

The ADvertising Coalition

November 15, 2017

The Honorable Orrin Hatch
Chairman
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Ron Wyden
Ranking Member
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Wyden:

On behalf of The Advertising Coalition (TAC), I respectfully request that you oppose an amendment to the Tax Cuts and Jobs Act submitted by Senator Claire McCaskill that would disallow the full and immediate tax deductibility of prescription drug advertising.

TAC is comprised of companies and national trade associations whose members are advertisers, advertising agencies, broadcasters, television networks and cable operators, and newspaper and magazine publishers. Our coalition represents perhaps the single broadest constituency of the advertising and media industry in this country engaged in protecting the free flow of advertising content and volume. As a consequence, TAC is vitally interested in preserving the ability of businesses to deduct the cost of all advertising as an ordinary and necessary business expense.

We particularly are concerned by this amendment's implications on freedom of speech. The First Amendment protects the right of pharmaceutical manufacturers to advertise to consumers, and Congress and the Food and Drug Administration (FDA) have established procedures to assure this speech is truthful and balanced. Moreover, the Supreme Court has defined clearly the standards for judicial review of restrictions on commercial speech. The McCaskill amendment is in direct conflict with the Court's findings that a tax becomes "constitutionally suspect" when it singles out certain ideas or perspectives.¹ The Court has required that a restriction on commercial speech must directly advance an asserted government interest, be narrowly tailored, and must be the government's last recourse. There is no evidence that this tax on advertising would meet this standard.²

In *Western States Medical*,³ the Supreme Court struck down a ban on advertising of compounded drugs because the ban did not directly advance the government's interest, and that the ban was the first and not the last remedy chosen. As the Supreme Court has stated on numerous occasions, the remedy is more speech, not less speech.

Furthermore, imposing a severe financial penalty on prescription drug advertising could result in consumers receiving less information about a potential new medication. Advertising has to meet FDA standards requiring that it be truthful and provide a fair balance of the risks and potential adverse events that have been identified with a drug. FDA continues to conduct its oversight of direct-to-consumer (DTC) advertising and completed three studies in 2015 examining corrective advertising, print formatting, and patient risk perception in these ads.

¹ *Leathers v. Medlock*, 499 U.S. 439 (1991).

² *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

³ *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

The ADvertising Coalition


The Honorable Orrin Hatch
The Honorable Ron Wyden
Page 2

Advertising has been recognized as an ordinary and necessary business expense since the Tax Code was adopted. The deduction for the cost of advertising is not a government subsidy, nor has it been classified as a tax expenditure. Tax expenditures are a form of federal spending designed to encourage specific behavior, and represent exceptions to sound tax policy. The deduction for advertising costs never has been treated as a special exclusion or exemption.

Advertising creates millions of jobs and adds trillions of dollars in U.S. economic activity. It benefits all levels of our economy, from national manufacturers to local businesses and broadcasters, publishers, content creators and advertisers. In 2014, advertising supported 20 million U.S. jobs and \$5.8 trillion in U.S. sales. Significantly, this study showed that every dollar of advertising spending generates \$19 of economic activity.⁴

We respectfully urge you to oppose the McCaskill amendment to tax prescription drug advertising. Thank you for consideration of this request.

Sincerely,



James H. Davidson, Executive Director
The Advertising Coalition

cc: Members of the Senate Committee on Finance

⁴ "The Economic Impact of Advertising in the United States." IHS Economics and Country Risk. (March 2015).