



March 4, 2015

The Honorable Gregory H. Hughes
Speaker of the House
350 North State, Suite 350
P.O. Box 145030
Salt Lake City, Utah 84114

Sent via email to: greghughes@le.utah.gov

Dear Speaker Hughes:

I am writing you on behalf of the members of the Advanced Medical Technology Association (AdvaMed) to express our concerns about SB 169, which regulates the distribution and pricing of contact lenses. 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. In Utah, 8 of our member companies provide over 10,000 jobs and contribute significantly to the revenue base of the state.

SB 169

SB 169 amends the Contact Lens Consumer Protection Act and identifies a new set of prohibited practices. The bill allows enforcement by the Attorney General

Problems Created by the Legislation

The legislation would harm competition in Utah and Utah consumers in a number of ways, which are set out below.

1.. Special Interest Legislation

The bill is restricted by its terms to a single product, contact lenses. Utah's current unfair trade practices statute generally applies to products and services in all industries. The legislature has never concluded that practices relating to one narrow product area should be banned while the
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identical practices in all other product and service areas should be lawful. The reason for this is clear: principles of competition are universal and properly governed by the generally applicable Utah trade practices law that is already in effect.

2. Dangerous Precedent

Because the provisions of 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 Utah 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, so as to dynamically compete against other manufacturers of similar consumer goods.

Preventing manufacturers from being able to control distribution could lead to an escalation in the number of fraudulent and unqualified individuals demanding that manufacturers sell to them, as well as limit dynamic competition between brands by imposing a “one size fits all” distribution strategy on all manufacturers. Similarly, many products manufactured or sold in Utah have suggested resale prices. If this legislation is enacted, manufacturers subject to these restrictions may decide not to do business in the state.

3. Inconsistency with State and Federal Antitrust Law

For many decades U.S. manufacturers have had the right to suggest resale prices to retailers. In addition, they have the right to terminate distributors who fail to charge these prices. This principle was recognized by the United States Supreme Court in 1919 in its *Colgate* decision and reaffirmed by the Court in its *Monsanto* decision in 1984. An actual “agreement” between manufacturers and retailers as to the price the retailer will charge is required to violate the antitrust laws in every state and under federal law. If there is no agreement, that is, the manufacturer’s pricing practices are “unilateral,” there can be no violation. The FTC has provided [guidance](#) to business on this issue that is consistent with *Colgate*.

Despite this firmly established principle, SB 169 expressly rejects the requirement to find an agreement by using the phrase, “take any action, by agreement, unilaterally, or otherwise...” No state has ever adopted such a policy and it would represent a dramatic and unwise departure from existing law.

The bill also bars a policy or practice that sets a minimum resale price. The bill makes it unlawful to prevent any retailer from selling or advertising such contact lenses to consumers below any specified price, or to and otherwise limits the ability of any retailer to determine process at which contact lenses are offered or advertised to consumers. These terms are striking in their potential breadth. As structured, the bill could extend to advertising discounted retail prices, offering use of coupons to purchase at a discount, entering into private label arrangements with certain retailers, or simply choosing not to sell to certain retailers because they do not meet the manufacturer’s quality standards or distribution strategy.

At the very least, the bill extends to suggesting retail prices, and effectively prohibits the practice because such practice would be viewed as setting a minimum resale price “unilaterally.” If this principle is extended to other industries using exactly the same practices, an electronics

manufacturer, a book publisher, a food products manufacturer and any other manufacturer would be prohibited from pre-printing a suggested price or placing a sticker on a product suggesting a resale price.

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 reflect 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 practices that “restrict product distribution from any channel of trade,” and limit “free and open competition among retailers,” the bill will effectively require manufacturers to sell to all retailers who demand to purchase products and thus would subject Utah consumers to the risk of purchasing products from individuals or companies that do not meet these standards. For example, a small grocer or service station that wished to sell contact lenses would have the right to demand that a contact lens manufacturer sell Class III contact lenses used for serious eye conditions.

5. The Contact Lens Industry

Some supporters of the legislation have said 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 they have ethical, high quality distributors who distribute their products safely.

Second, to the extent that contact lenses are necessities for Utah consumers, the harm of these practices to consumers in reducing competition and promoting the growth of unscrupulous and unqualified retailers will be magnified.

Conclusion

As Speaker of the House, we urge you to stop the advancement of this bill and advise your House colleagues to do the same. 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
Vice President, State Government & Regional Affairs

cc: Members of the House