**Minnesota H1440A7-1**

**Opioid and Controlled Substance Tax Amendment**

**April 10, 2018**

**Position: The Pharmaceutical Research and Manufacturers of America (PhRMA) respectfully opposes H1440A7-1, which imposes a tax on opiate and controlled substance drug manufacturers to fund the Opioid Addiction Prevention and Treatment Account.**

PhRMA represents the country’s leading innovative biopharmaceutical research and biotechnology companies, which are devoted to discovering and developing medicines that enable patients to live longer, healthier, and more productive lives. PhRMA supports a comprehensive policy approach to addressing the opioid crisis, including the prevention of overprescribing; efforts to educate patients and prescribers; expanding access to appropriate substance use disorder treatment; and enhancing law enforcement efforts; all while ensuring appropriate patient access to needed medications. Minnesota has taken a number of important steps in these areas and we look forward to the opportunity to work with policyholders to continue to advance these efforts. However, the proposed tax does nothing to address the opioid crisis and sets a dangerous precedent for taxing prescription drugs.

**The proposed controlled substance registration fee far exceeds the standard amount for a controlled substance registration fee in states and should be considered a tax on prescription drug manufacturers.**

Several states have a controlled substance registration fee, but the fee is nominal and applies more broadly to all entities in the supply chain that encounter a controlled substance. For example, Iowa has a biennial fee of $90 for entities and individuals who manufacture, distribute, dispense, conduct research or instructional activities and conduct chemical analysis with controlled substances. The fees collected by states with these types of registration fees are typically used to fund the costs associated with the administration and processing of the registration, not as a revenue source for other state programs. As the proposed registration fees are astronomically higher (i.e., up to $150,000) than the cost of administering the registration and based on volume dispensed in the state, the registration fee should be considered a tax on prescription drug manufacturers.

**While Article 2 purports to be a funding mechanism for the Prescription Monitoring Program, the annual opiate and controlled substance registration fees are a funding mechanism for the Opioid Addiction Prevention and Treatment Account.**

Revenue from the annual controlled substance registration fee for both opiate and controlled substance registrations is deposited into the Opioid Addiction Prevention and Treatment Account, with no provision or indication that the funds would be dedicated or limited to funding the Prescription Monitoring Program. This sets a dangerous precedent that prescription drugs lawfully prescribed to a patient can be taxed to generate revenue for the state.

**It is unclear why an additional tax is needed when the HF1440 includes $3.5 million of funding specifically for Prescription Monitoring Program improvements and millions more to fund opioid prevention and treatment programs. Additionally, prescription drug manufacturers remit hundreds of millions of dollars to Minnesota annually in the form of Medicaid rebates that can be used if additional funds are needed.**

HF1440 currently includes a $3.5 million appropriation to the Board of Pharmacy to make improvements to Prescription Monitoring Program. Based on presentations the Board of Pharmacy’s has made during this legislative session on additional revenue needed to update the Prescription Monitoring Program, the current $3.5 million appropriation included in HF1440 covers the requested expense. Thus, any revenue from the registration tax would be used to fund programs and activities other than the Prescription Monitoring Program.

In FFY2016, prescription drug manufacturers paid approximately $250 million back to the State in manufacturer rebates for the Medicaid program.[[1]](#footnote-1) This amount represents a 53% discount returned to the State in the form of prescription drug rebates. If additional revenue is needed to fund programs and activities in the state, PhRMA would strongly urge legislators to use the Medicaid rebate dollars that are currently returned to the General Fund instead of taxing prescription drug manufacturers.

**A tax on prescription drugs may be prohibited by Medicare and jeopardizes federal Medicaid payments.**

Federal regulations prohibit states from imposing a “premium, tax, fee or other similar assessment” on any payment the Centers for Medicare and Medicaid Services (CMS) makes on behalf of Medicare Part D plans or enrollees under 42 CFR 423.440.

In addition, taxing Medicaid payments on prescription drugs may jeopardize funds the State receives from the federal government for the Medicaid program. Revenue from **the tax may ultimately go towards reducing the federal government’s Medicaid payment obligations to Minnesota**. This is because, in calculating the federal share of assistance, Medicaid generally deducts revenues from health-care related taxes imposed by the state or local government unless such taxes are broad and uniform across an entire “class” of items or services and meet certain other requirements.[[2]](#footnote-2) Absent approval from CMS, revenue from the tax could therefore be off-set by reductions in how much the federal government pays Minnesota for Medicaid assistance. CMS acknowledged this issue in a July 25, 2014 State Medicaid Director/State Health Official Letter.[[3]](#footnote-3)

**The confusing and complex design of the registration tax will likely lead to erroneous collections and increased administrative burden for Minnesota and taxpayers.**

While states have broad powers with respect to taxation they must have sufficient protections against improper or erroneous tax deprivations to satisfy the Due Process Clause. As drafted, aspects of this tax call into question the clear availability of such safeguards.

Prescription drug manufacturers do not input or have access to the information in the Prescription Monitoring Program used to assess the registration tax. The Supreme Court has clearly said that tax collection systems must provide adequate procedures and a “clear and certain remedy” against erroneous taxation.[[4]](#footnote-4) Furthermore, establishment of such a process would be incredibly burdensome to both taxpayers and Minnesota.

**The registration tax for non-opiate controlled substance drug manufacturers should be rejected for lack of detail.**

As currently written, the proposed registration tax for non-opiate controlled substance drug manufacturers should be rejected for lacking detail on the amount of the fee, which allows the State to use the fee as a blank check. Without information on the amount of the fee, it is impossible to assess the potential impact on patients, manufacturers and the drug supply chain.

For the reasons described above, PhRMA urges legislators to reject H1440A7-1.

1. Total Medicaid rebates for this time period were approximately $504 million. After taking into account the federal-state shares of funding for the Medicaid program, approximately half of the rebates were retained by the State. [↑](#footnote-ref-1)
2. SSA § 1903(w)(2)©(i)(IV); 42 CFR § 433.68 [↑](#footnote-ref-2)
3. “Section 1903(w)(3)(A)(i) of the Act defines a health care-related tax using multiple tests that must be applied to these types of tax proposals. Health care-related taxes include taxes related to: (1) health care items or services; (2) the provision of, or the authority to provide, the health care items or services; or (3) payment for such items or services. Section 1903(w)(3)(A)(ii) further stipulates that a health care-related tax includes taxes that are not limited to health care items or services but provide for different or unequal treatment for individuals or entities that are paying for or providing health care items or services.” [↑](#footnote-ref-3)
4. McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dept. of Bus. Reg. of Fla., 496 U.S. 18, 39, 50 (1990) [↑](#footnote-ref-4)