

October 20, 2009

The Honorable Al Franken
United States Senate
Washington, DC 20510

Dear Senator Franken:

When the Senate considers health care reform legislation, we understand that Senator Al Franken (D-MN) may offer as an amendment his proposal (S.1763) to disallow the tax deduction for the marketing costs of prescription drug products. I am writing on behalf of the Association of National Advertisers (ANA) to express our strong opposition to such a change.

Prescription drug advertising provides valuable information to consumers. In today's economic climate, it would be counterproductive and unwise to make this form of advertising more expensive. In addition, singling out direct-to-consumer prescription drug advertising for differential tax treatment would be virtually unprecedented and raise very serious First Amendment concerns. We appreciate your efforts to address health care reform, but placing any restrictions on the deductibility of DTC advertising on a product-specific basis would be the wrong way to go.

ANA is the advertising industry's premier trade association dedicated exclusively to marketing and brand building. We represent more than 350 companies with over 8,000 brands that collectively spend more than $200 billion annually in advertising and marketing. Our members market products and services to both consumers and businesses in every state. More information about our association is available at www.ana.net

DTC Advertising Provides Benefits to Millions of Americans

DTC advertising is raising health awareness and helping consumers prevent serious health problems through earlier disease diagnosis.

One of the greatest health dangers in the United States is the under treatment of life threatening or debilitating diseases. Millions of Americans are unaware that they have high blood pressure, high cholesterol, clinical depression or diabetes. All of these

diseases can be successfully treated with prescription drugs. Early treatment can be a matter of life or death, or the avoidance of serious disability. Clearly, these drugs help patients avoid strokes, heart attacks, kidney disease and combat mental illness and can thereby save enormous costs in hospitalization or constant treatment by physicians.

We believe that consumers should have more information about their health, not less. Several surveys of doctor and consumer groups provide growing evidence of the value of prescription drug advertising. A recent Food and Drug Administration (FDA) survey of 500 doctors demonstrated important benefits from DTC prescription drug advertising. In fact, 80% of the surveyed doctors felt that the ads made patients aware of health problems, while 85% percent felt their patients were more likely to use their prescriptions properly because of the ads. Furthermore, 78% thought these ads led patients to seek treatment for potentially serious conditions.

According to a *Prevention Magazine* survey in 2004, 65 million patients talked with a physician as a result of seeing an ad for a prescription medication. Almost half that number of patients (30 million) spoke to a physician about a medical condition for the first time.

In a recent survey of African American physicians conducted by the National Medical Association (NMA), 72% of those responding believed that prescription drug advertising promotes increased communication between doctors and patients. The NMA called for *increased* direct-to-consumer advertising, stating that it would provide significant health benefits. These results are particularly important in light of recent studies, which found that racial and ethnic minorities lag behind on a number of health care quality measures.

DTC advertising is providing valuable information to millions of Americans about their health care. Denying the tax deduction for DTC marketing costs would be unwise and counterproductive.

A Tax on DTC Advertising Raises Serious First Amendment Concerns

The United States Supreme Court has repeatedly held that the First Amendment takes the government out of the business of discriminating between approved and disapproved categories of speech. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court struck down a law banning hate speech because it singled out certain offensive utterances for negative treatment because of their content. Similarly, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board,* 502 U.S. 105 (1991), the Court struck down a law that treated book royalties earned by a convicted criminal worse than other types of property owned by the criminal, holding that "a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." In both cases, the Court noted that the government was attempting to treat speech differently on the basis of content.

Further, the Supreme Court has long recognized that "speech can be effectively limited by the exercise of taxing power" (*Speiser v. Randall*, 357 U.S. 513, 518 (1958)) – just as it can be limited by more direct types of regulation. In *Arkansas Writers Project, Inc. v. Ragland,* 481 U.S. 221 (1987), the Court struck down efforts to exempt certain magazines from taxation based on content. The Court stressed that the First Amendment forbids government from manipulating tax liability to benefit speech that it likes and to penalize speech that it dislikes.

In a series of recent cases, the U.S. Supreme Court has consistently reaffirmed the strong protection that advertising for every legal product and service has under the First Amendment. In the *Western States* case, the Supreme Court ruled that a federal law prohibiting pharmacists from advertising compounded drugs violated the First Amendment. See *Thompson v. Western States Medical Center,* 535 U.S. 357 (2002). Writing for the majority, Justice O'Connor stated: "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort."

A Tax on DTC Advertising is Bad Tax Policy

The tax laws should provide the same tax treatment for the advertising costs of every legal product and service sold in America. Singling out a specific industry for onerous differential tax treatment would punish the speech of companies in that industry and politicize the tax code.

If lawmakers get into the business of picking and choosing between which advertising costs are deductible under the tax code or which ads should be taxed, based on the popularity of the product or service being advertised, the general tax principles underlying the tax code become meaningless.

A Tax on DTC Advertising Would Set a Dangerous Precedent

If the tax code can be used to penalize those companies that advertise and sell products that some people don't like, it can be used as a weapon against any legal product or service. If a restriction on the deduction for DTC advertising costs became law, the tax code could become a vehicle for punishing any advertising which a shifting majority of lawmakers decides is not at that time "politically correct."

For all of these reasons, we strongly urge you to oppose any effort to restrict or deny the tax deduction for DTC marketing costs.

Thank you for your consideration of our views.

Sincerely,



Daniel L. Jaffe
Executive Vice President, Government Relations
Association of National Advertisers (ANA)
1120 20th Street, NW, Suite 520-South
Washington, DC 20036
(202) 296-1883