NLWJC - Kagan

DPC - Box 042 - Folder 016

Tobacco-Settlement - Advertising [1]

Tob - ad - advertising

Comparison of Advertising Restrictions
in the FDA Rule and the Minnesota Settlement
(July 13, 1998)

Advertising Restriction	FDA Rule	Minnesota Settlement
Bans all billboards	No	Yes
Bans outdoor advertising within 1000 feet of schools and public playgrounds	Yes	Yes
Restricts advertising to black-and-white text only for publications, direct mail or outdoor billboards except in publications with a predominant adult readership or at adult only facilities	Yes	No
Restricts advertising to black-and-white text only for point of purchase sales.	Yes	No
Prohibits the sale or giveaways of promotional products like caps or gym bags that carry cigarette brand names or logos	Yes	Yes
Prohibits brand-name sponsorship of sporting or entertainment events, but permits it in the corporate name	Yes	No
Prohibits placement of tobacco products in films.	No	Yes

Tob-rr-advertising

Cynthia A. Rice 06/24/98 02:47:56 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP, Cynthia Dailard/OPD/EOP

cc:

Subject: Possible tobacco annoucement for tomorrow

Jim O'Hara called with an idea for a small tobacco annoucement for tomorrow -- we could issue a paper statement from us or from HHS saying "Today the Administation announced it will make available to all 50 states new anti-teen smokings ads being released today in Massachusetts."

Here's what this means. Massachusetts is unveiling three t.v. ads tomorrow and is offering to make them available to the CDC, who will make them available to other states. Normally, states that use other state's ads must pay a "talent" fee. In this case, CDC would offer to pay the fee.

The ads are hard-hitting ads based on the tobacco documents. While visually they focus on teens, they all repeat a mantra "It's Time We Made Smoking History" which could leave us open to the charge that we want to ban all tobacco.

Ad #1: Shows a 15 year old girl smoking with the words "The 14- to 18-year old group is an increasing segment of the smoking population. RJR must soon establish a successful new brand in this market if our position is to be maintained in the long term" citing a 1976 RJR document.

Then it closes with the phrase: "They Knew. They Always Knew. It's Time We Made Smoking History."

Ad #2: Shows an 11 year old girl smoking with the words "Happily for the tobacco industry, nicotine is both habituating and unique in its variety of physiological actions" citing a 1972 RJR memo.

Then it closes with the phrase: "They Knew. They Always Knew. It's Time We Made Smoking History."

Ad $3: Shows a 14 year old walking down the street with copy "If a young person's desire to be daring is part of the inclination to start smoking, the warning label on the package may be a plus" citing a 1973 RJR memo.

Then it closes with the phrase: "They Knew. They Always Knew. It's Time We Made Smoking History."

Tob-sct - advertising
and
Tob-sct - access

FDA Rule

Youth Access Restrictions

- Sets minimum age of purchase at 18 years
- Requires age verification by photo ID for anyone 26 or younger
- Requires face-to-face sales (except for mail order sales)
- Bans vending machines and self-service displays except in facilities where only adults are permitted

Advertising Restrictions

- Bans outdoor advertising within 1000 feet of schools and public playgrounds
- Restricts advertising to black-and-white text only (publications, outdoor, point of purchase, direct mail, etc.), except in publications with a predominant adult readership or at adult only facilities
- Prohibits sale or giveaways of products like caps or gym bags that carry cigarette or smokeless tobacco product brand names or logos
- Prohibits brand-name sponsorship of sporting or entertainment events, but permits it in the corporate name
- Constitutionally valid advertising restrictions are based on a strong factual record and are narrowly tailored to restrict advertising that contributes to young people's use of tobacco.

Point of Purchase Restrictions

- Prohibits sales of single cigarettes or "loosies"
- Bans free samples
- Sets minimum package size at 20 cigarettes
- Restricts all point of purchase advertising and labeling to black-and-white text only, except in adult only facilities

Tob - set - advertising

Current Federal Restrictions on Tobacco Product Advertising

The federal government has the authority to impose significant restrictions on the advertising of tobacco products without first obtaining the consent of tobacco manufacturers. Restrictions such as those contained in the FDA regulation are consistent with the First Amendment because they are tailored to serve the government's interest in reducing minors' demand for and use of tobacco products without impermissibly interfering with the tobacco industry's ability to advertise tobacco products to adults.

The FDA restrictions would, if implemented:

(a) limit virtually all tobacco advertising to the use of only black text on a white background — i.e., what is commonly known as "tombstone" advertising. 21 C.F.R. § 897.32(a).

> (i) Colors and images could be used only when tobacco advertising appears in "adult publications" or in facilities that are restricted to adults. 21 C.F.R. § 897.32(a)(1)-(2); see also 21 C.F.R. § 897.16(c)(2)(ii). An "adult publication" is one whose readership is at least 85 percent adult and includes less than two million children. 21 C.F.R. § 897.32(a)(2)(i)-(ii).

(b) prohibit all outdoor advertising of tobacco products — even tombstone advertising — within 1,000 feet of any elementary or secondary school or any playground in a public park and limit all other outdoor advertising to the use of black text on a white background. 21 C.F.R. § 897.30(b)

(c) prohibit tobacco manufacturers from sponsoring athletic, social, and cultural events "in the brand name" of a tobacco product. 21 C.F.R. § 897.34(c).

(d) prohibit tobacco manufacturers and distributors from marketing non-tobacco products, such as tee shirts, caps, and sporting goods, under tobacco brand names. 21 C.F.R. § 897.34(a).

(e) prohibit the use of color and image in point of sale advertising. 21 C.F.R. §§ 897.32, 897.16.

(f) require tobacco manufacturers, distributors, and retailers to provide written notice to the FDA 30 days prior to using new advertising in media that discusses the extent to which the new advertising may be seen by persons younger than

18. 21 C.F.R. § 897.30(a)(2).[1]

Proposed Restrictions on Tobacco Product Advertising

The June 20th Resolution, as well as some of the proposed bills, have contained additional restrictions on the advertising of tobacco products that go beyond those that are contained in the FDA regulation. These additional advertising restrictions would:

> (a) ban the use of human images or cartoons in all tobacco advertising. (This addition would extend the scope of the FDA regulation, which permits human images and cartoons to be used only in advertising that appears in specially defined adult publications or in adult facilities.)
>
> (b) ban all outdoor advertising of tobacco products. (This addition would extend the scope of the FDA regulation, which bans outdoor advertising within 1,000 feet of a school or playground but otherwise only limits such advertising to the use of black text on a white background.)
>
> (c) ban tobacco advertising on the Internet. (Such advertising is arguably already banned by 15 U.S.C. 1335. In any event, the FDA advises that such advertising is either rare or non-existent. Thus, under the FDA regulations, the FDA would have to be notified 30 days in advance of the advertising of tobacco products on the Internet.)

These additional advertising restrictions, and in particular the restriction on Internet advertising, raise significant constitutional concerns that are not presented by the restrictions contained in the FDA regulation. The risk that the courts would invalidate these additional advertising restrictions could be somewhat alleviated if federal law were to make compliance with them a term in some form of "consensual contract" between the tobacco manufacturers and the federal government. However, the additional advertising restrictions would still be subject to substantial First Amendment challenge (perhaps by third parties) under the "unconstitutional conditions" doctrine.[2]

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[1] There is an existing statutory ban on radio and television advertising of cigarettes and little cigars. See 15 U.S.C. 1335.

[2] The risk that existing federal restrictions on advertising, such as the FDA restrictions, would be invalidated would also be somewhat alleviated if they were not only imposed directly but also made conditional upon industry consent. We note, however, that the FDA restrictions would be constitutional if imposed directly while the direct imposition of the proposed additional advertising

Pursuant to the "unconstitutional conditions" doctrine, the Supreme Court has struck down previous governmental attempts to condition the receipt of discretionary benefits, such as federal funding, on a recipient's compliance with restrictions on expressive activities that could not have been imposed directly. See, e.g., F.C.C. v. League of Women Voters, 468 U.S. 364 (1984). There are grounds for distinguishing these rulings in this context, at least with respect to conditions that purport to restrict commercial speech. Courts therefore would be significantly more likely to uphold the additional advertising restrictions if federal law offered manufacturers the option of complying with them in order to receive special protections from liability than if federal law simply imposed such advertising restrictions unconditionally. However, because the additional advertising restrictions could be subject to a substantial constitutional challenge even if they were included in some form of "consensual contract," the most effective way to protect the legislation from litigation is to ensure that all of its advertising restrictions, whether or not they are made conditional, are crafted to satisfy judicial scrutiny even if imposed directly.

By confirming the FDA's authority to regulate the advertising of tobacco products, the legislation could ensure that the FDA would retain the flexibility to promulgate tailored regulations that go beyond those contained in its current regulation as circumstances require. Alternatively, federal legislation could set forth additional advertising restrictions that could be tailored as follows to ensure that they would be constitutional if imposed directly:

> (a) The proposed ban on the use of human images and cartoons would partially extend the restriction imposed by the FDA's ban on the use of all color and images in what are known as "adult publications" and adult facilities. A more tailored means of extending this restriction might be to alter the definition of an "adult publication" by lowering the threshold number of child readers for such publications to less than two million and then to adopt the newly limited "adult publication" exception for the use of human images and cartoons.
>
> (b) With respect to the ban on all outdoor advertising of tobacco products, legislation could impose a general requirement that outdoor advertising appear in a tombstone format and then extend the FDA's ban on such outdoor advertising to include geographic areas, in addition to schools and playgrounds, that are frequented by children.
>
> (c) With respect to the ban on tobacco advertising on the

---

restrictions raises significant constitutional that are not presented by the FDA regulations.

Internet, it should be noted that such advertising is arguably already banned by 15 U.S.C. 1535. Assuming the bill were to address advertising on the Internet, Congress should consider whether, in light of available technology, there may be means short of a complete ban that would serve the government's interest in protecting underage consumers from advertising about products that may not lawfully be sold to them.

Other Proposed Speech Restrictions

The June 20th Resolution, as well as some of the proposed bills, have also contained other restrictions on speech that appear to apply to both commercial speech and fully protected, non-commercial speech or that clearly target only fully protected, non-commercial speech. These additional speech restrictions would:

(a) ban the use of payments for product placements in movies, television, or video games;

(b) ban payments to "glamorize" tobacco use in media appealing to minors;

(c) restrict (or even prohibit) lobbying by tobacco industry trade associations; and

(d) prohibit the tobacco manufacturers from bringing constitutional challenges to specified provisions of the proposed Act.

(a-b) The restrictions on the use of payments for "product placements" and "glamorizing" appear to apply to both commercial and fully-protected non-commercial speech. To the extent that these restrictions would reach forms of expression other than commercial speech, they would have to be narrowly tailored to serve a compelling governmental interest in order to be upheld if they were imposed directly. See Board of Trustees of SUNY v. Fox, 492 U.S. 469, 473-74, 482 (1989) (describing commercial speech). Moreover, it is extremely doubtful that, in light of the unconstitutional conditions doctrine, courts would uphold such restrictions on fully-protected, non-commercial speech even if they were made conditional upon the consent of the industry. To ensure that these restrictions would be upheld, they could be redrafted to make clear that they apply only to payments for product placements of "brand-name" tobacco products, as this change would limit their application to commercial speech.

(c-d) The restrictions on lobbying and litigation challenging the legislation on constitutional grounds directly target expression that would appear to be fully protected. Accordingly, these restrictions could be imposed directly only if they were narrowly tailored to serve a compelling governmental interest. Moreover, it is extremely doubtful that, in light of the unconstitutional conditions doctrine, courts would uphold such

restrictions on fully-protected, non-commercial speech even if they were made conditional upon the consent of the industry.

Tob-sci-advertising
(from FDA)

Additional Advertising Restrictions

FDA's regulations are narrowly tailored and factually justified. Although FDA's record may provide sufficient factual support for additional restrictions, there are policy reasons for not extending the advertising restrictions at this time.

1. Cartoons, humans and animals

In order to narrowly tailor restrictions on the types of figures (cartoons, humans or animals) that can be used in adult publications, the proposal creates an interim category of publications, so that there would be three categories, (1) youth publication (youth readership of 15% or 2 million)- text only advertising, (2) adult only publication (e.g. youth readership of 10% and 1.5 million)- no advertising restrictions, and (3) interim publications (e.g. youth readership of 10-15% and 1.5-2 million) advertising permitted except cartoons, human or animal figures.

- Advertising imagery appealing to kids extends far beyond cartoons, and human and animal figures, see Kool cigarettes use of waterfalls. If the purpose of the proposed ban on these figures, even in adult publications, is to reduce the appeal to kids, then the proposed restriction would be severely under-inclusive and of little value.

- The regulation's current threshold (15% and 2 million) is based on current survey results and readership figures. FDA must retain the flexibility to modify these thresholds, by amending the regulation, in order to address changing reading habits and testing techniques (one testing service is already changing the way it measures readership and its results yield fewer young readers). A statutory three tier system would make it more difficult for FDA to modify the thresholds without concomitant benefit.

2. Extend the ban on outdoor advertising to geographic areas beyond FDA's 1,000 foot ban.

- FDA's factual record supports the areas around schools and playgrounds. Additional fact finding would be necessary to justify additional areas.

3. Internet advertising- use "blocking" technology to prohibit youth access to tobacco advertising on the Internet

- 15 USC 1335 (cigarettes) and 15 USC 4402(f) (smokeless) already ban advertising on FCC regulated media, which would include the Internet. Legislative language that is less

restrictive than a total ban could be seen as an amendment or as overruling the current ban.

- Internet technology is in its infancy. It would be premature to attempt to "legislate" a technological solution to children's access to Internet advertising.

- Interim restrictions, such as "blocking," could make imposing a ban more difficult when a record is developed.

THE WHITE HOUSE
WASHINGTON

DOMESTIC POLICY COUNCIL

FACSIMILE FOR: Bruce + Elena

DATE: 4/30

TELEPHONE:

FAX: 62878

FACSIMILE FROM: **CYNTHIA DAILARD**
ASSOCIATE DIRECTOR
FOR DOMESTIC POLICY

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NUMBER OF PAGES (INCLUDING COVER): 5

COMMENTS: Revised since this morning.

New data from the University of California shows cigarette advertising and promotion strongly encourages children to smoke:

> 7 million teens began smoking between 1988 and 1997 as a result of cigarette advertsing and promotion -- 44 percent as a result of the Joe Camel campaigns and 22 percent as a result of Marlboro.
>
> From 1988 to 1997, an estimated 3 million underage teens will have begun smoking because of Camel marketing, 1.4 million because of Marlboro, and 2.6 million because of other types of tobacco advertising and promotion. Over 500,000 of these teens will eventually die of smoking-related causes.

These new data are an outgrowth of a study published in the February 18th Journal of the American Medical Association which found that 34 percent of teen smoking in California could be attributed to advertising and promotion. The new analysis reveals for the first time which types of advertising influenced teens from 1988 through 1997. The study's author, John P. Pierce, PhD of the University of California San Diego, prepared the analysis for the Robert Wood Johnson Foundation. The study was based on a survey of non-smoking teens who in 1993 said they would not consider taking up smoking. A follow-up survey taken three years later found that those teens who in 1993 could cite a favorite cigarette advertisement or who possessed a tobacco promotional item (e.g., t-shirt, cap, lighter with brand logo) or were willing to use one were nearly three times more likely to take up smoking.

These new data underscore the critical importance of ending tobacco company targetting of our children. In 1996, the President issued a final Food and Drug Administration rule which would have stopped tobacco advertising and promotion aimed at children, but tobacco companies -- which claim they want to end underage smoking -- have spent millions of dollars on lawyers to tie this effort up in court.

We must enact comprehensive tobacco legislation this year so we can end tobacco company advertising and marketing to children now. President Clinton is committed to passing comprehensive bipartisan legislation to stop young Americans from smoking before they start, by raising the price of cigarettes, putting into place tough restrictions on advertising and access, imposing penalties on the industry if it continues to sell cigarettes to children, and ensuring that the FDA has authority to regulate tobacco products.

Estimates on the Long term Health Effects of Advertising and Promotion that encourages adolescents to start smoking by Specific Cigarette Campaigns .

— an example of additional work to be completed on the no-cost extension to the Robert Wood Johnson Foundation grant

Principal Investigator: John P. Pierce PhD
UC San Diego Cancer Prevention Program

1. Does Tobacco Industry Advertising and Promotion of Cigarettes influence Adolescent experimentation with cigarettes?

A recent research report was published in the Journal of the American Medical Association (JAMA 1998; 279:511-515). This report demonstrated in a longitudinal study that the influence of tobacco industry advertising and promotional activities occurred prior to any experimentation with cigarettes and, indeed, was the major predictor of which adolescents moved out of the lowest risk category for becoming an addicted smoker in the future. In this paper, we calculated that between 1993 and 1996, tobacco industry advertising and promotional activities were responsible for 34.3% of all experimentation with cigarettes in California.

2. How does this translate into daily experimentation with cigarettes?

The Office on Smoking and Health of the Centers for Disease Control and Prevention have estimated that 6,000 minors experiment with cigarettes each day in the United States. Using these numbers, the JAMA paper indicates that the Tobacco Industry advertising and promotional activities are responsible for over 2,000 adolescents experimenting with smoking each day.

3. Can we partition this effect between the activities of advertising and promotions separately?

The JAMA paper categorized the effect of advertising separately to the effect of promotional items. While a formal statistical attribution of the partial effect of advertising compared to promotional activities is complex, the adjusted odds ratios suggest that a reasonable approximation might be obtained by the simple heuristic of assuming that promotional activities are 50% more effective than advertising in influencing adolescents to experiment. However, it is clear that these lowest risk adolescents are not equally receptive to tobacco advertising and tobacco promotional products. In 1993, 60% of these adolescents reported having a favorite cigarette advertisement compared to only 16% who were categorized as receptive to tobacco industry promotional activities. These numbers suggest that, in 1993, approximately 72% of the effect of the combined variable can be attributed to an advertising effect compared to 28% which can be attributed to the effect of promotional items.

4. Is it possible to attribute the overall tobacco industry advertising and promotional effect to the activities of specific cigarette brands?

In 1993, these low risk adolescents were asked to name their favorite cigarette advertisement and to indicate the brand of any promotional product that they might have. These data indicate that there are only two major brands that appear to influence large numbers of adolescents, these are the Camel and the Marlboro brands of cigarettes. These brands account for two thirds of the nominations of favorite advertisements and over half of all the promotional items received. No other specific brand of cigarette accounts for more than 6% of the market share within any sub-group that we investigated (note: some respondents nominated favorite brands which were smokeless tobacco products).

The effect of Joe Camel

In 1993, the advertising for Camel cigarettes was named as the favorite by 50% of these minors who were assessed at minimum risk of being addicted to smoking. Further the Camel brand had 30% of the market share of the promotional items that were possessed by these adolescents. Using the above calculations, we estimate that 44% of the overall effect of tobacco industry advertising and promotional activities on adolescent experimentation can be attributed to the activities of the Camel brand. This translates to a total of **880** adolescents who experiment each day between 1993 and 1996 because of the influence of the Joe Camel campaign.

The effect of Marlboro

In 1993, the advertising of Marlboro cigarettes was named as favorite by 14% of these adolescents while 22% of all promotional items were from Marlboro (note this has been changing rapidly in recent years). This translates to **384** adolescents who experiment with smoking each day in 1993 because of the advertising and promotional activities of Marlboro cigarettes.

What is the likely impact of these specific cigarette advertising and promotional campaigns on the future smoking related disease in the United States?

The Joe Camel advertising campaign started in 1988 and would appear to have been retired in 1997. Thus, the campaign exerted its influence on adolescents for a total of ten years (probably longer given that we have demonstrated that there is a lag effect between liking an advertisement or promotional item and experimentation). From almost the day that R.J.Reynolds Tobacco Company launched the Joe Camel campaign, they were accused of unduly setting out to influence children and minors. Early papers in 1991 outlined that the Joe Camel campaign was different to most other campaigns in its attractiveness to young people. Thus, the effectiveness of the Camel campaign in influencing adolescents to experiment can be assumed to have occurred across the life of the campaign. The Marlboro campaign can also be assumed to have exerted its effect

over the same ten year period. Using this assumption of a constant influence of advertising and promotional activities on experimentation between 1988 and 1997, it is possible to use other information in the literature to estimate the likely impact of advertising and promotional activities on the future smoking-related deaths of people who were minors during this period.

This approach is used in the accompanying table. The results indicate that, over the ten years from 1988 to 1997, tobacco industry advertising and promotional activities will result in a total of over **500,000** deaths in people who were underaged adolescents in those years. Using our logic, we estimate that the Joe Camel advertising and promotional campaign will be responsible for **231,000 of these deaths** and the Marlboro advertising and promotional campaign will be responsible for **105,000 of these deaths.**

Table: The Impact of Advertising and Promotional Campaigns between 1988 and 1997 on smoking and smoking-related deaths

		Attributable to	
Smoking and Health Indicies	**All Advertising/ promotion**	**Camel campaigns**	**Marlboro campaigns**
Total Adolescents experimenters	7,000,000	3,080,000	1,400,000
Adolescents who become addicted (30% of experimenters)	2,100,000	924,000	420,000
Adolescents who will smoke for at least 20 years (50%)	1,050,000	462,000	210,000
Future smoking attributable deaths (50% from Doll and Peto)	525,000	231,000	105,000

(Notes on the above Table: Estimates of how many experimenters become addicted to cigarettes from the national longitudinal survey of adolescents (TAPS) published by our group. This 30% estimate is considered to be conservative as many adolescents were still in the uptake process at follow-up. The proportion of adolescents who become addicted was obtained from a birth cohort analysis that our group undertook of the time to successful cessation using the National Health Interview Surveys. Finally, the proportion of future smoking related deaths among smokers who were still smoking at age 35 years is obtained from the 40 year follow-up of the British Doctors data published by Doll and Peto in the British Medical Journal.)

Tob - snr - advertising

OFFICE OF THE ATTORNEY GENERAL

TO

FAX Number 456-2878

Name: Elena Kagan

Telephone Number:

Organization:

Building, Room Number, etc.

Number of Pages Transmitted (including cover sheet)

FROM

FAX Number:

Name: Tom Perrelli

Telephone Number : **Date:**

Building, Room Number, etc. MAIN JUSTICE - ROOM

COMMENTS

(NOTE: If the receiver did not receive the correct number of pages, please call the transmitter and request retransmission)

Elena,
Draft of letter re: FDA authority to promulgate marketing restrictions.

Tom

This letter presents the views of the Department of Justice regarding provisions in S.1415 that concern the authority of the Food and Drug Administration (FDA) to regulate the advertising of tobacco products. We believe that these provisions are constitutional.

Section 101, by amending The Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301 et seq. (The Act), to include a new section 901(c), confirms the existing statutory authority of the FDA to have promulgated the restrictions on the advertising and marketing of tobacco products that are contained in part 897 of title 21, Code of Federal Regulations. See 61 Fed. Reg. 44396 (Aug. 28, 1996). As I testified on ___ , and as the Department of Justice has explained at length in the FDA litigation, the Administration believes that the FDA regulation restricting the advertising of tobacco products is consistent with the First Amendment under the controlling framework for the review of commercial speech restrictions set forth by the Supreme Court in Central Hudson Gas & Elec. Corp v. Public Serv. Comm'n, 447 U.S. 557 (1980), and subsequent cases. The restrictions contained in the FDA regulation are appropriately tailored to the Government's wholly legitimate and compelling interest in curtailing demand for and use of tobacco products by those who may not lawfully purchase them by reducing minors' exposure to tobacco product advertising.

In addition to amending the Act to confirm the existing authority of the FDA to have promulgated its current regulation, section 101 of S.1415 would also amend the Act to include a new section 906(d) that addresses the FDA's general authority to regulate the sale, distribution, and use of tobacco products -- including authority to regulate the advertising of such products -- and that sets forth the standards that would govern the exercise of that authority. This provision constitutes a permissible delegation of authority to an administrative agency, and we are aware of no constitutional principle that would preclude it. We emphasize in this regard that the FDA would be authorized to exercise this authority only in accord with applicable constitutional limitations.

We hope that the presentation of our views on these matters is of assistance to you. If we may be of additional help, we trust that you will not hesitate to call upon us.

Tob-rer-advertising

Cynthia A. Rice 04/23/98 06:14:58 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: Update on Possible California Tobacco Event

Good news -- we have new data on advertising we could announce, either at an LA event or elsewhere. Dr. John Pierce, the UC San Diego professor whose February study in the Journal of the American Medical Association found that 34 percent of teen smoking could be attributed to tobacco promotional activities, says he could do an estimate showing how much of that smoking can be attributed to Joe Camel and the Marlboro Man -- and, how many deaths would happen as a result. These estimates would involve using a subset of the data from the JAMA study (teens were asked to name their favorite ad).

We could do a roundtable event with a tobacco researcher (Dr. Pierce), a state health official (Pierce recommends Judy Cook, the chair of the state's tobacco oversight committee which has operated the state's counteradvertising campaign), and a teenager or two. We could show some of the state's ads and Pierce could release his new data.

There are several dangers, however. First, Stan Glantz of UC San Francisco -- a tobacco critic who thinks we don't go far enough -- will likely invite himself, or make negative statements to the press if he is not invited. Second, there's a draft evaluation of California's tobacco control program which shows mixed results -- an event like this could bring it to light. Third, the controversy over the state banning of smoking in bars could resurrect itself (apparently the Assembly has voted to restore smoking to bars but the Senate has not). And finally, the state is about to launch a new ad campaign encouraging young people to avoid cigars.

Thus, I would recommend that we try to use the Joe Camel/Marlboro Man data, but at a different venue.

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Laura Emmett/WHO/EOP
Cynthia Dailard/OPD/EOP
Christa Robinson/OPD/EOP

Tolac - set - advertising

CENTER FOR MEDIA EDUCATION

March 24, 1998

Ms. Cynthia Rice
Special Assistant to the President for Domestic Policy
Old Executive Office Building
Room 212
Washington, DC 20502

Dear Ms. Rice:

In light of the uncertainty as to our meeting and the present Congressional focus on the issue, we thought it best to succinctly set forth our strong disagreement with the position outlined in III ("Ban on Internet Advertising") in the White House letter of February 27, 1998, responding to Chairman John McCain. There are three main points:

1. Cigarette advertising is proscribed on the Internet under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1335. That Act bars the advertisements of cigarettes on "any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." For the reasons stated in the Geller memoranda of March, 1997 and February, 1998, the Internet is clearly subject to the jurisdiction of the FCC. The precedents are directly on point, and recent developments reinforce that the Internet is the future of interstate (and international) telecommunications. We have enclosed two very recent reports in the lead trade journal that are illustrative of this last point. Since the FCC is the expert agency in this respect (see n.8, March, 1997 memo), we urge that if you have any doubt on this score, you should refer our memo (and this letter) to the FCC for its views.

Any misapprehension may have stemmed from the fact that the FCC does not regulate the content of the Internet; the Commission does not regulate the content of interstate telephone calls, but it certainly regulates the underlying interstate system (see. e.g., the Sheftel case, p.6, March 1997 memo). Or, some misapprehension may be due to the fact that the FCC has forborne from imposing access charges on the Internet Information Service Providers; that, however, is a matter of policy, not jurisdiction, and the key to

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1335 is whether the medium of electronic communication is subject to FCC jurisdiction.

Nor does the fact that the Internet could not have been contemplated by the drafters of 1335, undermine the statute's applicability to this new medium. Indeed, 1335 was drafted broadly and has been applied unquestioningly to other new media including cable and DBS. With the increasing convergence of television and the Internet, the need to regulate the Internet under 1335 becomes both more obvious and more important.

2. The proscription in 1335 is constitutional. We strongly disagree with the position taken in Part III of the White House letter. That position is based on a legislative purpose of "diminishing minors' exposure to [cigarette] advertising." We recognize that such a purpose is the basis of the commendable FDA regulations. But that is not the purpose of 15 U.S.C. 1335. As its legislative history and broad scope show, that Act is aimed at not only protecting minors but also the 19 year-old, the 25 year old, and indeed persons of all ages. See attached recent op-ed article of Dr. Koop. It seeks to discourage smoking by all persons, by barring the advertisements glorifying such smoking on electronic media, which have such heightened impact because of their visual or aural nature. That is a most substantial and important governmental purpose.

The citation of Reno v. ACLU in Part III is not pertinent. Section 1335 deals with commercial speech, and thus comes within the test of Central Hudson, not strict scrutiny. Unlike Reno, this case does not involve a vague category like "indecent" material. The ban on advertising on the electronic media, with their greater impact, directly advances an important governmental purpose, and does so without suppressing more speech than is necessary. Since it is aimed at all persons and not just minors, there is no issue of less restrictive alternatives, such as noted in Reno (117 S. Ct. at 2346-48). It is not a complete ban since print and other media are available to convey price and other information. Finally, the Clinton Administration is surely not arguing that in 1998, after 27 years and at a time when public concern over the health hazard of smoking has reached its zenith, the complete ban on cigarette advertising on the electronic media subject to FCC jurisdiction is unconstitutional, and the Marlborogh Man or Virginia Slims should return to broadcasting, cable, direct broadcasting satellite, and other new emerging electronic media.

3. Congress should be promptly informed about the applicability of 15 U.S.C. 1335 to the Internet. We also recommend the course set out on p.9 of the February, 1998 memo -- that Congress be urged to note the soundness of the 1335 approach. If this proves infeasible because of contentious political concerns, Congress should simply

drop all consideration of the Internet ban in the present bills and negotiations in light of applicability of 1335.

We hope that the foregoing is helpful to the Administration in its further participation in this vitally important health area. We of course continue to welcome the opportunity to discuss the above positions at your earliest convenience.

Sincerely,

Kathryn Montgomery, Ph.D.
President

Enclosures

Copy:
- Elena Kagan, Deputy Assistant to the President for Domestic Policy
- Jim Kohlenberger, Senior Domestic Policy Advisor, Office of the Vice President
- Matthew Myers, Executive Vice-President and General Counsel, National Center for Tobacco Free Kids
- Bruce N. Reed, Assistant to the President for Domestic Policy

Wash. Post, 3/8/98 C7

C. Everett Koop

Don't Forget the Smokers

To date, most of the tobacco control efforts of this administration have focused on preventing young people from taking up smoking. Everyone can agree that teenagers and younger children should not smoke. Even the tobacco industry can safely join in that refrain, and frequently does, with characteristic and clamorous hypocrisy as it turns its marketing machines loose on the young. But at exactly what age does the plight of American smokers lose its poignancy?

One-third of teenagers who experiment casually with cigarettes will become regular smokers, with one-half of these trying to quit, but failing, by age 18. In fact, the vast majority of current smokers were hooked in their teens or earlier. During the '80s, the tobacco industry mounted a public relations campaign maintaining that smoking was "an adult decision." It was a model of reverse psychology, tempting teens at the same time it offered false assurance to their elders. The vast majority of smokers are captive to their addiction, so that most who "decide" to quit cannot—not without help or years of repeated tries.

If we pretend that adult smoking is a consumer choice like any other, we fall prey to the trap laid by Big Tobacco. Addiction makes the very notion of choice moot. Who would freely choose sickness and suffering, lost productivity or 50 percent chance of premature death? Yet cigarette smokers of all ages continue to die prematurely at the rate of more than 400,000 per year. If not one single young person started smoking from this day forward, these losses would still continue unabated for 30 years. Imagine 1,000 jumbo jets emblazoned with Marlboro and Winston and Camel insignia crashing each year for the next three decades. Should we accept such dramatic losses as par for the course?

We must not focus our efforts so narrowly on preventing tobacco use by youth that we send smokers the message that we have abandoned them—that their addiction is their own fault and that we don't care about them. This is exactly what the tobacco industry wants them to hear. Forget quitting, hedge the health bets instead. Responding to founded fears, tobacco companies unleashed so-called "low-tar" brands in an effort to hold on to their smokers and reduce the concerns of the uninitiated. But in their attempt to avoid becoming yet another statistic, smokers have only changed the form of their resultant lung cancers from the squamous cell cancers of the upper lung to the adenocarcinomas of the lower lung as they inhaled more deeply to extract the nicotine their bodies craved from such cigarettes. There is an alternative. We can combine tobacco prevention initiatives with efforts to ensure that those who are hooked can obtain effective treatments.

The facts are that quitting smoking at any age reduces the risk of premature death; current treatments can substantially increase the odds of quitting. It therefore seems logical that each decision to smoke should present an equal opportunity not to smoke and an equal opportunity to get help. The Food and Drug Administration's actions in 1996 to restrict tobacco marketing to minors and to approve over-the-counter marketing of nicotine gum and patches for adults were pioneering steps in the right direction. So are several pieces of congressional legislation currently under discussion that include provisions for tobacco addiction treatments.

Nevertheless, much remains to be done if our nation is to make tobacco dependence treatment as acceptable and as readily available as tobacco itself. We must evaluate and approve potentially life-saving treatments for tobacco dependence at the level of priority we assign to treatments for diseases such as AIDS and cancer. Signaling such a course could help empower the private sector to meet these challenges in a way that will contribute to the health of our nation in the short and long run.

BY TIM BRINTON

Currently, the tobacco industry is lobbying Congress for its own solution to the needs of smokers. Under the guise of a new-found concern for the health of their consumers, these companies want incentives to market products that they claim will reduce the dangers of smoking. We do not want to stifle development of such products. Indeed, we should require reduced toxicity of tobacco products, as we now understand that they are unnecessarily dangerous and addictive. But such a course should not enable tobacco companies to undermine our efforts to reduce overall tobacco use by allowing them to advertise their products with claims such as "low tar" or "reduced delivery." Legitimate concern for the health of tobacco users should balance efforts to reduce the toxicity of tobacco products with the means to expedite the development of new treatments for those who are addicted. Under its existing authorities, including its designation of cigarettes and smokeless tobacco products as combination drug and device products, the FDA has many regulatory tools at its disposal to accomplish its goal of reducing the risk of death and disease in tobacco-addicted Americans. Congressional legislation that weakens the FDA's authority over tobacco reduces its ability to serve the public health.

I strongly encourage any forthcoming congressional legislation or executive actions to strengthen, if not leave alone, the FDA's authority over tobacco, and to support the FDA's ability to evaluate new treatments and treatment approaches in a manner that is consistent with the devastation wrought by unremitting tobacco use. Moreover, in our battle with Big Tobacco, we should not hide behind our children. Instead, as we take every action to save our children from the ravages of tobacco, we should demonstrate that our commitment to those who are already addicted, and those who will yet become addicted, will never expire.

The writer was surgeon general from 1981 to 1989.

Conference Panelists Discuss Future of Subsidies, Regulation in Wake of Internet's Growth

The rapid growth of the Internet soon will force the FCC to make "fulcrum decisions" on how to apply its old regulatory scheme to new services and what types of carriers will be subsidized in the future, according to the host of Legg Mason Wood Walker, Inc.'s *Telecom Investment Precursors* conference last week in Washington.

Highlights. . .

- Nacchio wants to avoid dependence on oligopolistic "price umbrella."
- Fields says FCC may face steep funding cut in 1998 if it doesn't grant an interLATA service application.
- McCann says ITU agreed on "mark" for handheld mobile satellite service terminals.

As might be expected at a conference focused on the financial aspects of the telecom industry, the future of telecom subsidies and the economics of the Internet and high-speed data services dominated the discussion.

Scott C. Cleland, telecom analyst with Legg Mason Precursor Group, said the FCC's upcoming decisions on access charges and their potential application to Internet service providers (ISPs) "will determine who is subsidized and who is not." The FCC's current regulatory scheme for ISPs provides "great benefits" to those companies, such as a "40% arbitrage" opportunity that stems from their exemption from paying access charge and paying into the Universal Service Fund.

Thomas J. Tauke, senior vice president-government relations for Bell Atlantic Corp., said the Internet shouldn't be subjected to the same regulatory requirements as the traditional circuit-switched network. By next year Bell Atlantic will be handing off more traffic to Internet service providers than to interexchange carriers, he predicted.

Washington attorney **Earl Comstock**, former legislative director for Sen. Ted Stevens (R., Alaska), said Congress bowed to "tremendous political pressure" and "punted" on tough issues regarding regulation of the Internet when it passed the Telecommunications Act of 1996. But if the FCC doesn't deal with the financial impact the Internet could have on universal service, "eventually AT&T [Corp.] and the [Bell companies] will be losing so much money, there'll be a crisis situation," he said.

Robert Pepper, chief of the FCC's Office of Plans and Policy, predicted continued growth of bandwidth demands. He lamented the current "bandwidth discontinuity," with long-haul backbone networks providing high-speed transmission while local bandwidth is limited. Noting that the cries about network congestion have disappeared in the last year, Mr. Pepper said Bell company engineers had "kept the network up and running." But they've spent about $500 million over the last year installing more circuit-switched facilities to deal with network congestion. "We have to get packet-switched data off the circuit-switched network," he said.

Joseph P. Nacchio, chief executive officer of Qwest Communications International, Inc., said he didn't want his company to become "dependent" on the "pricing umbrella" provided by the "oligopoly long distance industry." The former AT&T executive added, "As a former architect of that, I know it's oligopolistic." Long distance industry pricing has "no relation to cost," he said. Regarding whether long distance carriers "flow through" access charge reductions to their customers, he said, "Nobody really flows through access reductions. They flow through some. . .Nobody talks about elasticity of demand."

Discussing telecom subsidies, FCC Chief of Staff **John Nakahata** said revising the interstate subsidy system would top the FCC's 1998 agenda. He called on states to "step up to the plate to deal with subsidy reform."

Although some Senate leaders are considering legislation that would "confine" the level of universal service subsidies (*TR*, March 9), the size of the FCC's planned subsidy funds likely will "move forward without any significant change," said **Heather Burnett Gold**, president of the Association for Local Telecommunications Services. (That universal service bill is expected to be an amendment to the FY 1998 supplemental appropriations bill scheduled for markup March 17, congressional and industry sources have told *TR*.) Ms. Gold said the FCC might change its decision to cover only 25% of the "high-cost" support requirement from a federal fund.

Several panelists said they closely were monitoring "rate rebalancing" legislation under consideration by the Florida Legislature that is designed to remove implicit subsidies from local exchange rates (*TR*, March 2). Consumer groups say it would raise local phone rates in exchange for access charge reductions.

When a member of the audience asked why consumers would support rate increases in order to trigger compe-

BellSouth Appeals FCC Rejection Of Louisiana InterLATA Petition

BellSouth Corp. has filed a "notice of appeal" with the U.S. Court of Appeals for the D.C. Circuit, seeking review of the FCC decision denying its petition to provide in-region interLATA (local access and transport area) services in Louisiana (*TR*, Feb. 9). BellSouth said the court should set aside the decision because it was based on provisions of the Telecommunications Act of 1996 that amount to an unconstitutional bill of attainder against BellSouth and the other Bell companies.

BellSouth also said the FCC's finding that it had failed to satisfy the Act's "competitive checklist" provisions in Louisiana was arbitrary and capricious and inconsistent with the law.

A federal district court judge in Texas has found the Act's line-of-business restrictions on the Bell companies to be an unconstitutional bill of attainder (*TR*, Jan. 6). That decision has been stayed and is pending before the U.S. Court of Appeals for the Fifth Circuit (New Orleans) (*TR*, Feb. 16).

BellSouth earlier raised the bill-of-attainder claim in the FCC's rejection of its bid to provide interLATA services in South Carolina. The D.C. Circuit plans to hear oral arguments in that case Sept. 25 (*TR*, March 2, p. 42).

MCI Telecommunications Corp. denounced BellSouth's latest appeal, saying BellSouth's market-entry application in Louisiana was premature because local phone service customers in the state still can't turn to competitors for "more choices and lower prices."

Meanwhile, Robert T. Blau, BellSouth's vice president-executive and federal regulatory affairs, cited "record revenue and access line growth" reported by competitive local exchange carriers in 1997 as evidence for the existence of "strong local service competition in the telephone industry."

Mr. Blau said the CLECs' 1997 financial reports "clearly show there is broad, vigorous competition in the local market. The focus of new competitors continues to be the business customer, but it is indisputably clear the local market is open."

Among the examples cited by Mr. Blau were WorldCom, Inc.'s Brooks Fiber affiliate, which reported 1997 revenue growth of 183%. Brooks ended 1997 with 35 local switches, collocation in 168 incumbent telco central offices, operations in 89 markets, and an installed base of more than 111,000 local lines, BellSouth said.

ICG Launches IP Telephony Offering, Plans DSL Rollout

ICG Communications, Inc., plans to offer by year-end Internet protocol–based business and residential long distance service for 5.9 cents per minute on calls originating and terminating in 166 U.S. cities. The company will charge 7.2 cents per minute for calls originating from those cities but terminating elsewhere, including international points. ICG said it also would offer virtual private network and IP-based fax services.

During a conference call, J. Shelby Bryan, president and chief executive officer of ICG, told financial analysts that although voice quality for Internet telephony had been poor in the past, ICG's offering should have the "same voice quality as you'd experience on the telephone now."

That's because ICG controls a "robust, fully deployed" data network it acquired from NETCOM On-Line Communications Services, Inc. (*TR*, Oct. 20, 1997), he said. "We have the ability to control the voice quality, as long as we stay ahead of the [demand] curve" and avoid network congestion, Mr. Bryan said.

ICG said it had reached agreements with Lucent Technologies, Inc., and Cisco Systems, Inc., to deploy IP server products over its Internet backbone. The company said its acquisition of NETCOM had boosted its ISP footprint to 238 U.S. markets. ICG plans to begin marketing interLATA (local access and transport area) services to NETCOM's business and dial-up customers during the second quarter also to market the IP telephony service over the Internet.

ICG said it planned to begin offering high-speed DSL (digital subscriber line) services, using a variety of DSL protocols. Mr. Bryan said a primary target market for that offering would be home-based businesses, in light of a "gradual, accelerating demographic change" toward telecommuting. "The one thing they need most is more bandwidth," he said. ICG hopes to be collocated in 100 central offices by year-end.

Qwest Communications International, Inc., also provides IP-based interLATA services to consumers and small businesses in 9 U.S. cities, charging a flat rate of 7.5 cents per minute (*TR*, Dec. 22, 1997). Qwest intends to expand the service to 25 cities by midyear. And IDT Corp. of Hackensack, N.J., offers IP-based long distance services to residents and small businesses in 50 "major" U.S. cities at the flat rate of 5 cents per minute. IDT said its rate applied to all domestic calls, regardless of where they terminated. International calls cost 9 cents per minute, IDT said. TR

Supplemental Memorandum on 15 U.S.C. 1335 and the Internet

Henry Geller
February, 1998

This memorandum supplements two prior memoranda, attached hereto as Appendices A and B. It deals with issues of law, policy, and sound actions by the interested governmental entities in the present circumstances where there are far-reaching legislative proposals concerning the health hazard posed by smoking.

I. Cigarette advertising is barred on the Internet in light of the clear language of 15 U.S.C. 1335 and FCC precedent.

(a) The prior memorandum (App. A) establishes that Internet is a medium of electronic communication subject to the jurisdiction of the Commission. Not only are the facilities of the underlying carriers that constitute the Internet subject to that jurisdiction, but it is undisputed that the Commission has the authority to impose access charges on the Internet Information Service Providers (ISPs) (the issue being one of policy and not jurisdiction).[1] Increased usage of the Internet for telephony will also raise issues within the FCC's ambit, such as the Internet's proper placement in the universal service scheme (id.); indeed, at some point, access to the Internet will clearly come within Section 254(c)(1) of the 1996 Telecom Law as appropriate for universal service support.

(b) Significantly, the ban in Section 1335 was agreed to by the cigarette industry, and was enacted over the vigorous

[1] For full background on this issue, see 1998 comments filed in FCC Docket No. 96-45 (Report to Congress).

opposition of the broadcasters.[2] In the 27 years since its enactment, the tobacco industry has never challenged its validity, presumably because of its own agreement to the provision.

(c) Congress limited the ban to the electronic media (subject to FCC jurisdiction) because it wanted to reach the media with the greatest impact on smoking habits. Id. at 585-86.

(d) It was most wise of Congress to encompass any such medium instead of focusing only on broadcasting -- the by far dominant medium in 1969. Thus, cable in 1969 had a penetration of TV households of only 6.4 percent, no programming of its own (since cable's usage of satellite did not occur until the mid-1970s), and no advertising revenues.[3] Today it has 67% penetration, hundreds of channels of cable programming which have garnered almost a third of the television audience, and rapidly rising advertising revenues of 6.8 billion;[4] it constitutes the moving video force.[5]

(e) The Internet also is poised to duplicate that explosive

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[2] See, e.g., Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 586, n.13 (testimony of Joseph Cullman, Chairman, Phillip Morris, Inc. (D.D.C. 1971), 588-90 (dissenting opinion of J. Wright), aff'd mem. sub. nom. Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).

[3] 1969 BROADCASTING YEARBOOK, at 20 (Washington,DC: Broadcasting Publishers Inc., 1969).

[4] Paul Kagan Associates. Advertising Revenues Will Reach $6.8 Billion In 1997 at http://www.cabletvadbureau.com/indices.htm. Date visited Feb. 20, 1998. This figure represents an increase of 13% from 1996 and 170% increase from 1990.

[5] Annual Assessment of Status of Competition in Markets for the Delivery of Video Programming, FCC 97-243, issued Jan. 13, 1998.

growth. See Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997). Transmission entities (e.g., cable, telcos, satellite companies) vie with one another to supply high-speed linkage to the Internet. There is an effort to effect a convergence of television and the computer, with the Internet playing a most important role. Radio-type programming and "video streaming" are in the offing.[6] Truly this is a "digital tornado."[7]

II. The Government can and must defend the constitutionality of 1335, including its application to the Internet.

Section 1335 thus applies to a galaxy of electronic means of mass communications -- broadcasting, cable, Multichannel Multipoint Distribution Service (MMDS), Direct Broadcast Satellite (DBS), telco video distribution, Local Multichannel Distribution Service (LMDS), etc. Its application to the first two media, broadcasting and cable, goes back almost three decades. If the Section were to be found unconstitutional, it would thus be disruptive and most startling, in light of the present full-court press to markedly alleviate the smoking health hazard. We raise this consideration because (1) the constitutionality of 1335 as applied to broadcasting and cable cannot be regard as definitely settled; and (2) the arguments advanced against constitutionality of barring

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[6] R. Tedesco. World Wide Web: From A(udio) to V(ideo) at http://www.broadcastingcable.com/search/article.asp?articleID=6921704. Article posted Feb. 10, 1997; date visited Feb. 20, 1998.

[7] K. Werbach, Office of Plans and Policy, FCC, OPP Working Paper 29, Digital Tornado: The Internet and Telecommunications Policy (Mar. 1997).

cigarette advertising on the Internet are equally applicable to media like broadcasting and cable. This, in turn, means that the Government must vigorously defend the constitutionality of 1335 as applied to all electronic media, and must respond with arguments suited to that defense.

As to (1), it may be thought that the Capital Broadcasting case settled the constitutional issue as to broadcasting. But the district court relied on then prevailing doctrine that "product advertising is less vigorously protected than other forms of speech" (333 F. Supp. at 584). That doctrine has been replaced by the standard set out in Central Hudson and 44 Liquormart [8] A broadcaster (or a cable system or DBS operator, neither of which were involved in the Capital Broadcasting case) could bring a new suit, asking for review under the now prevailing standard.

The district court also relied upon the consideration that broadcasters are public trustees under the scheme of the 1934 Communications Act.[9] In 1967, the FCC ruled that broadcasters were required to offer substantial amounts of free air time for cigarette counter-ads, because airing advertisements that so heavily impacted the public health invoked the broadcaster's public

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[8] See Note 15, App. A, for the citations to these two cases.

[9] The court cited the seminal case, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The case remains the controlling precedent for broadcast regulation. See Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622. 637-38 (1994.

interest obligation.[10] But there would be no sound reliance on Red Lion if the FCC (or Congress) were to ban cigarette ads. While the characteristics of each media are always taken into account,[11] such a ban today clearly would be judged under the heightened Central Hudson standard -- not the highly flexible standard of Red Lion.

The district court held that "... there exists a rational basis for placing a ban on cigarette advertisements on broadcast facilities while allowing such advertisements in print." 333 F.Supp. at 585. In explaining this "heightened impact" rationale, the court stated: "Substantial evidence showed that the most persuasive advertising was being conducted on radio and television, and that these broadcasts were particularly effective in reaching a very large audience of young people ..." Id. at 585-86. The court quoted from the Banzhaf case (at 586): "Written messages are not

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[10] Cigarette Advertising, 9 FCC2d 921, 949 (1967), aff'd Banzhaf v. FCC, 405 F.2d 1082, 1091 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). Significantly, the aim of the FCC policy was to inform all members of the public, not just children or youths. The policy appears to have been a success, contributing to a reduction in cigarette consumption. See, e.g., R. Kluger, "Ashes to Ashes," A. Knopf, New York, 1996, at 326.

[11] In 1978, the Supreme Court, in a case involving "indecent" programming, set out a new approach in broadcast regulation that was based not on allocation scarcity but on its "uniquely pervasive presence in the lives of all Americans...", combined with children's ready access to the broadcast media. FCC v. Pacifica Foundation, 438 U.S. 726, 748. This rationale was then applied to the regulation of indecent material on cable television. See Denver Area Educational Telecommunications Consortium v. FCC, 116 S.Ct. 2374, 2386 (1996) (plurality opinion). Significantly, "indecent" material has First Amendment protection and thus is not to be banned but rather channeled to times when the child audience is much reduced or absent.

communicated unless they are read, and reading requires an affirmative act. Broadcast messages in contrast are 'in the air' ..."

As to (2), above -- constitutionality under the Central Hudson standard[12] -- there is no need for extended discussion of the first element, i.e., that commercial speech "related to" unlawful activity is not entitled to First Amendment protection.[13] Recent evidence has emerged that the cigarette companies have sought to target children below the lawful age for purchase of cigarettes. While such efforts, if established, would not be entitled to First Amendment protection, the discussion here will move on to the more general issue.

The second element -- whether the government's interest is substantial -- is readily met. As shown by the discussion on pp. 2-3, App. B, the interest here is not only substantial -- it is compelling in light of the enormous impact on public health of cigarette smoking. But there is one aspect that should be emphasized: While the major focus of government interest is to prevent children taking up the habit in view of the evidence that those who do not become addicted at a young age are unlikely to

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[12] Unlike the CDA regulations at issue in Reno, the ban here is limited solely to commercial speech -- cigarettes (and little cigars) advertisements on a medium of electronic communication subject to FCC jurisdiction. It thus need not meet the "most stringent" test of Reno (117 S.Ct. at 2341-43, 2347), but rather the intermediate standard of Central Hudson.

[13] 44 Liquormart, 116 S.Ct. at 1505, n.7; Central Hudson, 447 U.S. at 563-64.

smoke when older, the government seeks to discourage or end smoking by all persons, including the substantial percentage (18%) that first smoke after 18 (see App. to App. A). Stated differently, the government does not abandon its strong public health interest when a smoker begins at 18 or 20 or 30 or 40; as indicated by the quote of the Surgeon General at p.2, App. B, the governmental interest is served by trying to induce everyone to give up cigarettes.

The ban on cigarette advertising on the electronic media, with their heightened impact, directly advances that goal. Of course, there are other important ways to discourage smoking -- educational campaigns, high taxes on cigarettes, etc. But in combating such a huge health hazard, the Government clearly should be able to ban the strongest advertising activities of the industry, like the Marlboro Man, that would undermine the efficacy of the Government's own efforts. See discussion on p.3, App. B.

The Government's regulation is not more extensive than is necessary. It is focused on the electronic media (subject to FCC jurisdiction), with their heightened ability to make an impact on smoking habits, and therefore leaves the industry free to advertise as to price and related matters in print or billboards or other non-electronic means. There is thus not the complete suppression that was so problematic in 44 Liquormart (see n.16, App. A). Most important, unlike in Reno, there is no question here of utilizing software methods uniquely suited to the Internet to attempt to block children's access to undesirable sites. See 117 S.Ct. at 2348. While clearly the major aim of all tobacco legislation is to

discourage children from taking up the habit, as shown above, the Government seeks to discourage all smoking, including by the 18% that begin smoking as adults or by children who have become adult smokers.

This last point merits emphasis. A main argument raised by opponents of advertising restrictions in this area is that the restrictions are aimed at protecting children, and the Supreme Court has held that adults may not be cut off from protected speech because the speech may be harmful to children (Butler v. Michigan, 352 U.S. 380 (1957); that Reno is the most recent example of the Supreme Court's refusal to allow protection of children from indecent material to be used as justification to prevent adults receiving this protected material on the Internet.

But this argument mistakes the aim of Section 1335 -- that while the main governmental interest is to prevent children from taking up smoking, there is also a most significant purpose of discouraging or inducing all, including the slightly older youth (18 and above) and the adult, from smoking.

III. In the present circumstances, the Government should adopt a strategy bolstering both the constitutionality of Section 1335 and its full implementation as to all electronic media, including the explosively growing Internet.

(a) It is to be emphasized that no new law is needed to apply the ban on cigarette advertising to the Internet. On the contrary, to escape such application, it would take an unprecedented act --

for the first time, making an exception for one electronic medium, the Internet. In the present circumstances -- the all-out effort to do all the Government can to contain and roll back the health devastation caused by smoking, and the explosive growth of the Internet with its great potential for strong impact in the area of advertising[14] -- such a retreat would be a shocking step for the Government to take.

(b) The proper course for the Executive Branch is to advise the Congress in the current debate of the long established existence and application of 1335 to any electronic medium, including the Internet; and to urge that in hearings, floor statements, and if appropriate, references in reports, there should be Congressional affirmation of the wisdom of the 91st Congress in adopting a far-sighted approach to the section's applicability to electronic media (e.g., cable and now the Internet); and to make clear, with bolstering evidence, that the Section is aimed not only at the main target -- protection of children -- but also significantly at those 18 or above who smoke or are contemplating smoking.

(c) We recognize that there is a legislative strategy to avoid lengthy and serious challenges to the constitutionality of the tobacco advertising restrictions, including the ban on Internet

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[14] T. Hyland. IAB Online Advertising Guide at 20A, Spring 1998. "Internet advertising recorded the highest level of revenues during the third quarter of 1997, totaling $227.1 million, and year-to-date revenues of $571 million through September are already more than twice that of 1996 total annual revenues of $267 million."

advertising. Thus, in his February 10, 1998 Statement at the Hearing on Cigarette Advertising and the First Amendment, Senator Orrin Hatch stated that in his "...bill, S. 1530, the advertising restrictions are placed in a binding contract -- termed a Protocol -- whereby the tobacco companies waive any First Amendment rights they possess in exchange, in part, for the civil liability limitations ..." That would, of course, be a welcome development; we suggest that the waiver include not only the Internet but the whole of 1335.

(d) It may be argued that it is poor legal strategy to apply 1335 to the Internet, because the first test of constitutionality should come as to the FDA proposed advertising restrictions. First, based on the foregoing analysis, we believe that the Government's constitutional position is strong; we stress that there will be great reluctance at this juncture to strike down Section 1335 and open broadcasting, cable, DBS, and the Internet to cigarette advertising. Second, in any event, it would appear most likely that the first constitutional challenge will be to the FDA regulations. If there is no agreement leading to legislation and the above contract, that will certainly be the case, as the FDA regulations are already at the appellate level. The main issue for the Executive Branch is whether it should use the opportunity to obtain some bolstering legislative history.

Conclusion

The bottom line that the Government must confront is simply this: Is it going to acquiesce in the cigarette industry being

APPENDIX A

Memorandum on Applicability of 15 U.S.C. 1335 to the Internet

Henry Geller
March, 1997

I. Introduction. This legal memorandum discusses whether the Federal Cigarette Labelling and Advertising Act (herein "Cigarette Act" or "Act"), 15 U.S.C. Sec. 1335, applies to the Internet. It concludes, based on the clear language of the Act and FCC precedent, that it does apply. The memorandum then briefly discusses the constitutionality of such application.

II. The Cigarette Act clearly applies to the Internet.

The Cigarette Act proscribes the advertisements of cigarettes and little cigars "... on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."[1] The Act thus involves three elements: (1) an advertisement of cigarettes, as opposed, for example, to a discussion of the problems of smoking (which of course is not barred); (2) a medium of electronic communication, as opposed, for example, to the use of billboards or the print media; and (3) that the medium be subject to the jurisdiction of the FCC.

There is no need for discussion of the first element. While controversy can arise whether a presentation is an advertisement for cigarettes, that is a factual issue to be resolved in the particular circumstances. For the purposes of this memorandum, it is assumed that the presentation is an advertisement such as

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[1] The Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. 4402(f)(1986), contains a similar prohibition, specifically, that "...it shall be unlawful to advertise smokeless tobacco on any medium of electronic communication subject to the Federal Communications Commission."

now found on billboards or in the print media.

A. The Internet as a "medium of electronic communication."

The Internet is a mosaic of computer networks that links electronically individuals and institutions around the world, thus permitting interactive communications on a national and global scale. The Internet provides a broad set of services, including electronic mail (e-mail), on-line conversation, information/research retrieval, bulletin boards, and games. Because it is electronic, communications on the Internet occur instantaneously and can be targeted to specific individuals or "broadcast" to a large groups.[2]

The traditional telephone system makes this worldwide Internet communications possible. For the telephone infrastructure typically is involved in every Internet communication at two levels -- both as the carrier of the signal between the computer and the Internet access point and as the provider of many of the transmission services used by the Internet istelf.[3] A communication sent over this series of linked wires that connect computers around the world could travel many

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[2] See GLEE HARRACH CADY and PAT McGREGOR, MASTERING THE INTERENT, 1-15 (1996). The World Wide Web ("Web") is a multimedia Internet navigation tool that uses sound and colorful graphics in addition to text. Id. at 342-47. Because of its ability to connect users to other sites through the "hypertext" function (which allows the user to "jump" to different sites by clicking on an underlined phrase), the Web serves as the primary source of advertising on the Internet for a wide array of products. The material displayed on the Web originates on computers around the world that are automatically contacted when one requests material located at these sites. Id. at 342.

[3] LANCE ROSE, NETLAW 14 (1995).

different routes to its destination. For example, a message sent from a computer in Washington, D.C., to a computer in Seattle, Washington, might first be sent to a computer in Pittsburg, and then be forwarded to computers in Chicago, Aspen, and Sante Fe, before finally reaching Seattle. Or, if the message could not travel along that path because of a system overload, it would automatically be re-routed, perhaps from Washington to Wilmington, and then to Miami, Little Rock, New Orleans, and San Francisco, before reaching the destination computer in Seattle. This type of transmission and re-routing occurs within a matter of seconds. Thus, although most Internet connections begin with a local call processed through a local telephone provider, these connections involve long distance communications requiring interstate wire line or radio communications between the connected computers.[4]

From the foregoing description, it is clear that the Internet is a "medium of electronic communication."

B. This medium is subject to the jurisdiction of the FCC.

The foregoing analysis also establishes that this medium of electronic communication, the Internet, is subject to the jurisdiction of the FCC for the purposes of 15 U.S.C. 1335. For as shown, the Internet computers are linked by wire or radio communications that are subject to the jurisdiction of the FCC. Section 2(a) of the Communications Act states that provisions of

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[4] Id.; See also Washington Post, April 10, 1996, F4, for a description of Internet access services provided by Bell Atlantic, At&T, and MCI.

the Act "shall apply to all interstate and foreign communications by wire or radio... and to the licensing and regulating of all radio stations..."[5] Thus, Title II of the Communications Act is applicable to the interstate and foreign common carriers that form such an integral part of the Internet (and Title III to radio telecommunications service providers).[6]

From the standpoint of the applicability of 15 U.S.C. 1335, there is no practical difference between the present largely voice telecom network and the Internet. The voice network consists of interconnected local, long distance, and foreign carriers that transmit voice and data to telephone sets or, say, fax machines. The FCC does regulate the interstate portion in several significant respects but forbears from economic (rate) regulation and has deregulated the customer premises equipment

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[5] The Act defines "wire communication" very broadly to include "... the transmission of writing, signs, signals, pictures and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. 153(a). See similar broad definition of "radio communications." 47 U.S.C. 153(b).

[6] The telecommunications providers to the Internet may change over time. Thus, cable television systems are now embarked on providing access to the Internet, as are some satellite operators. But cable comes within the regulatory authority of the FCC under Title VI, and satellites must be licensed and regulated under Title III. Another pertinent development is the 1996 Telecommunications Act, which bestows considerable authority on the FCC with respect to local telecommunications carriers (e.g., as to interconnection, resale, unbundling, etc.). See, e.g., Sections 251, 252, 271.

(CPE) sector.[7] If an entity used that network to transmit cigarette advertisements via an 800 number or to thousands of fax machines, it would clearly constitute a violation of the Cigarette Act.

But the same thing is true of cigarette advertisements on the Internet: They traverse the same telecom provider paths, with the CPE in this instance being the computers. In both cases, the Cigarette Act is applicable. And in both cases, the FCC, wholly aside from constitutional prohibition, would have no authority to regulate the content of the millions or billions of messages being sent.

The key consideration is that the underlying transmission system is subject to the FCC's jurisdiction. The Commission itself has no authority to enforce the Cigarette Act, and simply advises the Department of Justice (DOJ) as to whether a particular medium of electronic communication is subject to its jurisdiction.[8] Just as the FTC would be the prosecuting agency as to a false and misleading advertisement or a smokeless tobacco ad on the Internet, so the DOJ would be the moving party as to enforcement of 15 U.S.C. 1335.

Long established FCC precedent makes clear the soundness of the above analysis. Thus, shortly after the effective date of

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[7] See Second Computer Inquiry, 77 FCC2d 384 (1980).

[8] See In the Matter of Marketing Technologies Group, Inc.Request for Declaratory Ruling on the Applicability of the Cigarette Advertising Prohibition in 15 U.S.C. Sec. 1335, 4 FCC Rcd 2694, 2695-96 1989) (herein "Marketing Tech. Group").

the Cigarette Act, the Commission received a request for a declaratory ruling that the Act was limited to broadcasting and cable, and did not apply to a service, using thousands of incoming telephone calls, that gave sports results accompanied by advertising messages, including for cigarettes. Stuart Sheftel, 37 FCC2d 619, 620 (1972). The Commission rejected the proposed limitation, stating that "... the broad scope of the language used -- any medium of electronic communication -- clearly eliminates any limitation of the statutory ban simply to radio and television broadcasting and cable television."[9] It concluded that since interstate telephone calls would be involved, the prohibition of the Act applies. Id. To the same effect, see Joseph D. Peckerman, 48 FCC2d 1056 (1948), holding that the Act's prohibition would apply to closed circuit systems using interstate common carrier facilities, microwave radio, or over-the-air broadcasts.

In the Marketing Tech. Group case, supra, 4 FCC Rcd at 2695-96, the Commission stated that its proper role in this area "... is limited to determining whether the system as a whole, or any of its component parts, is a medium of electronic communication subject to its jurisdiction," and then "... it is for the Department of Justice to determine what action, if any, should

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[9] See Chevron USA, Inc. v. National Resources Defense Council, 467 U.S. 837, 842-43 (1984), holding that clear statutory prescriptions must be followed. Significantly, where Congress wanted to limit its prescription to broadcasting and cable, it did so with explicit language to that effect. See 303a(d), 315(c)(1), 47 U.S.C. 303a(d), 315(c)(1).

follow." It concluded that in the case of the proposed system, "... the interstate common carrier telephone lines by which the host and store computers communicate with each other are 'media of electronic communication' subject to the Commission's jurisdiction."[10] Here in the case of the Internet, the interstate lines are not only a significant component part but indeed, the entire system would collapse without them.

C. The above holding strongly furthers the Congressional intent.

As noted (n.9, supra), the statute is crystal clear and its prescription must therefore be followed. As a further consideration, such action will strongly promote the Congressional intent.

In the 1971 case rejecting a Fifth Amendment claim that the Cigarette Act arbitrarily singles out the electronic media, the Court stated:[11]

> ... In 1969 Congress had convincing evidence that the Labelling Act of 1966 had not materially reduced the incidence of cigarette smoking. [fn. citing HEW recommendations and three FTC reports]. Substantial evidence showed that the most persuasive advertising was being conducted on radio and television, and these broadcasts were parti-

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[10] Id. The Commission noted that it has not "for the most part" exercised jurisdiction over computers as "media of electronic communication," but noted that it has exercised ancillary jurisdiction over them when used as CPE and that they are also "incidental radiation devices" subject to interference limitations under Section 302 of the Communications Act and Part 15 of the Commission's Rules. Id.

[11] Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 585-86 (D.D.C. 1971), aff'd mem. sub nom. Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).

> cularly effective in reaching a very large audience of young people. [fn. citing FTC report and another expert]. Thus, Congress knew of the close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people, and was no doubt aware that the younger the individual, the greater the reliance on the broadcast message rather than the written word...

As shown by the recent FDA report and articles such as the attached appendix,[12] the problem with young people persists today:

> ... Cigarette smoking begins predominantly in children and adolescents, and the resulting nicotine addiction is a pediatric disease. While the number of adult smokers has decreased, the prevalence of smoking among adolescents has increased markedly during the 1990s; at least 3 million daily smokers are below the age of 18. Moreover, 82 percent of adults acknowledge that they smoked their first cigarette before age 18. [See Appendix].

In these circumstances, it is all the more important the clear language of 15 U.S.C. 1335 be followed, with the Internet thus coming within its ambit. For young children and adolescents are attracted to the Internet in ever increasing numbers. Thus, the summary of the CME Report, released March 6, 1997, states that "[n]early five million children between the ages of two and seventeen used the Internet or an online service at home or school in 1996 and their numbers are expected to increase dramatically in the next few years.[13]

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[12] The Washington Post, March 13, 1997, at A23, attached as an appendix hereto.

[13] At projected rates, the number is expected to quadruple by the close of the decade; more than 37 percent of all Internet users are under the age of eighteen. Kathleen Murphy, "Web Marketers Aim Their Sites at Digital Kids," Webweek, No. 1995

II. Application of 15 U.S.C. 1335 to the Internet is constitutional.

The discussion here will be brief because there are pending cases that will shed more light on the constitutional issue before any Internet cigarette advertising ban would likely come before the courts. Most important in this respect is the resolution of the case now before the North Carolina district court as to the constitutionality of the FDA advertising restrictions on cigarette advertising.[14]

As noted, the constitutionality of the Act was sustained in the 1971-1872 Capital Broadcasting case against both First and Fifth Amendment challenges. See supra, at 7-8. The First Amendment challenge was decided at a time when the Court had not yet developed its commercial speech protection jurisprudence, and specifically the four-part Central Hudson test:[15]

> (1) For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading; (2) Next, we ask whether the government interest is substantial. If both inquiries yield positive answers, we must determine (3) whether the regulation directly advances the government interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.

Section 1335 would, I believe, readily pass the above test.

(citing Jupiter Communications).

[14] Coyne, Beahm, Inc. v. U.S., M.D. N.C., Greensboro Div., Civ. Action 2: 95CV00591; see also Penn Advertising v. Schmoke, ___ F.3d ___ (4th Cir. 1996), pet. for rehearing pending.

[15] See Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York, 447 U.S. 557 (1980); see also 44 Liquourmart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

If the advertisement were not shown to be directed to minors and thus misleading, we would come to the second prong -- whether the government interest is substantial. In light of the unprecedented health consequences of cigarette smoking and the urgent need to curtail such smoking by young people, the governmental interest is not just substantial -- it is the most compelling responsibility of government. See Appendix. The regulation in 15 U.S.C. 1335 does directly advance that interest by curtailing advertisements, enticing young people to become addicted, over the electronic communications, the media most watched by youths. Finally, there is a reasonable fit between the government's interest and the means chosen to accomplish that interest; indeed, since the ban is limited to the electronic communication, it leaves ample opportunity to advertise to the adult audiences in print and other media.[16]

In short, in light of the developments that have occurred since 1969, it is difficult to believe that the Supreme Court will now act, after a quarter of century of its application, to invalidate the Cigarette Act and permit cigarette advertisements to flood broadcasting, cable, and the other emerging electronic communications like DBS, LMDS, and MMDS.

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[16] Significantly, the government has not here entirely prohibited the dissemination of the commercial message, and thus would not come within the stronger protection formulated in the opinion of Justice Stevens (joined by Justices Kennedy and Ginsburg) in 44 Liquormart, 116 S. Ct. at 1507. Further, unlike in that case, the fit between the ends and the means is not "... too imprecise to withstand First Amendment scrutiny" (opinion of Justice O'Connor, for herself and the Chief Justice, Justice Souter and Justice Breyer).

Finally, it may be argued that application of 15 U.S.C. 1335 to the Internet stands on a different constitutional footing because of the unique nature of the Internet, and specifically the availability of software solutions to accomplish the governmental interest.[17] The Communications Decency Act (CDA) comes within the strict scrutiny test, and for the reasons set out by the district court, resulted in banning the presentation over the Internet of material that has First Amendment protection such as the AIDS material mentioned in the decision; in the circumstances, the availablity of alternatives such as the software applications, even if imperfect, is most pertinent to the question whether the least restrictive alternative had been adopted. As noted above, the Cigarette Act does not come within strict scrutiny but rather the intermediate standard of Central Hudson. In the circumstances described above -- the unprecedented importance of the governmental interest and the reasonable fit between that interest and means chosen, the Cigarette Act is constitutional.

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[17] See the holdings of the district court in ACLU v. Reno, Nos. 96-963, 96-1458, 929 F. Supp. 824 (E.D. Pa. June 11, 1996), now pending before the Supreme Court, Case No. 96-511.

APPENDIX

he Washington Post
arch 13, 1997, A23

Free-Speech Smokescreen

Last August the FDA issued regulations severely restricting the sale, promotion and advertising of cigarettes to minors. The regulations represent a historic public health initiative to prevent the 400,000 premature deaths in the United States associated with tobacco use each year.

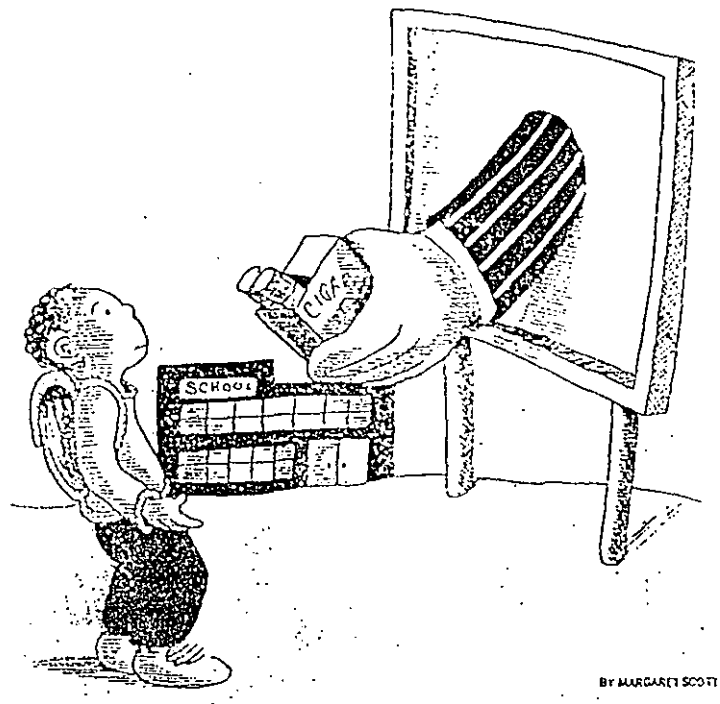
The tobacco industry and advertisers now are challenging the FDA rules in the federal district court in Greensboro, N.C., claiming the agency has no authority to regulate cigarettes as "drug-delivery devices" and, more important, that the rules violate the First Amendment to the Constitution. The case will determine how far government can go in curtailing commercial speech to protect public health.

The FDA regulations prohibit: (1) color and images in cigarette advertisements unless the advertisement appears in an adult publication; (2) outdoor advertisements, including billboards within 1,000 feet of any playground or school; (3) promotional offers of non-tobacco products such as T-shirts, hats and posters that display the cigarette logo or selling message; and (4) sponsorship of sporting and other events or teams using the brand name.

Society, of course, must remain respectful of the constitutional and ethical values at stake when freedoms of expression are suppressed. As the Supreme Court has emphasized: "A consumer's interest in the free flow of commercial information . . . may be as keen [as], if not keener by far than, his interest in the day's most urgent political debate." The tobacco industry, even if it is despised by some segments of society, clearly has the right to provide consumers with truthful information about its product, such as the price and contents.

The industry does not, however, have the First Amendment right to target children and adolescents with misleading and deceptive information about a product that is highly addictive and likely to cause serious illness and premature death. Considering that the informational value of tobacco advertising is so low and the health consequences so dire, the courts have compelling reasons to affirm the FDA's historical, social and legislative mission to protect the public health.

First, safeguarding the public health is perhaps the most important responsibility of government, and the health consequences of cigarette smoking are unprecedented. Tobacco use is the single leading cause of preventable mortality—greater than the deaths attributable to AIDS, motor vehicle accidents, alcohol, homicides, illegal drugs, suicides and fires combined. Direct medical care expenditures attributable to smoking are estimated at $50 billion per year, which does not include the indirect costs associated with ill- [illegible] premature mortality, estimat-



BY MARGARET SCOTT

Sterile estimates of direct and indirect costs, however, do not begin to measure the true loss to individuals, families and society from tobacco-related diseases. There exist profound social benefits of reducing smoking in America, including less personal pain and suffering, more energetic lifestyles and healthier parents and children.

Second, tobacco advertising and promotional campaigns are replete with images and text that are substantially misleading. These campaigns associate tobacco use with healthy, adventurous, glamorous lifestyles, portraying smokers as successful, fun-loving people. They can deceive consumers into believing that cigarette health warnings are exaggerated and that smoking is consistent with a robust, healthy and active existence. For example, the Newport "Alive with Pleasure" campaign used scenes of healthful outdoor activities, implying that tobacco use is safe and the choice of healthy, active people.

Third, the FDA regulations are directed at preventing the sale of tobacco to minors, which is unlawful in every state. Cigarette smoking begins predominantly in children and adolescents, and the resulting nicotine addiction is a pediatric disease. While the number of adult smokers has decreased, the prevalence of smoking among adolescents has increased markedly during the 1990s; at least 3 million daily smokers are under the age of 18. Moreover, 82 percent of adults acknowledge that they smoked their first cigarette before age 18.

Despite industry claims that its advertisements and promotions do not target youth, tobacco marketing [illegible] influences a substantial [illegible] of teenage persons. For example, "Joe Camel" [illegible] a youth market: Very young children were as familiar with Joe Camel as with Mickey Mouse, and, three years after the introduction of the campaign, the proportion of smokers under 18 years of age who chose Camels rose dramatically.

One internal R. J. Reynolds memo from the mid-1970s discovered during tobacco litigation stated, "Evidence is now available to indicate that the 14-to-18-year-old group is an increasing segment of the smoking population. RJR-T must soon establish a successful new brand in this market if our position in the industry is to be maintained."

The tobacco industry has long argued that cigarette smoking should be seen as a voluntary choice of individuals and thus should not be subject to government regulation. This argument is eroding in light of the scientific research showing the highly addictive quality of nicotine; the industry's knowledge of the addictive effects and its possible manipulation of nicotine content in cigarettes; the exploitation of vulnerable children; and the industry's apparent targeting of minors, women and minorities in advertising.

To be sure, tobacco manufacturers and advertisers have constitutional rights. But in weighing their rights, it is important to separate an honest attempt to provide the truth to consumers from a campaign of misleading claims and images directed at vulnerable groups and designed principally to gain commercial advantage.

Lawrence Gostin is a law professor at Georgetown University. Peter S. Arno is a health economist at the Montefiore Medical Center in New York. [illegible] is a professor at

APPENDIX B

To: Jeffrey Chester, CME

From: Henry Geller

Date: July 14, 1997

Subject: Constitutionality of 15 U.S.C. 1335 in light of Reno v. ACLU, Case No. 96-511, decided June 26, 1997.

You have requested that I supplement my memorandum of March, 1997, on the applicability of 15 U.S.C. 1335 to the Internet, by addressing what effect, if any, the above Reno decision has on the conclusion of the memorandum, Point II, that its application is constitutional. I adhere to that conclusion. That is not surprising since in the March 1997 memorandum (at 11), I cited and succinctly discussed the lower court's holding in the Reno case, showing that it does not in any way call for a different conclusion on the constitutionaly of the cigarette advertising ban. I will amplify that discussion here in light of the Supreme Court's decision and your request.

Justice Stevens' opinion in Reno first held that unlike broadcasting which has its own more liberal First Amendment jurisprudence (Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the Internet comes under traditional First Amendment jurisprudence, in the same way as print (Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)) and cable television (Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445 (1994)). Since the CDA provisions in the 1996 Telecom Act are clearly content-based (criminalizing the knowing transmission of indecent messages or displaying patently offensive sexual or excretory activities to persons under 18 years over the Internet), the regulations came under strict scrutiny -- namely, the government has the burden of showing that they serve a compelling purpose and are narrowly tailored (i.e., use the least restrictive means to accomplish that purpose). The Reno decision found that the regulations failed that test: While the government has an interest in protecting children from potentially harmful material, the CDA lacks the precision that the First Amendment requires; it suppresses a large amount of speech that adults have a constitutional right to send and receive; and there appear to be less restrictive means (software programs) that would be at least as effective in achieving the CDA's legitimate purposes.

However, as stated on p.9 of my March memo, the provision of the 1969 Act barring cigarette advertising over electronic media subject to the jurisdiction of the FCC comes under special First Amendment jurisprudence governing commercial speech regulation and protection. That jurisprudence is set forth in the seminal case, Central Hudson Gas & Electric Corp. v. Public Service Comm. of New

York, 447 U.S. 557 (1980):[1]

> (1) For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading; (2) Next, we ask whether the government interest is substantial. If both inquiries yield positive answers, we must determine (3) whether the regulation directly advances the government interest asserted, and (4) whether it is more extensive than is necessary to serve that interest.

As to (1), there can be an issue if the advertisements were shown to be intentionally directed to minors (persons under 18), to whom it is unlawful in every state to sell cigarettes. Assume that there is no problem as to (1), so that the three other criteria come into play. As to (2) and (3), the governmental interest is not only substantial; it is most compelling, and the regulation directly advances that interest.

As shown by the findings in the findings in the Senate Report on the Public Health Cigarette Smoking Act of 1969[2] (see also Appendix to March 1997 Memo), cigarette smoking constitutes the greatest danger to public health. The government thus has the most compelling reasons to discourage or diminish smoking. In the apt words of the Surgeon General, in urging the acceptance of public service announcemnts against smoking:[3]

> There is nothing, in our opinion, which offers a a greater or more immediate opportunity of reducing illness and premature death in this country than a national effort to reduce cigarette smoking...If everyone were to give up cigarettes, ... early deaths from lung cancer would virtually disappear; there would be a substantial decrease in early deaths from chronic bronchopulmonary disease; and a decrease in early deaths of cardiovascular origin ...

The government and non-profit health organizations like the American Cancer Society, the heart and lung associations, etc., all have educational campaigns directed against cigarette smoking. But the tobacco industry in 1969 was spending what, adjusted for

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[1] For the most recent exposition of that standard, see 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

[2] See Larus & Brother Co. v. FCC, 447 F.2d 876, 879-90 (1971).

[3] Quoted in Cigarette Advertising, 20 Pike & Fischer, RR at 1677.

inflation, would be several billions glamorizing smoking in ads like the Marlboro Man. See Appendix, March 1997 Memo. It was and is particularly troublesome that teenagers, intentionally or fortuitously, are the targets of the ads.[4] While the government's interest is especially directed at preventing children from beginning to smoke (id.; see March Memo, at 10), its goal includes all groups targeted by the ads -- minorities, women (Appendix), really everyone.

The government sought to directly advance its interest by barring what it reasonably found to be the "most persuasive" advertising for inducing smoking -- that presented over the "electronic media" such as broadcasting:[5]

> ...The fact is that there are significant differences between the electronic media and print. As the Court stated in Banzhaf, supra [405 F.2d at 1100-01],
>
> > Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air.' In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart... It is difficult to calculate the subbliminal impact of this pervasive propaganda, which may be heard if not listened to, but it may reasonable be thought greater than the impact of the written word...

While the above quote focusses on broadcasting, Congress acted soundly and with foresight to include the broader universe of electronic media subject to the FCC's jurisdiction. In contrast to where it stood in 1969, cable television has now achieved massive penetration; it is in 64% of the U.S. households, with its own channels of programming (most of which present advertising) gaining substantial viewership each year. In cable, the viewer must click to the channel to watch popular fare, and in the course of that viewing is subject to the advertising. The Internet presents a similar pattern: The viewer, using the keyboard instead of the remote control, seeks out entertaining or interesting material and has to view the advertisement, which again can be presented in the most striking or glamorizing fashion. The Internet now displays the same explosive growth pattern as cable did, including attracting the young.

As to (4), the government's regulation is not more extensive than

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[4] See Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 585-86, citing FTC Report (at n.13).

[5] Id. at 586.

is necessary to achieve its goal. It seeks to end the promotion of this deadly product over the most persuasive means -- the electronic media such as broadcasting, cable, and the Internet. It leaves the tobacco industry with the opportunity to advertise over media with less impact -- non-electronic ones like print. In this respect, I note that because the government has not here entirely prohibited the dissemination of the commercial message, the regulation does not come within the stronger protection formulated in the opinion of Justice Stevens (joined by Justices Kennedy and Ginsburg) in 44 Liquormart, 116 S. Ct. at 1507.[6]

Further, unlike in that case, the fit here between the ends and the means is not "too imprecise to withstand First Amendment scrutiny" (opinion of Justice O'Connor, for herself and the Chief Justice, Justice Souter, and Justice Breyer). It is directed to a real problem -- the glamorizing advertisements of the tobacco industry over the powerful electronic media -- and it deals directly with that problem. Of course, as shown by experience, the regulation is no panacea. There remains the need for other actions, such as increased educational programs, possibly higher taxation, and perhaps rules reducing the amount of nicotine. The ban, however, is a sensible effort contributing significantly to a growing comprehensive governmental effort to markedly reduce smoking.

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[6] In my view, the U.S. government could constitutionally join some other nations in prohibiting all marketing of cigarettes, but that is not the present case, so there is no need to consider that issue.

C E N T E R F O R M E D I A E D U C A T I O N

March 23, 1998

Lewis W. Bernard
c/o Morgan Stanley & Co., Inc.
1221 Avenue of the Americas
New York, NY 10020

Dear Mr. Bernard:

Angela Covert has urged me to contact you to introduce you to the Center for Media Education's (CME's) efforts to ensure a quality 21st century media system for children and families. She believes that this work would be of interest to the John and Mary Markle Foundation, especially under the new leadership of Zoe Baird. (We have written a separate letter to Ms. Baird.)

Since its founding in 1991, CME has been at the forefront of media policy initiatives on behalf of children. We are perhaps best known for our successful four-year campaign to get the Federal Communications Commission to require TV broadcasters to air a minimum of three hours of educational/informational children's programming per week. More recently, CME played the key leadership role in the development and implementation of content descriptors (e.g., V, S, L, D) in the new V-chip TV ratings system -- including the creation of a new label ("FV") for violent children's programs.

For the last two years, we have focused much of our efforts on ensuring that the new digital media will serve the needs of children and families. With major support from the Carnegie Corporation of New York, the MacArthur Foundation, and other prominent funders, CME has developed a number of initiatives to help accomplish this goal. All of our work in this area is premised on the belief that, because this new media system is in its early formative period, we have a unique window of opportunity for ensuring that policies and practices are put in place to create what we call an "electronic legacy" for children in the 21st century. I've enclosed a packet of materials which describe our work, including an essay I wrote which lays out our framework. But here is a brief snapshot of some of our projects:

New Media and the Healthy Development of Children - a multi-year research and public education initiative to bring together health professionals, educators, software industry representatives, child advocates, and policy makers to begin developing a framework for understanding the new media and their relationship to children.

1511 K Street, NW Suite 518 Washington, DC 20005 +1 202-628-2620 FAX: +1 202-628-2554 http://www.cme.org/cme • e-mail: cme@cme.org

Children's Civic Culture - a project designed to foster the development of quality educational, cultural, and informational programming and services for children and families in the new digital media, which will serve children not only as consumers, but also as citizens.

Connecting Children to the Future - an outreach initiative focused on ensuring that children from economically-disadvantaged communities will have equitable access to the information infrastructure.

Online Privacy for Children - a policy development and public education effort designed to promote responsible corporate practices and effective regulatory safeguards for protecting the privacy of children and families on the Internet.

I am very excited about this work and would welcome the opportunity to sit down and talk with you further about it. I will contact you next week to arrange a time to meet with you.

Sincerely,

Kathryn C. Montgomery, Ph.D.
President

Enc.