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March 5, 2026

The Honorable Natalie Ziegler
Maryland General Assembly
214 Lowe House Office Building
Annapolis, Maryland 21401
Via email

RE: House Bill 484, “Corporate Income Tax – Addition Modification – Direct-to-Consumer Pharmaceutical Advertising”

Dear Delegate Ziegler:

You have requested advice on the constitutionality of House Bill 484 (“Corporate Income Tax – Addition Modification – Direct-to-Consumer Pharmaceutical Advertising”) with respect to the First Amendment. House Bill 484 requires an addition modification under the corporate income tax for the amount of any expenses paid or incurred during the tax year that are deducted under Internal Revenue Code (“IRC”) § 162 for direct-to-consumer advertising of covered drugs. It is my view that the bill as introduced is not clearly unconstitutional on its face, though it presents a risk of violating the First Amendment Free Speech Clause because it could limit truthful and lawful advertising.

Arguably, under analogous Supreme Court precedent, HB 484 does not infringe upon any First Amendment rights or regulate any First Amendment activity by not allowing a tax deduction for expenses incurred from direct-to-consumer pharmaceutical advertising. *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983). But if a court were to conclude that the bill, if passed, implicates the First Amendment, the State would have to show that it has a “substantial” government interest and that HB 484 is proportional to that interest.

The First Amendment of the U.S. Constitution and Article 40 of the Maryland Declaration of Rights¹ protect commercial speech, such as prescription drug advertising, as long as the advertising is truthful and lawful. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (holding that state ban on pharmacists' advertising of prescription drug prices violates the First Amendment); *Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 121 (1973) (striking down similar law on First Amendment and State constitutional grounds).

The Supreme Court has reviewed the implications of tax laws² on First Amendment rights, particularly as it pertains to the Government denying deductions. For instance, in *Regan v. Taxation With Representation of Washington*, the Court held that Congress did not infringe upon any First Amendment right or regulate any First Amendment activity when it chose not to extend a tax deduction for lobbying expenses to Taxation With Representation of Washington ("TWR"). 461 U.S. 540; see also *Cammarano v. United States*, 38 U.S. 498 (1959) (upholding a regulation that denied business expense deductions for lobbying activities). The issue in *Regan* came about when Congress decided not to subsidize TWR's (a nonprofit organization) lobbying expenses, in which the organization claimed that this decision was a violation under the First Amendment as it infringed upon their freedom of speech. *Id.* at 545.

The Court reasoned that the First Amendment does not require Congress to subsidize lobbying and choosing not to do so does not impair First Amendment rights. *Id.* at 546. Further, the *Regan* Court explained that denying a subsidy does not equate to placing an obstacle in the path of a person trying to exercise freedom of speech as the denial of a deduction does not equate to a prohibition. *Id.* at 549-50. "Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds[.]'" *Id.* at 550.

A reviewing court could similarly find that no First Amendment right is implicated by HB 484, which, in effect, decreases the value of a federal tax deduction for expenses on direct-to-consumer advertising of prescription drugs by adding that amount to the federal taxable income of a corporation to determine Maryland modified income. Here, like in *Regan*, a court could reason that HB 484 does not interfere with free speech because it does not restrict a corporation's freedom to advertise. As *Regan* recognized, the state is not required to subsidize or allow a tax deduction for advertising activities. Even if the bill would reduce certain cost advantages of certain advertising, which is commercial speech entitled to less protection under the First Amendment than the political speech considered in *Regan*, that reduction does not amount to regulation of speech.

¹ According to the Supreme Court of Maryland, the "legal effect" of both the First Amendment and Article 40 of the Declaration of Rights "is substantially the same." *Pack Shack, Inc. v. Howard Cnty.*, 377 Md. 55, 64, n.3 (2003) (quoting *Sigma Delta Chi v. Speaker*, 270 Md. 1, 4 (1973)).

² Maryland courts have previously noted that "[t]he inevitable classifications and distinctions made by legislatures in designing a tax statute are entitled to a strong presumption of constitutionality." *Clear Channel Outdoor, Inc. v. Director, Department of Finance of Baltimore City*, 472 Md. 444, 463-64 (2021); citing *Leathers v. Medlock*, 499 U.S. 439, 451-52 (1991); (reasoning that tax laws are presumed to be valid and constitutional, even in the context of a First Amendment challenge).

In contrast to the above, if a reviewing court determined that HB 484 *does* regulate commercial speech, it would use the test articulated by the U.S. Supreme Court in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, laws restricting or limiting commercial speech must serve a “substantial” government interest and the regulatory means employed must be in proportion to that interest. 447 U.S. 557, 563-64. A reviewing court would apply a 4-part intermediate scrutiny analysis to determine constitutionality. *Id.* First, to be protected, the speech must concern lawful activity and not be misleading. *Id.* at 566; *see Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (the First Amendment does not protect commercial speech for unlawful activities); *see also Friedman v. Rogers*, 440 U.S. 1, 12 (1979) (government may ban forms of communication more likely to deceive the public than to inform it). The bill applies to all covered direct-to-consumer advertising, not just advertising that is deceptive or unlawful.

Second, the State must show a substantial governmental interest in regulating the speech, and third, that the regulation directly advances that interest. *Id.* Finally, the State must show that the regulation is no more extensive than necessary. *See Recht v. Morrissey*, 32 F.4th 398 (4th Cir. 2022) (involving legal advertisements about medical devices or medications).

Whether a court would conclude that a state denying a tax deduction on direct-to-consumer marketing of prescription medication violates the First Amendment depends on the strength of the asserted state interest and evidence—which should be in the legislative record—supporting the necessity of the regulatory means chosen. The State has several potentially relevant interests, the most obvious being increasing State revenue.

While the proposed State income calculation law in HB 484 does not ban direct-to-consumer prescription drug advertising, in its application, it might make these types of advertisements more costly. Nonetheless, if the State can show evidence that the proposed law is a direct means to advance a substantial State interest, then the bill is more likely to be upheld if challenged under the First Amendment.

For these reasons, it is my view that HB 484 is not clearly unconstitutional and is defensible if challenged under the First Amendment.

Sincerely,



Shaunee L. Harrison
Assistant Attorney General