



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

(304) 558-2021
Fax (304) 558-0140

November 2, 2016

The Honorable Loretta Lynch
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue
Washington, DC 20530

Re: Mylan Medicaid Settlement

Dear Attorney General Lynch:

Last month, Mylan, N.V., announced that it had agreed to pay the United States Department of Justice \$465 million to settle its allegations that Mylan had underpaid rebates to Medicaid.¹ Assuming the settlement figure is accurate, I urge the DOJ to reject it. The \$465 million figure represents a tremendous deal for Mylan, which may actually owe Medicaid nearly \$700 million² and which has benefited from soaring stock prices after word of the announcement began to spread.³ Simply put, if the settlement is accepted, Mylan—which, under the terms of the agreement, will admit no wrongdoing—wins, while the taxpayers who fund Medicaid and the States that participate in the program, including West Virginia, lose.

¹ Emily Willingham, "EpiPen Maker Mylan Agrees To \$465 Million Settlement With DOJ," *Forbes* (October 7, 2016), available at <http://www.forbes.com/sites/emilywillingham/2016/10/07/epipen-maker-mylan-agrees-to-465-million-settlement-with-doj/#7af5ba05c921>.

² Dan Mangan, "Underpayments on EpiPen rebates to Medicaid could top \$700 million," *CNBC* (October 7, 2016), available at <http://www.cnbc.com/2016/10/07/underpayments-on-epipen-rebates-to-medicaid-could-top-700-million-dollars.html>.

³ Berkeley Lovelace Jr., "Mylan Shares Soar After Company Settles With Government For \$465 Million," *CNBC* (October 10, 2016), available at <http://www.cnbc.com/2016/10/10/mylan-shares-soar-after-it-settles-with-government-for-465-million.html>.

Figures from the Centers for Medicare & Medicaid Services (CMS) show that government spending accounts for 53 percent of Mylan's EpiPen revenue.⁴ The final price tag to the American people, however, has been improperly high for years because the EpiPen—which is approved under a New Drug Application and “meets the definition of a single source drug or brand drug”—has been classified as generic, multiple-source drug for purposes of the Medicaid Drug Rebate Program.⁵ In other words, Mylan should have been paying rebates to Medicaid equal to approximately 23.1 percent of the EpiPen's Average Manufacturer Price (AMP), while it instead paid rebates set only at 13 percent of the EpiPen's AMP. Mylan has maintained this practice despite repeated warnings from CMS that it had misclassified the EpiPen.⁶

As a result, West Virginia, as well as its citizens and residents, have suffered.⁷ Although \$465 million is a large amount in the abstract, it does not approach the amount that Mylan illegally kept to itself instead of paying to Medicaid, a program designed to help the American families most in need.

Mylan must not be allowed to receive a windfall after flagrantly defrauding the Medicaid Drug Rebate Program. Indeed, allowing Mylan to cut nearly in half the amount it owes Medicaid, while simultaneously allowing it to avoid admitting any wrongdoing, will do little more than encourage similar malfeasance from other pharmaceutical companies. It is particularly discouraging that, at a time of decreasing revenues and funding cuts across the nation, the DOJ is primed to allow West Virginia and its sister states to lose millions and to allow Mylan to profit from its demonstrated commitment to increasing profits at the expense of American people. With West Virginia struggling to fund schools, drug testing at the State Police Crime Lab and drug treatment centers, it is irresponsible to let Mylan keep a large portion of their ill-gotten gains the taxpayers' expense.

There are no reports that the DOJ has finalized the \$465 million settlement, nor has my office seen the amount that West Virginia would purportedly recover from it. But because the total settlement is woefully deficient compared to the actual cost of Mylan's fraud, my office urges the DOJ reconsider this deal in recognition of the damage Mylan has caused. And for this reason, my office intends to urge our State's Department of Health and Human Resources to reject the deal if the DOJ is unwilling to do so.

⁴ Ben Popken, “Taxpayers Now Fund Most Of EpiPen Revenue, Senator Says,” *NBC News* (October 7, 2016). Available at <http://www.nbcnews.com/business/consumer/taxpayers-now-fund-most-epipen-revenue-senator-says-n661721>

⁵ *Ibid.*

⁶ *Ibid.*

⁷ NAMD Staff, “Impact of EpiPen Price Increases on the Medicaid Program,” Letter to Congressional Staff (September 8, 2016). Available at <http://medicadirectors.org/wp-content/uploads/2016/10/NAMD-Memo-EpiPen-issues.docx>

The reported settlement is not in the best interest of West Virginia. It does not nearly pay for the damage done by Mylan and sends the wrong message of leniency to other pharmaceutical companies engaged in the Medicaid market. The people of West Virginia deserve much better than this. My hope is that the DOJ will reach the same conclusion.

Respectfully submitted,



Patrick Morrissey
West Virginia Attorney General

cc: Karen L. Bowling
Cabinet Secretary
West Virginia Department of Health and Human Resources
100 Davis Square, Suite 100 East
Charleston, WV 25301