



July 27, 2018

Open Letter to the U.S. Senate: Coalition Opposes Durbin Amendment to Compel Biopharmaceutical Companies to Include List Prices in Direct-To-Consumer Advertisements

Dear Senator:

We the undersigned organizations, on behalf millions of concerned members, supporters and activists across America, write regarding an issue of critical importance: the recent misguided proposal from Senator Richard Durbin to compel biopharmaceutical companies to include list prices in direct-to-consumer (DTC) advertisements. We oppose the Durbin amendment because it violates the First Amendment, would confuse patients and misdirect federal public health resources.

The cost of medicines and prescription drugs remains among the most important health policy discussions today, and we recognize that many consumers struggle to access medicines they need and maintain legitimate questions regarding those medicines' costs.

In that vein, a proposal to compel biopharmaceutical companies to include list prices in DTC advertisements was introduced for consideration by the Trump Administration. We believe that proposal would actually inflict more harm than benefit for patients, and could have unintended consequences of deterring patients from seeking care. In fact, the fiscal year 2019 Labor-Health and Human Services Appropriations bill includes reporting requirements to examine that very issue.

Unfortunately, Senator Durbin has proposed an amendment to H.R. 6147 that would circumvent this process and allow for the use of funds by the Secretary of Health and Human Services to issue regulations on DTC advertising of prescription drugs. That proposed amendment would create a new misbranding violation for failure to include pricing information in a prescription drug DTC advertisement.

Among other dangers, list price constitutes a potentially confusing number for patients. Specifically, including the list price of medicines in DTC ads would not meet the aim of better informing patients, because it is not relevant to what they actually pay and would mislead consumers into thinking that their out-of-pocket costs will be significantly higher than the price that they actually pay for the medicine. Of considerable importance, most patients' prescriptions are subsidized with a co-pay or co-insurance dictated by their insurance company. Insurance companies in turn usually do not pay the full list price because they receive substantial rebates and discounts. Accordingly, any new requirement for

including pricing information in consumer ads should require careful study to determine what information is appropriate to include and how it should be presented and put into proper and understandable context.

Furthermore, the Durbin amendment would require Food and Drug Administration to divert critical public health resources from other activities to enforce the proposed new DTC price disclosure requirement, potentially straining the already understaffed agency.

In addition to the drawbacks for patients and misdirected resources, however, perhaps the most dangerous/unsettling/disturbing aspect of requiring disclosure of list prices in DTC ads is that it raises First Amendment concerns regarding compelled speech.

Only limited exceptions allow the government to compel speech, and none of those exceptions apply in this case. As an initial matter, advertising for pharmaceutical products constitutes commercial speech, and the Supreme Court has made clear commercial speech is protected by the First Amendment. Consequently, courts have repeatedly ruled that the government can only compel disclosure of “purely factual and uncontroversial information.”

Compelled disclosure of list prices simply does not meet these conditions. List prices are not “purely factual,” but rather potentially mislead because payers receive discounts, and rebates and most patients pay a different amount out of pocket. Additionally, that information is far from “uncontroversial” in the current environment, and disclosure in consumer ads of prices higher than what is actually charged would promote controversy.

With a unified goal of providing beneficial factual information to healthcare consumers, real solutions come from advancing thoughtful public policy discussions, not counterproductive and unconstitutional proposals that create additional regulation to confuse consumers, deter patients from care and raise First Amendment concerns regarding compelled speech.

We therefore urge you in the strongest terms to oppose this misguided proposal, and thank you for your attention to this critical matter.

Sincerely,

Jeffrey Mazzella, President
Center for Individual Freedom

Phil Kerpen, President
American Commitment

Dee Stewart, President
Americans for a Balanced
Budget

Grover Norquist, President
Americans for Tax Reform

Andrew F. Quinlan, President
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