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February 21, 2019

The Honorable Mitch Greenlick  
Chair, House Committee on Health Care  
Oregon House of Representatives  
State Capitol  
900 Court Street, NE  
Salem, Oregon 97301

**RE: Oppose House Bill 2961**

Dear Mr. Chairman:

I am writing on behalf of the Association of National Advertisers (ANA) to express our strong opposition to House Bill 2961. That bill would require pharmaceutical manufacturers to disclose the wholesale price paid by pharmacies in the state 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.

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 1,700 companies with 25,000 brands that collectively spend or support more than \$400 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](http://www.ana.net)

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 for the product, we believe that House Bill 2961 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 players in the marketplace. The average wholesale 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 changes periodically so the number would be a moving target for manufacturers. Consumers generally do not pay the wholesale price so the information will not be generally useful and often may be seriously 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 House Bill 2961 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 House Bill 2961.

While we have several pharmaceutical companies as ANA members, 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.

### **House Bill 2961 Raises Serious First Amendment Concerns**

House Bill 2961 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.

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. The *Zauderer* test was upheld last year by the U.S. Supreme Court in *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018). The Court there reaffirmed the limits the First Amendment imposes on the government’s authority to compel speech by private parties.

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 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.

House Bill 2961 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. House Bill 2961 would compel manufacturers to include information in all of their ads for every product, information that is likely to be misleading and or at best not helpful to most consumers.

By compelling manufacturers to disclose the wholesale price paid by pharmacies for a specific product in all ads for that product, House Bill 2961 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.

### **House Bill 2961 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. House Bill 2961 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. Placing impediments to this advertising as would be required by House Bill 2961 is clearly counterproductive.

DTC advertising is providing valuable information to millions of Americans about their health care. House Bill 2961 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. House Bill 2961 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. For example, the Pharmaceutical Research and Manufacturers of America (PhRMA)

released voluntary guidelines last October for providing more meaningful information to consumers about the costs of these products. Information about that effort is available at: [www.phrma.org/press-release/phrma-members-take-new-approach-to-dtc-television-advertising](http://www.phrma.org/press-release/phrma-members-take-new-approach-to-dtc-television-advertising)

We urge you to oppose House Bill 2961 and to make our letter a part of the hearing record.

Thank you for your consideration of our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith Scarborough". The signature is fluid and cursive, with a large initial "K" and "S".

Keith A. Scarborough  
Senior Vice President, Government Relations  
Association of National Advertisers  
2020 K Street, NW, Suite 660  
Washington, DC 20036  
(202) 296-1883  
[kscarborough@ana.net](mailto:kscarborough@ana.net)