

October 19, 2009

The Honorable Sheldon Whitehouse
United States Senate
502 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Whitehouse:

Our organizations represent virtually every business in the country that uses advertising or depends upon advertising as revenue to support public access to media and entertainment. We are writing to express our concerns about legislation that you have sponsored that would create a new section 280I of the Tax Code to disallow the ordinary and necessary business expense deduction for the cost of advertising prescription medications.

Because advertising is critical to the economic health of our country, particularly during this period in which we are experiencing a severe recession, we strongly urge you to reject this tax on advertising. Moreover, we believe the proposal would represent an unconstitutional restriction on commercial speech that is protected under the First Amendment.

Advertising for all products helps generate \$6 trillion in U.S. economic activity and supports more than 21 million jobs in our country. The current state of our economy requires that we do everything we can to create more sales and more jobs – not adopt policies to eliminate them. Our views do not reflect in any way our position on healthcare reform. They do reflect our view of how a tax on advertising would affect the health of the U.S. economy.

The disallowance of this deduction would make the advertising more expensive – in effect, it would be a tax on this advertising. Because the tax would make speech more expensive, affected companies would reduce their advertising, which, in turn, would reduce the amount of information available to consumers. The information in advertising is important and useful to consumers – that is why the U.S. Supreme Court has issued a number of decisions to protect it.

There are numerous examples of providing better care and potentially saving lives with access to information in pharmaceutical advertising, and this is captured in an article for Health Affairs. Out of 3,000 patients in the study, 35 percent discussed an ad for a medication during their appointment, and of the population, 25 percent received a new diagnosis. Approximately 43 percent of the new diagnoses were for "high priority" medical conditions including hypertension, diabetes, depression and high cholesterol.

Regrettably, the bill does not stop with taxing advertising, but would discourage other forms of communication that could benefit patients. According to the introductory statement, it is intended apply to any expense by a pharmaceutical company to communicate information about its products, including taxing the salaries of sales staff.

The Tax Code permits all businesses to deduct the cost of advertising and marketing, including advertising of prescription medications. The deduction of the cost of advertising and marketing is no different from the deduction of any other ordinary and necessary business expense, including utilities, salaries or rent.

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Page 2

As a general matter, it is thought that Congress may grant or withhold tax benefits according to its legislative discretion. However, according to several U.S. Supreme Court cases, the government may not use taxes or other policies to discriminate against speech, including commercial speech. For example, in *Grosjean v. American Press Co., Inc.*, 297 U. S. 233 (1936), the U.S. Supreme Court struck down a 2 percent Louisiana tax on newspapers with a circulation of more than 20,000 per week. The 13 affected newspapers were critics of Governor Huey Long and sued to challenge the tax as an unconstitutional restriction on speech. The U.S. Supreme Court agreed.

More recently, the Court struck down an FDA statute that gave the agency the power to prohibit advertising about compounded drugs. The purpose of the statute was to discourage pharmacies from becoming small manufacturers of compounded drugs in an effort to avoid FDA's manufacturing rules. Justice O'Connor, writing for the majority in *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), said that restrictions on speech, even when permissible to directly advance substantial government interest, must be the last, not the first choice of the government.

“Even if the Government . . . fear[s] that advertising compounded drugs would put people who do not need such drugs at risk by causing them to convince their doctors to prescribe the drugs anyway, that fear would fail to justify the restrictions.”

“[It] amounts to a fear that people would make bad decisions if given truthful information about compounded drugs.”

We urge you to reconsider your proposal to tax advertising. The potential for short-term revenues would be far outweighed by the adverse precedent it would establish and the repercussions for the treatment of all forms of advertising, particularly during these challenging economic times.

Respectfully,

ABC
American Advertising Federation
American Association of Advertising Agencies
CBS
Grocery Manufacturers Association
Magazine Publishers of America
Meredith Corporation
National Association of Broadcasters
National Cable & Telecommunications Association
National Newspaper Association
Newspaper Association of America

cc: The Honorable Al Franken
The Honorable Sherrod Brown