

Employers' Blueprint to Lower Prescription Drugs

Statement for the Record by
The ERISA Industry Committee (ERIC) to the
U.S. House of Representatives
Committee on Energy and Commerce (E&C), Subcommittee on Health

Hearing:

“Negotiating a Better Deal: Legislation to Lower the Cost of Prescription Drugs”

May 4, 2021

Introduction and About The ERISA Industry Committee

Subcommittee Chair Eshoo and Ranking Member Guthrie, Chair Pallone and Ranking Member McMorris Rodgers, and members of the Subcommittee, thank you for this opportunity to submit a statement for the record on behalf of The ERISA Industry Committee (ERIC) for the hearing entitled *“Negotiating a Better Deal: Legislation to Lower the Cost of Prescription Drugs.”*

ERIC is a national nonprofit organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. ERIC's member companies voluntarily provide benefits that cover millions of active and retired workers and their families across the country. With member companies that are leaders in every sector of the economy and with stores, factories, offices, warehouses, and other operations in every state, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans and to lawfully operate under ERISA's protection from a patchwork of different and conflicting state and local laws, in addition to federal law.

You are likely to engage with an ERIC member company when you drive a car or fill it with gas, use a cell phone or a computer, watch TV, dine out or at home, enjoy a beverage, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, go shopping, or use cosmetics.

Our member companies provide comprehensive health benefits and pay the vast majority of health care costs incurred by plan beneficiaries – as such, they have a significant stake in, and deep commitment to, efforts to curb the unsustainable rising costs of prescription drugs. ERIC and its member companies are committed to advancing policy that will lower costs and improve the quality of health care. Representing private sector companies, ERIC relies on market competition rather than government control, but at this point with respect to drug costs, some government involvement is needed.

Employers Could Potentially Support H.R. 3

Employers want their employees to have access to quality health coverage, including prescription drug coverage, which is affordable for families as well as employers. Prescription drug costs in the U.S. represent the single fastest growing component of health care costs for employers and the workers for whom they provide coverage. [Brand drug costs](#) have increased by double digits annually for much of the past decade, and much of the burden is falling on the employers who purchase health care for 181 million American employees and family members and pay on average 75 percent of the cost of that care. Innovation is critical to improving health care, but new drugs must also be efficacious and provide overall value. Our current system is unsustainable at all levels, and congressional action is necessary to help address this pressing problem. Policymakers across the political spectrum want to lower drug costs, so the time to act is now.

We strongly believe that healthy, functioning, competitive markets can drive lower prices and improved value. But we also recognize that markets sometimes fail, or don't even exist, and in those cases government intervention is needed. In this spirit, we applaud leaders in the House for drafting cost-saving, transformational proposals that increase competition, create transparency in the drug supply chain, and hold the pharmaceutical industry accountable for [unreasonable](#) drug costs and [anticompetitive](#) product life-cycle management.

The “*Elijah E. Cummings Lower Drug Costs Now Act*” (H.R. 3), for example, puts forward several policy proposals that would result in lower drug costs for employers and consumers. We are interested in certain aspects of H.R. 3, including:

- A carefully targeted policy that allows meaningful negotiations on the costs of drugs that lack sufficient competition, and
- The ability of self-insured payers and purchasers to take advantage of these negotiated prices, in order to protect patients in employer-based plans from “cost-shifting” efforts to make up perceived revenue losses.

In any scenario, it is essential that Congress include robust safeguards to ensure that employers and consumers do not experience cost increases by pharmaceutical manufacturers due to changes in how the Medicare program pays for drugs for Medicare beneficiaries.

H.R. 3 includes policies to prevent drug prices from growing faster than the economy or patients' ability to pay. These proposals are critical to garnering sufficient bipartisan support to pass legislation and send it to the President for signature. As with price negotiation, however, it is essential to protect self-insured payers, purchasers, and consumers in the commercial market from any cost-shifting due to changes in Medicare drug policy. ***Before employers can support H.R. 3, changes must be made to ensure that these so-called “inflation caps” protect the private sector as well as Medicare.***

Why H.R. 19 Fails to Address Employers' Concerns

While employers appreciate the bipartisan interest in advancing policies to reduce the costs of prescription drugs, unfortunately H.R. 19 falls short of the comprehensive solution employers and patients need. ERIC supports many of the policies contained in the package, but calls on policymakers to address the following problems with H.R. 19:

- The bill fails to address the drug supply chain issue, instead calling for a “study.” Employers are not interested in a study. We support reform of the drug supply chain, specifically regarding the pharmacy benefit management industry;
- The bill does not give employers and patients true transparency on drug prices, instead focusing only on fractional and aggregate prices. Consumers and purchasers have a right to know actual drug costs;
- The bill fails to address the issue of international freeriding. It is unfair and unsustainable that Americans are required to shoulder the entire world’s costs to support drug research and development; and
- Cost-shifting is not a solution. The bill relies primarily not on lowering drug costs, but on requiring others (via insurers, employers, and taxpayers) to shoulder patients’ costs. Employers support lower costs for patients, but simply capping patients’ out-of-pocket exposure without firmly addressing the underlying drivers of drug costs will only make the problem worse.

Although H.R. 19 does attempt to address rising drug costs, employers need a more comprehensive solution. Several other policies, outlined below, many of which are bipartisan, should be considered for inclusion as well. H.R. 19 should not be adopted without additional measures.

Other Prescription Drug Legislation That Will Help Patients

ERIC applauds efforts to crack down on gaming of the Food and Drug Administration (FDA) rules, which continue to have an ill effect on availability of and competition among prescription drugs. Many of the current problems in the prescription drug market are a result of failure by various parties to live by the “rules of the road” established by the 1984 Drug Price Competition and Patent Term Restoration Act (Public Law 98-417), usually referred to as the Hatch Waxman Act. The law laid out a roadmap wherein innovator companies are rewarded with market monopolies, for a limited duration of time, and then must face competition from generic products. Various strategies are now used to delay or escape entirely from that competition, and the result has been unconscionable prices and costs to plan sponsors and patients. Because of this, ERIC has officially endorsed the following bills, and urges inclusion of as many as possible in a final package:

“PBM Transparency in Prescription Drug Costs Act”: This bill would ensure that employers have full access to their own prescription drug costs, require that drug rebates and discounts are passed through to plan fiduciaries, guarantee that so-called “spread pricing” is optional at the choice of the plan sponsor, and brings transparency to secret agreements between pharmacy benefit managers and prescription drug companies.

“ADAPT Act”: This bill would create an expedited FDA approval pathway for medications already approved in other developed countries such as Japan, Israel, those in the European Union, etc. This could spur more competition in U.S. markets, thus reducing costs.

“Safe and Affordable Drugs from Canada Act”: This bill would allow limited importation of approved drugs from approved Canadian pharmacies, with protections to shore up supply chain security. Plan sponsors should be permitted to reimburse participants who take advantage of this option.

“Preserve Access to Affordable Generics and Biosimilars Act”: This bill would limit so-called “pay-for-delay” agreements to increase generic competition. ERIC endorsed this concept, which previously advanced through the House Energy and Commerce Committee.

“Stopping the Pharmaceutical Industry from Keeping Drugs Expensive (SPIKE)”: This bill requires drug manufacturers to publicly explain when prices increase 10 percent or \$10,000 over one year, 25 percent or \$25,000 over three years, or those with a launch price of more than \$26,000. ERIC has previously called for more transparency regarding drug cost increases, even if “name and shame” legislation is only a partial solution. A compromise version of the bill was included in a package that was unanimously approved by the House Ways and Means Committee.

“Creating Transparency to Have Drug Rebates Unlocked (C-THRU)”: This bill would require PBMs to report aggregate rebate amounts to CMS, and CMS would post the information. It would also ensure that Medicare beneficiaries’ cost-sharing was based on negotiated, not list, prices.

“Bringing Low-cost Options and Competition while Keeping Incentives for New Generics (BLOCKING)”: This bill prevents gaming (“parking”) of generic drug applications in a way that thwarts generic competition with branded drugs. ERIC has called for an end to patent shenanigans, and BLOCKING would end at least one of the currently practiced tricks used to prevent competition.

“Prescription Drug STAR Act”: This bill includes several of the bills described above. It also includes additional provisions designed to improve transparency.

“PACED Act,”: This bill would affirmatively ban sovereign immunity schemes that some drug manufacturers have attempted to use to avoid patent challenges.

We are additionally supportive of legislation that would:

- Clear the way for greater use of value-based purchasing agreements for medications;
- Address the issue of “international freeriding” wherein other wealthy, industrialized nations pay far less than American employers for the same drugs;
- Eliminate so-called “rebate traps”;
- Modernize Medicare reimbursement to pay hospitals and providers for their labor in administering a drug, not based on the price of that drug;
- Ban abusive use of coupons and third-party payment schemes to steer beneficiaries to branded or other expensive treatment options;
- Ensure that plans and plan sponsors have access to meaningful comparative effectiveness data on various pharmaceutical products;
- Incentivize the use by medical providers of point-of-prescribing and real-time benefits tools they can use to guide patients to affordable treatments;
- Reduce citizens petition abuse by giving the FDA additional guidance on denying petitions submitted for the purpose of delaying generic approval;
- Eliminate “patent evergreening” and ensure that branded products will face generic competition in line with the rules of Hatch-Waxman;
- Require health care providers and pharmacies to include National Drug Codes (NDC) in claims for commercial health plans. NDC codes are currently required for claims to public payers (Medicare and Medicaid) and provide greater transparency on prices to purchasers;

Conclusion

Employers are working diligently to reduce drug costs and keep health care affordable for the 181 million Americans with job-based health insurance. But we cannot achieve this objective alone – action from Congress is needed to create policies that foster real competition and crack down on abuses and gaming of the system. We applaud the Committee for holding this hearing and look forward to working with you to make drug costs and health insurance more affordable and sustainable for American workers, their families, and retirees.