To: Members of the House Committee on the Judiciary
From: Andrew Lautz, Director of Federal Policy, and Will Yepez, Policy and Government Affairs Associate; National Taxpayers Union
Date: September 28, 2021
Subject: NTU Views and Considerations on H.R. 3429, the "SHOP SAFE Act," and H.R. 2891, the "Preserve Access to Affordable Generics and Biosimilars Act"

I. Introduction and Key Taxpayer Considerations

On behalf of National Taxpayers Union (NTU), the nation's oldest taxpayer advocacy organization, we wish to share some of NTU's views and considerations on two bills the Committee is considering at their September 29 markup.[1]

H.R. 3429, the "Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce (SHOP SAFE) Act," would place significant burdens on online platforms and raise barriers for small sellers. The goal of reducing the availability of counterfeit goods is laudable, yet the need for this legislation is not apparent, as online platforms are already incentivized to prevent counterfeit or stolen goods from being sold on their platform. Consumers are less likely to trust and use a platform that regularly sells counterfeit goods, so there is a market-based incentive for platforms to be proactive. While this legislation would only apply to goods that "implicate health and safety," including injury or allergic reaction, this is an extremely broad definition. For example, this definition could be interpreted as including essentially all clothing items, as a consumer may be allergic to the materials they are made from. Online platforms would also be tasked with verifying the identity of third-party sellers through government-issued identification. Not only does this place a significant administrative burden on platforms, the cost of which would likely be passed onto the consumer, it makes it far more difficult for a well-intentioned seller to participate in the marketplace. As the Electronic Frontier Foundation notes, a third-party seller could reasonably find it easier to discard an item rather than be forced to comply with onerous regulations of selling it online. Overall, these regulations would have a chilling effect on online commerce and would more likely prevent beneficial competition among lawful sellers than stop the sale of counterfeit goods. ***Committee Members should oppose advancing H.R. 3429 to the floor.***

[1] As a reminder and to avoid any confusion, NTU does ***not*** include Committee markup votes in our annual rating of Congress. We weigh in at the markup level to improve legislation from the perspective of the taxpayer before it reaches the House or Senate floor.

H.R. 2891, the "Preserve Access to Affordable Generics and Biosimilars Act," may be well-intentioned, but NTU has regularly warned lawmakers that this bill (and similar legislation) would take a sledgehammer to the generics and biosimilars markets in an effort to fix a problem that is quite limited in size and scope. As we have previously noted, a "recent Federal Trade Commission (FTC) review revealed that nearly 90 percent of agreements between generic and brand-name manufacturers do not involve 'explicit compensation from a brand manufacturer to a generic manufacturer and a restriction on the generic manufacturer's ability to market its product.'"[2] Federal and state legislation banning so-called "pay-for-delay" could end up banning some of the private-sector agreements that bring benefits to consumers, taxpayers, brand manufacturers, and generic manufacturers, especially if those agreements bring generic drugs to market faster. H.R. 2891 would unduly interfere with market-based agreements that ultimately save consumers and taxpayers money. ***Committee Members should oppose advancing H.R. 2891 to the floor***.

II. Contact Information

Should you have any questions about the recommendations in this memo, please do not hesitate to reach out to Andrew Lautz at alautz@ntu.org and Will Yepez at wyepez@ntu.org.

[2] Federal Trade Commission. (2016). "Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003." Retrieved from: https://www.ftc.gov/system/files/documents/reports/agreements-filled-federal-trade-commission-under-medicare-prescription-drug-improvement/mma_report_fy2016.pdf (Accessed September 27, 2021.)