

Amendments to House Bill 692 – Drugs and Devices – Electronic Prescriptions-
Controlled Dangerous Substances (First Reading Bill)

Background and Rationale for Amendments

This bill would mandate electronic prescription of controlled substances (EPCS) despite antitrust charges recently filed by the Federal Trade Commission (FTC) against Surescripts, the principal proponent of the bill, and the absence of proof there is an urgent need in Maryland for EPCS. According to the FTC’s Complaint, for the last decade Surescripts has monopolized electronic prescription services and actively used its monopoly power to inhibit potential competitors while imposing monopoly prices on its customers.

https://www.ftc.gov/system/files/documents/cases/surescripts_redacted_complaint_4-24-19.pdf

The Office of the Attorney General (the Office) is concerned that mandating EPCS at this time would promote Surescripts' anticompetitive conduct. We believe the consequences of mandating EPCS cannot be understood or predicted reliably while the FTC “is [still] seeking to undo and prevent Surescripts’s unfair methods of competition, restore competition, and provide monetary redress to consumers” through its pending antitrust litigation.

<https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription>

The scale of harm resulting from the monopoly is described in a related class action lawsuit filed by customers against Surescripts and alleged co-conspirators on October 25, 2019: “Due to Defendants’ ongoing conduct, there is no meaningful competition in the markets for routing or eligibility. The decade-long monopolies in these markets have produced predictable effects: higher prices, reduced quality, stifled innovation, suppressed output, and stymied alternative business models. Pharmacies, like Plaintiff here, typically pay at least *17 cents* per routing transaction under Surescripts’ monopolistic regime. Surescripts has admitted that competitive prices in the routing market would be between *1 and 3 cents* a transaction. Using Surescripts’ own numbers, revealed by the Federal Trade Commission investigation, Plaintiffs have paid, and continue to pay, routing prices that are inflated by *at least 566-1700%* due to Defendants’ anticompetitive conduct.” <https://www.courthousenews.com/wp-content/uploads/2019/10/Pharma-Antitrust.pdf> (paragraph 8 of the Complaint)

According to the FTC’s antitrust investigation, Surescripts used contracts with pharmacy benefit managers (PBMs), licensed pharmacies, licensed pharmacists and electronic health record (EHR) vendors, to eliminate competitors, avoid quality improvements, and drive up prices.

Surescripts is owned by the National Association of Chain Drug Stores (NACDS), the National Community Pharmacists Association (NCPA), Express Scripts and CVS Health, owner of CVS Caremark. The membership of NACDS includes chain pharmacies; independent pharmacies

belong to NCPA; and Express Scripts and CVS Caremark are PBMs that contract with numerous health benefit plans and carriers to provide prescription drug benefits to enrollees in Maryland, including state employees.

Surescripts contends Maryland law should mandate EPCS before January 1, 2021. As of that date, Medicare Part D will not reimburse for CDS prescriptions unless they are e-prescribed using new security standards adopted in 21 CFR 1306.08 and 21 CFR 1311. However, the federal antitrust litigation against Surescripts is not guaranteed to be resolved by January 1, 2021, and pending that resolution, there is uncertainty as to whether or not adopting the new standards “shall be consistent with the objectives of improving (i) patient safety; (ii) the quality of care provided to patients; and (iii) efficiencies, including cost savings, in the delivery of care,” as required by 42 U.S.C. §1395w-104(e)(2)-(3)(B)(the statutory authority in part for the new standards), which are also objectives of Maryland’s health care policies and laws.

Assuming the federal regulations go into effect, they will apply in Maryland whether or not Maryland enacts mandatory EPCS effective January 1, 2021. We see no reason to extend the federal regulations' reach beyond the Medicare program until concerns about inflated, monopolistic pricing are addressed and potentially remedied by the FTC's antitrust litigation, which is why we propose amendments related to the FTC's allegations.

We also propose amendments that seek to preserve consumer choice and portability which current technology cannot support, according to Surescripts. Having a paper prescription allows consumers to price shop without the complications caused by current EPCS technology which fills the prescription upon receipt and simultaneously bills carriers. If the consumer chooses not to purchase because the price is lower at a second pharmacy, there cannot be electronic transfer to a second pharmacy or reversal of the claim without cancellation of the prescription. The consumer (in need of pain medication) would have to start all over again with the prescriber (who may not be readily available) in order to have a new EPCS sent to the second pharmacy. Similar problems occur if the pharmacy does not have the pain medication in stock, a frequent complaint of chronic pain patients.

The bill is silent about protecting consumers from problems that may interfere with portability, access and price shopping for prescribed controlled substances. The amendments expressly preserve the consumer’s right to a written prescription until Surescripts or a competitor provides consumers with the ability to have a prescription forwarded to a pharmacy of the consumer’s choosing.

Amendment #1

On page 3, in line 12, after “FILE”, delete “; AND”, and delete lines 13 through 15

Amendment #2

On page 6, in line 28, after “ELECTRONICALLY”, insert “IF: (I) THE HEALTH PRACTITIONER HAS ADVISED THE PATIENT THEY MAY REQUEST A WRITTEN PRESCRIPTION; (II) THE PATIENT

EXPRESSLY DECLINES A WRITTEN PRESCRIPTION; (III) THE PRICE IS COMPETITIVE AS DETERMINED BY THE MARYLAND HEALTH CARE COMMISSION; AND (IV) THE ELECTRONIC PRESCRIPTION MAY BE TRANSFERRED FROM THE DESIGNATED PHARMACY TO ANOTHER PHARMACY, WITHOUT DELAY OR COST, AT THE PATIENT’S REQUEST”

Amendment #3

On page 6, in line 28, after “SUBSTANCE”, delete “ONLY” and in line 29, after “(I)”, insert “THE PATIENT REQUESTS A WRITTEN PRESCRIPTION” and renumber subsequent subparts

Amendment #4

On page 11, in line 23, after “That”, insert “THE MARYLAND INSURANCE ADMINISTRATION, THE MARYLAND HEALTH CARE COMMISSION, THE MARYLAND BOARD OF PHARMACY AND THE MARYLAND OFFICE OF THE ATTORNEY GENERAL SHALL CONVENE A WORKGROUP TO EVALUATE THE ADEQUACY OF CONSUMER AND MARKETPLACE PROTECTIONS FOR ELECTRONIC PRESCRIPTION SERVICES IN MARYLAND AND TO MAKE RECOMMENDATIONS, IF APPROPRIATE, TO STRENGTHEN STATUTORY AND REGULATORY PROTECTIONS.

SECTION 3. AND BE IT FURTHER ENACTED, THAT THIS ACT SHALL TAKE EFFECT JANUARY 1, 2023, CONTINGENT UPON THE MARYLAND HEALTH CARE COMMISSION’S DETERMINATION THAT PRICES FOR EPCS SERVICES ARE COMPETITIVE AND THAT THE MARKET IS COMPETITIVE. SECTION 2 OF THIS ACT SHALL REMAIN EFFECTIVE THROUGH JUNE 30, 2025. SECTION 2 OF THIS ACT, WITH NO FURTHER ACTION REQUIRED BY THE GENERAL ASSEMBLY, SHALL BE ABROGATED AND OF NO FURTHER FORCE AND EFFECT.”