



BY JIM DAVIDSON

Congress Deliberates Tax on Advertising of Prescription Drugs

The idea of taking away the standard business-tax deduction for DTC is a threat that continues to linger in Washington.

The threat to the future of advertising for prescription medications has never been greater as Congress explores ways to tax or further regulate it. Many of you already know that the two tax-writing committees of the Congress – Ways and Means in the House and Finance in the Senate – seriously deliberated imposing a tax on this advertising to help pay for the cost of healthcare reform. The “tax” would have been in the form of denying the section 162 ordinary and necessary business expense deduction for the cost of advertising. All businesses are allowed to deduct advertising costs, just as they deduct salaries and other operating expenses.

Shortly after my last column appeared in June, rumors about the tax quickly turned into substantive discussions within the Finance Committee. Only a few days later the Ways and Means Committee staff had a revenue estimate for such a tax, indicating it would generate \$37 billion over 10 years. Cost estimates for healthcare reform and all legislation are projected over a decade. This projection looked like it captured more than just advertising and possibly all marketing costs. Industry advertising costs in 2008 were estimated at \$4.34 billion. Experts note that adjusting this from a rate card to actual cost basis probably would leave \$2.6 billion. At a 35 percent corporate tax rate, this would generate \$910 million a year or \$9.1 billion over 10 years.

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The Wall Street Journal and *The New York Times* reported that this advertising tax was under serious consideration. *Advertising Age* noted that marketing and advertising is under attack in Washington. “If what happens in business offends . . . advertising gets blamed,” Randall Rothenberg, chief executive of the Interactive Advertising Bureau told *Ad Age*. Nothing illustrates this more than what was happening to prescription medications.

Fortunately our friends in the Senate and the House have begun to register their concerns with leaders of their committees. Senators Chuck Schumer (D-N.Y.), Bob Menendez (D-N.J.) and Chuck Grassley (R-Iowa), began to work against it. Thus far, it has not resurfaced as a revenue option, but the Finance Committee has yet to produce a written document (now expected in September). The devil always is in the details. In the House Ways and Means Committee, several members – Reps. Ron Kind (D-Wis.), Earl Blumenauer (D-Ore.), Richie Neal (D-Mass.), Shelley Berkeley (D-Nevada) and Kendrick Meek (D-Fla.) – have spoken out against this ad tax. A Ways and Means revenue document was reissued with the explanation that the advertising revenue item had been “inadvertently” included.

The 111th Congress began with warnings from the new chairman of the House Committee on Energy and Commerce, Rep. Henry A. Waxman (D-Calif.), that he would propose legislation to mandate a three-year moratorium on advertising of newly approved drugs. He had lost that fight in the

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Health Subcommittee in the last Congress. Now he is the full committee chairman and he was planning to try again.

Then Rep. Rahm Emanuel (D-Ill.), a member of the Ways and Means Committee and chairman of the House Democratic Caucus, served up an equally stern warning. Pharma would be allowed to deduct the cost of its advertising, or research and development, but not both. Under current law, advertising and research costs are fully deductible.

Emanuel is now chief of staff to President Obama and Waxman leads a major committee that is a leader on healthcare reform, and their threats have taken on a new sense of urgency.

There is a sense of irony that both Waxman and Emanuel were preempted by others who sought to tax this advertising.

But it carries a warning that our battle is far from over. For a host of reasons, advertising is under attack, and we – you – must remain vigilant in letting your two U.S. Senators and your representative know your views and ask them to protect this important form of commercial speech.

Don't forget the words of Yogi Berra – "It ain't over till it's over."

Jim Davidson is an attorney and founded 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. Davidson can be reached by e-mail at jhd@davidsondc.com.

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Beacon Healthcare	15	wehearyou.info	908-781-2600	Robert Griffith	rgriffith@beaconhc.com
CARE Media Holdings Corp	36	caremediaholdings.com	813-888-7330	Elaine Mann	info@caremediatv.com
Catalina Health Resource	9	catalinahealthresource.com	800-803-9360	Erika Stauffer	erika.stauffer@catalinamarketing.com
Context Media	21	diabeteshealthnet.com/forsponsors	312-239-6656	Shradha Agarwal	shradha.a@diabeteshealthnet.com
HealthCentral	4	healthcentral.com	703-302-1064	Quincy Smith	smith@thcn.com
Health Monitor Network	64	healthmonitornetwork.com	201-649-9918	Alex Dong	alex@healthmonitor.com
InfoSlate, Inc.	47	infoslate.com	888-777-0091	Sharon Tiberia	sharon@infoslate.net
Mayo Clinic	11	mayoclinic.com	507-284-8875	Lindsay Dingle	dingle.lindsay@mayo.edu
Parade	63	parade.com	212-450-7141		
Physician's Weekly	33	patientedu.org	908-204-0010	Clay Romweber	clayr@physweekly.com
Real Age	7	realage.com	215-836-0397	Mike Wojcek	mwojcek@realage.com
RPM Report	57		240-221-4465	Joshua Berlin	
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