

ELECTRONIC TRANSMISSION OF PRESCRIPTIONS

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Senate Bill 248 (H-2) as reported from House committee
Sponsor: Sen. Ruth Johnson

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

Senate Bill 254 (H-1) as reported from House committee
Sponsor: Sen. Dale W. Zorn

1st House Committee: Health Policy
2nd House Committee: Ways and Means
Senate Committee: Health Policy and Human Services
Complete to 6-7-20

BRIEF SUMMARY: Senate Bills 248 and 254 would amend Parts 73, 161, and 177 of the Public Health Code. Largely, the bills function as companion bills to HB 4217,¹ which was passed by the House in December 2019. (See **Background Information**, below.) The H-4 substitute for HB 4217 is virtually identical to the combined H-1 substitutes for SBs 248 and 254. The exception—section 17554a, created by HB 4217—is referenced throughout the SBs 248 and 254 and would change a provision that currently allows a prescription to be transmitted electronically, as long as it complies with certain requirements, to require a prescriber or his or her agent to transmit the prescription electronically under those circumstances, beginning January 1, 2021. Additionally, SB 248 includes technical amendments to the Public Health Code to resolve issues concerning the registration and licensure of acupuncturists.

FISCAL IMPACT: Senate Bills 248 and 254, jointly examined, would have an indeterminate fiscal impact on the Department of Licensing and Regulatory Affairs (LARA). Senate Bill 248 would allow the imposition of a \$250 fine for violations related to the electronic transmission of prescriptions. Revenue from the fines would depend on the volume of violations and is presently indeterminate, though LARA indicated that any fine revenue would be deposited to the Health Professions Regulatory Fund. LARA would have expanded administrative responsibilities under the bills, including processing prescriber waivers and investigating whether grounds for disciplinary action exist with respect to the contents of the bills. Existing departmental resources would likely be sufficient to absorb these costs and activities. The bills would not affect any other unit of state or local government.

THE APPARENT PROBLEM:

In response to the recent opioid crisis, various measures have been proposed to reduce the likelihood of fraudulent prescriptions; the electronic prescribing of controlled substances, or EPCS, as an alternative to paper prescriptions, is one of those options. According to

¹ House Fiscal Agency analysis of HB 4217. <http://www.legislature.mi.gov/documents/2019-2020/billanalysis/House/pdf/2019-HLA-4217-69FDF088.pdf>

committee testimony for HB 4217, 97% of Michigan pharmacies already accept e-prescriptions, with the remaining 3% mostly in hospital and other non-retail environments.

The federal SUPPORT for Patients and Communities Act,² which was signed into law in October 2018, mandated the use of EPCS for all controlled substances under Medicaid Part D by January 1, 2021. This move toward electronic prescribing has driven an increase in legislation on that subject at the statewide level. Reportedly, at least four states³ have mandates currently in effect, while another 18 states⁴ have laws requiring e-prescribing for at least certain controlled substances scheduled to take effect between 2019 and 2023.

THE CONTENT OF THE BILLS:

Senate Bill 248 would require a pharmacist to consider, among other factors in determining whether dispensing of a controlled substance is lawful and conducted in good faith, the receipt of a prescription on a prescription form after the requirement to transmit a prescription electronically took effect. Following that consideration and determination, both dispensing of a schedule 2 to 5 controlled substance that was transmitted on a prescription form and electronically transmitted would be considered to be in good faith. (Additionally, as now, a practitioner could in good faith dispense a schedule 3 to 5 controlled substance upon receipt of a practitioner's oral prescription.)

Violation and penalty

Under the bill, if a prescriber failed to electronically transmit a prescription (unless granted a waiver), a disciplinary subcommittee would impose a fine of \$250 for each violation.

Acupuncturists

2019 PA 140 amended the Public Health Code to remove provisions regarding the registration of acupuncturists and instead provide for their licensure.⁵ That amendatory act provided that its licensure provisions would not take effect until rules were promulgated to implement them, yet it also immediately removed from the law many provisions governing registration, leaving a gap in the transition from one regulatory framework to the other.

SB 248 would restore, until the rules providing for licensure have been promulgated, provisions that allow for and govern the registration of acupuncturists.

The bill is tie-barred to SB 254 and HB 4217, which means it could not take effect unless those bills were also enacted.

MCL 333.7333 et seq.

² Public Law 115-271, <https://www.congress.gov/bill/115th-congress/house-bill/6/text>

³ Minnesota (2011), New York (2016), Maine (2017), Connecticut (2018). <https://mdtoolbox.com/eprescribe-map.aspx?AspxAutoDetectCookieSupport=1>

⁴ Arizona, Arkansas, California, Colorado, Indiana, Iowa, Kansas, Kentucky, Massachusetts, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Washington, Wyoming.

⁵ See <https://www.legislature.mi.gov/documents/2019-2020/billanalysis/House/pdf/2019-HLA-4710-AAF6505B.pdf>

Senate Bill 254 would add violation of the new requirement to transmit a prescription electronically unless an exception applied to the list of grounds for disciplinary subcommittee action. If LARA had a reasonable basis to believe that a violation occurred, it would not be required to investigate, but could issue a letter notifying the licensee of the violation. The letter would not be considered discipline.

The bill would take effect 90 days after its enactment. It is tie-barred to SB 248, which means it could not take effect unless SB 248 were also enacted.

MCL 333.16221 and 333.16221b

BACKGROUND INFORMATION:

House Bill 4217 would require a *prescriber*⁶ (or agent of the prescriber) to transmit prescriptions, including prescriptions for controlled substances, electronically to the patient's pharmacy, beginning January 1, 2021. Currently, the Public Health Code allows electronic transmission. The prescription, including one for a controlled substance, would have to be transmitted directly to the patient's chosen pharmacy.

Exceptions

However, the requirement to transmit the prescription would not apply under any of the following circumstances:

- The prescription is issued by a licensed veterinarian.
- Electronic transmission is unavailable due to a temporary technological or electrical failure.
- The prescriber has received a waiver from the Department of Licensing and Regulatory Affairs (LARA) based on an inability to electronically transmit prescriptions due to a technical limitation beyond his or her control or other exceptional circumstance. (A prescriber would have to notify LARA if the inability ceased to exist. A waiver would be valid for up to one year and would be renewable).
- The prescriber reasonably believes that electronically transmitting the prescription would make it impractical for the patient to obtain the prescription drug in a timely manner and that the delay would adversely affect the patient's medical condition.
- The prescription for a schedule 2 through 5 controlled substance is dispensed orally due to a specified emergency situation.
- The prescription is dispensed outside of Michigan.
- The prescription is dispensed in Michigan but the prescriber is located out of state.
- The prescription is issued and dispensed in the same health care facility and the patient would use the prescription exclusively in that facility, including a hospital, dialysis

⁶ *Prescriber* is defined in section 17708 of the Public Health Code as a licensed dentist, a licensed doctor of medicine, a licensed doctor of osteopathic medicine and surgery, a licensed doctor of podiatric medicine and surgery, a licensed optometrist certified under Part 174 to administer and prescribe therapeutic pharmaceutical agents, a licensed veterinarian, or another licensed health professional acting under the delegation and using, recording, or otherwise indicating the name of the delegating licensed doctor of medicine or licensed doctor of osteopathic medicine and surgery.

treatment clinic, freestanding surgical outpatient facility, skilled nursing facility, or long-term care facility providing certain nursing care.

- The prescription is issued for a hospice patient and used exclusively while under the care of the hospice.
- The prescription contains content not supported by the National Council for Prescription Drug Programs' prescriber/pharmacist script standard.
- The prescription is for a drug for which the FDA requires content that cannot be transmitted electronically.
- The prescription is issued under circumstances in which the prescriber is not required to include the name of the patient on the prescription.
- The prescription is prescribed under a research protocol.
- The patient is the subject of the prescription on a voluntary, unpaid basis for which neither the patient nor a third party will be charged or billed.

Rule promulgation

The bill would require LARA, in consultation with the Michigan Board of Pharmacy, to promulgate rules to implement these requirements by July 1, 2020.

Delay of requirement

If the federal Centers for Medicare & Medicaid Services delayed the Medicare requirement for electronic transmission of controlled substance prescriptions beyond January 1, 2021, LARA could, by rule, delay the implementation date to a date that did not exceed the implementation date of the Medicare requirement.

ARGUMENTS:

For:

In testimony supporting HB 4217, supporters advanced e-prescribing as a safer, more efficient, more convenient way of transmitting prescriptions. Additionally, without the requirement that patients receive, retain, and deliver a paper copy of the prescription, proponents argue that patient adherence would be higher, with fewer abandoned prescriptions. E-prescriptions would also eliminate the difficulty of reading medical terms in indecipherable handwriting, which, in turn, would drive down health care costs.

Against:

Opponents of HB 4217 supported the goal of aligning state and federal requirements, but expressed reservations about the cost for universal adoption of electronic health records. The internet is not as widely available in rural areas, they argued, and mandatory e-prescribing may present a hardship. Additionally, they noted that there is not complete adoption of two-factor authentication, or two-step verification, which they cited as a key safeguard. In two-factor authentication, the prescriber must input one set of identifying features (such as email and password) and is then prompted to input another set on another device (for instance, via a one-time-use password sent to the prescriber's cell phone). This step is intended to prevent fraud.

POSITIONS:

The following entities indicated support for the bills:

Blue Cross Blue Shield of Michigan (5-27-20)
Michigan Association of Health Plans (3-5-20)
Michigan Pharmacists Association (3-5-20)
Michigan Retailers Association (5-27-20)
National Association of Chain Drug Stores (5-27-20)
CVS/Aetna (3-5-20)
Walmart (3-5-20)
Michigan Academy of Physician Assistants (3-5-20)

The following entities indicated opposition to the bills:

Michigan State Medical Society (3-5-20)
Michigan Academy of Family Physicians (3-5-20)
Michigan Psychiatric Society (5-27-20)

The Michigan College of Emergency Physicians indicated opposition to the H-1 substitute for SB 248. (3-5-20)

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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.