



January --, 2019

The Honorable Christine Rolfes; Chair, Ways and Means Committee
The Honorable John Braun; Ranking Member, Ways and Means Committee
Members of the Senate Ways and Means Committee
Washington State Senate
416 Sid Snyder Avenue, Southwest
Olympia, WA 98504

RE: Oppose Senate Bill 5659

Dear Members of the Senate Ways and Means Committee:

I am writing on behalf of the Association of National Advertisers (ANA) to express our strong opposition to Senate Bill 5659. That bill would impose a 2 percent business and occupation tax surcharge on pharmaceutical advertising revenues paid to radio and television stations, newspapers and magazines and billboard companies. While providing additional resources to combat substance abuse and behavioral health conditions is certainly a laudable objective, taxing pharmaceutical advertising is not the way to do that. Senate Bill 5659 is an unconstitutional tax on advertising, much of which occurs in interstate commerce, and should be rejected.

Prescription drug products and direct to consumer (DTC) pharmaceutical advertising are heavily regulated by the Food and Drug Administration (FDA). In fact, DTC advertising may be the most heavily regulated business category in our entire economy. The FDA has very specific advertising requirements that must be met by all manufacturers.

Senate Bill 5659 Raises Serious First Amendment Concerns

Senate Bill 5659 would impose a content-based tax on one specific form of advertising (DTC advertising) carried out by one player in the health care arena (pharmaceutical manufacturers). Such an approach raises serious First Amendment concerns.

The U.S. Supreme Court has made it clear that truthful, nondeceptive commercial speech cannot be banned or restricted unless the restriction “directly and materially advances” a “substantial governmental interest” and is “narrowly tailored” to “reasonably fit” that interest. *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). Any government restriction on commercial speech must also be “no more extensive than necessary.” *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525 (2001).

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 *Thompson v. Western States Medical Center*, 535 U.S. 357 (2000), the Supreme Court ruled that a federal law prohibiting pharmacists from advertising compounded drugs violated the First Amendment. 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."

In *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), the Supreme Court held that a Vermont law banning the use of physician prescriber histories for commercial purposes violated the First Amendment. The Court held that since the Vermont law disfavored a particular type of speech, commercial speech, it was subject to "heightened scrutiny" under the First Amendment. Justice Kennedy wrote for the majority: "The State may not burden the speech of others in order to tilt public debate in a preferred direction."

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, (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.

Yet that is precisely what Senate Bill 5659 does – it singles out one specific form of advertising for differential tax treatment.

Senate Bill 5659 Raises Serious Interstate Commerce Concerns

Much of the DTC advertising seen or heard by the residents of Washington State is placed in media outside of the state's borders. Senate Bill 5659 would impose an additional cost on pharmaceutical companies that use national and regional media to communicate with consumers in the state.

DTC Advertising Provides Benefits to Millions of Americans

DTC prescription drug advertising is creating a health revolution in America. It 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. Placing impediments to this advertising as would be imposed by Senate Bill 5659 is clearly counterproductive.

Conclusion

As noted above, the FDA heavily regulates prescription drugs and prescription drug advertising. Pharmaceutical manufacturers conduct business in national and global marketplaces. We believe the goals of this legislation, to provide more funding to address serious health challenges, can best be accomplished through other channels.

While we have several pharmaceutical companies as ANA members, we are also concerned that this legislation would set a very dangerous precedent for a wide range of other products and services that may become “controversial.” Marketers could face threats from more than 30,000 state and local governments that seek to tax some of their ads.

We urge you to oppose Senate Bill 5659.

Thank you for your consideration of our views.

Sincerely,

A handwritten signature in black ink, appearing to read 'Keith Scarborough', written in a cursive style.

Keith A. Scarborough
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The ANA (Association of National Advertisers) makes a difference for individuals, brands, and the industry by driving growth, advancing the interests of marketers and promoting and protecting the well-being of the marketing community. Founded in 1910, the ANA provides leadership that advances marketing excellence and shapes the future of the industry. The ANA’s membership includes more than 2,000 companies with 15,000 brands that collectively spend or support more than \$400 billion in marketing and advertising annually. The membership is comprised of more than 1,100 client-side marketers and more than 800 marketing solutions provider members, which include leading agencies, law firms, suppliers, consultants and vendors. Many of our members conduct substantial business operations in the State of Washington. For more information visit: www.ana.net

