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PROPOSAL TO DENY TAX DEDUCTION FOR DRUG AD EXPENSES UNCONSTITUTIONAL

by
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Representative Pete Stark (D-CA) recently introduced the Fair Balance Prescription Drug Advertising Bill (H.R. 4686), which would preclude pharmaceutical manufacturers from claiming a tax deduction for advertising expenses. While many national policy makers have been focusing intensely on drug pricing, Representative Stark's proposal seems intended to reduce drug costs by limiting consumer demand and reducing marketing expenses. Although the proposal is unlikely to be acted on in the current session, it, or the ideas embodied in it, are likely to resurface in the future. As this LEGAL OPINION LETTER argues, policy makers examining this or other future proposals should consider that it not only undermines public health, but is also a clear violation of the First Amendment.

Details of the Proposal. The major component of Representative Stark's bill is a seemingly minor amendment to federal tax law. The Internal Revenue Code allows companies to deduct advertising expenditures from their taxable income as an ordinary and necessary business expense. The Stark bill would prevent a pharmaceutical manufacturer from claiming this deduction if the Food and Drug Administration ("FDA") determined that a manufacturer's advertising presented less information about the risks of a drug than about its benefits. The bill would also preclude the deduction if the advertisements violate drug law provisions that require truthful statements about side effects, contraindications, and effectiveness in all prescription drug advertisements. Under current law, FDA already has authority to fine and prosecute companies that fail to comply with these requirements.

Its Implications. The Stark bill is an unconstitutional attempt to restrict speech; it impermissibly focuses on an advertisement's content and the speaker. More importantly, this proposal threatens the sound public policy of free access to prescription drug information.

This proposal financially penalizes drug companies for the content of their advertising. The First Amendment protects against government restrictions on particular speakers with particular messages. The government cannot circumvent this rule by imposing tax liability on entities based on the content of their message. Thus, for example, the Supreme Court has concluded that magazine publishers cannot be denied sales tax exemptions based on their publication's particular content. *Arkansas Writer Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987).

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Under the test of *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), the government in fact has very limited authority to regulate the content of a particular advertiser's message unless it involves illegal activity or contains false or misleading information. If advertising is truthful and not misleading, there must be a serious need for government interference, the restriction on advertising must be carefully limited, and it must solve the problem that is the basis for government intervention.

Rep. Stark's proposal fails to meet these conditions. First, drug advertising is legal; in fact, FDA relaxed its restrictions on prescription drug advertising in 1997. Second, consumers benefit from access to drug-related information. In fact, the landmark 1976 Supreme Court case establishing First Amendment protection for advertising invalidated a state law prohibiting drug price information in advertising by pharmacists. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748 (1976). Third, the denial of a tax deduction addresses no serious government need or interest. FDA already has authority to prevent false and misleading prescription drug advertising; FDA guidelines even go so far as to require manufacturers to include particular information about the product. Indeed, the new sanction may chill important speech. Rather than lose such an important deduction, drug manufacturers might cease advertising altogether or refuse to provide useful information in its ads to consumers about a drug's benefits. Existing FDA broadcast advertising requirements often cause confusing and conflicting messages, and Rep. Stark's proposal would almost certainly lead to even less effective ads.

Aside from the constitutional problems with the proposal, sound public policy counsels those considering it to proceed with caution. Of greatest importance, advertising is one of the most effective ways to alert consumers to new drugs and to encourage their careful and continued use. Government warnings and traditional medical channels continue to be important, but commercials have proven to be an effective addition. Indeed, until communication professionals put messages into consumer parlance, information often did not reach the public. For example, in the mid-90's, although FDA had long approved the sale of nicotine patches, use was limited until an ad for the product ran during the Super Bowl. After the ad appeared, companies that produced nicotine patches were unable to meet consumer demand for months.

While the proposal seeks to trim advertising expenditures, drug marketing can save lives, improve the quality of lives, and often save money. Drugs save lives and lengthen life-spans. Without drugs, diabetes is a deadly rather than a manageable disease. Patients with a family history of high cholesterol and heart failure can take Lipitor or other anti-statens and expect to live up to five years longer than their parents before having a heart attack. Prophylactic use of drugs often delays and reduces future medical costs. For example, Liptitor costs about \$1,200 per year to take and thus about \$36,000 over a thirty year period. *One day* in an intensive care unit after a heart attack can cost nearly that much.

Drug use improves the quality of life. Heavily advertised Claritin and other new, non-sedating antihistamines have given allergy sufferers new-found ability to work, play, and enjoy living. Celebrex and Vioxx are giving arthritis sufferers an alternative to traditional stomach-irritating pain-relievers. Significant advertising by pharmaceutical companies both speeds such products to market and broadens their use, spreading their economic and life-enhancing value to greater numbers of patients.

Conclusion. Rep. Stark's bill would only serve to chill drug advertising and limit consumer access to life-enhancing and life-saving information. Pennies saved would lead to shorter, less healthy lives and often more dollars spent.