



March 8, 2017

The Honorable Laurie Monnes Anderson
Chair, Senate Committee on Health Care
Senator Jeff Kruse, Vice-Chair
Senator Lee Beyer
Senator Tim Knopp
Senator Elizabeth Steiner Hayward
Oregon State Senate
State Capitol
900 Court Street, NE
Salem, Oregon 97301

RE: Oppose Senate Bill 792

Dear Madame Chair and members of the Senate Committee on Health Care:

The associations listed below represent a broad cross section of the entire advertising and media industries in the United States. We are writing to express our strong opposition to Senate Bill 792.

That bill would require pharmaceutical manufacturers to disclose the wholesale price paid by pharmacies in the state (or the “manufacturer’s list price” pursuant to an amendment from the bill’s sponsor) in all advertisements for prescription drug products. Failure to include that information in pharmaceutical ads in any medium could lead to a civil penalty of up to \$5,000 for each publication or broadcast of the ad.

Prescription drug products and direct to consumer (DTC) pharmaceutical advertising are heavily regulated by the Food and Drug Administration (FDA). In fact, DTC advertising may be the most heavily regulated business category in our entire economy. The FDA has very specific advertising requirements that must be met by all manufacturers.

By mandating that all DTC advertising in the state disclose the wholesale price paid by pharmacies or the manufacturer’s list price for the product, we believe that Senate Bill 792 violates both the First Amendment and the Interstate Commerce clause of the U.S. Constitution.

The bill would impose a content-based restriction on one specific form of advertising (DTC advertising) carried out by one player in the health care arena (pharmaceutical

manufacturers). The disclosure requirement, which is compelled speech, would not apply to any other ads by any other participants in the marketplace.

The average wholesale price or the manufacturer's list price for a product can vary significantly from one pharmacy to another, across the state of Oregon or even within one city. The wholesale price and the list price change periodically so the number would be a moving target for manufacturers. Consumers generally do not pay the wholesale price or the manufacturer's list price so the information is not that useful and may be misleading or confusing. Finally, information about retail drug prices is available to consumers through other resources so it makes no sense to require this disclosure in DTC ads.

Much of the consumer advertising for prescription drug products is placed in media outside of the State of Oregon, yet Senate Bill 792 would impose a state-specific disclosure, which gives rise to our interstate commerce concerns. The legislation creates a substantial disincentive for pharmaceutical companies to provide valuable information to consumers. We urge you to oppose Senate Bill 792.

While we have several pharmaceutical companies as members of our associations, we are also concerned that this legislation would set a very dangerous precedent for a wide range of other products and services that may become "controversial." Marketers could face threats from more than 30,000 state and local governments that seek to mandate specific disclosures in their ads.

Senate Bill 792 Raises Serious First Amendment Concerns

Senate Bill 792 would require a national or global drug manufacturer to block its advertising from reaching consumers in any media form in the State of Oregon unless those ads contained the mandated disclosure of the wholesale price paid by pharmacies in the state or the manufacturer's list price.

The U.S. Supreme Court has made it clear that truthful, nondeceptive commercial speech cannot be banned or restricted unless the restriction "directly and materially advances" a "substantial governmental interest" and is "narrowly tailored" to "reasonably fit" that interest. *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). Any government restriction on commercial speech must also be "no more extensive than necessary." *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525 (2001).

In a series of recent cases, the U.S. Supreme Court has consistently reaffirmed the strong protection that advertising for every legal product and service has under the First Amendment. In *Thompson v. Western States Medical Center*, 535 U.S. 357 (2000), the Supreme Court ruled that a federal law prohibiting pharmacists from advertising compounded drugs violated the First Amendment. Writing for the majority, Justice

O'Connor stated: "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort."

In *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), the Supreme Court held that a Vermont law banning the use of physician prescriber histories for commercial purposes violated the First Amendment. The Court held that since the Vermont law disfavored a particular type of speech, commercial speech, it was subject to "heightened scrutiny" under the First Amendment. Justice Kennedy wrote for the majority: "The State may not burden the speech of others in order to tilt public debate in a preferred direction."

The government cannot target a specific product by burdening truthful, non-misleading ads or require private parties to vilify their own products. *Pacific Gas & Electric Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986). Under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), a government-compelled disclosure may be permissible only to convey "purely factual" information. Such disclosures may be required only if they are "uncontroversial" and when they relate to a governmental interest in preventing consumer deception or confusion. In fact, as we have already noted, the requirement for disclosing the average wholesale price or the manufacturer's list price may in itself lead to consumer confusion. Simply, there is no evidence that the DTC ads seen by Oregon residents are false, misleading or confusing so the across the board DTC disclosure requirement cannot pass constitutional muster.

Senate Bill 792 would impose state-specific disclosure requirements on DTC advertising seen by consumers in Oregon, an area that is already heavily regulated by the FDA. While the \$5,000 civil penalty is not a direct tax on DTC advertising, it nonetheless represents an unreasonable "speech fee" on drug manufacturers to conduct business in the State of Oregon.

There are a number of factors that determine the wholesale price paid by a pharmacy, many of which are out of the control of the manufacturer. The average wholesale price can vary significantly from one pharmacy to another, across the state of Oregon or even within the same city. Senate Bill 792 would compel manufacturers to include information in all of their ads for every product, information that may be at worst misleading or at best not helpful to consumers. Requiring the disclosure of the manufacturer's list prices raises the same problem.

In addition, the information about drug prices that the bill seeks to mandate is already publicly available. An online search revealed at least five websites which provide specific information about drug prices for any product in the zip code of any consumer:

www.goodrx.com
<http://rxpricequotes.com/>
www.wellrx.com
<http://easydrugcard.com>
www.lowestmed.com

By compelling manufacturers to disclose the wholesale price paid by pharmacies for a specific product or the manufacturer's list price in all ads for that product, Senate Bill 792 violates the First Amendment, which secures "both the right to speak [] and ...to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Where regulations operate by [m]andating speech that a speaker would not otherwise make," they "necessarily alter [] the content of the speech." *Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S.781, 795 (1988). The Supreme Court has noted that some of its "leading First Amendment precedents have established ... that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst'l Rights, Inc.*, 547 U.S. 47, 61 (2006).

We do not believe that the legislation can meet the test of *Central Hudson* and the subsequent cases protecting commercial speech.

Senate Bill 792 Raises Serious Interstate Commerce Concerns

Much of the DTC advertising seen or heard by the residents of Oregon is placed in media outside of the state's borders. Senate Bill 792 would impose significant costs and restrictions on pharmaceutical companies that use national and regional media to communicate with consumers in Oregon.

DTC Advertising Provides Benefits to Millions of Americans

DTC prescription drug advertising is creating a health revolution in America. It is raising health awareness and helping consumers prevent serious health problems through earlier disease diagnosis.

One of the greatest health dangers in the United States is the under treatment of life threatening or debilitating diseases. Millions of Americans are unaware that they have high blood pressure, high cholesterol, clinical depression or diabetes. All of these diseases can be successfully treated with prescription drugs. Early treatment can be a matter of life or death, or the avoidance of serious disability. Clearly, these drugs help patients avoid strokes, heart attacks, kidney disease and combat mental illness and can thereby save enormous costs in hospitalization or constant treatment by physicians.

Many patients do not get the medication they requested from their doctor, but the fact they are having the discussion with the doctor at all is because of DTC advertising. Placing impediments to this advertising as would be required by Senate Bill 792 is clearly counterproductive.

DTC advertising is providing valuable information to millions of Americans about their health care. Senate Bill 792 would impose a serious disincentive for pharmaceutical companies to provide this information to the residents of Oregon.

Conclusion

As noted above, the FDA heavily regulates prescription drugs and prescription drug advertising. Pharmaceutical manufacturers conduct business in national and global marketplaces. Senate Bill 792 would compel speech that could potentially be misleading or unhelpful to consumers, which violates the First Amendment. We believe the goals of this legislation, to provide consumers with more information about the products they purchase, can best be accomplished through other channels.

We urge you to oppose Senate Bill 792. Thank you for your consideration of our views.

Association of National Advertisers (ANA)

The Association of National Advertisers (ANA) provides leadership that advances marketing excellence and shapes the future of the industry. Founded in 1910, ANA's membership includes more than 1,000 companies with 15,000 brands that collectively spend or support more than \$300 billion in marketing and advertising annually. Several ANA members have corporate headquarters or conduct substantial business operations in the State of Oregon. More information is available at: www.ana.net

4A's – American Association of Advertising Agencies

4A's is the national trade association of the advertising agency business. 4A's member agencies create, place, manage and measure over 80 percent of all advertising media nationwide. They include the largest global advertising holding companies as well as a growing number of small and mid-sized digital advertising firms. 4A's provides leadership, advocacy and guidance to the advertising industry and serves as a spokesperson to the government, media and marketplace on behalf of the ad agency community. More information is available at: www.aaaa.org

American Advertising Federation (AAF)

The American Advertising Federation is the Unifying Voice for Advertising. Our over 100 corporate members comprise major advertisers, advertising agencies as well as the print, broadcast, and online media. Nearly 200 local advertising associations representing some 40,000 advertising professionals nationwide are AAF members. More information is available at: www.aaf.org

The Coalition for Healthcare Communication

The Coalition for Healthcare Communication, comprised of medical marketing agencies and media, defends the right of health professionals and consumers to receive truthful information. More information is available at: www.cohealthcom.org