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December 18, 2019

VIA CM/ECF

Mark Langer  
Clerk of the Court  
U.S. Court of Appeals for the D.C. Circuit  
333 Constitution Avenue NW  
Washington, DC 20001

RE: *Merck & Co., Inc. v. HHS*, No. 19-5222 (D.C. Cir.)

Dear Mr. Langer:

The government respectfully submits this letter, pursuant to Rule 28(j), to respond to the December 11, 2019 letter sent by the plaintiffs in this case.

Plaintiffs call the Court's attention to a proposed rule regarding Transparency in Coverage, 84 Fed. Reg. 65,464 (Nov. 27, 2019). That proposed rule, like the DTC rule challenged here, seeks to promote price transparency and reduce out-of-pocket healthcare costs. It proposes to require health insurers to disclose cost-sharing information to beneficiaries for covered items or services. *Id.* at 65,464.

The proposed Transparency in Coverage rule and the DTC rule are complementary components of the Administration's multi-prong approach to lower healthcare costs and improve transparency. Contrary to plaintiffs' suggestion, the proposed rule neither obviates the need for the DTC rule nor demonstrates its infirmity.

*First*, the proposed rule applies only to "group health plans and health insurance issuers"; it does not apply to Medicare and Medicaid. Therefore, Medicare beneficiaries—who often bear coinsurance obligations related to a drug's list price, *see* Reply Br. 19—will not be affected by the proposed rule.

*Second*, as HHS explained in promulgating the DTC rule, “including direction as to where price information can be found will not have the same impact as including the information in the advertisement itself.” J.A. 210. The proposed Transparency in Coverage rule requires insurers to disclose information for the benefit of individuals who want to learn more about their benefits. *See* 84 Fed. Reg. at 65,469. The DTC rule, by contrast, aims to provide information for the benefit of individuals who would not respond to television advertisements by conducting further, independent research. *See* J.A. 210.

*Finally*, the Transparency in Coverage rule does not call into question the usefulness of disclosing a drug’s list price. On the contrary, the proposed rule states that “plans and issuers often base cost-sharing liability for prescription drugs on the undiscounted list price.” 84 Fed. Reg. at 65,742. The list price can therefore help beneficiaries understand how much they are likely to pay for a drug. J.A. 205.

Sincerely,

/s/ Joshua Revesz  
Joshua Revesz

cc: Counsel of Record (via CM/ECF)