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AdvaMed
Advanced Medical Technology Association

February 4, 2016

The Honorable Floyd Prozanski
Chairman, Senate Judiciary Committee
Oregon Senate
900 Court St. NE, S-415
Salem, Oregon 97301 *Sent via email to: sen.floydprozanski@state.or.us*

Dear Senator Prozanski:

I am writing you on behalf of the members of the Advanced Medical Technology Association (AdvaMed) to express our concerns about SB 1576, which regulates the distribution and pricing of contact lenses. The bill is scheduled to be heard before the Senate Judiciary Committee on February 8, 2016. We are very concerned that this legislation would bar long-standing free market practices that promote competition and benefit consumers.

The Advanced Medical Technology Association (AdvaMed) is a trade association that leads the effort to advance medical technology in order to achieve healthier lives and healthier economies around the world. AdvaMed represents 80 percent of medical technology firms in the United States and acts as the common voice for companies producing medical devices, diagnostic products and health information systems. Our members produce nearly 90 percent of the health care technology purchased annually in the United States and more than 40 percent purchased annually around the world. AdvaMed's member companies range from the largest to the smallest medical technology innovators and companies

SB 1576

SB 1576 would add a provision to current law regarding unfair or deceptive trade practices to address the sale of contact lenses. The legislation would harm competition and consumers in Oregon in a number ways, which are set out below.

1. Special Interest Legislation

Section 1(b) of the bill prohibits practices that are common in many industries in Oregon, including choosing qualified distributors and restricting distribution to categories of businesses that are most appropriate for certain products. These practices have evolved because they ensure that distribution is efficient, promotes good service for consumers, and results in the sale of high

quality products. By prohibiting these common business practices, the legislature would be injecting itself into the details of business decision that are better left to the market and private competition. Moreover, the Oregon legislature has never concluded that practices relating to one narrow product area should be banned while the identical practices in all other product and service areas should be lawful. The reason for this is clear: principles of competition should be governed by the generally applicable Oregon trade practice laws that are already in effect.

2. Dangerous Precedent

Because the bill would bar practices that are common and lawful throughout the United States, enactment of the bill would create a dangerous precedent for applying such intrusive regulation to other industries. Virtually all consumer products manufactured or distributed in Oregon are subject to some form of distribution restrictions. For example, manufacturers routinely exercise the right to refuse to distribute products to retailers who are unscrupulous, fail to meet quality standards, violate criminal or civil rights laws, abuse consumers, or fail to market or display their products properly. Manufacturers also have the ability to tailor their distribution strategy to meet the needs of different customer segments in order to compete effectively against other manufacturers of similar consumer goods.

As an example, retail service stations selling gasoline in Oregon do not sell contact lenses. The owners and staff of these outlets are presumably qualified to provide gasoline and service cars but they are not qualified or equipped to sell contact lenses. Yet, if SB 1576 is enacted, a service station owner who wants to be a contact lens retailer and cannot buy contact lenses from a manufacturer could claim that it is being is being discriminated against under Section(1)(b)(A) based its "retailing category." Similarly, a lumber wholesaler who wants to sell contact lenses could claim discrimination based on "channel of trade." In both cases, these businesses can bring actions under ORS § 646.638 for damages, including punitive damages. The problem is magnified because the bill does not define ""channel of trade" or "retailing category."

3. Inconsistency with Federal Law

SB 1576 prohibits specifying a retailer price by "entering into a contract or other enforceable agreement with the retailer." This provision retains the long-established principle recognized under federal and state law that a violation requires proof of an agreement.

However, the effect of the statute may be to reject the prevailing approach to analyzing agreements between manufacturers and retailers about the retailer's price, which requires courts to determine whether an agreement harms competition based on all the relevant considerations. In *Leegin Creative Leather Products, Inc. v. PSKS*, 551 U.S. 877 (2007), the United States Supreme Court said that many manufacturer-retailer price agreements are beneficial to consumers by promoting retailer efforts to offer services and higher quality products. It rejected a flat, arbitrary rule that barred all such agreements.

It is not clear that this is the intent of the sponsors, but the legislative language may be

interpreted to be inconsistent with the Court's analysis in *Leegin* and, therefore, to codify the now discredited approach of condemning any agreement between a manufacturer and retailer about the price that the retailer will charge. This ban would extend to fixing a minimum price as well as a maximum price. Modern economic analysis as well as the Court's analysis in *Leegin* demonstrate that this arbitrary approach harms consumers.

4. Vagueness

Section (1)(c) of the bill prohibits actions that "otherwise [limit] a retailer's ability to set a retail price for prescription contact lenses…" It is not clear what this exceedingly vague provision is intended to prohibit. It could include any practices of manufacturers that might cause retailers to raise their prices. For example, it could include decisions by manufacturers to sell products to two retailers in the same geographic area, thus forcing the retailers to compete and lower prices. It is not hard to imagine a retailer, who previously had an exclusive territory, initiating litigation against a manufacturer when the manufacturer began to supply the retailer's competitor.

This vague provision could also apply to other common manufacturer practices such as charging different prices to two different retailers. This frequent practice is lawful and justified for legitimate business reasons unless it is barred under the very specific provisions of the federal Robinson-Patman Act or Oregon's price-discrimination statute, ORS § 646.040(1). The provision might also apply to other common practices, such as suggesting resale prices, requiring retailers to provide services or guarantees, providing volume discounts, and engaging in many other practices that could be said to "limit a retailer's ability to set a price." Unless the terms in this vague provision are defined, it is virtually certain to lead to frequent litigation.

4. Risk to Consumers

Contact lenses are Class II or Class III medical devices regulated by the FDA. The classification of devices by the FDA reflects levels of risk from improper manufacture, handling or use (Class III is the highest risk class). Contact lens manufacturers take extensive steps to make sure that their products are handled and sold by qualified retailers who comply with all applicable laws. By broadly prohibiting common practices intended to limit sales to qualified and appropriate retailers, the bill subjects Oregon consumers to the risk of purchasing products from individuals or companies that do not meet these standards.

5. The Contact Lens Industry

Some supporters of the legislation may argue that, while the provisions of the bill make no sense when applied to products generally, they are justified because contact lenses are a "necessity." This argument is unpersuasive for the following reasons. First, many other products, not only medical devices but vitamins, drugs, eyeglasses, and over the counter consumer health products could also be considered "necessities." In all these product areas, manufacturers engage in practices prohibited by the legislation in order to ensure that that they have ethical, high quality distributors who distribute their products safely. Second, to the extent that contact lenses

are necessities for Oregon consumers, the harm of these practices to consumers in reducing competition and promoting the growth of unscrupulous and unqualified retailers will be magnified.

Conclusion

We urge the Committee to reject this legislation. Please let me know if you need additional information or have questions. Feel free to contact me directly at 202-434-7265 or chartgen@advamed.org.

Sincerely,

Carrie A. Hartgen

cc: Members of the Senate Judiciary Committee
Senator Rod Monroe