The ADvertising Coalition

September 9, 2019

The Honorable Richard Shelby
Chairman
Committee on Appropriations
United States Senate
304 Russell Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy
Vice Chairman
Committee on Appropriations
United States Senate
437 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Shelby and Vice Chairman Leahy:

The Advertising Coalition urges the Committee on Appropriations to reject an amendment that may be offered again this year to require direct-to-consumer advertisements for prescription medicines to include the wholesale acquisition cost for the advertised drug. We understand that the Committee last year adopted an amendment with a similar requirement. Subsequently, however, that amendment was not included in the final conference agreement on Labor-HHS appropriations.

In the interim, on May 8, 2018, the Secretary of Health and Human Services proposed a similar requirement in a Department rule. That rule was set aside July 8, 2019 by U.S. District Court Judge Amit Mehta. The Department has elected to appeal that decision. The Advertising Coalition urges the Committee on Appropriations not to adopt a requirement that private sector advertising contain speech mandated by the government as part of any appropriations bill.

While the District Court decision addressed only the lack of statutory authority by HHS to issue the rule, the U.S. Supreme Court has been sharply critical of government attempts to require speech in advertising. Last year the Court struck down a California statute that required advertising by pro-life clinics for pregnancy-related services to explain that the State offered free and low-cost services including abortions, and to provide a phone number to call. Nat’l Inst. Of Family & Life Advocates v. Becerra, 338 S.Ct. 2361 (2018). The Supreme Court reaffirmed that it “has stressed the danger of content-based regulations in the fields of medicine and public health, where information can save lives.” In an earlier landmark case, the Court said, “A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of “animus toward the ideas contained” in the regulated speech.” Cincinnati v. Discovery Network, Inc., 507 U. S. 410, 429 (1993).

The requirement to display the wholesale acquisition cost of a drug in its advertisement almost certainly will be confusing to consumers since it likely would bear little relationship to what a consumer would pay. There is even a more serious issue whether a reader or viewer would be dissuaded by a high dollar amount appearing in an ad from even asking a physician whether the drug might be appropriate to treat her or his medical condition.
The ADvertising Coalition was formed more than 25 years ago by business associations that represent national media and advertising companies. The Coalition addressed many of these questions in comments filed with the Centers for Medicare & Medicaid Services on the rule proposed by Secretary Azar. Those comments are attached. We would encourage the Committee to address these important issues before adopting an amendment to require price information to be incorporated in pharmaceutical advertising.

Respectfully,

James H. Davidson
Executive Director
The ADvertising Coalition

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