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Congress Overlooking Some Tactics Used to Keep Drug Prices High

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- Incentives to keep prices high aren't addressed in legislation
- Drug middlemen are left out of legislation altogether

Congress is overlooking damaging tactics that drug companies and middlemen use to keep prices high as it tries to tackle the high cost of prescription drugs, policy researchers warn.

The Trump administration and Congress are looking to alter major pillars in the way drugs are paid for and priced in the U.S.—from rebates to patent law to court settlements. But whether they'll achieve their goal of lowering costs for consumers is up in the air, especially because companies can be faster and more flexible in adapting to whatever regulations or laws officials throw their way.

"Where there is a will, there's a way to keep prices high," Jane Horvath, a health policy consultant, said.

Part of the pharmaceutical industry's job is to find ways to avoid competition and set high prices so the government doesn't notice for a while, Fiona Scott Morton, an economics professor at the Yale University School of Management, said.

It's a constant game of whack-a-mole to stop these tactics, she said.

Incentives

High drug prices are often caused by high prices at launch and big price increases, and "transparency around price increases doesn't seem to stem the tide," Horvath said, referring to legislative proposals to require companies to make drug prices public.

Congress isn't targeting launch prices and price increases, but states are trying things like drug affordability boards that do address that, Horvath said. Until they get at those issues, we'll keep seeing high drug prices, she added.

"Everybody along the supply chain has a stake in high prices," including research institutions that still have patent rights or lease patent rights and get royalties on drugs, Horvath said.

It would be very difficult to target all the tactics used to keep drug prices high, but they can be addressed somewhat by focusing on existing incentives and potential unintended consequences of change, Stacie Dusetzina, a professor of health policy at Vanderbilt University Medical Center, said.

Pay for Delay

Lawmakers are trying to tackle pay-for-delay settlements between brand companies and generic drugmakers. But it's a delicate dance, because generic companies say certain settlements get generics onto the market faster and prevent unnecessary litigation, whereas critics say they inappropriately keep cheaper products off the market.

Traditional pay-for-delay settlements—where a generic competitor agrees to wait to market a generic drug, typically in exchange for a payment from a brand-name manufacturer—are declining, according to a recent Federal Trade Commission report. But the industry is trying new agreements with different features and the same intent, a former FTC attorney said on condition of anonymity.

The FTC report doesn't capture all of the ways in which value can be transferred, Robin Feldman, a professor at the University of California Hastings College of the Law in San Francisco, said.

Congress is looking at a bill (S. 64) introduced by Sens. Chuck Grassley (R-Iowa) and Amy Klobuchar (D-Minn.) to address pay-for-delay practices, but the legislation leaves "enormous room for anticompetitive agreements," she said.

Brand drugmakers also can block competitors' cheaper products by marketing their own "authorized generics," which cost less than the original product but reduce what a generic company can make on its own generic, Feldman said.

A first-filing generic competitor's revenue drops between 40% and 52% when facing competition from an authorized generic during the generic maker's 180-day exclusivity period, according to a 2011 FTC report. So brand drugmakers hold a lot of power over generic companies when they threaten to green-light an authorized generic, Feldman said.

There's no language on authorized generics in current drug price legislation.

Moving on From Rebates

Some researchers question whether congressional and regulatory efforts to tackle rebates will lower prices or end up harming patients.

Rebates are partial refunds insurers collect from drug companies. The rebate amount is negotiated by drug middlemen called pharmacy benefit managers, who keep a percentage of the rebate as part of payment for being a liaison between insurers and drug companies.

Insurance plans say they pass on those rebates to consumers indirectly by using the money to keep premiums low. The Trump administration has proposed upending the rebate system so that the partial refunds are given directly to consumers when they buy drugs and drug middlemen are paid flat fees instead.

But Dusetzina said paying middlemen a flat fee could reduce their incentive to negotiate prices with drugmakers.

Consolidation in health care complicates things too. If the same company owns the insurer and the drug middleman, it's not clear where the money ends up going, Walid Gellad, a professor of medicine and health policy and management at the University of Pittsburgh, said.

Rebate reform also doesn't stop a practice Feldman calls "guaranteed pricing," where the drug middlemen promise the insurer that drug prices won't rise more than a set percentage annually.

In this scenario, there are no rebates, Feldman said. So there wouldn't be any savings to "pass through" to consumers—a major selling point of the Trump administration's rebate rule.

When middlemen seek a guaranteed pricing deal, they're betting they'll be able to negotiate with the drugmakers to cap the price increase at those levels. That negotiation power is driven in part by promising drugmakers a certain market share, Feldman said.

In the end, guaranteed pricing contracts have the same effect as so-called "rebate traps," when brand drugs get preferred placement on drug coverage lists because their high rebates make them cheaper for the insurer to cover than the generic. They save a little bit of money in the short term but sacrifice long-term savings by keeping generic competitors off the market, Feldman said.

Charity Care Causing Problems?

Drugmakers' increased reliance on patient assistance programs also hasn't been addressed by legislation.

The groups often offer medicine at a steep discount to patients who can't afford it otherwise. They're used primarily to dole out brand drugs, and critics of the programs say they keep patients from switching to cheaper generic products.

Drug coupons, which give patients discounts on branded medications, also lower costs for patients on the front end, but end up costing the health-care system more in the long run because they encourage using the more expensive product.

Congress has started digging into charity care and tax-exempt groups' affiliations with drugmakers, but no legislation is on the table.

The programs remain popular because they offer cheaper options in the short term for patients, Michelle Mello, a professor of health law at Stanford Law School, said, and that's a "really hard thing to resist politically."

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