

Legislative Analysis



DISCLOSURE OF PRESCRIPTION DRUG PRICING

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House Bill 4351 (H-3) as reported from committee
Sponsor: Rep. Karen Whitsett

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4352 as reported from committee
Sponsor: Rep. Sue Allor

Committee: Health Policy
Complete to 3-22-21

SUMMARY:

House Bills 4351 and 4352 would amend the Third Party Administrator Act and the Public Health Code, respectively, to prohibit certain prescription price nondisclosure contracts and to make other pharmacy-related changes, notably concerning drug pricing for covered entities under section 340B of the federal Public Health Service Act.

House Bill 4351 would amend the Third Party Administrator Act. In addition to adding provisions concerning pharmacies, the bill would define **pharmacy benefit managers** and **carriers** as **third party administrators** for purposes of the act and add or change definitions for other terms used throughout.

Definition of carrier

Currently under the act, a **carrier** is defined as any of the following:

- An insurer (including a health maintenance organization) regulated under the Insurance Code.
- A health care corporation regulated under the Nonprofit Health Care Corporation Reform Act.
- A dental care corporation regulated under 1963 PA 125.

A carrier is now specifically excluded from being considered a third party administrator for purposes of the act.

The bill would remove health care corporations regulated under the Nonprofit Health Care Corporation Reform Act from the definition of carrier. Under the bill, **carrier** would mean either of the following:

- An insurer (including a health maintenance organization) regulated under the Insurance Code.
- A dental care corporation regulated under 1963 PA 125.

A carrier would be specifically defined as a third party administrator for purposes of the act. A carrier that administered the carrier's pharmacy benefit plan would also be defined as a pharmacy benefit manager (see below).

Definition of third party administrator

Currently, a third party administrator is defined as a person who processes claims under a **service contract**, and who may also provide one or more other administrative services under a service contract, other than a worker's compensation self-insurance program under the Worker's Disability Compensation Act. The term does not include a carrier or employer sponsoring a **plan**.

Service contract means the written agreement for the provision of administrative services between the third party administrator and a **plan**, a sponsor of a plan, or a carrier.

Plan means a medical, surgical, dental, vision, or health care benefit plan and may include coverage under a policy or certificate issued by a carrier.

The bill would add carriers and **pharmacy benefit managers** to the definition of third party administrator and make them subject to the provisions of the act that now apply to third party administrators.

Pharmacy benefit manager would mean a person that contracts with a pharmacy (as defined in the Public Health Code) on behalf of an employer, multiple employer welfare arrangement, public employee benefit plan, state agency, insurer, managed care organization, or other third party payer to provide pharmacy health benefits services or administration, including reimbursement. The term would include a carrier that administers the carrier's pharmacy benefit plan.

Under the bill, a **third party administrator** would mean a person that processes claims under a service contract, and that may also provide one or more other administrative services under a service contract, other than a worker's compensation self-insurance program under the Worker's Disability Compensation Act. The term would not include an employer sponsoring a plan. The term would include a carrier and a pharmacy benefit manager. (The bill would not change the definition of "service contract" or "plan.")

Disclosure of drug prices

The bill would require that a contract between a carrier or pharmacy benefit manager and a pharmacy not prohibit the pharmacy from disclosing the current selling price of a drug in accordance with section 17757 of the Public Health Code, as it would be amended by HB 4352. This provision would apply to a contract executed, extended, or renewed after the date the bill took effect.

340B entities and carrier prohibitions

Additionally, the bill would prohibit a carrier or pharmacy benefit manager that reimburses a **340B entity** for drugs under federal law¹ from reimbursing the 340B entity for pharmacy-dispensed drugs or provider-administered drugs at a rate lower than what it pays for the same drug to pharmacies that are not 340B entities or engaging in any other discriminatory

¹ See <https://www.hrsa.gov/opa/index.html>

practices against 340B entities including adjustment, network exclusions, or interference with patient choice of pharmacy or provider.

340B entity would mean a **covered entity** and any pharmacy contracted by the entity to deliver pharmacy-related services.

Covered entity would mean that term as defined in 42 USC 256b.²

The bill would also do both of the following:

- Prohibit a carrier or pharmacy benefit manager from requiring a patient to pay a co-pay that is higher than the selling cost of the drug dispensed to him or her.
- Prohibit a carrier or pharmacy benefit manager from excluding or discriminating against a pharmacy solely because the carrier does not have a vested financial interest in the pharmacy, such as being an owner or co-owner, being a shareholder, or having another connection through which it could make or lose money.

Sanctions

Under section 50 of the act, the director of the Department of Insurance and Financial Services (DIFS) can, after notice and hearing, impose various sanctions for a third party administrator's or manager's violation of the act, including monetary fines, suspension or revocation of a certificate authority, and restitution to aggrieved parties, and depending largely on the degree to which the violations were knowing or persistent.³

MCL 550.902 and proposed MCL 550.926 and 550.927

House Bill 4352 would amend the Public Health Code. Currently under the code, if a pharmacist who sells drugs at retail is asked, he or she must provide the current selling price of a drug the pharmacy dispenses or comparative current selling prices of generic and brand name drugs it dispenses. This information must be given before a drug is dispensed. Asking for this information does not oblige a person to buy a drug asked about.

The bill would retain these provisions, but would amend them to allow a pharmacist to provide this information without first being asked. Further, the bill would prohibit a pharmacy or pharmacist from entering into a contract prohibiting the disclosure of this information.

The bill would also amend the comparative selling prices the pharmacist must now disclose upon request (and under the bill could volunteer) to include biosimilar drug products.⁴

² According to the American Hospital Association, covered entities under the federal act “include community health centers, children’s hospitals, hemophilia treatment centers, critical access hospitals (CAHs), sole community hospitals (SCHs), rural referral centers (RRCs), and public and nonprofit disproportionate share hospitals (DSH) that serve low-income and indigent populations.” See <https://www.aha.org/system/files/media/file/2019/04/fact-sheet-340b-0419.pdf>

³ See <http://legislature.mi.gov/doc.aspx?mcl-550-950>

⁴ Provisions regulating these products were added to the Public Health Code by 2018 PA 41. See the HFA analysis here: <https://www.legislature.mi.gov/documents/2017-2018/billanalysis/House/pdf/2017-HLA-4472-C1F5C414.pdf>

Prohibited pharmacy contracts

Finally, the bill would prohibit a pharmacy or pharmacist from entering a contract with a pharmacy benefit manager that does either of the following:

- Violates the provisions of HB 4351 that are described above under the heading “340B entities and carrier prohibitions.”
- Prevents or interferes with a patient’s choice to receive an eligible prescription drug from a 340B entity or a pharmacy when dispensing a **340B drug**.

340B drug would mean a covered drug as that term is defined in 42 USC 256b.

Penalties

Section 16299 of the Public Health Code provides that a person who violates or helps another to violate Article 15 of the code is, with some exceptions, guilty of a misdemeanor punishable by imprisonment for up to 90 days or a fine of up to \$100, or both, for a first offense. For a second or subsequent offense, the person is guilty of a misdemeanor punishable by imprisonment for at least 90 days and up to six months or a fine of at least \$200 and up to \$500, or both.

House Bill 4352 is tie-barred to HB 4351, which means that it could not take effect unless HB 4351 were also enacted.

MCL 333.17757 and proposed MCL 333.17757b

BACKGROUND:

The bills are reintroductions of House Bills 5941 and 5942 of the 2019-20 legislative session. They are respectively identical to the introduced and H-1 substitute versions of the earlier bills.⁵ HBs 5941 and 5942 were considered by the House Health Policy committee and referred to the House Ways and Means committee in September of 2020.

FISCAL IMPACT:

House Bill 4351 would have an indeterminate fiscal impact on the state. Third party administrators or managers violating provisions under the bill would be afforded an opportunity for a hearing before the DIFS director. If the director determines that a violation has occurred, the director could order payment of a monetary penalty as well as suspension or revocation of the third party administrator’s certificate of authority or manager’s license. Revenue from monetary penalties would be remitted to the state treasurer and credited to the general fund. There is no practical way to determine the number of violations that will occur under provisions of the bill, so the estimate for the amount of revenue to the state is indeterminate.

House Bill 4352 would have an indeterminate fiscal impact on the state and on local units of government. Individuals convicted under the bill could be subject to penalties under MCL 333.16299. Currently, under section 16299 of the Public Health Code, unless

⁵ <http://www.legislature.mi.gov/documents/2019-2020/billanalysis/House/pdf/2019-HLA-5941-8A09276B.pdf>

otherwise stated, a person who violates any provision within Article 15 of the act is guilty of a misdemeanor. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction. The fiscal impact on local court systems would depend on how provisions of the bill affected court caseloads and related administrative costs. Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues. Because there is no practical way to determine the number of violations that will occur under provisions of the bill, an estimate of costs to the state or to local units, or revenue for libraries cannot be made.

POSITIONS:

The following entities indicated support for House Bills 4351 and 4352:

- NFIB (3-3-21)
- Michigan Association of Health Plans (3-3-21)
- Economic Alliance for Michigan (3-10-21)
- Grand Rapids Chamber of Commerce (3-10-21)
- Michigan Manufacturers Association (3-10-21)
- Michigan Health & Hospital Association (3-3-21 and 3-10-21)

The following entities indicated support for House Bill 4351:

- National Multiple Sclerosis Society (3-3-21)
- Trinity Health (3-10-21)
- Henry Ford Health System (3-10-21)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.