



January 31, 2024

The Honorable Stephen Meredith, Chair
The Honorable Donald Douglas, Vice Chair
Health Services Committee
Senate of the Commonwealth of Kentucky
State Capitol
Frankfort, KY 40601

Dear Chair Meredith, Vice Chair Douglas, and Members of the Committee:

On behalf of National Taxpayers Union (NTU), America's oldest nationwide taxpayer advocacy organization, I write to urge caution against premature consideration of Senate Bill 27, which would ban prescription drug manufacturers from imposing reasonable limits on contract pharmacies and Pharmacy Benefit Managers (PBMs) for procuring heavily discounted drugs offered through the federal 340B program.

As you know, the 340B program was originally conceived as a targeted method of providing affordable medicines to needy patients – not as a gateway to systemic price controls. Taxpayers, including our supporters in Kentucky, have a major stake in preventing even more burdensome government mandates and market manipulation in health care.

States have experimented with various schemes that purport to control health care costs for taxpayers. These include bills to create importation of supposedly lower-priced drugs from outside the U.S. (whose policing costs would dwarf any savings), government boards to control drug price increases on taxpayer-backed health program formularies, and international pricing indices tying state purchases to the costs of price-controlled countries abroad that freeload from U.S. medical innovations.¹

The legislation before you begins from a similar assumption that has driven the latter bills. When it comes to prescription drugs, such plans are often not only misaimed, but they also focus on the wrong target in the first place. As an extensive 2023 paper from NTU's research arm explains, prescription drugs can, over the longer term, bend the health care cost curve by obviating much more expensive therapies:

Academic literature indicates that advances in medicine have brought trillions of dollars of benefits to the American economy in recent decades, helping people live and work longer, lead healthier and more productive lives, and avoid more expensive medical interventions that occur in

¹ See, for example, some of NTU's communications regarding state legislation: <https://www.ntu.org/publications/detail/letter-ntu-opposition-to-north-dakota-price-control-scheme>; <https://www.ntu.org/publications/detail/washington-state-prescription-drug-bill-would-inhibit-access-for-consumers>; [Date: March 11, 2020 To: Members of Minnesota State Senate ...](#); and <https://www.ntu.org/publications/detail/drug-importation-legislation-in-the-utah-legislature>.

hospital or physician settings. This is one reason why prescription drug spending remains a relatively small portion of overall health spending (less than 10 percent of national health expenditures) and of the nation's economic output (less than two percent of GDP).²

These general observations aside, SB 27 would not be an ideal response to legitimate, specific concerns over managing health care costs in taxpayer-funded settings. Among the reasons:

- **Kentucky's reputation of providing a hospitable tax and regulatory environment for innovation, development, and economic opportunities for its citizens needs to be carefully nurtured.** According to the Tax Foundation's most current business tax climate index, Kentucky currently ranks #18 out of 50 for tax policies fostering the right conditions to prosper.³ Legislation such as SB 27 sends the wrong signal to citizens and businesses considering either remaining in or relocating to Kentucky. While the Tax Foundation's ranking does not include proposals affecting health care like SB 27, they can nonetheless act as detriments to progress made in other policy areas affecting the general business environment. Why would the Commonwealth want to risk tipping the balance with untested legislation such as SB 27?
- **The bill is based on a controversial federal program currently under scrutiny from the U.S. Congress.** Since its creation in 1992 as a well-intentioned public-private partnership to deliver prescription drugs to moderate-income patients, 340B has become increasingly controversial amid allegations that providers are "gaming" its structure to earn revenues and distribute medications well outside the communities the program was supposed to serve. Last year, NTU favorably commented on legislation before a subcommittee of the U.S. House Energy and Commerce Committee that would "step in and place guardrails on 340B and its future growth."⁴ Among the major changes contemplated then – and now – by Congress are codifying the definition of a 340B beneficiary to mean an uninsured, low-income individual, ensuring that facilities utilizing 340B savings are audited for compliance with the law, and re-visiting automatic eligibility of disproportionate share hospitals for 340B benefits.⁵ Given the potential for Congressional consideration of these and other structural reforms to 340B, SB 27 could be establishing its regulatory foundation on a house of cards.
- **The bill could put Kentucky in a precarious legal position.** To the first point above, similar bills enacted by other states are, indeed, untested in the policy world. Two pieces of legislation in Arkansas and Louisiana bearing a major resemblance to SB 27 are currently under rigorous legal challenges. In the case of Arkansas, the U.S. Court of Appeals for the Eighth Circuit is weighing whether or not a state can utilize police powers to interpret and enforce the federal 340B statute, while with the Louisiana case, the U.S. District Court for the Western District of Louisiana is pondering the fate of a similar law enacted by that state's Legislature. Other litigation has been ongoing.⁶ These cases do not turn on minor technicalities. Rather, they involve the most

² See the NTU Foundation paper at <https://www.ntu.org/publications/detail/how-much-is-medicine-worth-to-the-american-taxpayer-a-cost-benefit-analysis>.

³ See the index at <https://taxfoundation.org/research/all/state/2024-state-business-tax-climate-index/>.

⁴ See https://www.ntu.org/publications/detail/ntu-comments-on-several-pro-health-transparency-house-bills#_ftnref4.

⁵ See, for example, H.R. 3290 at <https://www.congress.gov/bill/118th-congress/house-bill/3290?q=%7B%22search%22%3A%22h.r.+3290%22%7D&s=2&r=5>; S. 1133 at <https://www.congress.gov/bill/118th-congress/senate-bill/1133?q=%7B%22search%22%3A%22s.+1133%22%7D&s=4&r=5>; and S. 1182 at <https://www.congress.gov/bill/118th-congress/senate-bill/1182?q=%7B%22search%22%3A%22s1182%22%7D&s=6&r=1>.

⁶ See, for example, *Pharmaceutical Research & Manufacturers of America v. McClain, et al.*, Case No. 4:21-CV-864-BRW (E.D. Ark. 12/12/22) and *Pharmaceutical Research & Manufacturers of America v. Landry*, 6:23-cv-00997, (W.D. La.).

fundamental questions of how states may conduct their own approaches to what qualifies as a 340B entity and whether manufacturers can be forced to recognize such approaches. In fact, these legal controversies could, over 2024 and even into 2025, find their way onto the U.S. Supreme Court docket, depending on how the circuits rule. At the same time, 340B recipient hospitals have launched litigation against the federal Health Resources and Services Administration for promulgating post-pandemic guidance intended to enhance program integrity.⁷ Knowing all of this, lawmakers should, to the greatest extent possible, avoid putting Kentucky's taxpayers on the hook for defending a bill whose legal and constitutional pedigree is currently in flux.

NTU strongly supports measures at the state and federal level that would bring transparency to the operations of 340B pharmacies and PBMs acting as 340B entities in taxpayer-funded health care programs. For example, some states have commendably offered legislation to establish performance and cost-reporting metrics for hospitals and other 340B participants. Here again, however, policymakers must avoid the temptation to hastily overcorrect current law by proposing significantly higher fees on 340B entities or micromanaging PBMs' negotiations with non-340B entities.

For all these reasons, especially given the prospect of courts striking down the particular policy approach contemplated in SB 27, we respectfully believe that the Committee's time and expenditure of tax dollars is better spent focusing on legislation that more effectively reduces the financial burdens on the citizens of your state. Furthermore, we encourage you to prioritize policies that ensure savings from government programs like 340B intended to help those in need are realized by the intended recipients.

Accordingly, NTU urges you to table SB 27. Should you have any questions or require any additional information, NTU is at your service. Thank you for your consideration.

Sincerely,



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⁷ See <https://www.beckershospitalreview.com/legal-regulatory-issues/health-systems-sue-over-340b-policy-reversal.html>.