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October 14, 2016

The Honorable Loretta E. Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, Northwest
Washington, D.C. 20530

Dear Attorney General Lynch:

On Friday, October 7, 2016, Mylan Pharmaceuticals announced it has entered into a settlement agreement with the Department of Justice (DOJ) regarding the possible misclassification of its EpiPen product for purposes of the Medicaid Drug Rebate Program.¹

I write to reaffirm my request for DOJ to reject this agreement and conduct a thorough and timely investigation into Mylan's actions. This proposed agreement is a shadow of what it should be—lacking real accountability for Mylan's apparent lawbreaking. It short circuits an investigation and fact finding necessary to determine the scope of illegality, culpability of individuals, and proof of criminal wrongdoing. Simply, this agreement is blatantly inadequate, not only in dollar amount, but also Mylan's avoiding admission of moral and legal responsibility.

The amount recovered in this settlement is unfair to federal and state taxpayers because Mylan pays \$465 million, far less than the more than \$700 million in harm to federal and state taxpayers, according to one estimate.² Many state Medicaid offices have yet to calculate the actual overcharges. This proposed settlement has been reached – inexplicably – without knowing the exact profit Mylan made through these overcharges and requiring Mylan to pay at least that amount in fines and restitution. Moreover, Mylan also plans to include this \$465 million as a “pre-tax charge” in its upcoming quarterly filings, thereby getting a tax break for repaying overcharges to federal and state taxpayers. Taxpayers become losers several times over.

Finally, the proposed settlement fails to provide “any finding of wrongdoing on the part of Mylan Inc. or any of its affiliated entities or personnel.”³ Mylan should be held fully

¹ <http://newsroom.mylan.com/2016-10-07-Mylan-Agrees-to-Settlement-on-Medicaid-Rebate-Classification-for-EpiPen-Auto-Injector>

² <http://www.cnn.com/2016/10/07/underpayments-on-epipen-rebates-to-medicare-could-top-700-million-dollars.html>; Memorandum, National Association of Medicaid Directors, *Impact of EpiPen Price Increases on the Medicaid Program*, Sept. 8, 2016, (available at <http://medicaiddirectors.org/publications/namd-memo-on-impact-of-epipen-price-increases-on-the-medicare-program/>).

³ *Id.*

accountable for its apparent lawbreaking. Unfortunately, by ending this investigation now, DOJ may forgo an effective investigation regarding the facts and scope of criminal wrongdoing. DOJ has stated that “[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.”⁴ However, the settlement allows possibly culpable individuals to avoid even a full factfinding – not to mention liability for wrongdoing. Ensuring individual accountability is truer to the spirit of the law, and policy goal of making pharmaceutical drug prices fairer and more affordable.⁵ Unfortunately, halting the process here prevents DOJ from achieving justice from Mylan and industry-wide progress.

A settlement that lacks any acknowledgement of responsibility and requires payment smaller than profits made illegally at taxpayer expense is simply unacceptable. The American people have been rightly outraged by Mylan’s apparent profiteering and price gouging and possible fraud. DOJ must fulfill its responsibility to fully and fairly investigate the facts, establish intent, and punish wrongdoing to deter present and future bad actors.

I urge you to explore any possible opportunity for investigation and encourage you to work with state authorities in pursuing remedies that adequately compensate harm done to state taxpayers. I stand ready to support and assist such efforts.

Sincerely,



Richard Blumenthal
United States Senate

⁴ Memorandum, U.S. Deputy Attorney General Sally Yates, *Individual Accountability for Corporate Wrongdoing*, Sept. 9, 2015, (available at <https://www.justice.gov/dag/file/769036/download>).

⁵ “[individual accountability] deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public’s confidence in our justice system.” *Id.*