STATEMENT

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In Opposition to Oregon Senate Bill 792 (SB 792)

March 9, 2017

Position: The Pharmaceutical Research and Manufacturers of America (PhRMA) respectfully opposes SB 792 which would require pharmaceutical manufacturers to disclose the wholesale price (average wholesale price or "AWP") in any advertisement about a prescription drug. Under SB 792, failure to include the AWP in such materials could subject the manufacturer to a civil penalty of up to $5,000 for each publication or broadcast of an advertisement that fails to disclose the AWP of the prescription drug.

Discussions about the cost and affordability of medicines are important. No patient should have to worry about whether he or she can afford needed health care. However, the notion that spending on medicines is the primary driver of health care cost growth is false, and this misconception ignores the cost savings that medicines provide to the health care system overall. Medicines lead to fewer physician visits, hospitalizations, surgeries and other preventable procedures – all of which translate to lower health care costs. New medicines are making crucial contributions to medical advances and changing the direction of health care as we know it.

SB 792 would impose a criminal sanction on pharmaceutical manufacturers who advertise prescription drug products in Oregon without providing the AWP of the drug. If enacted, this bill would pose serious legal and practical problems. Simply put, SB 792 mandates speech on a targeted group – pharmaceutical manufacturers. Under governing First Amendment precedent, SB 792 would be subject to "heightened scrutiny," which we do not believe it would survive.

In *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), the Supreme Court evaluated a Vermont statute which restricted the sale, disclosure, and use of pharmacy records revealing the prescribing practices of individual doctors. These records were sold by IMS Health to pharmaceutical manufacturers to guide marketing efforts. Vermont defended its ban as a legitimate effort to regulate commerce, specifically arguing that physicians' privacy was at issue and the costs of prescription drugs increased as pharmaceutical manufacturers used the pharmacy information to target potential prescribers. The Supreme Court struck down the Vermont statute after determining that it was a content-based restriction that imposed burdens on specific speakers (pharmaceutical manufacturers) aimed at a particular viewpoint (marketing messages about drugs).[1] Additionally, the Court noted that the Vermont ban disfavored a particular type of speech – marketing – which also led to the conclusion that heightened scrutiny was warranted.[2]

SB 792 would suffer from the same flaws. What would be required under the proposed provisions would result in a content-based restriction. SB 792 would penalize manufacturers for advertisements that "fail to disclose the wholesale price of a prescription drug."[3] Thus, the bill directly regulates the content of prescription drug advertising. SB 792 also includes a speaker-based restriction. The bill applies specifically and only to "manufacturers" of prescription drugs.[4] Other

[1] *Sorrell*, 131 S. Ct. at 2664.
[2] *Id.*
[3] Or. S. 792 § 2(1).
[4] *See id.* §1(1)(d) (definition of "manufacturer").

speakers, like pharmacists, need not disclose the wholesale price should they engage in advertising of prescription drugs. And, speech in aid of pharmaceutical marketing is protected speech.[5]

Even if a heightened scrutiny test would not be applied, SB 792 fails the less stringent test for regulation of commercial speech. Under this analysis the state must show that its regulation directly advances a substantial government interest and that the regulation is narrowly tailored to achieve that interest.[6] And, there must be a fit between the legislature's ends and the means chosen to accomplish those ends.[7] SB 792 does not meet even this less stringent standard. There is nothing in the legislation to indicate how the requirements would advance public health or reduce healthcare costs simply by having a drug's wholesale price included in advertising. And, manufacturers engage in national advertising campaigns which are not specifically tailored to individual states like Oregon.

Equally important is the fact that SB 792 is unnecessary and provides no meaningful benefit to patients. Price comparison websites already exist to help consumers compare and look for the best retail prices, the price the consumer actually pays for their prescription medications at local pharmacies. Disclosure of AWP price information on an advertisement would do nothing to help patients gain meaningful access to their medicines.

The retail price of drugs varies because of the complex nature of the pharmaceutical supply chains. Discounts and rebates are an important piece of the value equation for many products. Unfortunately, too often these discounts don't make it to patients at the pharmacy counter, with middlemen using them instead to subsidize other costs. Other stakeholders in the drug supply chain – not manufacturers – determine how much consumers ultimately pay for a medicine including insurers, pharmacy benefit managers (PBMs), wholesalers, and government agencies such as Medicaid. Today, the country's top three PBMs control patient access to nearly 75% of all prescriptions filled in the United States. They leverage their market share to obtain deep discounts on medicines while driving utilization to the lowest cost therapies. These discounts are often not passed on to patients.

Additionally, biopharmaceutical manufacturers currently report extensive information on costs, sales, and total research and development expenditures. Requiring proprietary and pricing history for individual products may not be feasible as research and development is long term and manufacturers pursue research efforts that include many failures before the development of one FDA approved drug. Accounting for these related discovery costs could be nearly impossible.

PhRMA respectfully urges Oregon lawmakers to oppose SB 792.

[5] *See Amarin v. U.S. Food & Drug Admin.*, 119 F. Supp. 3d 196 (S.D.N.Y. 2015) (applying cases since *Sorrell*).

[6] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

[7] *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).