

Vote Yes on Prop 79

Cheaper Drugs More Californians Can Count On



Frequently Asked Questions about Propositions 78 & 79

NO on Prop 78: No to the Drug Companies' Unfair Prices
YES on Prop 79: Cheaper Drugs More Californians Can Count On

1. What would Prop 79 do?

Prop 79 would provide 8-10 million Californians who struggle to pay out-of-pocket for prescription drugs with deep, enforceable discounts of 50% or more.

Prop 78 would create a similar prescription drug discount card program, but it promises to provide smaller discounts to half as many people. It's unclear whether any discounts would be provided, since the drug companies would decide which drugs to discount, which drugs to exclude, or whether to participate at all. If the drug companies don't participate, the program could end.

2. Who supports and opposes Prop 79?

Prop 79 is supported by major consumer, senior, health, and medical organizations, including Consumers Union, the League of Women Voters of California, Health Access California, California Association of Retired Americans, Congress of California Seniors, Latino Coalition for a Healthy California, AIDS Healthcare Foundation, Breast Cancer Action, CALPIRG, California Physicians Alliance, and dozens of other organizations.

Prop 78 is supported by major drug companies, which have vowed to spend "whatever it takes" to oppose Prop 79.

3. Who would get the drug discounts under Prop 79?

Prop 79 would create a prescription drug discount card, which would be available at participating pharmacies, for 8-10 million Californians. The vast majority of Californians that now pay out-of-pocket for prescription drugs would be eligible for these discounts. This includes both uninsured and underinsured Californians under 400% of the federal poverty level (\$38,000 for an individual, \$77,000 for a family of four), but also includes other Californians as well, including people with high deductible plans, seniors who have gaps in their Medicare Part D drug coverage, and people with chronic conditions who have health care costs that are more than 5% of their income.

Prop 78 would provide discounts for only half of these Californians who now pay retail for prescription drugs. At the most, Prop 78 would cover only 4-5 million Californians: only those uninsured people under 300% of the federal poverty level, and it excludes other populations. For example, those underinsured Californians with high deductible plans who have high out-of-pocket expenses for drugs or health care would not be eligible for discounted cards; neither would those who have generic drug coverage, but still have to pay retail for brand name drugs.

4. Where would the savings come from?

Prop 79 would allow the state to negotiate with the drug companies for the best possible price for Californians. Prop 79 uses the purchasing power of the state's Medi-Cal program, which buys over \$4 billion in drugs a year. If a drug company does not agree to provide discounts, the state could steer hundreds of millions of dollars of business to other drug companies that do provide discounts.

Prop 78 does not allow the state of California to use its \$4 billion in annual drug purchases as bargaining power to negotiate discounts with the drug companies. Any savings would depend on the voluntary goodwill of the drug industry—the same industry responsible for the problem of unaffordable prices for prescription drugs.

5. How would these discounts be enforced?

Under Prop 79, the state can use its purchasing power to steer business to drug companies that cooperate and offer sufficient discounts. If a drug company refuses to provide sufficient discounts, then the company's drugs may be removed from the Medi-Cal "preferred drug list." This simply means that doctors would be less likely to prescribe that company's drug for Medi-Cal patients and the company would lose business to its competitors. This would only happen for drug categories in which there are

more than one drug to choose from. But if a patient needs a drug not on the preferred list, they still have access to that drug. Medi-Cal is required to provide necessary drugs to patients, regardless of whether the drug is on the preferred list.

In the case where a doctor has a choice of several drugs to prescribe, placing a drug on a preferred list can steer hundreds of millions of dollars of business from one company to another. California needs that kind of bargaining power in order to negotiate lower prices on prescription drugs. Otherwise, the drug companies remain in control of setting the price. Prop 79 does not create this preferred drug list system, it simply builds on Medi-Cal's existing 15-year old system for negotiating good prices from drug companies.

On the other hand, Prop 78 won't result in any real discounts because the state lacks any leverage to negotiate with drug companies. It has no enforcement mechanism, and the drug companies can decide not to provide any discounts without any consequences. In fact, if enough drug companies decide not to participate, the program can simply end at any time.

6. What is the level of these discounts?

Under Prop 79, the discounts would be the result of a negotiation between the state and state government, but the benchmark in Prop 79 is "Medicaid best price," which is the best price that the state government gets for prescription drugs. According to the Congressional Budget Office, this is calculated to be a savings of up to 50% or more.

Under Prop 78, the discounts are determined at the whim of the prescription drug industry. The state has no ability to get a lower price than the drug companies "take it or leave it" offer. Even if it did, the benchmark is "lowest commercial price," which is an unknown, unverifiable price that they can change. Even if Prop 78 had an enforcement provision, this benchmark is unenforceable.

7. What is the impact of Prop 79 on taxpayers?

According to the independent Legislative Analyst's Office (LAO), Prop 79 would cost taxpayers a modest amount to set up the prescription drug discount card program. However, according to the LAO, taxpayers could stand to save under Prop. 79. If Californians can better afford prescription drugs, they are less likely to need to depend on state and county public programs and health providers. This would provide savings to both state and county taxpayers.

Prop 78 costs the same amount to set up the prescription drug card program, according to the LAO. However, since the promised benefits, if they ever materialized, would be to a smaller group of people, the savings to the state and counties, and thus to the taxpayer, would be smaller.

8. Why is Prop 79 on the ballot?

For the last several years, a coalition of consumer, senior, labor, and health organizations have been working to pass legislation to help provide affordable prescription drug prices. Last year, these groups succeeded in passing six bills through the Legislature, but those bills were opposed by the prescription drug companies, and vetoed by Governor Arnold Schwarzenegger. (Governor Schwarzenegger was the second biggest recipient, after the President, of campaign contributions from the pharmaceutical industry last year.) This year, these consumer groups decided to continue to pursue legislation, but also placed Prop 79 on the ballot as another way to win cheaper drugs for Californians.

In response, Prop 78 was submitted to the Attorney General by a lawyer representing the drug companies weeks after consumer advocates submitted Prop 79.

9. What is the experience in California with these programs?

Through Medi-Cal, California now negotiates discounts of 50 percent and more, saving taxpayers \$5 billion in the last 10 years. Prop. 79 builds on this success, using the same mechanism to negotiate these discounts for eligible Californians. As a result, consumers will pay less out of their own pockets for prescriptions at the expense of the drug companies, not taxpayers.

Prop 78's "voluntary" approach has already failed in California. The Golden Bear State Pharmacy was designed to offer seniors voluntary discounts on prescription medications. The Department of Health Services sent out more than 500 requests for participation to drug manufacturers, yet only 14 responded. Unable to implement it successfully, Governor Schwarzenegger closed the program.

10. What is the experience in other states?

The state of Maine is running a successful prescription drug program, which like Prop 79, uses the purchasing power of the state's Medicaid program to negotiate enforceable discounts for Maine residents. Maine passed the law in 2000, but it was challenged in the court by the pharmaceutical industry. The drug companies lost. The U.S. Court of Appeals found that the Maine program was legal, and the drug companies took the case to the Supreme Court to overturn that decision. But the

Supreme Court turned the drug companies down. The program now provides meaningful, enforceable discounts to a significant percentage of the state's population.

Consumer, senior, and health advocates in Ohio tried to follow Maine's lead. Frustrated by a lack of action by the legislature, they filed a ballot measure similar to Prop 79. The drug companies sued in over 40 counties to prevent the measure from going to the voters. The drug companies then offered a "voluntary" proposal in Ohio, which the drug companies say is similar to Prop 78. Yet the program has had enrollment problems, covering only a few thousand Ohio residents, and is providing smaller discounts than promised. Of the small total amount of discounts provided, over 90% of the discount is actually provided by the pharmacy, not the drug company. The drug companies aren't providing their promised discounts in Ohio.

11. When can Prop 79 take effect?

Prop 79 can go into effect immediately, without federal approval or other delays. The prescription drug program in Maine is now in effect without seeking or getting federal approval, providing discounts to a significant percentage of the state's population. No court has ever required federal approval for such a prescription drug program.

12. How would Prop 79 impact the ability of low-income Californians to get the medications they need?

Prop 79 would enable low-income Californians to have more access to needed prescription drugs, not less.

- Medi-Cal patients will continue to get access to all medically necessary drugs under Prop 79 just as they do now. Prop 79 uses the same, successful authorization mechanism the Medi-Cal drug program has used for the last 15 years to help provide California with the best price. Protections are already in place to ensure Medi-Cal patients don't go without the prescriptions they need. Federal law requires Medi-Cal to have a process for responding to authorization requests within 24 hours.
- For those without Medi-Cal or other drug coverage, Prop 79 will allow them to get discounts of 50% or more, allowing millions to get affordable prescription medications.

13. How would Prop 79 impact drug prices for everybody, even those who wouldn't qualify for the card?

Prop 79 would help keep drug prices in line by prohibiting drug companies from charging unconscionable prices or prices that lead to unjust profits. It would make drug companies think twice before hiking their prices without justification.

Take the example of Norvir, a drug made by Abbott Labs. Norvir is an essential ingredient in three companies' drug "cocktails" used to treat HIV and AIDS. In December, 2003, Abbott suddenly increased the price of Norvir, a seven-year old drug, by 478% (from \$206 for 120 capsules to \$1,029). But it only charged this new higher price for Norvir when *other* companies used it as an ingredient in their drug cocktails. Abbott did not increase Norvir's price when it was used in Abbott's *own* cocktail. Thus, the cost of its two competitors' drug cocktails skyrocketed, while Abbott's version did not. Despite an outcry from patients, doctors, and government officials, Abbott refused to reduce Norvir's price, even though Abbott was potentially putting patient lives at risk. Prop 79's anti-profiteering section would help prevent such shocking behavior from drug companies.

Prop 78, written by the drug companies, continues to allow drug companies to set the prices they want, including allowing them to charge Americans more than anybody else in the world for prescription drugs.

14. Would there be litigation coming out of Prop 79?

The litigation threatened under Prop 79 comes from the drug companies who don't want to comply with Prop 79—but they are likely to lose. Like they have in Maine, Ohio, California, and elsewhere, the drug companies are likely to sue to stop the program. PhRMA, the drug company lobby, filed lawsuits in 44 Ohio counties to keep a measure similar to Prop 79 off the ballot there. In California, they sued to take Prop 79 off the ballot as well—but they lost. In Maine, they sued to stop an enforceable measure similar to Prop 79 from being implemented, but they lost at the Court of Appeals Court, the Supreme Court, and in the final District Court. Just because the drug companies threaten lawsuits doesn't mean they will win. Despite the drug companies' opposition, Maine now has a prescription drug program providing meaningful discounts to its residents.

With regard to the consumer protections against "unconscionable" pricing, if drug companies aren't charging shockingly high prices, then they have nothing to worry about under Prop 79. "Unconscionable" requires something that shocks the conscience—something far, far out of line. There's a difference between making a reasonable profit and charging an unconscionable price.

"Unconscionable" is a high standard, which is used in other states as well as in other parts of California law. It should be a deterrent against the worst predatory pricing practices of the drug industry. The industry suggests that Prop 79 would generate thousands of "frivolous" lawsuits. But about a case like Norvir? (See *Question 13 above*). Or the Vioxx and Celebrex scandals? Proposition 79 will be a needed deterrent to such bad behavior.

For many years until last November with the passage of Proposition 64, any person in California could already sue to stop any “unfair business practice,” including unjust and unconscionable pricing, broadly defined. There weren’t thousands of lawsuits over drug company prices prior to last November. There won’t be after Proposition 79 either.

The voters passed Proposition 64 last November to make some changes to California’s “unfair business practice” law. Proposition 64’s campaign claimed small “mom and pop” businesses were “shaken down” by lawyers filing frivolous lawsuits, in order to get them to pay settlement money rather than go to court. But the big drug companies, with their significant legal firepower, can’t be “shaken down.” A lawyer would not spend the significant amount of money to file a complaint against a drug company unless they had a very strong case. Proposition 79 won’t generate thousands of lawsuits, but it will make drug companies think twice before quadrupling the cost of an AIDS drug.

15. How does Prop 79 work with the new Medicare Part D drug benefit?

Seniors who would get the new Medicare Part D prescription drug benefit in 2006 would still be eligible for the drug discount card under Prop 79. Seniors will soon find out the extent to which Medicare Part D provides actual coverage for prescription drugs. The Prop 79 discount card would be useful for getting discounts on drugs that are not covered under Medicare Part D, either because the drugs are not in the formulary, or that the seniors have used up most of their coverage and are in the “donut hole” (spending between \$2,250 and \$5000 for prescriptions in year).

The Medicare bill has been criticized for not allowing the federal government to negotiate with the drug companies for the best price. A vote for Proposition 79 would allow the state of California to use its negotiating power, so Californians don’t have to pay more for prescription drugs than people in other wealthy nations as they do now.

16. How much have the drug companies raised to fight Prop 79?

Even before Labor Day 2005, the drug companies have raised over \$75 million against Prop 79, and for their counter-measure, Prop 78, breaking the record for the most expensive ballot campaign in the nation’s history.

Only twice in the history of the nation has a ballot campaign ever cost more than \$30 million: In 1998 in California, on the issue of tribal casino gambling, and in 1988 in California, on auto insurance reform. In the 1988 campaign, there was also multiple proposals on the ballot by competing interests, and an industry that spent record-breaking amounts, but at the end, the less funded, consumer group-backed measure, Proposition 103 passed.

17. How can I remember the difference between Prop 78 and Prop 79?

One rhyme that many people use to remember the difference is:

Prop 78, too little, too late;
Prop 79, keeps drug prices in line!

Vote Yes on Proposition 79

www.VoteYesOnProp79.com

Paid for by Yes on 79, a coalition of consumer, senior, labor and health organizations and Consumers Union of U.S., Inc