposing a tax penalty if drug companies increase their prices faster than inflation, and lowering the out-of-pocket drug costs for seniors.

The 116th Congress failed to enact a total of 12 prescription drug cost-relevant bills including the Prescription Drug Pricing Reduction Act of 2020, which was sponsored by Sen. Charles E. Grassley (R-IA). Noteworthy for its focus on the price of prescription drugs under Medicare and Medicaid, the bill "requires drug manufacturers to issue rebates to the Centers for Medicare & Medicaid Services (CMS) for certain drugs covered under Medicare for which the average manufacturer price increases faster than inflation." The 117th Congress, for its part, revisited but did not enact the Elijah E. Cummings Lower Drug Costs Now Act (H.R.3) which was sponsored by Frank J. Pallone, Jr. (D-NJ), chairman of the House Committee on Energy and Commerce. The bill "requires HHS to negotiate prices for certain drugs" with manufacturers with inflation caps in mind. Second, the bill insists on "drug price transparency" that is to be required by HHS. Three other bills of relevance to the pricing of prescription drugs, the Freedom from Price Gouging Act (Rep. Katie M. Porter [D-CA]), the Capping Drug Costs for Seniors Act of 2021 (Rep. Steven A. Horsford [D-NV]), and the Drug-Price Transparency for Competition Act (DTC) of 2021 (Sen. Richard J. Durbin [D-IL]) failed to advance as well.

With the Build Back Better Act stalled in the Senate, the prospects for near-term congressional action on prescription drug prices appear to be at a standstill. It follows that the legislative momentum on prescription drug prices could well shift to the states. Such a trend is likely to be markedly enhanced if and when Massachusetts, a tried-and-true national health policy bellwether, were to enact Senate Bill S. 2774.[6] Federal legislation intent on holding high-cost drug manufacturers accountable could then follow suit. Whereas progress along these lines would be widely applauded, the historic record does not bode well for congressional action when it comes to the imposition of inflationary limits on drug price increments. To the degree that states comprise a reliable indicator of national trends, the prospect of capping prescription drug prices may have a fighting chance.

References

1. NASHP. National Academy for State Health Policy. 2022 State Legislative Action to Lower Pharmaceutical Costs. May 5, 2022 (https://www.nashp.org/rx-legislative-tracker/).
2. Congressional Budget Office. Prescription Drugs: Spending, U.S., and Prices. January 2022 (https://www.cbo.gov/system/files/2022-01/57050-Rx-Spending.pdf).
3. Hamel L, Lopes L, Kirzinger A, Sparks G, Kearney A, Stokes M, et al. Kaiser Family Foundation. Public Opinion on Prescription Drugs and Their Prices. April 5, 2022 (https://www.kff.org/health-costs/poll-finding/public-opinion-on-prescription-drugs-and-their-prices/).
4. State of Maine Legislature. Summary of LD 1636. An Act to Reduce Prescription Drug Costs by Using International Pricing. Sponsored by Senator Ned Claxton. April 14, 2022 (https://legislature.maine.gov/LawMakerWeb/summary.asp?ID=280080692).
5. State of Rhode Island. Governor Dan McKee. Governor McKee Signs Prescription Drug Affordability Bills. September 1, 2021 (https://governor.ri.gov/press-releases/governor-mckee-signs-prescription-drug-affordability-bills).
6. The Commonwealth of Massachusetts. Senate No. 2774. March 15, 2022 (file:///C:/U.S.ers/Eli/Downloads/S2774.pdf).
7. Lannan K. Drug manufacturers call Baker plan 'dangerous.' The Berkshire Eagle. April 11, 2022 (https://www.berkshireeagle.com/statehoU.S.e/drug-manufacturers-call-baker-plan-dangeroU.S./article_4f06c2a6-b9a8-11ec-843f-03eab1a69002.html).

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