

State Efforts to Rein in High Drug Prices in the 2019 Session

High drug prices harm families by forcing them to make impossible choices between health, livelihood, and well-being. Nearly one in three adults have not taken a medicine as prescribed due to its costs.¹

The U.S. pays twice as much for prescription drugs as economically comparable countries.² High and rising prescription drug prices are made possible by abuses to patent and government-granted monopolies that limit competition and leave prices to be set by drugmakers.

In 2019, the U.S. Congress has begun to explore a number of options to take on the underlying problems that cause high drug prices, but progress toward enacting reforms is slow. Although federal government intervention is essential for long-term, comprehensive reform to high drug prices, states have the power to lower drug prices for consumers now, setting a precedent for federal action.

The 2019 legislative session saw statehouses consider a wide range of proposals worth highlighting and approaches that can allow states to leverage their market power, improve transparency around drug pricing practices, and build energy for bigger reforms and actions to rein in high drug prices.

Leveraging State Market Power

Establishing a Prescription Drug Affordability Board

In 2019, 14 states³ proposed the creation of an independent board (or review board or commission) to consider price increases for prescription drugs and explore options to lower costs in the state. Modeled after common approaches to regulated public utility boards in many states, the affordability board would have the ability to collect information on prescription drugs that meet price, cost, or need thresholds, and then determine the appropriate upper payment limit for the medicine when purchased in the state.

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In 2019, two versions of the affordability board became law in Maryland and Maine. Though neither law fully implements an upper payment limit for prescriptions sold in the state, the laws do establish independent boards and other approaches to rein in prescription drug spending. Both boards are designed to help government payers start to rein in spending.

- » Maryland — [HB 768](#) — This law establishes the Prescription Drug Affordability Board in Maryland and requires it to collect data, identify prescription drugs that may cause affordability challenges for the state or individuals, and examine problems arising from high-cost drugs in the state. The board will have the authority to make prescription drugs more affordable for state and local government entities, and will be required to present a plan to the state Legislature on how to make drugs more affordable for all Marylanders. Upper payment limits can be an approach explored by the board for state and local government entities. (The original legislation would have granted the board the ability to set upper payment limits for all purchasers in the state.)
- » Maine — [LD 1499](#) — The Maine Legislature passed An Act to Establish the Maine Prescription Drug Affordability Board. This law establishes a board that will use prescription drug spending data to develop plans to help lower costs for public payers, including any division of state, municipal, or county government that administers a health plan. The board will create annual spending targets for a public payer's total prescription drug spending

and spending targets for specific drugs that cause affordability challenges for enrollees in a public payer's health plan. In addition, the board will make recommendations for strategies to help payers meet spending targets, which could include setting upper payment limits as suggested in the model law. Maine's law also establishes an advisory council, made up of representatives for government agencies, which will advise the board on spending targets.

State Agency Collaboration on Prescription Drug Purchases

Some states are considering options to procure prescription drugs by pooling tools across state-level agencies. These approaches have the potential to find state-level savings by lowering costs for prescriptions purchased by public payers and government systems. Depending on the design for these systems, savings could spill over into the private sector as well. In 2019, two states took the first steps toward collaboration among state agencies to rein in prescription drug spending.

- » New Mexico — [SB 131](#) — The law establishes the Interagency Pharmaceuticals Purchasing Council, tasked with reviewing and coordinating cost containment and consolidated pharmaceutical or pharmacy benefit purchasing among state agencies and departments, with an option for local, county, or municipal governments to opt in. The council will review strategies that could work best for the state of New Mexico, including those that could contain costs in the private sector, and will recommend approaches to state agencies and the Legislature.

- » Delaware — [HCR 35](#) — The law establishes the Interagency Pharmaceuticals Purchasing Study Group with the purpose of studying options for bulk purchase of prescription drugs for the state. The study group will be tasked with researching and evaluating opportunities for bulk purchasing on behalf of state agencies, and will make recommendations about the nature of purchasing agreements and necessary regulatory changes that fit Delaware’s needs.
- » California — Gov. Gavin Newsom announced [via an executive order](#) earlier this year that the state would begin pooling purchases to take on high drug prices. As [a first step](#), the California Department of Health Care Services will begin accepting proposals to move the Medi-Cal pharmacy services from its contracted managed care plans to a directly negotiated system.⁴
- » Texas passed a transparency bill — [HB 2536](#) — that builds on efforts in previous years in Oregon⁵ and California⁶ to collect information about drugmakers’ pricing practices. Drugmakers will have to report to the Texas Department of Insurance pricing information about any prescription drug that has a list price of at least \$100 for a 30-day supply and price increases of 40% over three years or 15% in the previous calendar year. The report includes basic information about the nature of the drug, underlying research and development costs, and a statement delineating the factors that caused the increase in list price and an explanation of the role of each factor’s impact on the cost. The bill also requires that pharmacy benefit managers report aggregate information on the rebates attained from drug manufacturers, as well as information about whether those rebates were passed through to insurers and beneficiaries or retained by the pharmacy benefit manager for revenue.

Improving Transparency

The high prices charged for prescriptions are determined based on a number of hidden factors and proprietary sales agreements for which consumers, providers, and policymakers have had very little visibility. In recent years, states have passed legislation that would require manufacturers and others report more information about prescription drug prices are set, including justifications for price increases, information about underlying factors contributing to high prices, and information from payers and pharmacy benefit managers. This information is designed to help payers both public and private understand the landscape of drug price increases, negotiate price concessions, and develop plans to handle the financial impact of planned increases. State lawmakers could use this information to develop targeted policy approaches that will help rein in high prices in the future.

Advancing the Political Conversation

Some policies advanced at the state level solve individual issues, build momentum for larger-scale reforms to rein in high drug prices, or create new precedents for action against high prices in general. In 2019, a number of states were successful in taking action toward the long-term goal of reining in high drug costs.

Punishing Anti-competitive Pay for Delay Deals

Although states are generally not able to intervene on the patent issues that allow for drug monopolies and pricing increases to continue unchecked, California's Legislature is on the cusp of advancing legislation that would help bring more actions for the state when drugmakers engage in certain anti-competitive behaviors that keep prices high for longer.

Generic drugmakers apply for approval of their products from the U.S. Food and Drug Administration based on the brand name drug that ultimately will compete with their product. When this happens, brand name companies will sometimes pay a generic drugmaker to delay entering the prescription drug market. After arrangements are made, brand name companies continue to sell their product without any competition even after an alternative is ready to enter the market. These deals, called "pay for delay," drive prices higher and limit consumer choices, despite the potential for a lower-priced generic to be available.

In California, state lawmakers have advanced first-of-its-kind legislation to prevent these deals. Earlier this year, [AB 824](#)⁷ passed the California Judiciary Committee on a bipartisan basis. The bill would allow the attorney general to take legal action in California and leverage fines on drugmakers that engage in "pay for delay" deals.

Prescription Drug Importation

Importing prescription drugs from Canada has become a popular proposal among statehouses. The approach is politically appealing because it is easy to understand and can raise awareness around the issue of unaffordable drug costs. In most cases, states would establish a state-run wholesaler that purchases prescription drugs from Canadian wholesalers and builds in a distribution process for pharmacies in the state.

However, there are a few prevailing concerns about how well importation will solve the problem of high prescription drug prices. You can find more information about these concerns in our guide, "State Models for Addressing High and Rising Drug Prices."⁸ These concerns include:

- » There is no guarantee that savings on imported drugs would be passed on to consumers.
- » Importation could drive up Canada's prices.
- » A state cannot import medicines without federal approval, which has never been granted.
- » States may not have the resources to set up an importation infrastructure.

In 2019, a number of states advanced prescription drug importation legislation.

- » Colorado — [SB 19-005](#)⁹ — In Colorado, the law requires the Department of Health Care Policy and Financing to submit a proposal to the federal government to approve a wholesale importation program managed by a designated office or division of the Department of Health Care Policy and Financing. The division or office would be able to sell to commercial plans, licensed Colorado pharmacists or wholesalers, Medicaid pharmacies, or pharmacists and wholesalers under contract with the Department of Corrections.
- » Florida — [HB 19](#)¹⁰ — Importation legislation in Florida authorizes state agencies to seek the approval of the federal government to establish a program to import drugs from Canada or other countries. The Florida legislation is written in such a way that would allow importation from countries beyond Canada in the case that the federal government expands eligibility to those countries for importation.
- » Maine — [LD 1272](#)¹¹ — Maine created a wholesale prescription drug importation program with very similar legislative requirements to that of Colorado, and established a mandate to seek federal certification and approval to import prescription drugs from Canada.

Controlling Out-of-Pocket Costs

Capping out-of-pocket costs for beneficiaries can be a way to realize immediate savings for consumers who see high and rising out-of-pocket expenses for prescription drugs. However, these policies can also shift the costs for high-priced medicine to insurance plans and, by extension, monthly premiums paid by consumers.

Colorado lawmakers weighed the pros and cons of capping out-of-pocket spending on insulin products. One in four patients who need lifesaving insulin have rationed their supply because it was not possible to afford it.¹² Colorado passed a cap to restrict cost-sharing for insulin to \$100 per 30-day supply for insured residents whose plans are subject to state regulation.¹³ Insulin access advocates note that this proposal does not go far enough to rein in insulin costs, calling it a “foundation to build upon.”¹⁴

Regulating Pharmacy Benefit Managers

Pharmacy benefit managers (PBMs) are companies hired by health plans to negotiate drug prices, build formularies, and pay pharmacy claims. Plans expect PBMs to drive down drug prices, but their practices can also inflate costs. States can require PBMs to register with state authorities in order to enforce reforms on business practices.

In the 2019 session, state legislatures introduced 119 measures¹⁵ to gain valuable insight into PBMs' business practices to ensure consumers have the ability to know and act on information about drug prices or retain discounts for consumers' benefit. Here are some of the states that passed major changes in PBM laws in 2019.

- » Alabama — [SB 73](#)¹⁶ — The state's PBM law prevents PBMs from penalizing pharmacists for disclosing information to consumers about the lower cost, clinically comparable alternatives to covered drugs, contract terms often referred to as a "gag clause." In 2018, the federal government passed similar legislation,¹⁷ but Alabama goes a step further by preventing PBMs from penalizing pharmacists for actually selling lower-cost alternatives to consumers.
- » Minnesota passed a [similar bill](#)¹⁸ to Alabama in 2019, which additionally requires PBMs to register with the Department of Commerce and imposes cost-sharing limits at the point of sale for beneficiaries.
- » Maine — [LD 1504](#)¹⁹ — Maine's new PBM law goes one step further by requiring PBMs to have a fiduciary duty to insurance carrier clients, and for any compensation remitted from a manufacturer to be applied to lower premium costs or passed through directly to consumers.

State Legislatures Are Just Getting Started

Statehouses in nearly every state introduced legislation to take on high drug prices on behalf of consumers, and many of those proposals made it across the finish line. Future sessions may see tougher legislation that will pass savings on to consumers, improve transparency in the system, utilize the market power of a state to lower drug prices, and leverage legal mechanisms to push back against abusive practices. While states continue to innovate in this space, pressure continues to mount for the federal government to take actions that can help lower drug prices for all families in America.²⁰

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Endnotes

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- ⁵ HB 4005, Sess. of 2018 (Ore. 2018), available online at <https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/HB4005>.
- ⁶ SB 17, Sess. of 2017-2018 (Calif. 2018), available online at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB17.
- ⁷ AB 824, Sess. of 2019-2020 (Calif. 2019), available online at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB824.
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- ¹⁰ HB 19, Sess. of 2019 (Fla. 2019), available online at <https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0019er.docx&DocumentType=Bill&BillNumber=0019&Session=2019>.
- ¹¹ LD 1272, Sess. of 2019 (Maine 2019), available online at <http://legislature.maine.gov/bills/getPDF.asp?paper=SP0392&item=3&snum=129>.
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