



COALITION FOR HEALTHCARE COMMUNICATION

February 20, 2019

**TO: Rep. Mitch Greenlick  
Chair, Oregon House Health Care Committee**

**RE: Oregon House Bill 2961 on drug prices in DTC advertising**

On behalf of the Coalition for Healthcare Communication, we are pleased to file comments and make recommendations on HB 2961, proposed legislation in the Oregon House, that would require pharmaceutical manufacturers to disclose the “wholesale price” that pharmacies located in the state pay for prescription drugs in any advertisement about a prescription drug and that could subject the manufacturer to a civil penalty of up to \$5,000 for each advertisement that fails to disclose the “wholesale price” of the prescription drug.

The Coalition, founded in 1991, is a nonpartisan group devoted to ensuring the free flow of accurate and credible health information to improve patient care. CHC member companies cover a range of disciplines involved in communicating about health, including health advertising agencies, marketing firms, scientific communications agencies, medical journal publishers, and health websites.

The Coalition generally favors more, not less, information about the value of diagnostic and therapeutic options for clinicians and their patients. Medical decisions should be based on best practices for patient care, and both healthcare practitioners and their patients should have access to the best possible information to make informed decisions. This includes data on the clinical efficacy, safety, and adverse reactions of a pharmaceutical or procedure. We believe that collaboration among industry, academia and government has enabled the great medical breakthroughs that have added 10 years to the average American life in just a generation.

Healthcare expenses are also a highly relevant factor; the cost of medical care is important to patients, to providers, to government, and to society. Therefore, we are not opposed to the inclusion of drug prices in advertising *per se*, but when provided, cost information – just like information on efficacy or safety – must be presented in a manner that is accurate and not misleading.

We believe that HB 2961 fails that standard of accuracy. In fact, the requirement to include the wholesale cost of a drug in DTC advertising would be detrimental to the interests of both health providers and patients. Our concerns include practical and legal considerations.

- The “wholesale price pharmacies located in the state pay for prescription drugs” does not represent the price that the great majority of consumers would actually pay. The “wholesale price” is not actually set by the pharmaceutical manufacturer, but is apparently intended here as a proxy for the “wholesale acquisition cost” (WAC). The amount actually paid by a patient is only rarely the WAC; instead, the amount paid depends on a combination of the list price, the type (including plan details) of insurance the patient has, the structure of its formulary, the impact of rebates to pharmacy benefit managers, copays, deductibles, patient assistance programs, and other factors. The difference between what is actually paid by a typical patient, versus the WAC, may be one of orders of magnitude, as is dramatically illustrated in a recent “Perspectives” article in *The New England Journal of Medicine*.<sup>1</sup> The difference between WAC and what is likely to be paid is significant, whether the drug is an expensive biologic for cancer or a more common medicine for diabetes. For example, Table 2 in the *NEJM* article states that the WAC for a 30-day course of treatment with cancer treatment Keytruda (pembrolizumab) is \$4,649.64, but the out-of-pocket cost for that course of treatment for Medicare beneficiaries ranges from \$0 to \$1,480.53. The WAC for Trulicity (dulaglutide) for Type 2 diabetes treatment is listed as \$730.20/mo., but Medicare beneficiaries actually pay between \$74 and \$223/mo. Patients on private insurance plans also generally see significantly lower costs than the WAC.
- The mission and regulatory scope of the Food and Drug Administration (FDA) includes monitoring to ensure that advertising of pharmaceuticals to patients is accurate and non-misleading. To include the wholesale price in an advertisement as though that is the price commonly paid by a patient is, in fact, inaccurate and misleading, undermining the stated goal of both the FDA and the pharmaceutical industry.
- To provide a misleading list price is potentially harmful to patients. A major purpose of DTC advertising is to make patients aware of symptoms and conditions that they did not know they had or did not understand were significant, and to prompt patients to visit their health care practitioner to discuss their health. Such conversations prompted by DTC advertising can lead to recognition and diagnosis of significant health issues that require management. There is a real risk that if a television advertisement states a WAC as though it is a reasonable approximation of the price of the drug to the patient – without appropriate context as to what a typical patient would actually be likely to pay – it may simply dissuade the patient from seeking medical care or advice from their practitioner in the first place, leaving clinical problems undiagnosed and untreated. Indeed, the *NEJM* article states that “a better alternative would be making patient-specific cost information accessible at the point of prescribing,” and that it should be “a routine part of prescribing discussions with patients.”<sup>2</sup>
- We believe that the bill as proposed would not withstand First Amendment scrutiny. The First Amendment prohibits the government from restricting or censoring speech; it also

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<sup>1</sup> Dusetzina, Stacie B., Ph.D.; and Mello, Michelle M., J.D., Ph.D., “Disclosing Prescription-Drug Prices in Advertisements – Legal and Public Health Issues,” *New England Journal of Medicine* (Nov. 14, 2018).

<sup>2</sup> *Id.*

prohibits the government from compelling someone to convey particular messages against their will.<sup>3</sup> Laws that compel speech on the basis of its content – speech that in the case of disclosure of an arbitrary and misleading price metric in DTC advertising would not otherwise be conveyed in advertising – are presumptively invalid under the First Amendment.<sup>4</sup>

As previously stated, the Coalition for Healthcare Communication supports the free flow of accurate and credible healthcare information to allow HCPs and patients to make the best, most informed decisions about patient care. The information for caregivers and consumers must be credible and non-misleading, and we believe that HB 2961's requirement that wholesale cost be included in DTC advertisements for pharmaceuticals fails that standard.

The more that we all can support the overall goal of helping providers and patients understand their therapeutic choices while giving them access to lifesaving and life-changing medications, the better off everyone will be. Promoting transparency of medical costs, including drug costs, is a part of that goal. Yet we need to ensure that the information in DTC advertising is conveyed in a manner through which it can be most successful in achieving the goal, and does not inadvertently create unintended outcomes.

We thank you for the opportunity to share our comments. We encourage you to contact us if further information or clarification is necessary.

Sincerely,

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<sup>3</sup> *Janus v. Am Federation of State, City, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2464 (2018).

<sup>4</sup> *Sorrell v. IMS Health Inc.*, 564 US 552, 571 (2011).