May 20, 2019

The Honorable Mitch McConnell
Majority Leader
U.S. Senate
U.S. Capitol, S-230
Washington, D.C. 20510

The Honorable Nancy Pelosi
Speaker of the House
House of Representatives
The Capitol, H-232
Washington, D.C. 20515

The Honorable Charles Schumer
Minority Leader
U.S. Senate
U.S. Capitol, S-221
Washington, D.C. 20510

The Honorable Kevin McCarthy
Minority Leader
House of Representatives
The Capitol, H-204
Washington, D.C. 20515

On behalf of the millions of members and supporters of our respective organizations, we are writing in opposition to the use of binding arbitration to lower drug prices in Medicare Part B and possibly in Medicare Part D.

At a March 7, 2019 Medicare Payment Advisory Commission (MedPAC) public hearing, binding arbitration was discussed as a way to lower drug costs, as did a June 2017 MedPAC Report to Congress. Some MedPAC commissioners and economists have advocated using binding arbitration to lower drug costs, claiming doing so would be similar to what professional baseball teams and players use to settle salary disagreements or to New York's law that addresses surprise billing, which occurs when an insured patient is treated by an out-of-network provider at an in-network facility and receives a hefty and unexpected bill.

Binding arbitration for Medicare Part B would be nothing like these two examples. In baseball, the teams and players jointly agree on a panel of three arbitrators. The panel reviews the salary requests and offers, along with the corresponding supporting evidence from the players and teams. It is agreed in advance that the panel will choose only one of the two salary figures.

New York's law provides three specific circumstances where a charge is determined to be a surprise bill, and if a patient's complaint falls within these categories, he or she is not responsible for any payment higher than their plan's standard fees. The health plan then makes a payment to the out-of-network provider. If the provider believes the amount is incorrect, the plan and provider then participate in an independent dispute process, which includes an expert in healthcare billing, where a final payment is determined.

According to the MedPAC June 2017 report and the March briefing, binding arbitration would come into play for Medicare Part B when a subjective drug price threshold is exceeded, mainly for a newly-launched drug, or a drug with no competition. The Department of Health and Human Services (HHS) secretary would then demand arbitration from a supposed impartial party. HHS and the drug manufacturer would each offer a price for the drug and their supporting documentation. The arbitrator would evaluate the offers based on the information presented in the supporting documents and pick one of the prices.

But MedPAC admits in its 2017 report that the arbitration would probably be designed by HHS in the rulemaking process. Unlike baseball or the New York arbitration law, the government controls the entire process, from the rules to deciding when arbitration would be utilized to who becomes the arbitrator. This process makes the arbitrator a non-neutral party that is between the pharmaceutical manufacturer and the aggrieved HHS. If the manufacturer chooses not to participate, their drug will not be covered. How this process could ever be truly fair and independent is difficult to comprehend. It is in effect a price control.

Our organizations have long maintained that competition, not government-imposed price controls, lowers cost and encourages innovation. Too often, the lack of competition can be blamed on government actions. According to a February 25, 2019 Pew Charitable Trusts' report, generic drug user fees have had mixed results. For example, Pew noted Food and Drug Administration (FDA) approvals have increased, but the median approval time has not significantly declined. Furthermore, there are more than 500 brand drugs that still lack competition even though their patents and periods of exclusivity have expired. These are the very drugs that invite huge price increases.

It would be better for Congress to make sure the FDA continues to not only reduce the backlog but also expedite generic drug approval times, while providing incentives to pharmaceutical manufacturers to develop generic alternatives to the drugs with no competition. Congress also needs to focus on how the FDA is implementing the proposals found in the 21st Century Cures Act that are supposed to modernize and speed up clinical trials and the drug approval process for innovative drugs. Speeding up approvals for innovative drugs could help encourage more "me too" drugs, which are drugs in the same class and provide choice and competition when patents are still valid.

These market-based solutions are far better than proposals like binding arbitration that are in fact government price controls.

Sincerely,

Thomas Schatz
President
Council for Citizens Against Government Waste

Grover Norquist
President
Americans for Tax Reform

Daniel Schneider
Executive Director
American Conservative Union

Pete Sepp
President
National Taxpayers Union

George Landrith
President
Frontiers of Freedom

Peter J. Pitts
President
Center for Medicine in the Public Interest

Sarah Anderson
Federal Affairs Manager
FreedomWorks

David Williams
President
Taxpayers Protection Alliance

Andrew F. Quinlan
President
Center for Freedom and Prosperity

Dee Stewart
President
Americans for a Balanced Budget

Ryan Ellis
President
Center for a Free Economy

Jeffrey Mazzella
President
Center for Individual Freedom

Phil Kerpen
President
American Commitment

Ginevra Joyce-Myers
Executive Director
Center for Innovation and Free Enterprise

Lisa B. Nelson
CEO
ALEC Action

Sara Croom
Executive Director
Trade Alliance to Promote Prosperity

Fred Roeder
Health Care Economist/Managing Director
Consumer Choice Center

Charles Sauer
President
Market Institute

James Edwards
Executive Director
Conservatives for Property Rights

Matthew Kandrach
President
Consumer Action for a Strong Economy

Tom Giovanetti
President
Institute for Policy Innovation

Colin Hanna
President
Let Freedom Ring

Karen Kerrigan
President & CEO
Small Business & Entrepreneurship Council

Stephen Pociask
President and CEO
American Consumer Institute

Dick Patten
President
American Business Defense Council

Mario H. Lopez
President
Hispanic Leadership Fund

CC: U.S. House of Representatives;
U.S. Senate