

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: CS/CS/SB 1192

INTRODUCER: Appropriations Committee (Recommended by Appropriations Subcommittee on Health and Human Services); Health Policy Committee; and Senators Bean, Baxley, and Rouson

SUBJECT: Electronic Prescribing

DATE: April 19, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rossitto-Van Winkle	Brown	HP	Fav/CS
2.	Loe	Kidd	AHS	Recommend: Fav/CS
3.	Loe	Kynoch	AP	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1192 requires a prescription that is electronically generated and transmitted to contain an electronic signature from the prescribing practitioner, and requires such practitioner to, under specified conditions except in certain circumstances, exclusively transmit prescriptions electronically for medicinal drugs upon license renewal or by July 1, 2021, whichever is earlier.

The bill has no impact on state revenues or state expenditures.

The bill provides an effective date of January 1, 2020.

II. Present Situation:

Federal Regulation on Electronic Prescribing

The federal Drug Enforcement Administration (DEA) implements the Comprehensive Drug Abuse Prevention and Control Act of 1970, often referred to as the Controlled Substances Act (CSA).¹ The DEA publishes the implementing regulations for these statutes in Title 21 of the Code of Federal Regulations, Parts 1300 to 1399. These regulations are designed to ensure an

¹ 21 U.S.C. 801-971.

adequate supply of controlled substances for legitimate medical, scientific, research, and industrial purposes, and to deter the diversion of controlled substances to illegal purposes. The CSA mandates that the DEA establish a closed system of control for manufacturing, distributing, and dispensing controlled substances. Any person who manufactures, distributes, dispenses, imports, exports, or conducts research or chemical analysis with controlled substances must register with the DEA, unless exempt, and must comply with the applicable requirements for the activity.²

The Controlled Substances Act (CSA) and Current Regulations

The DEA's regulations were originally adopted at a time when most transactions and prescriptions were done on paper. The CSA provides that a controlled substance in Schedule II may only be dispensed by a pharmacy pursuant to a "written prescription," except in emergency situations.³ By contrast, for controlled substances in Schedules III and IV, the CSA provides that a pharmacy may dispense pursuant to a "written or oral prescription."⁴

Where an oral prescription is permitted by the CSA, the DEA regulations further provide that a practitioner may transmit to the pharmacy a facsimile of a written, manually signed prescription in lieu of an oral prescription.⁵

For a prescription of a controlled substance to be valid, it must be issued for a legitimate medical purpose by a practitioner acting in the usual course of professional practice.⁶ The DEA regulations state, "[t]he responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription."⁷ The prescription provides a record of the actual dispensing of the controlled substance to the patient and, therefore, is critical to documenting that controlled substances held by a pharmacy have been dispensed legally. The maintenance by pharmacies of complete and accurate prescription records is an essential part of the overall CSA regulatory scheme established by Congress.

The CSA is unique among criminal laws in that it stipulates acts pertaining to controlled substances that are permissible. If the CSA does not explicitly permit an action pertaining to a controlled substance, then, by its lack of explicit permissibility, the action is prohibited. Violations of the CSA can be civil or criminal, which may result in administrative, civil, or criminal proceedings. Remedies under the CSA can range from modification to revocation of DEA registration, monetary penalties, or imprisonment, depending on the nature, scope, and extent of the violation.⁸

² Federal Register, Part II, Department of Justice, Drug Enforcement Administration, 21 C.F.R. Parts 1300, 1304, 1306, and 1311, *Electronic Prescribing of Controlled Substances*; Final Rule (March 31, 2010) available at <https://www.govinfo.gov/content/pkg/FR-2010-03-31/pdf/2010-6687.pdf> p. 16237 (last visited April 8, 2019).

³ 21 U.S.C. 829(a).

⁴ 21 U.S.C. 829(b).

⁵ 21 C.F.R. 1306.21(a).

⁶ *United States v. Moore*, 423 U.S. 122 (1975); 21 C.F.R. 1306.04(a).

⁷ 21 C.F.R. 1306.04(a).

⁸ 21 U.S.C. 841 - 844.

Prior to 2010, a major obstacle to electronic prescribing (e-prescribing) was a prohibition by the DEA on e-prescribing controlled substances. However, in 2010, the DEA adopted a rule that allowed providers to write electronic prescriptions for controlled substances and permitted pharmacies to receive, dispense, and archive these electronic prescriptions.⁹ To e-prescribe controlled substances, a health care practitioner must:

- Purchase or use DEA-compliant software that supports e-prescribing;
- Complete the identity-proofing process to acquire a two-factor authentication credential or digital certificate;
- Attach the authentication credential to his or her identity;
- Set access controls so that only individuals who may legally prescribe a controlled substance are allowed to do so; and
- Access the e-prescribing or electronic health record platform.¹⁰

Medicare E-Prescribing

In 2018, Congress mandated e-prescribing for controlled substances under the Medicare Part D program by January 1, 2021, as a part of a comprehensive bill to address the opioid crisis.¹¹ The Secretary of the federal Department of Health and Human Services may waive the requirements for a Medicare Part D covered schedule II, III, IV, and V controlled substance to be electronically transmitted in the case of a prescription issued:

- When the practitioner and dispensing pharmacy are the same entity;
- Cannot be transmitted electronically under the most recently implemented version of the National Council for Prescription Drug Programs' Stanford Computerized Researcher Information Profile Technique (SCRIPT) Standard;
- By a practitioner who received a waiver or a renewal for a period of time, not to exceed one year, from the requirement to use electronic prescribing due to economic hardship, technological limitations outside the control of the practitioner, or other exceptional circumstances;
- By a practitioner under circumstances in which it would be impractical for the individual to obtain the substances prescribed by electronic prescription in a timely manner, and such delay would adversely impact the individual's medical condition;
- By a practitioner prescribing a drug under a research protocol;
- By a practitioner for a drug for which the FDA requires a prescription to contain elements that are not able to be included in e-prescribing, such as a drug with risk evaluation and mitigation strategies that include elements to assure safe use;

⁹ U.S. Department of Justice, Drug Enforcement Administration, Diversion Control Division, *Electronic Prescriptions for Controlled Substance (EPCS)*, available at https://www.deadiversion.usdoj.gov/e-comm/e_rx/ (last visited April 10, 2019). See also 21 C.F.R. 1306.08, available at https://www.deadiversion.usdoj.gov/21cfr/cfr/1306/1306_08.htm (last visited April 10, 2019), and 21 C.F.R. Part 1311, *Requirements for Electronic Orders and Prescriptions*, available at <https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=2ccf6f9b1e97a3431d79157294d163da&mc=true&r=PART&n=pt21.9.1311> (last visited April 10, 2019).

¹⁰ *Id.* See also, DrFirst, *EPCS: Getting Started with Electronic Prescribing of Controlled Substances*, available at http://www.drfirst.com/wp-content/uploads/EPCS_Infographic_from_DrFirst-1.png (last visited April 3, 2019).

¹¹ Substance Use-Disorder Prevention that Promotes Opioid Recovery Treatment (SUPPORT) for Patients and Communities Act, Pub. Law No. 115-271 s. 2003 (2018). See also U.S. House of Representatives, Energy and Commerce Committee, *HR 6: SUPPORT for Patients and Communities Act*, available at <https://www.congress.gov/bill/115th-congress/house-bill/6/text#toc-H7820B15EE005461C9DA95E7E747412DD> (last visited April 3, 2019).

- By a practitioner for an individual receiving hospice care that is not covered under the hospice Medicare benefit or a resident of a nursing facility dually eligible for Medicaid and Medicare.¹²

Overview of State E-Prescribing Laws

Florida Law

Prescriptions that are electronically generated and transmitted must contain the name of the prescriber; the name, strength, quantity, and directions for use of the prescribed medicinal drug; and the date the prescription was issued.¹³ The prescription must be dated and signed by the prescribing practitioner on the same day the prescription was issued, and the practitioner's signature may be in an electronic format.¹⁴

E-prescribing software may not interfere with a patient's choice of pharmacy or use any means, such as pop-up ads, advertising, or instant messaging to influence or attempt to influence the prescribing decision of the prescriber at the point of care.¹⁵ E-prescribing software may provide formulary information, as long as nothing makes it more difficult or precludes a prescriber from selecting a specific pharmacy or drug.¹⁶

E-prescribing is done by health care practitioners through the use of electronic devices such as a computer, tablets, or phones that are equipped with software to securely enter and transmit prescriptions to pharmacies using a special software program and connectivity to a transmission network.¹⁷

In 2007, the Legislature created s. 408.0611, F.S., to promote the implementation of e-prescribing¹⁸ by health care practitioners, health care facilities, and pharmacies in order to prevent prescription drug abuse, improve patient safety, and reduce unnecessary prescriptions. To that end, the Legislature created a clearinghouse in the Agency for Health Care Administration (ACHA) to provide information on e-prescribing to:

- Convey the process and advantages of e-prescribing;
- Provide information regarding the availability of e-prescribing products, including no-cost or low-cost products; and
- Regularly convene stakeholders to assess and accelerate the implementation of e-prescribing.¹⁹

¹² 42 U.S.C. s. 1395W-104(e)(7)(B), Beneficiary Protections for Qualified Prescription Drug Coverage, *available at* <https://www.law.cornell.edu/uscode/text/42/1395w-104>, p. 24 (last visited April 8, 2019).

¹³ Section 456.42(1), F.S.

¹⁴ *Id.*

¹⁵ Section 456.43, F.S.

¹⁶ *Id.*

¹⁷ The Office of the National Coordinator for Health Information Technology, *What is Electronic Prescribing?* (September 22, 2017) *available at* <https://www.healthit.gov/faq/what-electronic-prescribing> (last visited April 3, 2019).

¹⁸ Section 408.0611(2)(a), F.S. The term "electronic prescribing" means, at a minimum, the electronic review of the patient's medication history, the electronic generation of the patient's prescription, and the electronic transmission of the patient's prescription to a pharmacy.

¹⁹ Section 408.0611, F.S.

The AHCA is required to work in collaboration with private sector e-prescribing initiatives and relevant stakeholders to create and maintain the clearinghouse. These stakeholders must include organizations that represent health care practitioners, health care facilities, and pharmacies; operate e-prescribing networks; and create e-prescribing products, and regional health information organizations.²⁰

Specifically, the AHCA was tasked to provide on its website:

- Information regarding the advantages of e-prescribing, including using medication history data to prevent drug interactions, prevent allergic reactions, and deter doctor-shopping and pharmacy-shopping for controlled substances;
- Links to federal and private sector websites that provide guidance on selecting an appropriate e-prescribing product; and
- Links to state, federal, and private sector incentive programs for the implementation of e-prescribing.²¹

The AHCA annually reports to the Governor and Legislature on the implementation of e-prescribing by health care practitioners, facilities, and pharmacies.²² The AHCA reports that, as of the end of September 2018, the average number of e-prescribers is 50,200 and almost 10 million e-prescriptions are transmitted each month.²³ Florida's e-prescribing rate has steadily increased since 2007, with an estimated 75.7 percent of all prescriptions being e-prescribed;²⁴ however, Florida prescribers have been slower to adopt e-prescribing for controlled substances.²⁵ In 2017, only 7.8 percent of controlled substance prescriptions were e-prescribed.²⁶

Laws in Other States

Over the last few years, 15 states have enacted mandatory e-prescribing laws.²⁷

State	Effective Date	Applicable Prescriptions
Arizona	January 1, 2019 in large counties; July 1, 2019 in small counties	Schedule II opioids
California	January 1, 2022	All
Connecticut	Currently required	Controlled substances
Iowa	January 1, 2020	All

²⁰ Section 408.0611(3), F.S.

²¹ Section 408.0611(3)(a), F.S.

²² Agency for Health Care Administration, Florida Center for Health Information and Transparency, *Florida's Annual Electronic Prescribing Report for 2018* (January 2019), available at <http://www.fhin.net/eprescribing/docs/reports/Florida2018ePrescribeReport.pdf> (last visited April 3, 2019).

²³ *Id.*

²⁴ *Id.* E-prescribing rate is defined as the amount of e-prescribing relative to all prescriptions that could have been e-prescribed.

²⁵ Agency for Health Care Administration, Florida Center for Health Information and Transparency, *2018 Florida Electronic Prescribing Quarterly Summary*, available at <http://www.fhin.net/eprescribing/dashboard/docs/2018eprescribmetrics.pdf> (last visited April 3, 2019).

²⁶ *Id.*

²⁷ DrFirst, *E-Prescribing Mandate Map*, available at <https://www.drfirst.com/resources/e-prescribing-mandate-map/> (last visited April 8, 2019), and SureScripts, *Electronic Prescribing for Controlled Substances*, available at <https://surescripts.com/enhance-prescribing/e-prescribing/e-prescribing-for-controlled-substances/> (last visited April 8, 2019).

State	Effective Date	Applicable Prescriptions
Maine	Currently required	All controlled substances containing opiates
Massachusetts	January 1, 2020	Schedules II-VI controlled substances
Minnesota	Currently required	All
New Jersey	May 1, 2020	Schedule II controlled substances
New York	Currently required	All
North Carolina	January 1, 2020	Schedule II and III opioids
Oklahoma	January 1, 2020	Controlled substances
Pennsylvania	October 24, 2019	Controlled substances
Rhode Island	January 1, 2020	Controlled substances
Tennessee	July 1, 2020	Schedule II controlled substances
Virginia	July 1, 2020	All prescriptions containing opiates

E-Prescribing Software and Systems

National Council for Prescription Drug Programs (NCPDP)

The National Council for Prescription Drug Programs (NCPDP) is a not-for-profit membership organization that uses a consensus-based process for standards development. The NCPDP creates national standards for electronic health care transactions used in prescribing, dispensing, monitoring, managing, and paying for medications and pharmacy services. The organization also develops standardized business systems and best practices that safeguard patients. NCPDP members are pharmacies, pharmacists, physicians, health plans, long-term care providers, claims processors, e-prescribing system vendors, pharmaceutical manufacturers, and government agencies such as the federal Centers for Medicare & Medicaid Services and the Food and Drug Administration.²⁸

Stanford Computerized Researcher Information Profile Technique (SCRIPT)

SCRIPT is a standard developed for transmitting prescription information electronically between prescribers, pharmacies, payers, and other entities for new prescriptions, changes of prescriptions, prescription refill requests, prescription fill status notifications, cancellation notifications, relaying of medication history, transactions for long-term care, electronic prior authorization, and other transactions.²⁹

The current SCRIPT standard is version 10.6, which is anticipated to sunset on December 31, 2019, and will be replaced by version 2017071 on January 1, 2020.³⁰

²⁸ National Council for Prescription Drug Programs, *Frequently Asked Questions*, available at <https://www.ncdp.org/About-Us/FAQ> (last visited April 8, 2019).

²⁹ National Council for Prescription Drug Programs, *Standards Information*, available at <https://www.ncdp.org/Standards-Development/Standards-Information> (last visited April 8, 2019).

³⁰ National Council for Prescription Drug Programs, *NCPDP SCRIPT Standard Implementation Timeline*, p. 7, (October 2018) available at https://www.ncdp.org/NCPDP/media/pdf/NCPDP_SCRIPT_Version_2017071_Timeline_Implementation.pdf (last visited April 8, 2019).

The Cost of E-Prescribing Software

The cost of an e-prescribing system used by prescribers is based on the number of prescribers using the system and the options included in the system. It is estimated that the cost of an electronic health record system for an office with 10 full-time prescribers is approximately \$42,332 for implementation and \$14,725 for annual maintenance.³¹

III. Effect of Proposed Changes:

Section 1 amends s. 456.42, F.S., to require a prescription that is electronically generated and transmitted to contain an electronic signature from the prescribing practitioner. The bill requires health care practitioners licensed to prescribe medical drugs who maintain an electronic health records (EHR) system,³² or who prescribe drugs as an owner, employee, or contractor of a licensed health care facility or practice that maintains such a system, and who is prescribing in that capacity, may only electronically transmit prescriptions for such drugs. This requirement takes effect upon renewal of the health care practitioner's license or by July 1, 2021, whichever is earlier, but does not apply if:

- The practitioner and the dispenser are the same entity;
- The prescription cannot be transmitted electronically under the most recently implemented version of the NCPDP SCRIPT program;
- The practitioner has been issued a waiver by the DOH, not to exceed one year, due to demonstrated economic hardship or technological limitations, not reasonably within the practitioner's control, or other exceptional circumstances;
- The practitioner determines that it is impractical for a patient to obtain in a timely manner a drug electronically prescribed and that the delay would adversely impact the patient's medical condition;
- The practitioner is prescribing a drug under a research protocol;
- The prescription is for a drug for which the federal Food and Drug Administration requires the prescription to contain elements that may not be included in electronic prescribing;
- The prescription is issued to an individual receiving hospice care or who is a resident of a nursing home facility; or
- The practitioner or patient determine that it is in the best interest of the patient to compare prescription drug prices among area pharmacies, and such determination is documented in the patient's medical record.

Prescribing practitioners who do not have access, in their practice or employment, to an EHR system may still provide written prescriptions to their patients for medicinal drugs. The DOH, in consultation with the Board of Medicine, the Board of Osteopathic Medicine, the Board of Podiatric Medicine, the Board of Dentistry, the Board of Nursing, and the Board of Optometry, may adopt rules to implement these provisions.

³¹ Amber Porterfield, et. al., *Electronic Prescribing: Improving the Efficiency and Accuracy of Prescribing in the Ambulatory Care Setting*, *Perspect. Health Inf. Manage.* 2014 Spring: 11 (Apr. 2014), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3995494/> (last visited April 8, 2019)

³² Section 408.051, F.S., defines "electronic health record" as a record of a person's medical treatment that is created by a licensed health care provider and stored in an interoperable and accessible digital format.

Section 2 amends s. 456.43, F.S., to include the prescribing decision of a prescribing practitioner's agent that electronic prescribing software is prohibited from influencing, through economic incentives or any other method of influence, at the point of care, and expands the types of methods electronic prescribing software is prohibited from using to influence such prescribing decision. The bill also extends to a prescribing practitioner's agent the ability for electronic prescribing software to display information regarding a payer's formulary if nothing is designed to preclude, or make more difficult, the selection of a certain medicinal drug.

Sections 3 through 8 make conforming changes to other areas of the Florida Statutes.

Section 9 provides an effective date of January 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 456.42, 456.43, 409.912, 456.0392, 458.3265, 458.331, 459.0137, and 459.015.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Appropriations on April 18, 2019:

The committee substitute:

- Adds an additional exemption of the requirement for certain health care practitioners to electronically transmit all prescriptions upon the practitioner's license renewal or July 1, 2021, whichever occurs earlier; and
- Expands the professional health care boards that are required to consult with the Department of Health when promulgating rules relating to the exemption of the mandatory e-prescribing requirement of certain health care practitioners.

CS by Health Policy on April 8, 2019:

The CS:

- Requires certain health care practitioners to begin issuing all prescriptions through e-prescribing no later than July 1, 2021, if such prescribers have access to an electronic health records (EHR) system;
- Provides an exception to mandatory e-prescribing for those prescribers who do not have access to an EHR system;
- Creates seven exceptions to the requirement that prescribers with access to an EHR system must issue all prescriptions through e-prescribing, which are all consistent with federal-law exceptions to the e-prescribing requirement for the Medicare program;
- Authorizes the DOH to adopt rules in consultation with the Board of Medicine and the Board of Osteopathic Medicine; and
- Makes numerous conforming changes throughout other areas of the Florida Statutes.

- B. **Amendments:**

None.