

Letter: Congress should repeal 'safe harbor' provision

By William Barnett and Phil Zweig

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As chairman of the powerful House Energy and Commerce Committee, Congressman Greg Walden is caught between the ER and the morgue as he ponders how to repeal or replace Obamacare without denying coverage to constituents and losing his seat in 2018.

Fortunately, there is a painless way to the recovery room for patients, practitioners, taxpayers and Walden alike: repealing an obscure, ill-conceived 1987 statute called the Medicare anti-kickback "safe harbor" provision, which exempts health care group purchasing organizations from criminal prosecution for taking kickbacks from suppliers. Never heard of GPOs or the "safe harbor?" You're not alone.

Four of these secretive outfits — Vizient, Premier, HealthTrust and Intaler — control purchasing of more than \$300 billion annually of drugs, devices and supplies for 5,000 health systems, and thousands more non-acute care facilities. Supplies constitute the second largest health care expenditure after labor costs.

GPOs were founded in 1910 when several New York hospitals banded together to save money by buying in bulk. Members paid dues to cover administrative costs. This co-op model worked fine until hospital lobbyists sold Congress on the fiction that GPOs could save more money — their sole purpose — if vendors paid "admin" fees instead.

Consequently, the safe harbor became a pirate cove. After the feds issued the safe harbor rules in 1991, GPOs morphed into a "pay-to-play" scheme that undermined competition and innovation. Empirical studies and anecdotal evidence show that instead of saving money, GPOs have inflated annual health care costs by upwards of \$100 billion. The reason: GPO "fees" — aka "legalized" kickbacks — are calculated as a percentage of total volume, so higher prices mean more revenue for GPOs. Court documents show that these "fees" have sometimes exceeded 50 percent of a company's revenue for a given product, including drugs.

In effect, buying cartels sell market share to the highest bidder, mostly dominant suppliers, denying small manufacturers of better, cheaper and safer devices access to member facilities. Their well-documented anticompetitive contracting and pricing practices, self-dealing and kickbacks have also slashed the number of domestic makers of many generic prescription drugs to a handful or even none at all, causing artificial shortages and skyrocketing prices of hundreds of lifesaving generics. Absurdly, that's why the U. S. imports sterile saline (aka salt water) from Spain, Norway and Germany and chemotherapy agents from unsanitary Chinese plants. Competition lowers prices. Cartels raise them.

In 2005, former Sens. Herb Kohl (D-WI) and Mike DeWine (R-OH), who presided over four Senate Antitrust Subcommittee hearings on GPO abuses, drafted a bill that would have repealed the safe harbor. But it died because of the vehement opposition of the GPO lobby, including the Healthcare Supply Chain Association, the American Hospital Association, and the Service Employees International Union — and their primary congressional patron, Sen. Chuck Schumer (D-NY).

Walden is also pushing a bill that proposes to increase generic drug competition and lower costs by requiring the Food and Drug Administration to prioritize applications for generics in short supply or for which there is little competition. This bill is superfluous because the FDA has been doing that for years, and it doesn't address the underlying cause. Although the measure blames the agency's applications backlog for inadequate competition, a March 2016 analysis by the Center for American Progress, a respected Washington, D. C. think tank, found that there were actually very few applications for these drugs. Drug makers have halted production of them because they're unprofitable. The GPO middlemen make all the money.

The only beneficiaries of this perverse system are well-heeled lobbyists, GPO and hospital executives, certain members of Congress, and academicians-for-hire who produce bogus "sponsored research" claiming that their clients save billions.

To be sure, the Affordable Care Act has serious flaws, notably its failure to provide for cost control. Repeal the safe harbor and American health care could become great again.

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