



Janet T. Mills
GOVERNOR

STATE OF MAINE
OFFICE OF THE GOVERNOR
1 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0001

June 29, 2021

The 130th Legislature of the State of Maine
State House
Augusta, Maine

Dear Honorable Members of the 130th Legislature:

By the authority conferred by Article IV, Part Third, Section 2 of the Constitution of the State of Maine, I am hereby vetoing LD 1117, *An Act To Prevent Excessive Prices for Prescription Drugs*.

The high price of prescription drugs is an enormous problem for consumers in the State of Maine and nationally. It is unconscionable that lifesaving medications are often unavailable or difficult to access due to their cost. I have worked hard as Governor to expand health coverage to more Maine citizens – through MaineCare expansion, development of the State-based Marketplace for individual coverage, and reforms to make coverage more affordable for small businesses – thus increasing insurance coverage for prescription drugs. In my first year in office I restored the Maine Low-Cost Drugs for the Elderly and Disabled Program to cover an additional 1,800 Maine seniors. Additionally, I have supported a number of bills that shine a light on pricing practices of pharmaceutical companies so that the public and purchasers are more aware of drug pricing, as well as a bill to create the Prescription Drug Affordability Board, and bills to better regulate pharmacy benefit managers.

This bill is one five bills that comprised the *Making Health Care Work for Maine* package. Of these five, I was pleased to sign two into law (LDs 673 and 686), while a third, LD 120, which I support, is on the Special Appropriations Table. On LD 1117, which received a divided report in the Health Coverage, Insurance and Financial Services Committee, I was prepared to support the Amendment advanced by the Committee Chairs. I remain committed to working with the Legislature to address these important issues in a way that will ultimately be legal and, as a result, will allow us to make real and meaningful change for the people we represent, a goal I know we all share.

I commend the sponsor and supporters of LD 1117 for bringing further attention to the high price of prescription medications. Unfortunately, I believe this bill, along with LD 675, would not survive Constitutional scrutiny, would invite costly and protracted litigation, and, even if unexpectedly upheld in court, would not have the intended effect of significantly lowering the price of medication for Maine citizens.



PRINTED ON RECYCLED PAPER

The laudable goal of LD 1117 is to prohibit excessive price increases of generic or off-patent prescription drugs, a goal I wholeheartedly share. Under this legislation, a price increase of such drugs would be deemed excessive when, adjusted for inflation using the Consumer Price Index, the increase exceeds 20 percent of the wholesale acquisition cost per pricing unit of the preceding calendar year, so long as the cost of the drug is at least \$10 per pricing unit. As structured, the bill would require the Maine Health Data Organization to notify the Attorney General of any such price increases. The Attorney General could then seek an order from the Superior Court to compel the production of records to restrain or enjoin a violation, to restore money to consumers, to assess civil penalties of up to \$30,000 per day, and provide for any other relief.

This bill, with its complex structure, appears to be crafted in an attempt to avoid the Constitutional flaws that resulted in a similar law being invalidated in Maryland. When Maryland passed a law (H.B. 631) prohibiting manufacturers and wholesale distributors from price gouging – defined as an unconscionable increase in price of generic or off-patent prescription drugs – the statute was successfully challenged as a violation of the Commerce Clause of the U.S. Constitution.¹ The problem with the Maryland law and LD 1117 is that both attempt to regulate transactions that occur outside of the states' borders.²

Furthermore, the Maryland law, like LD 1117, applied only to medications available for sale in the state. Ultimately, however, the out-of-state manufacturers are liable for the price increase, based on the terms of these dealings with out-of-state wholesalers. It was this attempt at extra-territorial regulation that the Fourth Circuit Court of Appeals found to be a Commerce Clause violation. The Court specifically held that the law could not be applied to situations in which both parties to a transaction are located out of state.³ LD 1117 is fundamentally structured in the same way, and, as a result, would likely meet the same end in court and Maine people would shoulder the costs of the legal challenge. Even if this bill were ultimately upheld in court, it focuses only on off-patent generic drugs, which are much less expensive than their brand-name counterparts, this bill would do little to lower costs for those it purports to serve.

I believe it is critical that the Federal government pass legislation to address the national concern of drug pricing and that the Federal government is best positioned to help our citizens achieve benefit from real and lasting drug pricing reforms. In particular, the federal government could use its purchasing power through the Medicare program, to negotiate prices of medications on behalf of seniors, for instance.

¹ *Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664, (4th Cir. 2018), cert. denied, 139 S. Ct. 1168 (2019).

² The Maryland law was also challenged on the grounds that its definition of price gouging was unconstitutionally vague. On this issue, LD 1117's specific but complex process for determining what constitutes an excessive price increase would likely make the bill more defensible. The court never reached the vagueness issue in its review of the Maryland law, resolving the case instead on basis of the Commerce Clause violation, which is also the fundamental problem that remains with LD 1117.

³ *Ass'n for Accessible Meds. v. Frosh*, 887 F.3d at 671.



PRINTED ON RECYCLED PAPER

Whether as District Attorney, Attorney General, or as Governor, I have never shied away from a legal battle that I knew was right and that would benefit the people of Maine. This is not such an occasion. The risks associated with this legislation are high, and the potential reward is low. In the meantime, for the reasons set forth above, I return LD 1117 unsigned and vetoed and urge the Legislature to sustain this action.

Sincerely,



Janet T. Mills
Governor



PRINTED ON RECYCLED PAPER