

State of
Washington
House of
Representatives



March 2, 2006

To: Members of Washington State Congressional Delegation

Re: International Trade Agreement and Pharmaceutical Drug Programs

Prescription drug prices are the fastest-growing component of state health-care spending. In recent years, states have developed innovative solutions to combating these steep price hikes. State formularies, preferred drug lists, negotiation of bulk discounts, and drug reimportation schemes have been among the tools advanced by state legislators and state Medicaid directors to manage costs. The Prescription Drug Consortium Bill (SB5471) developed by the legislature and signed into law by Governor Gregoire on 26 April 2005 contains several key innovations that help guarantee cheaper prescription prices for Washington residents.

There are those who do not wish to see states utilize their negotiating power to expand access to affordable medicines. They have resorted to the courts to try and block implementation of these cost-reduction programs—with little success. More recently, however, drug manufacturers have made specific requests of United States trade negotiators to try and embed provisions in international trade agreements that could lead to preemption of state programs, even those passed by legislatures and signed into law by governors.

We appreciate that Congress has shown its concern regarding the seeming willingness of the United States Trade Representative (USTR) to pursue a strategy that essentially preempts state and Congressional lawmaking authority on matters of public policy that are still unsettled at the national level. As part of the appropriations bill that provides USTR with its funding, Congress passed language that prevents USTR from negotiating international trade commitments on drug reimportation. Congress didn't want USTR to put down a marker on the international law chessboard regarding public policies that hadn't yet been fully settled as matters of domestic law.

There is another area of uncertain domestic law where it appears trade negotiators have attempted to use that international trade chessboard before states have had a chance to adequately deal with crucial matters of health care policy. At stake is state administration of Medicaid.

In a recent bilateral trade agreement with Australia, the United States Trade Representative (USTR) included an Annex to the agreement *specific to pharmaceuticals*. The Annex states that this agreement covers "federal health care programs." Australia, it should be noted, operates federal-level schemes for controlling drug costs. In a clever bit of legal drafting, the Annex states

March 2, 2006

Page -- 2

that a federal health care program is one in which the country's "federal health care authorities make the decisions" to which the Annex applies.

And so a number of states are asking—and we are asking you to inquire of the administration, as well--**would this definition apply to Medicaid?** Medicaid is administered by states, but nonetheless federal health care authorities also make significant decisions with respect to waivers, drug formularies, etc., regarding the use of federal funds in Medicaid.

With this concern in mind, a group of state legislators--including representatives from Washington--wrote last year to US Trade Representative Rob Portman asking whether state programs were covered. We were gratified by Ambassador Portman's response. He said that the Annex on pharmaceuticals does NOT apply.

But unfortunately this is not the end of the story. Ambassador Portman's written assurance itself has no legal power in the case of a complaint filed by a trading partner of the United States regarding state administration of health care programs. In a follow-up letter, state legislators asked Ambassador Portman to use the "Interpretive Note" process to clarify this Annex language as a matter of international law. Enshrined in all trade agreements, the "Interpretive Note" process allows parties to an agreement to state definitively, as a matter of international law, what the text of the trade agreement actual means. (Of course, Congress has in the past used its broad interpretive power to define aspects of agreements submitted for ratification.)

So, based on Ambassador Portman's assurances, it would seem that USTR could quickly and easily work with the Australian government to clarify the language of the Annex. But **USTR thus far has refused to engage Australia in clarifying whether or not this international trade agreement covers—and thus may impact—the administration of state Medicaid programs.**

The good news is that in March of this year, US and Australian negotiators will sit down to review the implementation of the US-Australia Free Trade Agreement. We fully support the full implementation of this important agreement with one of our key trading partners, one that is of particular importance to the economy of Washington State. At the same time, we do not wish to see our state Medicaid personnel operating under the cloud of uncertainty regarding whether their decisions might be second-guessed in an international trade tribunal.

The one-year review of AUSFTA implementation presents a perfect opportunity to clarify the language of the Annex on pharmaceuticals. **USTR must be strongly urged to pursue this clarification, and we ask your support in this.**

With this letter, the undersigned members of the Washington state legislature urge you to take up this matter with the United States Trade Representative. Given USTR's high standards of professionalism, it seems quite unlikely that the ambiguity in this Annex is the result of poor legal drafting. Rather it suggests an attempt to leave open the question of scope of coverage regarding what constitutes a federal health care program to an international trade challenge.

In order to avoid any potential misinterpretation by an international trade tribunal—the kind of "misinterpretation" which has led in the two years to costly defeats at the WTO on cotton subsidies and internet gambling—we request that, at the earliest possible date, that USTR work to memorialize its interpretation of AUSFTA's Pharmaceutical Annex by issuing an interpretive


March 2, 2006

Page -- 3

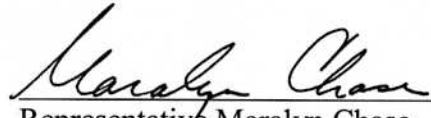
note, which USTR would propose for adoption by the Joint Committee for administration of the AUSFTA under the provisions of Article 21.1(2)(e).

Thank you very much for your kind attention.

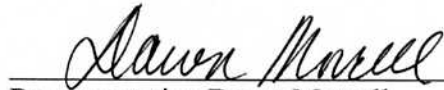
Very truly yours,



Senator Paull Shin
21st Legislative District



Representative Maralyn Chase
32nd Legislative District



Representative Dawn Morrell
25th Legislative District



Representative Tami Green
28th Legislative District

cc: United States Trade Representative