

Senate Stops 'Gag' on Discussing Cheaper Drugs at Pharmacy (Corrected)

By Shira Stein

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- Bill prohibits "gag clauses" for individual market insurance plans and employer group health plans
- Bill comes on back of another passed in Senate and another moving through House

A bill outlawing pharmacy contract provisions that ban pharmacists from telling some insured patients about the cheapest available drugs passed the Senate Sept. 17.

"Americans have the right to know which payment method provides the most savings when purchasing their medications," bill sponsor Sen. Susan Collins (R-Maine) said Sept. 17. The vote was 98-2, with Sens. Rand Paul (R-Ky.) and Mike Lee (R-Utah) voting against the measure.

The measure has the support of the White House. "Americans deserve to know the lowest drug price at their pharmacy, but 'gag clauses' prevent your pharmacist from telling you! I support legislation that will remove gag clauses and urge the Senate to act," President Donald Trump tweeted ahead of the vote.

The bill (S. 2554), sponsored by Collins, affects most employer group health plans and individual market plans. It accompanies another bill (S. 2553) passed by the Senate Sept. 4 that prohibits gag clauses for Medicare. The House Energy and Commerce Committee approved a bill (H.R. 6733) Sept. 13 that would prohibit gag clauses for Medicare and private health insurance plans.

Both Senate bills are supported by CVS, Express Scripts, the American Pharmacists Association, America's Health Insurance Plans, AARP, and the ERISA Industry Committee.

Working Toward Same Bill

Both chambers are close to having the same language with H.R. 6733 in the House, and S. 2554 and S. 2553 in the Senate, according to Collins's office.

The bill is narrowly tailored to address a practice Collins finds egregious, her office said. Collins had a very clear picture of where she wanted to go with the bill.

The bill doesn't require disclosure if a prescription is cheaper without using insurance, Collins' office said.

Twenty-three percent of prescriptions cost more to patients if filed through insurance, according to a 2018 article from the Journal of the American Medical Association.

Biosimilar Lawsuit Agreements

A provision to require the reporting of patent settlement agreements between biologic and biosimilar manufacturers to the Federal Trade Commission and Department of Justice is another provision that goes after drug costs, Collins's office said.

Biosimilars are cheaper versions of biologics, drugs made from living cells that treat complex diseases like cancer.

The reporting provision would give the FTC and DOJ the opportunity to take a closer look at the agreements in order to determine if they are anticompetitive, Collins's office said. The FTC and DOJ have the authority to review similar agreements between branded and generic drug manufacturers.

The biosimilars provision was also added as an offset to the Congressional Budget Office estimate of the cost associated with prohibiting gag clauses, Collins's office said. The CBO estimated that prohibiting gag clauses alone would save \$37 million over the next decade.

Amendment Voted Down

An amendment to the bill, introduced by Lee of Utah, would have only prohibited gag clauses for self-insured employer-sponsored plans, but failed in an 11-89 vote.

Lee said the federal government shouldn't be regulating insurance plans on a national basis, Conn Carroll, Lee's communications director, told Bloomberg Law Sept. 11. Lee voted for banning the gag rule for Medicare plans and supports state laws to do the same.

States are not allowed to regulate self-insured plans under the Employee Retirement Income Security Act of 1974, so only the federal government can ban such contracts.

Eighty-five million fewer people would get relief from gag clauses under Lee's amendment, Collins said.

Other Support

Rep. Buddy Carter (R-Ga.), a pharmacist, is the sponsor of the House gag clauses bill approved by Energy and Commerce. His bill includes similar language from the Senate Health, Education, Labor and Pensions Committee and Senate Finance Committee markups and added additional provisions, Mary Carpenter, Carter's deputy chief of staff, told Bloomberg Law.

Trump called gag clauses a "total rip-off" in a May 11 speech. Trump's drug blueprint includes allowing the Department of Health and Human Services to ban such clauses for Medicare Part D plans.

Centers for Medicare & Medicaid Services Administrator Seema Verma sent a letter to all Medicare Part D plans May 17 to remind them that gag clauses are unacceptable.

Twenty-six states enacted laws prohibiting the gag clauses between 2016 and Aug. 21, 2018, according to the National Conference of State Legislatures.

(Corrects story from Sept. 17 to remove description of scope of gag clauses that would still be in effect.)

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