

The Future of Pharmaceutical Advertising on Television: Legal and Regulatory Considerations

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The debate over pharmaceutical advertising on television has resurfaced with renewed vigor, among populist conservatives and activists, such as Charlie Kirk, who have advocated for regulatory intervention, and from Robert F. Kennedy Jr., the nominee for Secretary of HHS, and Brendan Carr, the new FCC Chairman, who have either called for or agreed with calls to ban pharmaceutical advertising. This article examines the potential for restrictions on direct-to-consumer (DTC) pharmaceutical advertising, the Federal Communications Commission's (FCC) regulatory framework for broadcast advertising, the broader implications of FCC oversight, and the legal precedent that shapes government regulation of commercial speech.

The FCC's Jurisdiction over Advertising

The FCC derives its regulatory authority over broadcast advertising from the Communications Act (the Act) of 1934, which mandates that broadcasters operate in the "public interest, convenience, and necessity." The Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC* (1969) affirmed the FCC's ability to regulate broadcast content on the basis of spectrum scarcity—the principle that the electromagnetic spectrum is a limited public resource and, therefore, subject to government oversight. Under Title III of the Act, the FCC oversees licensing (Section 301), regulatory powers (Section 303), and license renewals (Section 309), all of which impose conditions on broadcasters that use the public spectrum.

Despite this broad authority, the FCC has tended to focus on over-the-air broadcasts, where the FCC must grant licenses to operate. While cable and streaming services do not rely on licensed spectrum for their core businesses, the FCC might impose limits on cable direct-to-consumer pharmaceutical advertising, too. The Commission, for example, has long regulated political and lottery advertising on cable origination programming and might well use similar authority to reach cable service content with respect to direct-to-consumer pharmaceutical advertising. *See, e.g.*, 47 U.S.C. 152(a) ("The provisions of this [Act] shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in [Title VI]."). Of course, the FCC's ability to influence the

communications sector extends beyond formal enforcement: operators often self-censor or decline to air certain advertisements for fear of FCC scrutiny, as seen in past controversies surrounding political advertising, lottery promotions, and tobacco regulations.

Historical Precedents in FCC Advertising Regulation

Regulating advertising has long been a balancing act between government oversight and First Amendment protections. Political advertising, for instance, presents unique challenges. While the FCC enforces the Equal Time Rule and the Lowest Unit Charge provisions to ensure fair access for candidates, it does not regulate ad content, barring outright censorship (*FCC v. League of Women Voters*, 468 U.S. 364 (1984)). This hands-off approach to content is in contrast to its more direct interventions in areas such as gambling and tobacco.

Lottery advertising has also been a point of contention. The FCC historically prohibited the promotion of gambling and lottery activities under Section 73.1211 of its rules, though exemptions were later introduced for state lotteries and tribal gaming. The Supreme Court case *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173 (1999) found that blanket bans on truthful, non-misleading ads for legal gambling were unconstitutional, yet certain targeted restrictions remained permissible.

Perhaps the most significant advertising restriction came with the regulation of tobacco products. In 1971, following congressional action, the FCC banned cigarette advertising on broadcast media. The courts upheld this prohibition in *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), reasoning that broadcasters had no inherent First Amendment right to profit from cigarette advertisements. This decision, which was affirmed by the Supreme Court without opinion, illustrated the power of Congress and the FCC to impose public health-driven advertising restrictions when supported by legislation.

Commercial Speech and First Amendment Considerations

The legal framework surrounding commercial speech has evolved through a series of landmark cases that shape how courts view advertising restrictions today.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the Supreme Court recognized that commercial speech, including advertising, is protected under the First Amendment, establishing a precedent that the government cannot impose sweeping restrictions without justification.

This principle was further refined in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), which laid out the still-operative test for assessing restrictions on commercial speech. The ruling required that regulations must directly advance a substantial government interest and be narrowly tailored to avoid unnecessarily stifling lawful expression.

Later, the Court reinforced these protections in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), striking down restrictions on tobacco advertising, including a ban on billboard advertising within 1,000 feet of schools and playgrounds, because the Court held that such a regulation would improperly reach lawful avenues of communication to adults. The ruling underscored that even well-intentioned regulations must be carefully crafted to ensure they do not infringe on constitutional rights.

More recently, in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), the Court invalidated a Vermont law restricting pharmaceutical marketing, arguing that government-imposed burdens on commercial speech must withstand heightened judicial scrutiny. This ruling is particularly relevant to the discussion of pharmaceutical advertising, as it demonstrates the Court's reluctance to allow regulatory overreach in the name of consumer protection.

Prospects for Pharmaceutical Advertising Regulation

Given the FCC's historical reluctance to regulate advertising absent legislative action, any direct restrictions on pharmaceutical advertisements would likely require new congressional mandates. Legislative proposals, such as the Drug-Price Transparency for Consumers Act, signal growing interest in regulating pharmaceutical promotions. However, any attempt to curtail pharmaceutical advertising—whether through direct regulation or the FCC's "long shadow"—would likely face legal challenges under the commercial speech doctrine.

Moreover, the ideological composition of the judiciary has shifted in recent years, increasing the likelihood that courts would uphold certain regulatory measures. While outright bans on DTC pharmaceutical ads may be difficult to justify under existing precedent, indirect regulatory pressures and disclosure requirements may emerge as viable policy tools. These disclosure requirements will face First Amendment challenges as well, but courts have shown they are more likely to uphold such rules.

Conclusion

The intersection of FCC authority, legislative action, and First Amendment protections creates a complex legal landscape for pharmaceutical advertising regulation. While direct FCC intervention remains limited to spectrum-based broadcasters, the long shadow of regulatory influence—combined with potential legislative action—could reshape the future of pharmaceutical advertising on television. Whether such measures would survive judicial scrutiny remains an open question, particularly given the courts' historical skepticism toward restrictions on commercial speech. Nonetheless, with rising political interest in curtailing pharmaceutical advertising, the industry must prepare for a shifting regulatory environment that could redefine the boundaries of permissible direct-to-consumer advertising of pharmaceuticals.

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