



BY JIM DAVIDSON

'You're Still the One' In the Cross-hairs of Legislation

Three bills have been introduced in the House and two in the Senate during the current session that would deny the ability of a manufacturer of prescription pharmaceuticals to deduct the cost of its advertising. Advertising is being attacked like never before on Capitol Hill.

In the 1970s, an extraordinarily talented musician – John Hall – founded a band he named “Orleans,” and scored a major radio hit with the song, “Still The One.” No, this is not a music review in the place of a column on DTC advertising.

Today, that singer is Congressman John Hall from New York’s 19th Congressional District. He is a member of the Committees on Transportation and Infrastructure and Veterans’ Affairs. For those wondering what is the connection, Congress-

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man Hall has just introduced H.R. 4518, a bill to deny a deduction for image advertising expenses for any trade or business if the company’s gross receipts exceed \$100 million.

Congressman Hall is not the only member of Congress who thinks that advertisers of certain products should have to pay more taxes or operate under rigid content restrictions. Advertising is under attack on all fronts in Congress. Not in

the past quarter century has so much criticism and negative legislation been focused on restricting or taxing the rights of American businesses to market and advertise their products.

In this 111th Congress, three bills have been introduced in the House of Representatives and two in the United States Senate that would deny the ability of a manufacturer of prescription pharmaceuticals to deduct the cost of its advertising.

Most of you are familiar with S. 1763, Protecting Americans from Drug Marketing Act, sponsored by Senators Al Franken (D-Minn.), Sherrod Brown (D-Ohio), Tom Udall (D-N.M.), Sheldon Whitehouse (D-R.I.), and Mark Begich (D-Alaska).

Senator Begich has introduced a separate version on the same theme, but would allocate the revenue raised to pay for a deduction of fees for children to participate in organizations that promote physical activity. The House bills include H.R. 3979 by Rep. Marion Berry (D-Ark.) to disallow the deduction for the cost of pharmaceutical advertising. Similar bills have been introduced by Reps. Dan Lipinski (D-Ill.) and Jerry Nadler (D-N.Y.). Rep. Jim Moran (D-Va.) authored the Families for ED Advertising Decency Act that would prohibit as indecent the broadcasting of any advertisement for a medication for the treatment of erectile dysfunction.

The advertising and pharmaceutical industries made it through the first session of the 111th Congress without an amendment being successfully attached to healthcare reform or other legislation that would deny the deduction of pharmaceutical advertising costs. But it wasn’t for lack of trying. At least three separate efforts were made to raise \$37 billion from pharmaceutical advertisers by taking away this deduction, and the debate over healthcare reform is far from over.

Pharmaceutical advertising is not alone, as the bill offered by Rep. Hall indicates. Rep. Dennis Kucinich (D-Ohio) offered H.R. 4310 to deny any deduction for advertising and marketing to promote the consumption of food from quick service restaurants or food of poor nutritional quality to children. Rep. Moran offered H.R. 4053 to direct the Federal Trade Commission to issue rules to limit the marketing of foods or beverages of low nutritional value to children and youth.

While some of these bills have laudable goals of trying to improve child health and nutrition, all of them share a common flaw. In the absence of promoting an effective, long-term strategy to improve the information content of advertising, or the nutrition of foods consumed by children and youth, the sponsors want to tax or regulate constitutionally protected speech.

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With regard to pharmaceutical advertising, the Food and Drug Administration Amendments Act of 2007 (FDAAA) provided the FDA with a major new weapon to investigate and to seek sanctions on DTC advertising that is found to be false or misleading. Unfortunately the agency has not put its new tools to work. These include authority to conduct hearings on advertising and to seek fines of up to \$500,000 a day for false or misleading content.

So as we move through the second session of the 111th Congress, it appears likely that those of you involved in producing, printing and televising pharmaceutical advertising will

still be the ones some members of Congress will want to shout (if not sing) about.

Jim Davidson is an attorney and founder of the public policy firm Davidson & Company. He currently chairs the Public Policy Group at the Washington law firm of Polsinelli Shughart PC, and he has been actively engaged in supporting the advertising industry on Capitol Hill for almost 20 years. In October 2008, Davidson was inducted into the DTC Perspectives' Hall of Fame for DTC marketing. He can be reached by e-mail at jhd@davidsondc.com.