



October 20, 2009

The Honorable Harry Reid
United States Senate
522 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Reid:

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 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.

The proposal would overturn nearly 100 years of tax policy that is central to our net income system of taxation. 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 and rent. If you take away a deduction you increase the tax on the advertiser and the cost of the advertising. Where would this stop? What other forms of advertising will be taxed? Would it be advertising for vehicles that do not meet emissions or fuel economy standards, advertising for gaming, or foods that do not meet some nutrition standard?

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 advertising tax either as a separate bill, an amendment to healthcare reform legislation, or as part of the Leadership healthcare reform bill presented to the Senate.

Advertising for all products helps generate \$6 trillion of economic activity in the United States 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 this advertising 35 percent more expensive. Affected companies would reduce their advertising, which, in turn, would reduce the amount of information the media could make available to consumers. The information contained in advertising is important and useful to consumers – that is why the U.S. Supreme Court has issued a number of decisions to protect this form of commercial speech.

There are numerous examples of how better care was provided and lives were potentially saved through information provided in pharmaceutical advertising. A study of 3,000 patients featured in an article for *Health Affairs* revealed that 35 percent discussed an ad for a medication during their appointment, and of that 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 media advertising, but it also would discourage other forms of communication that could benefit patients. It is intended to apply to any expense by a pharmaceutical company to communicate information about its products, including taxing the salaries of sales personnel.

We also believe the proposed tax on advertising would represent an unconstitutional restriction on commercial speech that is protected under the First Amendment. 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 two 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 that 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 a 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 not to support the advertising tax in S. 1763, or any other proposal to tax advertising, particularly during these challenging economic times.

Respectfully,

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