



BY JIM DAVIDSON

## 'A Tax on Advertising – Plain and Simple'

*The Franken bill would establish a dangerous precedent for all advertising.*

**A**s we went to press with this issue, Sen. Harry Reid (D-Nev.) had just mustered the necessary margin to allow the Senate, in a historic 60-39 vote on a Saturday night before Thanksgiving, to reject a filibuster and proceed to debate the substance of a healthcare reform bill that contains components from the bills reported by two Senate committees: Finance and the Health, Education, Labor and Pensions. The House passed its version of the legislation by 220-215 a few minutes after midnight on Nov. 8, 2009.

Lurking in the background, however, is a troubling amendment that may be offered by Sen. Al Franken (D-Minn.) and that would disallow as an ordinary and necessary business expense, not only the cost of all advertising for prescription medications, but most if not all marketing expenses, including salaries of sales personnel, marketing seminars and free samples of medications. A similar measure was scored in the House of Representatives as generating \$37 billion in new revenue. This would be a tax on advertising, plain and simple.

Sen. Franken said on introducing S. 1763, the bill that would provide the basis for a floor amendment, that “the federal government gives pharmaceutical companies a tax break every time you see a drug advertisement on TV . . . This legislation will remove these unfair tax benefits so pharmaceutical companies can focus their dollars on developing new drugs, not excessive marketing schemes.” The statement does not explain that all companies in the United States, not just pharmaceutical companies, are permitted to deduct the cost of their advertising. This has been true since the business income tax was adopted in 1913. Our Tax Code taxes only the net income of a business. To determine net income, or profits, all businesses are allowed to deduct the cost of salaries, rent, utilities, office supplies – and yes, advertising – from their total revenues.

Over the years, members of Congress have proposed to disallow the deduction for the cost of advertising tobacco products and alcohol beverage products. Votes on these issues on the Senate floor were rejected by large margins. When asked about how such a proposal would fair when measured against the protection offered by the First Amendment, proponents of those taxes on advertising argued that tobacco or alcohol beverages were somehow different.

The sponsors of the “Protecting Americans from the Drug Marketing Act,” likely are among those who disagree with the Senate healthcare reform bill and with the Obama Administration for not asking the pharmaceutical industry to contribute more than \$80 billion over the next 10 years to reduce healthcare expenditures. The House bill asks the industry to contribute an estimated \$140 billion.

Far more troubling than a disagreement over what the industry should contribute is the mechanism chosen to seek this “payment.” The introductory statement said, “Research has shown that glossy advertisements and logo-laden pens don’t add any value to our health care system.”

I imagine that the nearly 40 million Americans who spoke to their doctors for the first time about a new health condition – because an ad for a medicine prompted them to have that conversation – might disagree. More than 65 million Americans see a doctor each year because they saw an advertisement for a prescription medicine, according to *Prevention* magazine, which has been surveying Americans for 12 years about their views on this advertising. I think the millions of Americans who have been helped to get medical treatment for high blood pressure, diabetes, depression or other medical conditions also might disagree.

Even more troubling about this proposal is the dismissal of the value of this advertising as protected commercial speech. The U.S. Supreme Court has been expanding the First Amendment

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protection of advertising for more than 30 years. This protection would bar taxes on advertising that are designed to discourage speech by taxing it, as S. 1763 would do. Amendment proponents have said that this \$37 billion tax on pharmaceutical advertising would “help stem the tide of confusing and misleading drug ads that you . . . see every day on TV and in magazines.”

Actually, Congress only two years ago approved an extensive administrative process, sponsored by Senators Tom Harkin (D-Iowa) and Pat Roberts (R-Kan.) that gave the Food and Drug Administration the tools to hold evidentiary hearings about ads they believe are untruthful or deceptive (the Supreme Court standard) and to levy fines of up to \$250,000 a day for ads that violate that standard. That is a much more effective way to assure that consumers receive accurate information in advertising rather than taxing it.

As to the importance of advertising of prescription drugs, I would recommend that advocates of a tax on advertising consider the 1976 decision by the U.S. Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In the majority opinion that struck down a state statute barring advertising of the price of prescription drugs, Justice Blackmun wrote:

“As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate. . . . Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.”

Over the past 33 years, the Supreme Court has broadened its protection of commercial speech even further. An amendment to tax advertising, of any kind, certainly would seem inconsistent with the protection being afforded to commercial speech by our highest Court.

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