

**Subject:** Draft Letter and PR if Governor Hogan Declines to Veto  
**From:** Chris Bowlin <Chris.Bowlin@accessiblemeds.org>  
**Date:** 5/25/2017 10:06 AM  
**Attachments:**  Draft Hogan Letter re H.B. 631 No-Sign-v2.docx (37.4 KB),  
 Draft Language re H.B. 631 No-Sign-v2.docx (36.7 KB)

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**To:** "christopher.shank@maryland.gov" <christopher.shank@maryland.gov>,  
"sam.malhotra@maryland.gov" <sam.malhotra@maryland.gov>

Chris and Sam,

Chris Bowlin here from AAM.

You should have received my email on Tuesday with principles for an alternative bill to HB 631 that you all could announce along with a veto. We are still strongly encouraging a veto.

If the governor is not going to veto the bill, attached is a draft letter the governor could write a letter to the assembly and issue a press release with some suggested messages.

Please let me know if you have any questions.

Chris  
Bowlin

### Chris Bowlin

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May 26, 2017

The Honorable Thomas V. Mike Miller  
President of the Senate  
State House  
Annapolis, Maryland 21401

The Honorable Michael E. Busch  
Speaker of the House of Delegates  
State House  
Annapolis, Maryland 21401

Dear Mr. President and Mr. Speaker:

I write to explain the rationale for my decision not to sign House Bill 631 -- *Public Health -- Essential Off Patent or Generic Drugs -- Price Gouging -- Prohibition*.

Although the stated intent of the bill is laudable — to curtail and punish specific bad actors responsible for outrageous increases in certain prescription drug prices — House Bill 631 inexplicably targets the manufacturers of lower cost generic drugs, which have saved Maryland patients and taxpayers billions of dollars every year. And it does so in a manner fundamentally at odds with the limitations of the United States Constitution by regulating drug pricing and commerce at the national level rather than focusing on consumers and sales here in Maryland.

Sensible regulation of prescription drug prices in the state of Maryland is something that I support and which can be done in a targeted manner consistent with the Constitution. But I cannot endorse legislation, even bipartisan legislation, that contravenes the boundaries of federalism enshrined in the Commerce Clause and which does not provide sufficient guidance to manufacturers as to what conduct is prohibited.

House Bill 631 appears to suffer from serious constitutional infirmities, because the bill would directly regulate interstate commerce and prices by prohibiting and penalizing manufacturer pricing behavior occurring at the national and interstate wholesale level, and thereby impacting pricing beyond the boundaries of the state of Maryland. *See PhRMA v. D.C.*, 406 F. Supp. 2d 56, 69-70 (D.D.C. 2005), *aff'd sub nom. BIO v. D.C.*, 496 F.3d 1362 (Fed. Cir. 2007) (“PhRMA”). Under Supreme Court jurisprudence, a state statute “directly regulat[ing]” commerce occurring beyond the boundaries of that state is *per se* invalid and “generally struck down ... without further inquiry.” *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *see also Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (“[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid...”); *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (noting that “[t]he Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State”).

Indeed, the bill prohibits *any* “unconscionable” increase in the price of an essential off-patent or generic drug so long as the drug is “*made available for sale in the State*,” H.B. 631 §2-801(B)(IV), (C), and (F) (emphasis added), meaning that price increases are prohibited even

without the occurrence of an actual intrastate sale. Moreover, the bill contains an express limitation, H.B. 631 §2-803(D), that in an action brought by the Attorney General, a person alleged to have violated the statute “may not assert as a defense that the person did not deal directly with a consumer residing in the State.” H.B. 631 §2-803(G). Based on these provisions, the bill as written appears unequivocally to target pricing and sales that occur out-of-state, and at a minimum, the bill can be viewed as having the practical effect of controlling manufacturers’ conduct beyond the boundaries of the state, because the pricing prohibition would reach national wholesale pricing and the sale of products well beyond the borders of Maryland. *PhRMA*, 406 F. Supp. 2d at 69-70; *Healey*, 491 U.S. at 336.

H.B. 631 also appears to suffer from serious “vagueness” problems under the procedural due process concepts of the Due Process Clause of the Fourteen Amendment. *See, e.g., FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”). The Supreme Court has long held that “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law,” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926), and that the requirement of clarity in regulation is essential to the protections provided by the Due Process Clause, *see United States v. Williams*, 553 U.S. 285, 304 (2008). A fair reading of the bill indicates that it provides little real guidance to manufacturers as to what conduct they are permitted to engage in and what market forces might permissibly justify price increases. The bill, for example, leaves entirely unstated what price increases might be unconscionably “excessive,” and what types of increases might be “justified” by the “cost of production” or “the cost of appropriate expansion of access.” H.B. 631 §2-801(F). These are precisely the types of information that fair notice requires the State to provide to manufacturers before any prohibition or enforcement action may be undertaken.

Given the large legislative majorities that supported this bill, I have determined that a veto will not serve the interests of the citizens of Maryland in efficient government. I have no desire to waste the time of the General Assembly or the public. But I do believe this bill will be struck down by the courts has transgressing the fundamental limits of federalism in the United States Constitution and I cannot sign a bill I strongly believe to be unconstitutional.

For these reasons, I have decided not to endorse H.B. 631.

Sincerely,

Lawrence J. Hogan, Jr.  
Governor

**DRAFT LANGUAGE FOR GOVERNOR HOGAN RE NON-SIGN OF H.B. 631**

**GOVERNOR LARRY HOGAN DECLINES TO ENDORSE UNCONSTITUTIONAL  
GENERIC DRUG PRICING LEGISLATION**

May 26, 2017

*Well Intentioned But Fatally Flawed, Bill Would Unconstitutionally Regulate Commerce and Prices Beyond the Boundaries of Maryland And Fails To Provide Basic Notice To Manufacturers Regarding Prohibited Conduct*

**ANNAPOLIS, MD** – Governor Larry Hogan today declined to sign House Bill 631, which would directly regulate interstate commerce in and national pricing of generic drugs in violation of the Interstate Commerce Clause of the United States Constitution. The bill is also likely to be found unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment.

“Although the stated intent of the bill is laudable -- to curtail and punish specific bad actors responsible for outrageous increases in certain prescription drug prices -- House Bill 631 inexplicably targets the manufacturers of lower cost generic drugs that save Maryland patients and tax payers billions of dollars every year” said Governor Hogan. “And it does so in a manner fundamentally at odds with the limitations of the United States Constitution by regulating drug pricing and commerce at the national level rather than focusing on consumers and sales here in Maryland.”

“Sensible regulation of prescription drug prices in the state of Maryland is something that I support and which can be done in a targeted manner consistent with the Constitution. But I cannot endorse legislation, even bipartisan legislation, that contravenes the boundaries of federalism enshrined in the Commerce Clause and which does not provide sufficient guidance to manufacturers as to what conduct is prohibited.”

The governor detailed several fatal flaws in the legislation, such as the bill’s—

- targeting of pricing at the national manufacturer and wholesaler level occurring outside the state of Maryland without any requirement that an actual sale be made within the state;
- express limitation on a manufacturer’s ability to demonstrate that it did not engage in transactions with consumers in the state; and
- vague prohibition on unconscionably “excessive” price increases that provides little to no information to manufacturers as to what free market behavior is acceptable and what is not.

“Given the large legislative majorities that supported this bill, I have determined that a veto will not serve the interests of the citizens of Maryland in efficient government. I have no desire to waste the time of the General Assembly or the public. But I do believe this bill will be struck down by the courts has transgressing the fundamental limits of federalism in the United States Constitution and I cannot sign a bill I strongly believe to be unconstitutional.”