STATEMENT

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In Opposition to Oregon Senate Bill 844
March 10, 2021

Position: PhRMA respectfully opposes SB 844. PhRMA believes that discussions about affordability of medicines are important, but the intention of this bill is for the government to decide drug prices, which could limit the prescription options available in Oregon. SB 844 shortsightedly targets drug spending in ways that likely will have long-term, harmful effects on innovation and the development of new, life-saving therapies.

Specifically, SB 844 implements a government-appointed Board to review prescription drug costs and value, with the authority to set price limits by way of an "upper payment limit" for the entire drug supply system in Oregon. Regulating drug prices in-state could lead to a shortage of or limit access to medicines for patients. Specifically, if a pharmacy or provider cannot obtain a medicine at the government price, the medicine will not be available to Oregon residents. Further, the legislation also permits the Board to require onerous submission of competitively sensitive information from manufacturers, which raises constitutional concerns, will not benefit patients and could jeopardize the competitive market. By disincentivizing the development of innovative treatments, this legislation could threaten the positive effect that the biopharmaceutical industry has on Oregon's economy.

This legislation ignores that there are meaningful policies for addressing affordability without government price setting that could reduce treatment options.

PhRMA is increasingly concerned that the substantial rebates and discounts paid by pharmaceutical manufacturers, approximately $175 billion in 2019,[1] do not make their way to offsetting patient costs at the pharmacy counter. Patients need concrete reforms that will help lower the price they pay for medicines at the pharmacy, such as making monthly costs more predictable, making cost-sharing assistance count toward a plan's out-of-pocket spending requirements, and sharing negotiated savings on medicines with patients. These policies can be done without government price setting, which can reduce the options available to treat patients.

This legislation does not account for insurance benefit design issues that prevent discounts from flowing to patients, and SB 844 assumes incorrectly that the price a patient pays is determined solely by drug manufacturers.

This legislation singles out the biopharmaceutical industry and ignores the variety of stakeholders involved in determining what consumers ultimately pay for a medicine, including insurers, pharmacy benefit managers (PBMs), wholesalers, and the government. The important role that these entities play in determining drug coverage and patient out-of-pocket costs is overlooked by the requirements of this legislation. For example, PBMs and payers—which dictate the terms of coverage for medicines and the amount a patient ultimately pays—negotiate substantial rebates and discounts, but do not share these savings with patients.

According to research from the Berkeley Research Group (BRG), rebates, discounts, and fees account for an increasing share of spending for brand medicines each year, while the share received by manufacturers has

[1] Fein, A. "The 2020 Economic Report on U.S. Pharmacies and Pharmacy Benefit Managers," Drug Channels Institute. March 2020.

decreased over time. In 2018 manufacturers retained only 54% of brand medicine spending while members of the supply chain retained 46%.[2] Increased rebates and discounts have largely offset the modest increases in list prices and reflect the competitive market for brand medicines.

The growth of net price prices, which reflects rebates and discounts, has been in line with or below inflation for the past five years. Specifically, net prices of brand medicines increased 1.7% in 2019.[3] This, of course, does not necessarily reconcile with what patients are feeling at the pharmacy counter, which is why looking at the whole system is so important. For example, despite manufacturers' rebates and discounts negotiated by health plans, nearly half of commercially insured patients' out-of-pocket spending for brand medicines is based on the medicine's list price rather than the negotiated price that health plans receive.[4]

Price controls on brand medicines raise constitutional concerns.

Among other legal concerns, SB 844 raises constitutional concerns under the Supremacy Clause because it would restrict the goal of federal patent law, which is to provide pharmaceutical patent holders with the economic value of exclusivity during the life of a patent. Congress determined that this economic reward provides an appropriate incentive for invention and Oregon is not free to diminish the value of that economic reward. Specifically, in the case of *BIO v. District of Columbia*, 496 F.3d 1362 (2007), the U.S. Court of Appeals for the Federal Circuit overturned a District of Columbia law imposing price controls on branded drugs, reasoning that the law at issue conflicted with the underlying objectives of the federal patent framework by undercutting a company's ability to set prices for its patented products.

The potential disclosure of trade secret information also raises legal concerns.

PhRMA is concerned that SB 844 does not provide sufficient protections to ensure that confidential and proprietary trade secret information, which is protected by state and federal law, would not be publicly disclosed by the Board or used for other purposes. Unless this information is fully protected, the bill would raise concerns under the federal Defend Trade Secrets Act and the Takings Clause of the U.S. Constitution.

Moreover, public disclosure of sensitive commercial information, such as confidential and proprietary information, could result in significant competitive harm and undermine the competitive market. The Federal Trade Commission (FTC) has repeatedly acknowledged that disclosure of competitively sensitive information could undermine beneficial market forces within the pharmaceutical industry.[5] In a letter to the New York legislature in 2009, the FTC's Office of Policy and Planning, Bureau of Competition and Bureau of Economics cautioned that disclosure of sensitive commercial information could jeopardize the competitive market by impacting incentives to provide discounts and additional rebates, which "may increase pharmaceutical prices."[6]

PhRMA recognizes the access challenges faced by patients in Oregon with serious diseases. We stand ready to work with the Oregon legislature to develop market-based solutions that help patients better afford their medicines at the pharmacy counter. We believe this bill would not help patients better access breakthrough, innovative medicines and respectfully oppose the passage of SB 844.

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[2] BRG: Revisiting the Pharmaceutical Supply Chain 2013-2018. January 2020.

[3] IQVIA Institute for Human Data Science. Medicine spending and affordability in the United States. Published August 2020. Accessed August 2020. https://www.iqvia.com/insights/theiqvia-institute/reports/medicine-spending-and-affordabilityin-the-us

[4] IQVIA Institute for Human Data Science. Medicine spending and affordability in the United States. Published August 2020. Accessed August 2020. https://www.iqvia.com/insights/theiqvia-institute/reports/medicine-spending-and-affordabilityin-the-us

[5] FTC Letter to Terry G. Kilgore, Member, Virginia House of Delegates, re: H.B. 945 (Oct. 2, 2006); FTC Letter to Representative Patrick McHenry, re: North Carolina Bill 1374 (July 15, 2005); FTC Letter to California Assembly Member Greg Aghazarian, re: AB 1960 (Sept. 7, 2004). FTC Letter to The Honorable Mark Formby, Mississippi House of Representatives, re: SB 2445 (March 22, 2011).

[6] FTC Letter to Senator Seward, re: SB 58 (March 31, 2009).