

Horvath Health Policy

Innovations in Healthcare Financing Policy

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Why a State Prescription Drug Affordability Board Would Not Violate the Dormant Commerce Clause (DCC)

Summary of a PDAB:

A prescription drug affordability Board (PDAB) would have authority to establish an all-payer, statewide, upper payment limit for all sales, purchases, billing and reimbursement of certain high cost brand or generic drugs intended for sale in the PDAB state.

Summary of why a PDAB does not place an undue burden on the operations of the prescription drug industry nor impact interstate commerce:

The PDAB is based on two long-standing practices that meet the key requirements to avoid violating the dormant commerce clause. The first is the prescription drug industry business model that accommodates the demands of different providers and health plans for different discounts and other price concessions across the country for most of their product line. The second is state regulation of what consumers will pay for vital public services.

Practice of Payment Rate Setting Throughout the US Healthcare System:

The first example is the decades-old practice in healthcare of *not* paying list prices or even billed charges for products and services. Instead, health plans set payment limits for healthcare goods and services which may be unrelated to the list price or service fees. This is the same for prescription drugs. The dormant commerce clause might disallow a state regulatory system where the benefit to the public is less than the burden on the out-of-state industry. In contrast, prescription drug manufacturers are fully accustomed to the impact of payment regulation and reimbursement limits on their customers. Manufacturers accommodate these myriad reimbursement limits for a drug product through their supply chain, direct invoice discounts, or post-sale rebates. Because this is the current business practice, PDAB rate setting of state-licensed healthcare entities is not unduly burdensome but rather uses the current industry business model.

Public Service Commissions:

Public service commissions in all 50 states set consumer payment rates for vital services such as electric, natural gas, taxi, and/or telecommunications services. These commissions regulate charges for products that may come from companies and facilities located out of state. These same corporations sell their services in other states and what they can charge in those states is set by various state commissions.

Like the function of a public service commission, a PDAB would set payment rates for consumers and state-licensed healthcare entities (wholesalers, local distributors, hospitals, physicians, pharmacists, and insurers).

These are the ways a PDAB is similar to state public service commission operations and mission, and how neither entity violates the key aspects dormant commerce clause court decisions:

- Like a public service commission, a PDAB works to protect state residents from exceptional costs that threaten quality of life or health.
- Like a public service commission, a PDAB does not favor in-state businesses at the expense of out of state businesses.
- Like a public service commission, any small impact on a manufacturer's out of state operations (negotiations with wholesalers) is wholly incidental to the significant benefits to health and welfare of state residents.
- Like a public service commission, a PDAB sets payment rates only on services provided to individuals present in the state.
- Like a public service commission, a PDAB upper payment limit does not impact the price of the service or product in another state, nor the national 'list price' of a drug manufacturer.
- Like regulated regional or national electric, gas, or telecommunications services, drug companies rely on wholesalers or specialty distribution systems to manage the product supply going to a specific state to meet the needs of the market in a specific state or states.
- Like a public service commission, the PDAB mission is to maintain (or increase) consumer access to vital services and products through affordability.