



September 11, 2008

Hon. Francisco T. Duque III

Secretary
Department of Health
San Lazaro Compound
Sta. Cruz, Manila

Dear Secretary Duque,

May we submit to your office, attached herewith, our proposed language for the Implementing Rules and Regulations of Chapter 3 of RA 9502, entitled “Drugs and Medicines Price Regulation”.

Our think tank is advocating small government, small taxes, free market and individual responsibility. Hence, we are not comfortable with price control policy and politicized pricing because it indicates that a sector, if not the whole economy, is not free. Heavy regulations are very costly to us ordinary citizens both in terms of high taxes and fewer options as such practices tend to kill competition. Hence, burdensome regulations like price control should be tempered as much as possible; it should not be exercised lightly and arbitrarily even though the provision has been enacted into a law.

We hope you will consider our proposals. We will also be happy to participate in any public consultation that your department will conduct on this subject. For any question or public announcement, you can reach us at the address and contact details below.

Thank you very much.

Sincerely yours,

Bienvenido Oplas, Jr.
President

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Controlling the dangers of price control

(Proposed IRR, Chapter 3 of RA 9502,
“Drugs and Medicines Price Regulation”)

Bienvenido Oplas, Jr. *

September 11, 2008

Introduction

Price regulation and control is the clearest proof and explicit signal that an economy is not free, that pricing of the regulated commodity is highly politicized. Price control is also a naked and blunt proof that there is price dictatorship: the price dictators decide at what price the producer and/or seller of a final product or service can sell, even though the same people do not decide or dictate the price of all inputs and intermediate products and services needed to produce that final product or service.

Thus, while the rationale or alibi given to institute price regulation and control is to “give justice to the consuming public”, there is great injustice to the producer and/or seller of a commodity whose price has been politicized and regulated. And when prices are controlled, producers who can possibly make some “miracle” products at sky-high and “miraculous” costs will be discouraged from innovating and producing those products. Ultimately, it is the public, the consumers, who will be the losers because they will be deprived of enjoying such revolutionary products.

In the case of drugs and medicines, absence of more effective drugs to evolving diseases will compel patients and their physicians to take measures that are more costly, like using less effective drugs at longer treatment period, longer hospital stay, and even surgery. It is better to allow price segmentation – different prices for different products or services for different people with different budget and different needs. This way, people from different economic status can be served. Patients for instance who need anti-biotics to cure a certain viral infection, can choose from really cheap medicines and they can recover in 2 weeks or more, to medium-priced

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medicines and recover in 1 to 2 weeks, to expensive but more powerful medicines and recover in just 2 to 3 days. The drug manufacturer can make big profit from more powerful but more expensive medicines consumed by richer patients, so that it can sell less powerful but nonetheless safe, effective and cheaper drugs to poorer patients.

But the provision of medicine price control is already in the new law, RA 9502 or the “Universally accessible cheaper medicines act of 2008”. We can only institute certain mechanisms to lessen and reduce the dangers of price control policy.

Below are suggested language for the Implementing Rules and Regulations (IRR) of RA 9502, Chapter 3 entitled “Drugs and Medicines Price Regulation”, as well as the rationale why said language is being proposed. The chapter contains 14 Sections, but this paper will suggest IRR proposals for only 4 out of those 14 Sections.

SUGGESTED IRR PROVISIONS:

1. On Section 17 of the law, Drug price regulation authority of the President:

Section ____. The power to impose maximum retail prices over drugs and medicines shall be exercised within such period of time as the situation may warrant as determined by the President of the Philippines, but such period should not exceed one year from the time the price control was implemented, and cannot be re-declared within one year from the expiration of the earlier price control order of the President.

Rationale: Price control and politicized pricing, ie, some medicines’ prices are to be set by the DOH Secretary and the President of the country, is clear proof that the economy is not democratic. This is a violation of the current Constitution. No timetable or no-deadline price control can be abused by a corrupt DOH Secretary and President of the country. Frequent and arbitrary declaration and re-declaration of price control is possible. Hence, these tendencies should be tempered.

2. On Section 18, Drug price monitoring and regulation authority of the DOH Secretary:

Section ____. The Price Monitoring and Regulation Council or body to be created by the DOH Secretary shall be composed of 10 members as follows:

1. Secretary of Health or his duly authorized representative as Chairperson;
2. Secretary of Trade and Industry or his duly authorized representative as Vice-Chairperson;
3. Director, Bureau of Food and Drugs or his duly authorized representative as Member;
4. One representative from producers or importers of active pharmaceutical ingredients (API) sector as Member;

5. One representative from the pharmaceutical industry sector as Member;
6. One representative from private health and maintenance organizations (HMOs) sector as Member;
7. One representative from the physicians and medical profession sector as Member;
8. One representative from the drug retail industry sector as Member; and
- 9-10. Two (2) representatives from the consumer sector as Members.

The members of the Council representing various sectors including the consumers shall be appointed by the President of the Philippines upon the recommendation of the Secretary of Health and shall serve for a term of two (2) years, and they shall not be eligible for reappointment for another term.

Rationale: The price regulators – DOH and DTI Secretaries and ultimately, the President of the Republic – should hear the concerns and issues more of the people in the private sector involved in the manufacture, distribution and sale of effective and well-demanded medicines. Ultimately, it's those few medicines that are highly effective, yet high-priced because of the high cost of producing them, that will be targeted for price control, not those less effective, less innovative, less-demanded and lower-priced medicines.

3. On Section 19, Functions and Responsibilities of the DOH Secretary:

Section __. In recommending the maximum retail price, the DOH Secretary shall consider the following factors:

- (a) to (c) as provided in the law.
- (d) The number and amount of taxes, duties and fees, other compliance regulations, imposed by both national and local government units.
- (e) The value of the patented pharmaceutical product, evidence of its effectiveness and safety.
- (f) Such other factors or conditions, like the cost of active pharmaceutical ingredients (APIs), which will aid in arriving at a just and reasonable maximum price.

The DOH Secretary shall inform the manufacturers/importers of medicines whose price is sought to be regulated and controlled, hear their side and explanation about the computation of the cost of various inputs including taxes and fees, before the final recommendation for the MRP to the President shall be made.

Rationale: There are plenty of factors that need to be identified and defined in the IRR that the DOH leadership should consider before proposing price regulation. Price control is a serious move, a confiscatory move in fact, that can rob legitimate producers and sellers of their rightful returns for bringing in effective and safe

medicines to the public, given the proliferation of ineffective and unsafe, counterfeit medicines. Hence, the issuance of price control should be tempered and controlled as much as possible.

Section ____. The DOH Secretary should not propose or recommend price control of any medicine in the following situations:

(a) Where the Council was not consulted or where there was no majority of members present, and Council members have not monitored and deliberated the various factors, especially the costs of production and distribution, that contributed to a price deemed to be “high”.

(b) Where parallel imports pursuant to this law constitute at least ten percent (10 %) of local market demand; and

(c) Where a compulsory license has been issued by the Intellectual Property Office, or Government use has been declared by the same office and by the DOH.

Rationale: The State should not declare double or multiple confiscatory schemes on producers, distributors and sellers of safe and effective drugs. As mentioned earlier, it is those safe, innovative and effective medicines that get the attention and patronage of physicians and patients, and these drugs would tend to be high-priced mainly because of the high costs of developing and distributing them.

Section ____. Once the maximum retail price for certain medicines has been set and approved by the President, the Council should conduct monthly monitoring of the controlled price: (a) compared with their prices one to three months prior to price control; (b) compared with prices from reputable producers and sellers from other Asian countries a month ago; and (c) compared with the prices of next-popular medicines on the same generic or therapeutic effect category.

Once those prices are not more than twice the maximum retail price set by the President, price regulation and control should immediately be withdrawn.

Rationale: Price control being a confiscatory move, should not stay long; it should be a temporary and short-term measure that should be revoked as shortly as possible.

Section ____. Other government entities to be deputized by the DOH Secretary, especially the armed units like the Philippine National Police, the Armed Forces of the Philippines, and the National Bureau of Investigation, should fully understand the limitations of their involvement as price determination is not their function nor mandate. They shall be accountable for any abuses that will be committed in the course of their actions.

Rationale: During the “rice crisis” situation middle of this year, there were a number of reports of harassment and raids by the PNP, NBI, NFA and LGU personnel of

owners of rice warehouses and storage places. Practically anyone could be accused of rice “hoarding” if the warehouse is full or near-full of rice stocks. Thus, some traders refused buying from farmers on fear of being harassed or raided for “hoarding”, pushing some farmers to sell at lower price when retail price of rice remained high.

Section ____. The DOH Secretary can only require the production and submission of records, documents, books of account, bills of lading, records of purchase and sale, financial statements, other documents and information, only for those companies who were proven to have produced or distributed fake and dangerous medicines.

Rationale: Such forcible submission of financial information can constitute spying. A manufacturer of a very effective drug, say can cure a particular disease at one-third or one-tenth the treatment period compared to the next-popular medicines, but selling that drug at twice or thrice the price of the next-popular medicines, will hesitate bringing that medicine to the Philippines because of the various harassment it will face if it will market such product here. Not only that such medicine will be subject to price control or compulsory license or government use, but the manufacturer and distributor/s will now be forced to submit financial records that can open up such information to any DOH official or bureaucrat and possibly pass the information to other players or competitors for a good price. So the financial harassment should be limited only to producers and distributors of counterfeit medicines.

4. On Section 26, Display of MRP:

Section ____. For medicines whose quality and efficacy will be adversely affected when they are opened and repackaged, the display of Maximum Retail Price (MRP) should apply only to batches that were manufactured and packaged at the time the price control order was made. And once the price control order has been lifted, said medicines should still not be opened and repackaged to packs that do not have the MRP display. Instead, the MRP display will be disregarded and the new market price of said medicines will be reflected and followed.

Rationale: Medicines that are too sensitive to be opened and repackaged to suit new packs that display or remove the MRP display should be spared from such move. The efficacy of the medicine, more than its price, should be considered foremost.

Concluding Notes

It is unfair when government puts up uncontrolled taxes, duties and fees, other uncontrolled compliance regulations, both of the final product or service and its inputs (from electricity to wages to raw materials, etc.), then control the price of the final product later.

The current law on “affordable medicines” is putting more power and authority, but also more work and reporting responsibility, to the DOH. The DOH Secretary has the power to recommend price control to certain medicines, the power to demand various documents from drug producers and distributors. But the Secretary is also compelled by the new law to (a) create and convene a Price Council, (b) do price monitoring, (c) require the LGUs and the DTI to submit quarterly price monitoring reports to him/her, (d) submit bi-annual Monitoring Report to the President and publish it in a newspaper, (e) submit annual report to both the House of Representatives and the Senate, (f) submit regular report and comply to any order by the Congressional Oversight Committee, among others. These additional functions on top of the DOH mandate of providing basic and primary health care to the public and other functions, can stretch out the already thin and limited resources and manpower of the DOH.

More power, more responsibilities and accountability. And only dictators and opportunists will favour more power with little or no accountability. And if the DOH Secretary and President of the country are corrupt, they can abuse the price control provision to harass and extort money and favour from the manufacturers and distributors of safe and effective medicines by threatening, “Hey, we will issue price control (or compulsory license) on your most popular and block-buster medicines, unless you pay us...”

This is **not** to say that the current DOH Secretary and President are corrupt and extortionists. This law will stay with us for the next 20 or 50 years or even longer, unless amended by another law where the price control provision is removed and abolished. The appearance of corrupt and extortionist DOH Secretaries and Presidents of the country in the next 20 or 50 years or even longer, is a big probability considering the bad governance culture and history in the country.

It will be a big disgrace and injustice, therefore, to honest DOH Secretaries and Presidents that their sincere effort at public service will be hijacked and tainted by their dishonest successors. Because the current law allows for such opportunity to abuse and steal.

Hence, mechanisms should be instituted to make it difficult for future corrupt and extortionist DOH Secretaries and Presidents, to impose medicine price regulation and control arbitrarily. Then more innovators and inventors of effective, revolutionary and safe medicines will be encouraged to come in. With more competition among such type of medicine producers, the public will be protected with quality and affordable medicines.