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Tobacco-Settlement - Advertising [2]

Tob ltr – advertising

Cynthia A. Rice 03/02/98 08:11:20 PM

Record Type: Record

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

cc: Peter G. Jacoby/WHO/EOP, kburke1 @ os.dhhs.gov @ inet, Laura Emmett/WHO/EOP
Subject: FTC Testimony

Thanks to Tom, we have the FTC testimony. It lays out FTC's history of tobacco legislation, noting that in the FTC shares jurisdiction with FDA over regulation of food, over-the-counter drugs, medical devices, and cosmetics.

It then calls for a reaffirmation of the FDA's authority while saying the FTC is willing to do more, saying: "We believe the FDA's efforts have been valuable in promoting public health and that Congress should affirm FDA's authority to regulation tobacco products as it would any other drug or device. We also believe that the FTC can make a significant contribution to any post-settlement regulation of tobacco advertising."

The testimony goes on to say that:

1) At a minimum, legislation should not alter the FTC's current authority over unfair or deceptive acts and practices in the advertising or marketing of tobacco products.

2) Should Congress determine that FTC has a role to play in administering the advertising provisions of the settlement, it would do so "vigorously and competently."

The testimony then gives a strong statement against the anti-trust provisions of the settlement -- after a detailed discussion, it concludes "the Commission believes that the industry has not established a need for any antitrust exemption in order to implement the proposed settlement."

Message Sent To:

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Tobacco - settlement - advertising

Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

Constitutionality of First Amendment Restrictions on Tobacco Advertising

Summary

The tobacco industry has come to Capitol Hill proposing a Faustian bargain: if Congress wants tobacco companies to stop *illegal* efforts to induce children to smoke cigarettes and chew tobacco, then Congress must give the industry the limits on liability it covets. Congress should have no part of such a deal, and nothing in the First Amendment compels it to do so. *The ad restrictions proposed by the FDA and pending bills are acceptable under the First Amendment and can be enacted without the industry's consent.*

- Whether advertising restrictions survive constitutional review depends heavily on the facts, and the grim statistics on children and smoking create a compelling case for action. Each day 3,000 children under age 18 begin to smoke. That amounts to *1 million new under-age smokers each year.* Over 80% of adult smokers started when they were children or adolescents; very few started after age 21. The intended targets of the industry's $6 billion annual advertising budget are obvious.

- As the FDA concluded, advertising often plays a pivotal role in an adolescent's decision to use tobacco. The sophisticated marketing tactics used by the industry prey on this highly vulnerable population that, by and large, cannot fully appreciate the gravity of the health risks. The clearest evidence of this is the notorious R. J. Reynolds "Joe Camel" campaign, which featured a cartoon figure that appealed directly to children. In one study, 30% of 3-year olds and more than 90% of 6-year olds understood Joe Camel was a symbol for smoking. RJR itself has explicitly stated that "if our Company is to survive and prosper . . . we must get our share of the youth market."

- Commercial speech cases are evaluated under what is called the "Central Hudson" analysis, which inquires: 1) whether the speech concerns a *lawful activity* or is *misleading;* 2) whether the government's interest in limiting the speech is *substantial*; 3) whether the limits *directly advance* the government's interest; and 4) whether the legislation is *no more extensive than necessary.*

- The First Amendment does not entitle tobacco companies to market their products to minors. Under *Central Hudson*, regulating the promotion of tobacco products is acceptable under the First Amendment for two fundamental reasons: first, the advertising restraints seek to prevent the tobacco industry from persisting in *illegal efforts* to market their products to minors; and second, the restraints are an *eminently reasonable* way of achieving Congress' *legitimate and compelling* goal of reducing the number of children who begin using tobacco.

- Some legislators have proposed that the industry be offered liability limits to get them to "consent" to advertising restrictions and thus avoid legal challenges. But this will not work. Any *other companies* adversely affected by the restrictions (like advertisers, billboard companies, etc.) would be free to challenge them. The notion that the ad regulations would go unchallenged is an illusion.

Public Citizen opposes giving the tobacco industry *any* limitations on its liability for its past or future wrongdoing. The issues of immunity and the First Amendment need not, and should not, be linked.

Ralph Nader, Founder

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Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

MEMORANDUM

To: Members of Congress and Their Staffs

From: Joan Mulhern, Staff Attorney, Public Citizen's Congress Watch
David Vladeck, Director, Public Citizen Litigation Group

Date: March 6, 1998

Re: **Constitutionality of First Amendment Restrictions on Tobacco Advertising**

The tobacco industry is asserting that it is unconstitutional for Congress to restrict the advertising of tobacco products. Therefore, the companies say, in order to for tobacco advertising to be restricted, they must give their consent, which they will not do unless Congress gives them unprecedented special protection from their legal liability. This argument is without merit.

This memorandum explains why the provisions restricting the advertising and promotion of tobacco products being considered in pending legislation to implement the so-called "global tobacco settlement" pass muster under the First Amendment. In order to explain why that is the case, it is important first to understand the nature of the problem that the advertising restrictions are designed to address and the specific restraints that have been proposed. The memorandum then turns to an analysis of the "commercial speech" doctrine and an explanation of why the advertising restraints under consideration by Congress do not violate the First Amendment. Finally, the memorandum explains why the proposal to use consent decrees with the tobacco industry as a means of insulating advertising restrictions from judicial review will not work.[1]

I. Background

As discussed more fully below, whether restrictions on advertising and promotion survive

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[1] Public Citizen's Litigation Group has been in the forefront of challenging restrictions on commercial speech and has as much, if not more, expertise in this area of constitutional law than any other law firm in the nation. Public Citizen's lawyers handled *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 (1976), the first Supreme Court case holding that commercial speech merits protection under the First Amendment, as well as *Edenfield v. Fane*, 507 U.S. 761 (1993), and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). They also represented *amici curiae* in other key commercial speech cases, urging the Court to strike down the challenged restriction. *See, e.g., Florida Bar v. Went for It, Inc.*, 115 S. Ct. 2371 (1995); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *Peel v. Attorney Registr'n and Disciplinary Comm'n*, 496 U.S. 91 (1990). In addition, Litigation Group lawyers have broad expertise in constitutional law and have argued 40 cases in the United States Supreme Court.

constitutional review depends heavily on the context giving rise to the imposition of those restrictions. Thus, it is important to briefly review the facts that initially propelled the Food and Drug Administration (FDA) to propose advertising restrictions for tobacco products.

A. The Record on Tobacco Use By Minors

After perhaps the most extensive rulemaking in history, the FDA has compiled a record -- including nearly 50,000 pages of submissions from the tobacco industry -- that conclusively shows that death and disease from addiction to tobacco products can best be eliminated by reducing the number of children and adolescents who begin to use tobacco products.

The statistics are grim. According to the FDA, each day 3,000 children under the age of 18 begin to smoke regularly. That amounts to 1 million new under-age smokers each year. Of the 3,000 children a day who become addicted to tobacco, no fewer than 1,000 will die prematurely as a result of tobacco use. Well over 80% of adult smokers started when they were children or adolescents; very few people start smoking after the age of 21. Thus, the FDA's finding that tobacco use is a "pediatric decision" is beyond legitimate dispute.

The high numbers of new adolescent smokers each year demonstrates the weakness of existing law -- which focuses on denying access to tobacco products to kids. It is illegal to sell cigarettes to minors in all 50 states. As a result of a number of federal enactments, every state has imposed additional access limitations (photo identification checks, requirements that tobacco products not be available on shelves, etc.) designed to keep tobacco away from children. Despite substantial efforts to bar access to tobacco by young people, minors nonetheless manage to obtain cigarettes and smokeless tobacco products from a variety of sources.

Moreover, as the FDA concluded, advertising targeted to children often plays a pivotal role in an adolescent's decision to use tobacco products. The sophisticated marketing tactics used by the tobacco industry prey on this highly vulnerable population that, by and large, is not capable of fully appreciating the gravity of the health risks inherent in tobacco usage.

Were there any doubt beforehand, recently released industry documents confirm that the tobacco companies have long targeted the youth market. The most clear evidence of this is the notorious R.J. Reynolds "Joe Camel" campaign, which featured a cartoon figure that appealed directly to the youth market. Thirty percent of three-year olds and 90% of six-year olds understood that Joe Camel was a symbol for smoking. As a result of the Joe Camel campaign, Camels' share of the youth market increased from less than 3% to more than 13% in barely four years. RJR records explicitly state that "if our Company is to survive and prosper, over the long-term, we must get our share of the youth market." Another document recites that "[e]vidence now available . . . indicate[s] that 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 in the industry is to be maintained."

B. FDA's Rule on Tobacco Advertising

Confronted with substantial evidence of this sort, the FDA concluded that tobacco advertising has a powerful impact on children and that the pervasiveness and imagery used in tobacco

advertising erodes the ability of adolescents to understand the significance of the health risks and the strength of the addictive power of tobacco products.

Accordingly, in its final rule published in August, 1996, the FDA established a number of restrictions aimed at preventing tobacco companies from continuing to market to children. The FDA's rule is highly complex, and the Federal Register notice setting forth the regulations and summarizing the supporting evidence runs nearly 1,000 pages. The key rules are those:

> * requiring black and white, text-only advertising format except in adult publications;
>
> * banning outdoor advertising of tobacco products within 1,000 feet of schools and playgrounds;
>
> * prohibiting tobacco companies from distributing items such as hats and tee-shirts bearing brand names or logos; and
>
> * forbidding companies from sponsoring athletic events in tobacco brand names.

The FDA regulations are not currently in effect due to litigation initiated by the tobacco industry, which is still pending.

Many of the bills now pending in Congress seek to codify these FDA rules. As discussed below, no provisions of the FDA rule, and no provision in any of the major bills thus far introduced, would violate the First Amendment.

II. General First Amendment Principles.

The "commercial speech" doctrine is a relative newcomer to constitutional jurisprudence. As recently as the early 1970s, the law was quite clear that the First Amendment did not protect commercial speech. It was not until the Supreme Court's landmark ruling in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), that the Court first held that commercial speech -- speech that proposes a commercial transaction -- is entitled to some degree of First Amendment protection, albeit significantly less protection than core political speech.

Since 1980, every commercial speech case has been evaluated under what has come to be called the "*Central Hudson*" analysis, named after *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 563-64, 566 (1980). That test inquires:

> * first, whether the speech concerns a *lawful activity* or is *misleading;*
>
> * second; whether the government's asserted interest in regulating speech is *substantial*;
>
> * third, whether the restraint *directly advances* the government's interest; and

* fourth, whether the legislation is *no more extensive than necessary* to serve the government's interest.

In more recent cases, the Court has explained that the last two steps of the *Central Hudson* analysis involve a consideration of the fit between the legislature's ends and the means chosen to achieve those ends. The fit need "not be perfect, but simply reasonable." *See Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

In measuring the reasonableness of the fit, the Court looks to danger signals of overreaching: Is the government using a blanket to suppress speech where a handkerchief would suffice? Has government jumped the gun by regulating speech where obvious non-speech-regulating alternatives exist? If the answer to those questions is "no," then the restraints ordinarily are upheld.

III. The First Amendment Does Not Entitle the Tobacco Companies to Market Their Products to Minors.

Under the *Central Hudson* analysis, regulating the advertising and promotion of tobacco products is acceptable under the First Amendment for two fundamental reasons: *first*, the restraints seek to prevent the tobacco industry from persisting in illegal efforts to market their products to minors; and *second*, the restraints are an eminently reasonable way of achieving Congress' legitimate, if not compelling, goal of reducing the number of children who begin using tobacco.

A. Tobacco Advertising Can Be Strictly Regulated Because It Relates To An Illegality -- Selling Tobacco Products To Minors.

The First Amendment does not protect commercial speech that proposes or is related to an illegal transaction. *Florida Bar v. Went for It, Inc.*, 115 S. Ct. 2371, 2375 (1995); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973). The first and most basic reason why the advertising provisions pass muster under the First Amendment is because they are designed to bar the tobacco companies from continuing to illegally market their products to minors.

As noted above, most smokers are initiated into tobacco use as children and become addicted as children, although selling tobacco products to minors is illegal. On the other hand, non-smoking adults rarely take up tobacco use. Because of these facts, a reviewing court would understand that, as a matter of necessity, much of the industry's advertising and promotion is geared toward minors -- a fact confirmed by the industry's own marketing documents. Tobacco ads need not say "Children, buy Camels" to propose an illegality, if it is clear from the circumstances that the ads are designed to persuade children.

No one would argue that the First Amendment disables government from prohibiting tobacco companies from placing billboards at the entrance to schools or playgrounds or color advertisements in the *Weekly Reader, Sports Illustrated for Kids*, or *Seventeen* magazine. Similarly, a reviewing court will see that the government's effort here is directed towards interdicting a message that proposes an illegal transaction, and the advertising restraints will be upheld on this basis.

B. Applying The Remaining *Central Hudson* Factors, Tobacco Advertising May Be Restricted Without Violating the First Amendment

Even if a reviewing court were to find that tobacco advertising overcomes the first prong of the *Central Hudson* test, the proposed restraints would be upheld. Applying the remaining *Central Hudson* factors, a court would conclude that the advertising restrictions are carefully tailored to the government's legitimate, indeed overwhelming, interest in reducing the incidence of tobacco use among minors.

1. The Government's Interest Is Substantial. There can be little question about the substantiality of the government's interest in preventing the addiction of children to tobacco products. Indeed, the enormous benefits that would flow from these advertising restraints are the industry's Achilles' heel. As noted above, every day, 3,000 more children get hooked on tobacco products -- 1,000,000 kids per year. The FDA has concluded that limits on advertising will avert the addiction of between 25% and 50% of the children at risk. Preventing the addiction of 250,000 youngsters or more each year is surely a governmental interest of the highest order. No court will want to sacrifice the most important public health initiative in history -- dwarfing the inoculation programs of the 1950s and 60s, for example -- on the altar of the tobacco industry's commercial speech rights. Indeed, the Court has often held that protecting children from harmful messages "is an extremely important justification" for imposing restraints. *Denver Area Educ. Telecommunications Consortium v. FCC*, 116 S. Ct. 2374, 2392 (1996); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982). Nothing is more important to the health and well-being of our nation's children than avoiding the ravages of tobacco addiction.

2. The Restraints Directly Further the Government's Interests in Curbing Tobacco Use By Children. As noted above, the FDA, along with the National Academy of Sciences and the Institute of Medicine, has concluded that the tobacco industry's advertising and promotion campaigns play a pivotal role in inducing many minors to try tobacco. Moreover, as a matter of common sense, industry spends $6 *billion* annually to drive up demand for its product because it is convinced that the advertising stimulates consumption. In many cases, the Supreme Court has recognized the "common-sense" link between advertising and demand. *E.g., Central Hudson*, 447 U.S. at 569; *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 2506 (1996).

Were there any doubt about this point in 1996 when the FDA issued its final rule, it has been dispelled by the recent disclosures of long-secret tobacco company marketing plans. These documents demonstrate that each of the major tobacco companies, Phillip Morris, RJR, and Brown & Williamson carefully mapped out advertising and promotional campaigns that targeted children as young as 12 and 14 years old. When evaluated in light of these records, it is hard to imagine any court second-guessing the Congress' judgment that advertising restrictions are essential to compel the industry to stop marketing to children.

3. The Restraints Are No More Extensive Than Necessary. At the outset, it is important to understand that, in the realm of commercial speech, the test of whether a regulation goes too far is not an exacting one. Precision of regulation may be the touchstone when government seeks to restrain core, political speech. But where restraints on commercial speech are concerned, the

Court requires that legislative judgments "need not be perfect, but reasonable." Within those bounds, the Court notes, "we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). A regulation of commercial speech will be set aside only when it burdens substantially more speech than necessary; that is, if a blanket is employed when a handkerchief would do.

The proposed restraints meet this narrow tailoring test. As the Supreme Court has often stressed, the core purpose in protecting commercial speech is to ensure that consumers have access to information about the price and availability of goods and services. *Virginia Pharmacy Bd.*, 425 U.S. at 765. But nothing in the First Amendment forbids the government from ensuring "that the stream of commercial information flow[s] cleanly as well as freely." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)(citations omitted). That observation has substantial force here, since the proposed restraints would have little impact on the *information* that may be carried in tobacco ads. Nothing in the restraints limits the advertising of price, availability, product attributes, ingredients, and so forth to adults.

The FDA's carefully crafted restraints, that form the basis of the legislative proposals, focus on those advertising techniques and modes of communication that have been shown to have a powerful effect on children, while, at the same time, leave ample means for industry to communicate with adults. In this respect, the targeted restrictions under consideration are fundamentally different from the sort of advertising restrictions invalidated by the Court in other cases. For instance, in *44 Liquormart* the Court set aside a state law that prohibited liquor advertisers from providing consumers information about the price of their products. In *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995), the Court set aside a law that sought to deprive consumers of information relating to the alcohol content of beer. And in *Virginia Pharmacy Board*, the Court set aside a state law forbidding the advertising of the price of prescription medications. In each case, the Court invalidated laws that barred an advertiser from conveying important information to lawful consumers. That is a far cry from what the FDA did, and what Congress is considering doing -- namely, preventing tobacco companies from continuing to hawk their products to young people who are barred by law from purchasing them.

Nor is there any merit to the suggestion that the government must continue to pursue non-speech regulation to the exclusion of advertising restraints, where advertising directed at children is concerned. To be sure, the First Amendment generally requires government to exhaust non-speech means of addressing a problem before it resorts to restraints on speech. But that doctrine is inapplicable here for two reasons. First, here the speech restraints are related solely to children. Nothing in the First Amendment compels the government to stand idly by while an industry breaks the law by targeting its advertising efforts on minors who cannot lawfully purchase their products.

Second, here the government has tried all means short of speech-restraints to curb the alarming rise of tobacco use by children. For the past three decades, the government's efforts have focused on restricting *access* to tobacco products by minors. But it has by now become clear that imposing access restrictions, without simultaneously attacking *demand*, is futile. Bluntly put, access restrictions can never be effective so long as industry is permitted to spend much of its $6 billion a year promoting its products to children. For this reason as well, restraints on tobacco advertising pass muster under the First Amendment.

IV. A "Deal" With The Industry Would Not Foreclose Challenges To Ad Restrictions

While we believe most if not all of the advertising restrictions proposed in various bills would survive First Amendment attack, those who support the tobacco deal have argued that they may not. Others argue that even if the restrictions could pass constitutional muster, it would take many years of litigation and delay which should be avoided. Their plan is to give the industry protection from its legal liability and in exchange the industry will sign consent decrees "voluntarily" promising not to challenge the restrictions.

The first and most glaring of the many flaws in the proposal to have the industry "consent" to advertising restrictions is that the decrees would be binding on signatories and *no one else*. Any other entity adversely affected by the decrees or related restrictions would be free to challenge them. Thus, the assurance that Congress is looking for that the advertising restraints would go unchallenged under the First Amendment is an illusion.

It is well-settled that, except for certain class actions, only parties are bound by a consent decree entered in litigation. *Martin v. Wilks*, 490 U.S. 755 (1989). Even those aware of the litigation and affected by the outcome have no obligation to participate. They are free to wait on the sideline, and then, if they are unhappy with the result, come into court and challenge the decree collaterally.

As a consequence, the consent decrees, and any underlying legislation, would be open to constitutional attack by a plethora of potential plaintiffs. Any commercial entity adversely affected by the new regime -- new entrants into the tobacco market, the manufacturers not covered by the consent decrees, advertising agencies, billboard companies, magazines, etc. -- could seek to collaterally attack the decrees on First Amendment grounds, or perhaps bring its own suit to challenge the validity of the underlying legislation. These parties would clearly have standing to bring such challenges. Standing doctrine under the First Amendment is especially broad to ensure that anyone affected by speech restraints may challenge them in court. *See, e.g., Virginia Pharmacy Board, supra* (First Amendment challenge may be brought by "listener" as well as speaker); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (newspaper may challenge closing of judicial proceeding); *Craig v. Boren*, 429 U.S. 190 (1976) (third party standing). Indeed, in every past case challenging the imposition of restrictions on tobacco advertising, the challenger was not a tobacco company, but a third party, and in each case the challenger had standing to proceed. *See Packer Corp. v. Utah*, 285 U.S. 105 (1932); *Penn Advertising of Baltimore v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996), cert. denied, 117 S. Ct. 1569 (1997); *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1972) (three-judge court), aff'd without opinion sub nom. *Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1992).

VII. Conclusion

At bottom, the industry's plea for limitations on liability comes down to the bald proposition that, if Congress wants the industry to stop marketing to children, it has to give the industry the immunity it craves. Congress should not enter into this Faustian bargain, and nothing in the First Amendment compels it to do so.

David Vladeck's recent testimony before the Senate Commerce Committee on the First Amendment implications of regulating the promotion of tobacco products is available at http://www.citizen.org/. For more information, call Joan Mulhern at (202) 546-4996.

3-20 Consent decree - marketing restrictions

Need to make sure if the sp. restriction go down, the rest doesn't follow.

Make sure p. participate
Non-participants - holdout prob
Enf. problems
Severability →

OLC proposal

FDA auth
Codifying rule
Codifying rule + other narrowly tailored
——— const concerns ↓

AGs say -
state consent decrees
statute would not do sp restrictions.
" would refer to a master settlement agreement.
ag w/ each state and with fed govt.
$ goes to states directly -

proposal - as cond of liab limits -
manus must submit reports to Secy
come up w/ plan - to reduce youth ^smoking
(indep of targets)
any # of ways to satisfy - for Secy to approve [not part of safe harbor]
safe harbor - all marketing restrictions. except glamorizing
Penalties for viol of plan - tobacco ~~marketing~~ institute
ultimate penalty - liab limits. lobbying restrictions
} not commercial speech - harder under CA.

are there other alterns ~~to~~ - ways to satisfy Secretary? if so, do this / if not, just do a straight-up conditioning.

No need to enter into state settlements -
(Conrad - has opt out for states)
could have here too - but put incentives on states)

1996 - Children's TV Act
ed. TV - to nT license renewal -

want to give Sec'y discretion?

any other ways to satisfy?

either have to do 3 hrs of programming

OR submit a plan – other ethics –

TBS research –

tobacco - entitlement - advertising

Tobacco Industry Promotion of Cigarettes and Adolescent Smoking

John P. Pierce, PhD; Won S. Choi, PhD; Elizabeth A. Gilpin, MS; Arthur J. Farkas, PhD; Charles C. Berry, PhD

Context.—Whether tobacco advertising and promotion increases the likelihood that youths will begin smoking has important public policy implications.

Objective.—To evaluate the association between receptivity to tobacco advertising and promotional activities and progress in the smoking uptake process, defined sequentially as never smokers who would not consider experimenting with smoking, never smokers who would consider experimenting, experimenters (smoked at least once but fewer than 100 cigarettes), or established smokers (smoked at least 100 cigarettes).

Design.—Prospective cohort study with a 3-year follow-up through November 1996.

Setting and Participants.—A total of 1752 adolescent never smokers who were not susceptible to smoking when first interviewed in 1993 in a population-based random-digit dial telephone survey in California were reinterviewed in 1996.

Main Outcome Measure.—Becoming susceptible to smoking or experimenting by 1996.

Results.—More than half the sample (n=979) named a favorite cigarette advertisement in 1993 and Joe Camel advertisements were the most popular. Less than 5% (n=92) at baseline possessed a promotional item but a further 10% (n=172) were willing to use an item. While having a favorite advertisement in 1993 predicted which adolescents would progress by 1996 (odds ratio [OR] =1.82; 95% confidence interval [CI], 1.04-3.20), possession or willingness to use a promotional item was even more strongly associated with future progression (OR=2.89; 95% CI, 1.47-5.68). From these data, we estimate that 34% of all experimentation in California between 1993 and 1996 can be attributed to tobacco promotional activities. Nationally, this would be over 700 000 adolescents each year.

Conclusion.—These findings provide the first longitudinal evidence to our knowledge that tobacco promotional activities are causally related to the onset of smoking.

JAMA. 1998;279:511-515

A NUMBER of studies have implicated tobacco industry advertising and promotional activities as possible causal agents in the stimulation of demand for cigarettes among adolescents.[1-3] The effectiveness of promotional activities over the past 10 years has been postulated as a major reason for the recent increases in adolescent smoking behavior.[4-6] There is abundant evidence that adolescents are exposed to and have high recall of tobacco industry promotional messages.[2,7,8] Studies of smoking initiation rates in population samples demonstrate that sharp increases in adolescent smoking coincide with the conduct of effective tobacco promotional campaigns.[9,10] Since the first Surgeon General's report on smoking and health in 1964,[11] these increases appear to be specific to adolescents aged 14 to 17 years; there were no similar increases among adults.[6,9,10]

A summary of over 2 decades of psychological research on audience receptivity to persuasive communications identifies 3 elements: (1) exposure to the message, (2) attendance to and understanding of the message, and (3) development of a cognitive or affective response to the message.[12] The first goal of any persuasive communication is to ensure that a target audience is effectively exposed. This audience needs to both attend to and understand the message before it can have persuasive impact. To characterize individuals as receptive to the communication, however, requires evidence that they have internalized positive affect or cognitions related to the communication. While these internalizations may facilitate the purchase of a product that is the subject of the persuasive communication, an additional incentive (such as a promotional item or free sample) is often needed to maximize the likelihood that the persuasive communication will lead to actual consumer behavior.[13]

Using this conceptual framework, we previously found measures of adolescent receptivity to tobacco industry promotional activities to be associated with susceptibility to smoking among adolescent never smokers.[5,14,15] This longitudinal study addresses whether the receptivity to tobacco advertising and promotional activities actually precedes the first steps in the smoking uptake process.

See also pp 516 and 550.

The concept of susceptibility to smoking comes from previous research, which showed an increased likelihood of future smoking among never smokers who do not adamantly rule out the possibility of smoking a cigarette in the near future.[16] During the elementary and early middle school years, most children have not yet tried a cigarette and strongly assert that they will not be future smokers.[17,18] Then, as they get older, many change and are no longer prepared to rule out this possibility. When the opportunity presents itself, some young adolescents might respond "why not? " and begin to experiment. While not all adolescents who experiment with smoking will go on to become addicted, experimentation is a necessary step and is a key early marker of eventual smoking uptake.[17-21] To prevent addiction to smoking it is necessary to understand the influences encouraging adolescents to take these early steps in the smoking uptake process.

In this article, which reports on the findings from a longitudinal study, we consider adolescents who were nonsusceptible never smokers at baseline in 1993. As our outcome measure, we use any progression in the smoking uptake process by follow-up in 1996, and investigate the independent influence of

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receptivity to tobacco industry promotional activities on movement toward addiction to smoking.

METHODS

Data Sources

We report data on a representative sample of California adolescents who were 12 to 17 years old at baseline in 1993. These adolescents were identified using a random-digit dialed computer-assisted telephone interviewing (CATI) method as part of the California Tobacco Surveys, which are designed to provide population data on tobacco use in California, as part of the evaluation of the Statewide Tobacco Control Program funded from a voter-initiated constitutional amendment (Proposition 99).[22] In 1993, Westat, Inc, enumerated the members of a total of 30 910 households in California, and identified 6892 adolescents who represent the baseline sample. With parental permission, in-depth interviews on tobacco issues were completed for a total of 5531 (response rate, 80.3%) of these adolescents. Initially, there was no funding support for a follow-back survey and parents were informed only that we might contact them again in the future. When separate funding was obtained, we attempted to contact the parents of all adolescent respondents to the 1993 survey. Those who were not at the same telephone number were traced through online directory assistance, the national change of address database, and national credit reference services using information provided by the parent in 1993. Even with these tracing methods, we were unable to locate 26.5% of the 1993 respondents. Of those we did locate, we completed detailed follow-up interviews on 3376 (response rate, 85%), with 1.2% of parents and 5.8% of adolescents refusing to participate, for a total 7% refusal rate. Accounting for both the initial and follow-up response rates, the overall response rate for the longitudinal study was 61.5%. Considering only the subgroup of this research, the nonsusceptible never smokers at baseline, the overall response rate was 66%, for a total sample of 1752 adolescents.

Measures of Smoking Initiation

Based on our previous research,[16,18] we categorize adolescents into 4 mutually exclusive categories: nonsusceptible never smokers, susceptible never smokers, experimenters, and established smokers. An established smoker is defined as an adolescent giving a positive response to the question, "Have you smoked at least 100 cigarettes in your life?" An experimenter is defined as an adolescent giving an affirmative response to either of the following 2 questions: (1) "Have you ever smoked a cigarette?" or (2) "Have you ever tried or experimented with cigarette smoking, even a few puffs?" A negative response to both of these questions categorizes an adolescent as a never smoker. A nonsusceptible never smoker is distinguished from other never smokers by responses to the following 3 questions about future smoking: (1) "Do you think that you will try a cigarette soon?" (response choices: yes or no), (2) "If one of your best friends were to offer you a cigarette, would you smoke it?" and (3) "At any time during the next year do you think you will smoke a cigarette?" The response choices to the latter 2 questions were: "definitely yes," "probably yes," "probably not," or "definitely not." To be classified as a nonsusceptible never smoker, the adolescent needed to respond in the negative to the first question and "definitely not" to the other 2. Any other response led to the adolescent being categorized as susceptible to smoking. Previous findings from a national longitudinal survey[16] and the results of the current one have validated this measure by showing that susceptible never smokers have about twice the risk of future smoking as nonsusceptible never smokers.

Receptivity to Tobacco Promotional Activities

In the persuasive communication theoretical framework, receptivity to tobacco industry advertising and promotional activities involves a basic exposure to a communication and a cognitive response entailing an understanding of the communication and agreement with the message. The development of a positive affective response to the communication (eg, having a favorite advertisement or being willing to use a promotional product) indicates a greater degree of receptivity.[12,13,23] We defined the highest level of receptivity as having or being prepared to use a tobacco promotional item, and accordingly asked: (1) "Some tobacco companies provide promotional items to the public that you can buy or receive for free. Have you ever bought or received for free any product which promotes a tobacco brand or was distributed by a tobacco company?" and (2) "Do you think that you would ever use a tobacco industry promotional item, such as a t-shirt?" Those who had an item or who would be willing to use one were considered highly receptive to tobacco promotional activities. To characterize a minimal level of receptivity among the remaining respondents, we asked for unaided recall of tobacco advertising with the question: "Think back to the cigarette advertisements you have recently seen on billboards or in magazines. What brand of cigarettes was advertised the most?" Respondents who did not name a brand were considered minimally receptive to tobacco advertising and promotional activity.

To define intermediate levels of receptivity among those not in either the highly or minimally receptive categories, we asked: "What is the name of the cigarette brand of your favorite advertisement?" For the few respondents who hesitated in their response, we probed with the question: "Of all the cigarette advertisements you have seen, which do you think attracts your attention the most?" Naming a brand as most advertised (see previous paragraph) but not having a favorite advertisement classified a respondent as having low receptivity, whereas having a favorite advertisement classified a respondent as having moderate receptivity.

Exposure to Peer and Family Smokers

Adolescents were queried about smokers in the family with the questions: "Do any of your parents, stepparents or guardians now smoke cigarettes?" and "Do you have any older brothers or sisters who smoke cigarettes?" Negative responses to both questions classified an adolescent as having no family exposure to smokers. To determine exposure to peer smokers, respondents were asked: "About how many best friends do you have who are male?" and "Of your best friends who are male, how many of them smoke?" The same 2 questions were asked concerning female best friends. Those who indicated that none of their male or female best friends smoke were classified as unexposed to peer smokers.

Analytic Procedures

All percentages are weighted to represent the population of California according to age, sex, race or ethnicity, and education. We derived variance estimates and 95% confidence intervals (CIs) using the jackknife procedure[24] contained in the WesVar PC program.[25] This program provides an estimate of variance in the setting of large-scale population surveys that are not completely random. We used the WesVarPC χ^2 procedure to evaluate differences in the demographic distribution of who progressed to various levels in the uptake continuum among adolescents who had never tried a cigarette at baseline and who were nonsusceptible to smoking. Then, we used the logistic regression procedure to identify the independent predictors of any progression in the uptake process by follow-up. Demographic variables, exposure to other smokers, the tobacco promotional activities receptivity index, and interactions between exposure to smokers and the index were the independent variables.

Table 1.—Baseline (1993) Distribution of Adolescent, Nonsusceptible Never Smokers and Progression Through the Smoking Uptake Continuum by 1996

Demographics, 1993	1993, %*	Level on Uptake Continuum in 1996			
		Susceptible, % (95% CI)*	Experimenters, % (95% CI)*	Established, % (95% CI)*†	Total Progressed, % (95% CI)*
Overall	1752	16.6 (14.1-19.1)	29.5 (25.8-33.2)	3.6 (2.5-4.7)	49.7 (45.9-53.5)
Sex					
Male	48.5	17.3 (13.4-21.2)	28.6 (23.0-34.2)	4.1 (2.4-5.8)	50.5 (45.1-55.9)
Female	51.5	16.1 (12.6-19.6)	30.3 (26.0-34.6)	3.1 (1.7-4.5)	49.5 (44.4-54.6)
Age group, y					
12-13	45.5	21.2 (17.2-25.2)	29.4 (23.5-35.3)	3.3 (1.8-4.8)	53.9 (48.9-58.9)
14-15	31.3	15.9 (10.5-21.3)	26.3 (20.6-32.0)	4.8 (2.4-7.2)	47.0 (39.7-54.3)
16-17	23.1	8.9 (5.3-12.5)	33.9 (25.9-41.9)	2.5 (1.2-3.8)	45.3 (37.7-52.9)
Race/ethnicity					
White	48.7	12.4 (10.1-14.7)	28.6 (24.4-32.8)	5.8 (3.7-7.9)	46.8 (42.3-51.3)
African American	10.2	22.4 (10.5-34.3)	25.8 (13.6-38.0)	1.9 (0.0-4.2)	50.1 (33.3-66.9)
Hispanic	28.9	18.9 (12.8-25.0)	34.2 (26.7-41.7)	1.3 (0.3-2.3)	54.4 (47.7-61.1)
Asian/other	12.2	23.5 (16.1-30.9)	24.5 (16.2-32.8)	1.6 (0.3-2.9)	49.8 (40.6-59.0)
School performance					
Much better	25.4	15.6 (10.8-20.4)	26.8 (18.8-34.8)	2.0 (0.0-4.2)	44.4 (36.9-51.9)
Better than average	40.5	17.4 (12.8-22.0)	29.5 (24.6-34.4)	3.0 (1.3-4.7)	49.9 (44.7-55.1)
Average/below	34.1	16.6 (11.8-21.4)	31.4 (25.1-37.7)	5.5 (3.4-7.6)	53.5 (46.9-60.1)

*Weighted percentages; CI indicates confidence interval.
†Smoked at least 100 cigarettes.

The attributable risk is a standard epidemiological index for assessing the strength of association between 2 measures.[26] In the current setting, the attributable risk can be interpreted as the proportionate excess risk of future experimentation that is associated with receptivity to tobacco promotional activities. The formula used to calculate the attributable risk percent for receptivity to tobacco promotional activities is: $AR\% = [(I_e - I_o) / I_e] \times 100$, where I_e is the incidence rate of experimentation among those receptive to tobacco promotional activities and I_o is the incidence rate of experimentation among those minimally receptive to tobacco promotional activities.

RESULTS

Characteristics of the Study Population

Table 1 presents the baseline demographic distribution of the nonsusceptible never smokers (left column of data) as well as the proportion of each group who progressed toward smoking by the 1996 follow-up survey. The sample contained slightly more girls than boys and almost half (45%) of the nonsusceptible never smokers were aged 12 to 13 years. Minority groups make up more than half the sample, and two thirds of the sample considered their performance in school better than average.

A total of 49.7% of these nonsusceptible never smokers progressed toward smoking within the 3-year follow-up period: 16.6% by becoming susceptible to smoking, 29.5% by experimenting, and 3.6% by reaching a lifetime consumption level of at least 100 cigarettes.

There were no sex differences for becoming susceptible, experimenting, or becoming an established smoker. Although the percentage experimenting did not vary much by age, the percentage becoming susceptible did; 16- to 17-year-olds were about half as likely to become susceptible by follow-up than the younger adolescents. In African Americans and in the Asian or other group, the rate of susceptibility was higher, but the rate of experimentation was lower than for whites. Perceived school performance was related to future experimentation (but not to susceptibility), with those who reported much better than average school performance showing a lower rate of future cigarette use than those who reported average or below average school performance.

Cigarette Advertisements and Tobacco Promotional Items

Overall, 8.9% of nonsusceptible never smokers in 1993 were at the minimal level of the receptivity index (could not name a brand as most advertised). The percentage at this level did not vary much with age; 9.8% of those aged 12 to 13 years, 7.1% of 14- to 15-year-olds, and 9.3% of 16- to 17-year-olds were at this level.

Over half (56.5%) of nonsusceptible never smokers in 1993 had a favorite cigarette advertisement, and 83% of those who did nominated either Camel (R. J. Reynolds) or Marlboro (Phillip Morris) as the brand of their favorite advertisement. Camel was the clear favorite of young adolescents aged 12 to 13 years (67.8% for Camel vs 16.8% for Marlboro), but Marlboro was named almost as frequently as Camel by older adolescents aged 16 to 17 years (46.6% for Camel vs 33.9% for Marlboro).

The percentage of adolescents who had a tobacco promotional item increased with age among the nonsusceptible never smokers in 1993 from a low of 2.9% among 12- to 13-year-olds to 8.5% among 16- to 17-year-olds; overall, less than 5% (n=92) possessed an item. However, about 10% (n=172) of each age group responded that they would be willing to use a promotional item. It is of interest that among those without a promotional item in 1993, those who were willing to use an item were twice as likely to have obtained one by 1996 than those who were not willing to use a promotional item.

Predicting Future Experimentation

The results of the logistic regression analysis of predictors of which adolescents progressed toward smoking are presented in Table 2. This model included the demographic variables (see Table 1), and the odds ratios (ORs) presented are adjusted for any effects of these variables and the others in the model. Both exposure to family or peers who smoke appeared to increase the probability that a nonsusceptible never smoker would progress toward smoking by approximately 20%; however, the sample size was not sufficient to demonstrate this level of difference to be statistically significant.

The baseline receptivity to tobacco industry promotional activities was strongly related to which adolescents progressed toward smoking. Among those who were assessed as having a minimal level of receptivity, 37.7% progressed toward smoking. Compared with this group, those who had a favorite advertisement but who were not willing to use a promotional item (the moderate level) were 82% more likely to progress toward smoking, which is a statistically significant increase compared with those at the minimal level. Those with a high level of receptivity (at least willing to use a promotional item) were almost 3 times more likely to progress toward

Table 2.—Logistic Regression Predicting Progression Along the Uptake Continuum by 1996 Among Nonsusceptible Never Smokers in 1993 (n=1752)

Independent Variables	Progressed Toward Smoking, % (95% CI)*	Adjusted Odds Ratios (95% CI)†
Exposure to familial smoking		
No	48.0 (43.5-52.6)	1.00
Yes	53.5 (47.1-59.9)	1.19 (0.88-1.59)
Exposure to peer smoking		
No	48.7 (44.2-53.2)	1.00
Yes	52.7 (45.8-59.5)	1.19 (0.85-1.66)
Exposure to tobacco promotions/advertising		
Minimal (no brand, not willing)	37.7 (25.8-49.6)	1.00
Low (brand, not willing)	43.9 (37.2-50.6)	1.32 (0.73-2.41)
Moderate (favorite advertisement, not willing)	51.7 (46.3-57.1)	1.82 (1.04-3.20)
High (willing/has item)	62.1 (52.6-71.6)	2.89 (1.47-5.68)

*Weighted percentages; CI indicates confidence interval.
†Adjusted for age, sex, race or ethnicity, and school performance.

smoking, which was highly statistically significant. Preliminary analyses showed no significant interactions between the index of receptivity and the exposure to smoking variables and these interactions were not retained in the final model.

Percentage of Experimentation Attributable to Tobacco Promotional Activities

From our representative sample survey in 1993, we estimate that there were about 1.18 million 12- to 17-year-old adolescents in California who were nonsusceptible never smokers. The incidence rate of experimentation among those receptive to tobacco advertising and promotion activities was 34%. The incidence rate among those who were minimally receptive was 22%. Thus, using the standard formula, the percentage of experimentation attributable to tobacco advertising and promotional activities is 34.3%. Over half (50.7%) of the 17-year-old California adolescents in the full 1993 cross-sectional sample had already experimented with cigarettes, which represents a total of 158 758 adolescents. Using our attributable risk calculation, we estimate that tobacco promotional activities influenced 54 454 (34.3%) of 158 758 of these adolescents (or 17% of the total population of this age) to experiment with cigarettes before they reached the age of 18 years. This translates to over 700 000 adolescents nationally.

COMMENT

This longitudinal study provides clear evidence that tobacco industry advertising and promotional activities can influence nonsusceptible never smokers to start the process of becoming addicted to cigarettes. The strength of this association is consistent with estimates from other cross-sectional studies[5,8,27] and with previous studies that have demonstrated a coincidence of increases in the incidence of addiction with the conduct of effective promotional campaigns.[6,9,10,28] Our data establish that the influence of tobacco promotional activities was present before adolescents showed any susceptibility to become smokers.

Exposure to other smokers in this analysis does not appear to significantly influence which adolescents begin the smoking uptake process, which is somewhat contradictory to previous studies.[5,29] Although theories of how adolescents become smokers have included a stage prior to experimentation,[20,30-32] most analyses of smoking uptake use smoking within the last month before follow-up as the outcome. This measure underestimates the proportion of people who are in the early stages of the smoking uptake process. The influence of other smokers in facilitating and possibly encouraging adolescents to smoke may be most apparent after first experimentation,[18] rather than influencing the adolescent to experiment for the first time.[5]

We used a communication persuasion framework to assess adolescent receptivity to tobacco promotional activities.[12] This generally accepted framework postulates that the higher the level of receptivity to a persuasive communication, the higher the likelihood that it will have an effect on behavior. Our findings are consistent with this hypothesis. Progress toward smoking by follow-up among these nonsusceptible never smokers was significantly associated with receptivity to tobacco industry advertising and promotional activities at baseline. Indeed, each higher level on the receptivity index was associated with a greater degree of movement toward smoking over the study period.

The results presented here support findings from previous studies showing R. J. Reynold's advertising of their Camel brand to be very effective with children and adolescents throughout the 1990s.[1,4,7,27] Camel advertising was clearly the favorite among adolescents, particularly those aged between 12 and 15 years. Since the popularity of Camel advertisements was highest in the youngest age group, the peak effect of this advertising probably occurs at an even younger age than has previously been suggested.[33,34]

Our findings that willingness to use a promotional item is more effective in predicting progression than having a favorite advertisement is consistent with Ray's theory of how promotion works to build consumer behavior.[13] The majority of the progression that we observe involves actual experimentation with cigarettes. Ray[13] hypothesizes that advertising creates a structure of attitudes and beliefs about a product that will facilitate its purchase. But a promotional item or a free sample is often needed to maximize the probability that the behavior will be performed. We have previously reported that the majority of adolescents who purchase cigarettes buy Marlboros.[14] The most common promotional item possessed by adolescents was for the Marlboro brand. Hence, even though Camel advertising may be the most influential in getting adolescents interested in smoking, the success of Phillip Morris promotional activities would appear to have reduced substantially the potential market share achieved by R. J. Reynolds in young people.

The demographic differences that we observed in progression toward smoking deserve comment. First of all, in this 3-year period, over 16% of adolescents had started on the uptake continuum but had not yet experimented with cigarettes. This was particularly the case in the youngest age groups, suggesting that the duration of the smoking uptake process for many adolescents may be much more extended than previously believed.[20,35] Minority youth were much more likely to only progress to susceptibility than non-Hispanic whites. This suggests that the duration of the uptake process among minority groups is more extended, or that they begin the process at a later age. The decline in the proportion of older adolescents who were at the susceptible stage of the uptake process at baseline is consistent with other studies suggesting that there may be a time window during which adolescents begin the smoking uptake process.[20] Once people are old enough to rationally evaluate the well-known health risks of smoking, they choose not to start smoking.

One limitation of our study is that not all of the 1993 sample were contacted again in 1996. We compared the nonsusceptible never smokers in 1993 with a follow-up interview to the nonsusceptible never smokers in 1993 who were not interviewed again. The group contacted again in 1996 had slightly more males (49% contacted vs 45% not recontacted), and the oldest age group was less represented (23% vs 27%). African Americans and Hispanics were less successfully followed, so that whites comprised 49% of those followed and only 35% of those not inter-

viewed again. The group followed had about a 4% higher rate (56% vs 52%) of naming a brand of cigarette as most advertised or having a favorite advertisement, but the rates for possession or willingness to use promotional items were nearly identical, regardless of follow-up status. The sample weights are constructed to adjust for demographic disparities in the population, so bias from these differences should be minimal. The potential bias from the slight difference in advertising recall rates is difficult to assess but should be minimal.

Our study estimates that tobacco industry promotional activities in the mid 1990s will influence 17% of those who turn 17 years old each year to experiment with cigarettes. We feel that this is a conservative estimate, as there was a 3-year period between the 2 surveys that offered a considerable time period for adolescents who were not receptive to these tobacco industry activities at baseline to become receptive prior to progressing toward smoking. However, the finding that one third of the nonsusceptible never smokers with minimal receptivity at baseline in 1993 did progress, suggests influences other than tobacco advertising and promotions are likely acting to cause smoking as well. It is important to note that not all adolescents who experiment with cigarettes go on to become addicted smokers. Previous national data suggest, very conservatively, that 30% of experimenters become established smokers.[18] We have previously estimated that it will take an average of 16 to 20 years of addicted smoking before the average adolescent, who reaches a lifetime consumption of 100 cigarettes or 5 packs, will be able to successfully quit.[36]

This study only considered the influence of tobacco promotional activities on nonsusceptible never smokers. It is possible that these influences also encourage experimenters to continue smoking until they become addicted and act to prevent addicted adolescent smokers from quitting. These potential influences of tobacco industry advertising and promotions need to be investigated further.

In conclusion, this longitudinal study adds a crucial piece of evidence to the contention that tobacco industry advertising and promotional activities are causally associated with young people starting to smoke. The 5 criteria for assessing causality of a suspected agent from epidemiological studies[37] are that (1) it must clearly precede the hypothesized effect; (2) the association should be strong, (3) consistent, and (4) specific; and (5) it should be expected from theory. From this study it is clear that the effect of advertising and promotional activities precedes the development of susceptibility to smoking. The effect is strong and specific, with at least 34% of experimentation with cigarettes attributed to these activities. The association is consistent with other studies.[5,8,15,27] Finally, such a causal effect is expected from theoretical considerations of how persuasive communications work.

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References

1. Pierce JP, Gilpin E, Burns DM, et al. Does tobacco advertising target young people to start smoking? evidence from California. *JAMA.* 1991;266:3154-3158.
2. Centers for Disease Control and Prevention. Comparison of the cigarette brand preferences of adult and teenage smokers—United States, 1989, and 10 U.S. communities, 1988 and 1990. *MMWR Morb Mortal Wkly Rep.* 1992;41:169-173, 179-181.
3. Centers for Disease Control and Prevention. Changes in the cigarette brand preferences of adolescent smokers: United States, 1989-1993. *MMWR Morb Mortal Wkly Rep.* 1994;43:577-581.
4. Pollay RW, Siddarth S, Siegel M, et al. The last straw? cigarette advertising and realized market shares among youths and adults, 1979-1993. *J Marketing.* 1996;60:1-16.
5. Evans N, Farkas A, Gilpin E, Berry C, Pierce JP. Influence of tobacco marketing and exposure to smokers on adolescent susceptibility to smoking. *J Natl Cancer Inst.* 1995;87:1538-1545.
6. Cummings KM, Shah D. Trends in smoking initiation among adolescents and young adults—United States, 1980-1989. *MMWR Morb Mortal Wkly Rep.* 1995;44:521-525.
7. Di Franza JR, Richards JW, Paulman PM, et al. RJR Nabisco's cartoon camel promotes Camel cigarettes to children. *JAMA.* 1991;266:3149-3153.
8. Altman DG, Levine DW, Coeytaux R, Slade J, Jaffe R. Tobacco promotion and susceptibility to tobacco use among adolescents aged 12 through 17 years in a nationally representative sample. *Am J Public Health.* 1996;86:1590-1593.
9. Pierce JP, Lee L, Gilpin EA. Smoking initiation by adolescent girls, 1944 through 1988: an association with targeted advertising. *JAMA.* 1994;271:608-611.
10. Pierce JP, Gilpin EA. A historical analysis of tobacco marketing and the uptake of smoking by youth in the United States: 1890-1977. *Health Psychol.* 1995; 14:500-508.
11. US Dept of Health and Human Services. *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public* Health *Service, 1964.* Washington, DC: US Dept of Health and Human Services; 1964. Public Health Service publication 1103.
12. McGuire WJ. Attitudes and attitude change. In: Lindzey G, Anderson E, eds. *The Handbook of Social Psychology, II.* 3rd ed. New York, NY: Random House; 1985.
13. Ray ML. *Advertising and Communication Management.* Englewood Cliffs, NJ: Prentice Hall; 1982.
14. Pierce JP, Evans N, Farkas AJ, et al. *Tobacco Use in California: An Evaluation of the Tobacco Control Program, 1989-1993.* La Jolla: University of California, San Diego; 1994.
15. Gilpin EA, Pierce JP, Rosbrook B. Are adolescents receptive to current sales promotion practices of the tobacco industry? *Prev Med.* 1997;26:14-21.
16. Pierce JP, Choi WS, Gilpin EA, Farkas AJ, Merritt RK. Validation of susceptibility as a predictor of which adolescents take up smoking in the United States. *Health Psychol.* 1996;15:355-361.
17. Pierce JP, Farkas A, Evans N, et al. *Tobacco Use in California 1992: A Focus on Preventing Uptake in Adolescents.* Sacramento: California Dept of Health Services; 1993.
18. Choi WS, Pierce JP, Gilpin EA, Farkas AJ, Berry CC. Which adolescent experimenters progress to established smoking in the United States? *Am J Prev Med.* 1997;13:385-391.
19. US Dept of Health and Human Services. *Reducing the Health Consequences of Smoking: 25 Years of Progress: A Report of the Surgeon General, 1989.* Washington, DC: US Dept of Health and Human Services; 1989. US Dept of Health and Human Services publication CDC: 89-8411.
20. US Dept of Health and Human Services. *Preventing Tobacco Use Among Young People: A Report of the Surgeon General.* Atlanta, Ga: US Dept of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 1994. US Dept of Health and Human Services publication S/N 017-001-00491-0.
21. Chassin LA, Presson CC, Sherman SJ, Edwards DA. The natural history of cigarette smoking: predicting young-adult smoking outcomes from adolescent smoking patterns. *Health Psychol.* 1990;9:701-716.
22. Bal DG, Kizer KW, Felten PG, Mozar HN, Niemeyer D. Reducing tobacco consumption in California: development of a statewide anti-tobacco use campaign. *JAMA.* 1990;264:1570-1574.
23. Petty RE, Cacciopo JT. *Attitudes and Persuasion: Classic and Contemporary Approaches.* Dubuque, Iowa: Wm C Brown Co; 1981.
24. Efron B. *The Jackknife, the Bootstrap and Other Resampling Plans.* Philadelphia, Pa: Society for Industrial and Applied Mathematics; 1982.
25. Brisk JM, Broene P, James P, Severynse J. *A User's Guide to WesVarPC.* Rockville, Md: Westat Inc; 1996.
26. Hennekens CH, Buring JE. *Epidemiology in Medicine.* Boston, Mass: Little Brown & Co; 1987.
27. Slade J. Camel flip flops. *Tob Control.* 1992;1: 207.
28. Gilpin EA, Pierce JP. Trends in adolescent smoking initiation in the United States: is tobacco marketing an influence? *Tob Control.* 1997;6:122-127.
29. Conrad KM, Flay BR, Hill D. Why children start smoking cigarettes: predictors of onset. *Br J Addict.* 1992;87:1711-1724.
30. Leventhal H, Cleary PD. The smoking problem: a review of the research and theory in behavioral risk modification. *Psychol Bull.* 1980;88:370-405.
31. Flay BR, d'Avernas JR, Best JA, Kersell MW, Ryan KB. Cigarette smoking: why young people do it and ways of preventing it. In: McGrath PJ, Firestone P, eds. *Pediatric and Adolescent Behavioral Medicine: Issues in Treatment.* New York, NY: Springer; 1993. Springer Series on Behavior Therapy and Behavioral Medicine, vol 10.
32. Chassin L, Presson CC, Sherman SJ, Corty E, Olshavsky RW. Predicting the onset of cigarette smoking in adolescents: a longitudinal study. *J Appl Soc Psychol.* 1984;14:224-243.
33. Fischer PM, Schwartz MP, Richards JW Jr, Goldstein AO, Rojas TH. Brand logo recognition by children aged 3 to 6 years: Mickey Mouse and Old Joe the camel. *JAMA.* 1991;266:3145-3148.
34. Mizerski R. The relationship between cartoon trade character recognition and attitude toward product category in young children. *J Marketing.* 1995;59: (14):58-70.
35. Baugh JG, Hunter SM, Webber LS, Berenson GS. Developmental trends of first cigarette smoking experience of children: the Bogalusa Heart Study. *Am J Public Health.* 1982;72:1161-1164.
36. Pierce JP, Gilpin EA. How long will today's new adolescent smoker be addicted to cigarettes? *Am J Public Health.* 1995;86:253-256.
37. Susser M. *Causal Thinking in the Health Sciences: Concepts and Strategies in Epidemiology.* New York, NY: Oxford University Press; 1973.

Adolescent Exposure to Cigarette Advertising in Magazines

An Evaluation of Brand-Specific Advertising in Relation to Youth Readership

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Context.—Understanding the relationship between cigarette advertising and youth smoking is essential to develop effective interventions. Magazine advertising accounts for nearly half of all cigarette advertising expenditures.

Objective.—To investigate whether cigarette brands popular among adolescent smokers are more likely than adult brands to advertise in magazines with high adolescent readerships.

Design.—Cross-sectional analysis of 1994 data on (1) the presence of advertising by 12 cigarette brands in a sample of 39 popular US magazines; and (2) the youth (ages 12-17 years), young adult (ages 18-24 years), and total readership for each magazine.

Main Outcome Measures.—The presence or absence of advertising in each of the 39 magazines in 1994 for each of the 12 cigarette brands.

Results.—After controlling for total magazine readership, the percentage of young adult readers, advertising costs and expenditures, and magazine demographics, youth cigarette brands (those smoked by more than 2.5% of 10- to 15-year-old smokers in 1993) were more likely than adult brands to advertise in magazines with a higher percentage of youth readers. Holding all other variables constant at their sample means, the estimated probability of an adult brand advertising in a magazine decreased over the observed range of youth readership from 0.73 (95% confidence interval [CI], 0.50-0.96) for magazines with 4% youth readers to 0.18 (95% CI, 0.00-0.47) for magazines with 34% youth readers. In contrast, the estimated probability of a youth brand advertising in a magazine increased from 0.32 (95% CI, 0.00-0.65) at 4% youth readership to 0.92 (95% CI, 0.67-1.00) at 34% youth readership.

Conclusion.—Cigarette brands popular among young adolescents are more likely than adult brands to advertise in magazines with high youth readerships.

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AT THE HEART of the public health debate about interventions to reduce teenage smoking lies the question of whether cigarette advertising influences youth.[1] Of all the media by which cigarettes are advertised—newspapers, magazines, billboards, and mass transit—magazines receive the largest share of tobacco company expenditures.[2] In 1994, the tobacco industry spent $252 million, or 46% of its total cigarette advertising expenditures, on magazine advertising.[2]

Although the Food and Drug Administration's tobacco regulations[3] and the proposed global tobacco settlement[4] address magazine advertising, the specific impact of cigarette advertising in magazines on youth smoking behavior has not been well studied. Previous studies have provided indirect evidence that cigarette advertising in magazines targets youth readers. This evidence derives primarily from studies of differences in the number or proportion of cigarette advertisements in youth-oriented compared with adult-oriented magazines,[5-12] changes in the number of advertisements in youth-oriented magazines over time,[5,7-9,13] demonstrations of the appeal of magazines' cigarette advertisement themes and images to youth,[14-16] and differences in the themes and images used in cigarette advertisements in youth-oriented and adult-oriented magazines.[7,8,12,17]

See also pp 511 and 550.

Two methodological problems limit the ability of the existing studies to draw definitive conclusions. First, since most youth-oriented magazines have many more adult than youth readers, these studies cannot exclude the possibility that cigarette advertisements in these magazines target adult, rather than youth, readers. Cigarette advertisements in these magazines may be targeting young adult readers (18- to 24-year-olds), rather than those younger than 18 years. The tobacco industry itself has defended its advertising practices on the grounds that its advertising is reaching young adults, rather than youths.[18]

Second, these studies only examined aggregate cigarette advertising. Youth tend to smoke only a few cigarette brands.[3] By aggregating all brands, even those smoked almost exclusively by adults, previous analyses may have reduced their power to detect a significant association between cigarette advertising and youth readership.

In this study, we examine whether brands smoked by a significant number of adolescents are more likely to advertise in magazines with higher youth readerships than cigarette brands smoked almost exclusively by adults. The analysis addresses the major limitations of previous research by (1) using data on adult and youth magazine readership as con-

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tinuous variables instead of classifying magazines as either adult or youth; (2) controlling for adult readership and young adult (ages 18-24 years) readership in the analysis; (3) using brand-specific, rather than aggregate, cigarette advertising data; and (4) comparing brands smoked by a substantial proportion of youths with those smoked almost exclusively by adults.

Although a finding that youth cigarette brands are more likely to advertise in magazines with more youth readers does not demonstrate an intent on the part of cigarette advertisers to expose adolescents to their advertising messages, such a finding would demonstrate that adolescents are more likely to be exposed to advertising by cigarette brands that are popular among youth smokers.

METHODS

Model of Advertising Behavior

Using a probit model, we analyze whether—controlling for the other factors that might affect a cigarette brand's magazine advertising—youth brands are more likely than adult brands to advertise in magazines with a high percentage of youth readers. We also compare the effect of different demographic readership characteristics on the likelihood that a cigarette brand advertises in a magazine.

Since only the outcome of the advertising decision is observed, the empirical specification uses a binary choice model of advertising behavior. The dependent variable is the presence or absence of advertising for a specific brand in a given magazine in 1994. The predictor variables in our model include the following: (1) the demographic characteristics of a magazine's readership, including the total number of readers (ages 12 years and older) and the percentage of readers in various demographic subgroups (youth [ages 12-17 years], young adults [ages 18-24 years], females, blacks, smokers, heavy smokers, and menthol smokers); (2) the cost per reader of placing an advertisement in a given magazine (the cost of a full-page, 4-color advertisement divided by the total number of magazine readers); (3) the number of annual magazine issues; (4) the total magazine advertising expenditures of a cigarette brand; (5) the popularity of the magazine (the percentage of readers who consider that magazine to be their favorite); and (6) the median income of magazine readers.

Regression Specification

For each cigarette brand, we determine whether that brand advertised in each of the 39 magazines in our sample. We create a record for each of these brand-magazine pairs. Since there are 12 brands and 39 magazines, the data set comprises 468 records. For each record, the dependent variable is 1 if the cigarette brand advertised in that magazine and 0 if the brand did not advertise in that magazine.

To assess possible differences in the advertising behavior of adult and youth cigarette brands, we constructed an indicator variable, δ, that is 0 for adult brands and 1 for youth brands and created an additional series of regressors by multiplying each explanatory variable by δ. These interaction variables allowed us to estimate separate regression coefficients for youth and adult brands. For example, the interaction variable for youth readership is defined as $\delta \times$ (*% youth readers*). This interaction variable enabled us to measure differences in the advertising patterns for adult and youth brands with respect to the level of youth readership in magazines in which they advertise.

In our complete probit model, the probability, P, that a given brand advertises in a particular magazine is $P = \Phi(y^*)$, where Φ is the cumulative distribution function for the standard normal and

$$y^* = A + A_i\,\delta + (B + B_i\,\delta) \times (\%\ \textit{Youth Readers}) + (C + C_i\,\delta) \times (\textit{Total Number of Readers}) + (D + D_i\delta) \times (\textit{Advertising Cost per Reader}) + (E + E_i\delta) \times (\textit{Total Advertising Expenditures for Brand Among All 39 Magazines}) + (F + F_i\,\delta) \times (\textit{Number of Annual Issues of Magazine}) + (G + G_i\,\delta) \times (\%\ \textit{Young Readers}) + (H + H_i\,\delta) \times (\%\ \textit{Female Readers}) + (I + I_i\,\delta) \times (\%\ \textit{Black Readers}) + (J + J_i\,\delta) \times (\%\ \textit{Hispanic Readers}) + (K + K_i\,\delta) \times (\%\ \textit{Smokers}) + (L + L_i\,\delta) \times (\%\ \textit{Heavy Smokers}) + (M + M_i\,\delta) \times (\%\ \textit{Menthol Smokers}) + (N + N_i\,\delta) \times (\%\ \textit{Favorite Magazine}) + (O + O_i\,\delta) \times (\textit{Income}) + \textit{Error}.$$

Here $\delta = 1$ for youth brands and $\delta = 0$ for adult brands.

By including both a variable and its interaction term in the regression specification, we can determine whether differences in the probability that adult and youth brands advertise in a magazine are statistically significant for each independent variable in the model. For example, the coefficient B reflects the change in likelihood of advertising as youth readership increases for adult cigarette brands, and the coefficient $(B + B_i)$ reflects the change in likelihood of advertising as youth readership increases for youth brands. Under the null hypothesis—that the probability of a cigarette brand advertising in a magazine is unrelated to the magazine's youth readership—both the coefficients B and B_i would be 0. If adult brands, but not youth brands, were more likely to advertise in magazines with higher youth readership, then the coefficient B would be positive and the coefficient $(B + B_i)$ would be 0 (B_i would be negative and equal in magnitude to B). If youth brands, but not adult brands, were more likely to advertise in magazines with higher youth readership, then the coefficient B would be 0, but the coefficient $(B + B_i)$ would be positive (B_i would be positive).

The statistical significance of the coefficient B_i allows us to assess the significance of any difference between adult and youth brands in the likelihood of advertising in magazines at varying levels of youth readership.

Magazine Sample Selection

To select a sample of magazines, we identified the 60 national magazines with the highest overall readership for 1994 using data from Simmons Market Research Bureau, Inc.[19] Of these 60 magazines, we included in the sample only those for which 1994 information on adult and youth readership and brand-specific cigarette advertising was available. Ten magazines were excluded because these data were unavailable. An additional 10 magazines were excluded because, as a policy, they did not accept tobacco advertising in 1994. One magazine was excluded because it contained cigarette advertisements for only 1 brand in 1994, and the other magazines in which that brand advertised were not among the 60 in our study. The final sample consisted of 39 magazines (Table 1).

Data Sources

Magazine Advertising Expenditures.—From the *Leading National Advertisers Brand Detail Report* for 1994, we determined whether each cigarette brand advertised in each of the 39 magazines in 1994 and estimated each brand's total expenditures for advertising in the 39 magazines in 1994.[20] These estimates of advertising expenditures are based on the number of pages of advertising and the price per advertising page for the magazine, not on actual dollars negotiated with a publisher.

Cost of Advertising.—We used the *SRDS Consumer Magazine Advertising Source* to obtain the cost for a single, full-page, 4-color advertisement in each magazine in 1994 and the annual number of issues for each magazine.[21]

Adult Magazine Readership.—Data on the adult (ages 18 years and older) readership for each magazine were obtained from the 1994 *Study of Media and Markets*,[19,22,23] produced by the Simmons Market Research Bureau, Inc. From the Simmons data, we also collected the following demographic information about

Table 1.—Readership Characteristics and Tobacco Advertising Expenditures in 39 Magazines*

Magazine	Youth Readers, Millions	Young Adult and Adult Readers, Millions	Percentage of Youth Readers	Percentage of Young Adult Readers	Tobacco Advertising, $ in Millions	Percentage Ratio of Tobacco Advertising Pages to Total Advertising Pages
Better Homes and Gardens	2.0	35.1	5.5	6.2	7.0	2.4
Car and Driver	1.5	6.5	18.3	25.1	18.3	5.1
Cosmopolitan	2.3	15.5	12.8	25.2	9.4	5.5
Ebony	2.1	11.3	15.8	17.7	22.0	5.2
Elle	0.8	3.8	17.8	33.8	1.8	2.3
Entertainment Weekly	0.7	3.7	15.4	24.9	8.8	10.7
Essence	1.3	6.2	16.9	20.2	1.8	4.7
Family Circle	1.2	27.6	4.2	5.8	6.2	1.9
Field and Stream	1.8	14.1	11.1	15.0	6.3	11.2
Glamour	2.2	10.7	17.1	33.0	6.0	4.8
GQ	1.0	5.8	15.1	30.6	2.0	3.3
Harper's Bazaar	0.7	3.2	18.2	16.4	1.0	1.9
Hot Rod	2.3	5.8	28.2	32.1	2.5	11.2
Jet	1.7	8.6	16.7	20.4	1.3	6.4
Ladies Home Journal	0.8	18.2	4.4	4.9	5.1	2.4
Life	2.7	18.0	12.9	14.1	4.7	13.8
Mademoiselle	1.4	5.6	19.7	35.6	3.1	5.8
McCall's	1.3	17.7	6.7	8.2	5.0	3.7
Motor Trend	1.4	4.9	22.1	28.8	2.5	6.1
New Woman	0.7	4.2	14.0	12.2	3.3	9.6
Newsweek	1.9	22.0	8.0	11.0	7.3	2.1
Outdoor Life	1.6	7.2	18.0	18.4	3.9	9.8
People	3.0	35.7	7.8	13.8	29.6	6.2
Popular Mechanics	1.6	9.5	14.5	15.1	4.5	8.8
Popular Science	1.9	7.3	20.8	12.6	1.2	1.7
Redbook	1.2	13.6	7.8	11.2	5.2	4.6
Road and Track	1.2	4.8	20.6	28.8	3.2	4.9
Rolling Stone	1.9	8.2	18.5	38.0	5.9	6.4
Self	0.8	4.1	16.2	18.2	1.1	1.9
Soap Opera Digest	1.3	7.8	14.3	21.0	3.2	14.6
Sport	2.3	4.5	33.8	23.3	2.4	15.2
Sporting News	1.4	3.6	27.8	24.7	1.0	6.4
Sports Illustrated	5.2	23.7	18.0	21.4	30.2	7.7
Time	2.0	23.6	7.7	12.6	12.2	3.0
True Story	0.7	4.3	14.8	10.8	1.5	13.5
TV Guide	6.7	44.3	13.2	15.7	19.7	4.3
Us	0.8	5.1	13.8	21.9	3.6	13.6
Vogue	2.2	10.2	18.0	30.8	3.0	2.3
Woman's Day	1.2	23.8	4.8	5.9	9.0	4.2
Total	68.8	489.8	...	...	232.0	...
Average per magazine	1.8	12.6	12.3	16.1	5.9	5.3

*Data are from Simmons Market Research Bureau, Inc,[19,22-24] Mediamark Research Inc,[25] and Leading National Advertisers.[20] Readers are defined as youth, ages 12 through 17 years; adult, ages 18 years and older; and young adult, ages 18 through 24 years. Ellipses indicate data not applicable.

adult readers for each magazine: median individual income; percentage of female, black, Hispanic, and young adult (ages 18-24 years) readers; percentage of readers who are smokers, heavy smokers (≥30 cigarettes per day), and smokers of menthol brands; and percentage of readers who reported a magazine to be their favorite.

Youth Magazine Readership.—Data on the number of youth (ages 12-17 years) readers for each magazine were obtained from the 1994 *Simmons Teen Age Research Study (STARS)*,[24] produced by the Simmons Market Research Bureau, Inc, and the *Mediamark Research Inc (MRI) Twelve Plus* report,[25] produced by MRI.

Data Collection

The data were extracted from the above publications and entered into an Excel spreadsheet. Data entry was 100% verified by comparing printouts of the spreadsheet with the data in each publication. After verification, a SAS data set was created by converting the Excel spreadsheet using DBMS/COPY.[26] We used SAS[27] and Stata[28] to conduct all analyses.

Classification of Youth and Adult Brands

In classifying adult and youth cigarette brands, we used data from the national Teenage Attitudes and Practices Survey-II (TAPS-II).[18,29] Using data obtained from 70 smokers in a cross-sectional, probability sample of 4992 youths between the ages of 10 and 15 years, we divided cigarette brands into 2 groups: those smoked almost exclusively by adults ("adult" brands) and those smoked by a substantial proportion of adolescent smokers ("youth" brands). Although there were only 70 smokers in our sample, the classification of adult and youth cigarette brands was identical to that obtained using the full sample of 438 smokers aged 12 through 17 years.

Because the TAPS-II survey did not record the name of every cigarette brand, the usual brand smoked for 2.5% of 10- to 15-year-old smokers was reported as "other." We therefore defined youth brands as those smoked by at least 2.5% of smokers aged 10 to 15 years in TAPS-II and adult brands as the usual brand smoked by less than 2.5% of 10- to 15-year-old smokers in TAPS-II. Based on these criteria, we classified 7 brands as adult brands (Salem [smoked by 0.6% of youth smokers], Virginia Slims [<2.5%], Benson & Hedges [<2.5%], Parliament [<2.5%], Merit [<2.5%], Capri [<2.5%], and Kent [<2.5%]) and 5 brands as youth brands (Marlboro [42.9%], Newport [24.6%], Camel [13.2%], Kool [4.1%], and Winston [2.8%]). Two generic brands (Basic and Doral) were classified as unknown and were excluded from analyses that compared adult and youth brands because we could not determine whether they were smoked by 2.5% or more of 10- to 15-year-old smokers (TAPS-II did not record the specific names of generic cigarette brands).

Since 1994 youth market share data were not available, the brand market share data were obtained from a 1993 survey. It is unlikely that changes in brand use among youth smokers from 1993 to 1994 would have been large enough to change the classification of brands as adult or youth brands in this study. Moreover, using 1993 youth market shares and then examining brand advertising behavior in 1994 alleviates the potential problem of advertising simultaneously affecting youth market share.

RESULTS

Descriptive Analysis

The 39 magazines in this study accepted $4.1 billion in total advertising in 1994, of which tobacco advertisements accounted for $232.0 million (5.7%) (Table 1) and cigarette advertisements accounted for $207.1 million (5.1%). There were 51 579 pages of total advertising in these magazines, of which 2737 (5.3%) were cigarette advertisements. These

Table 2.—Results From Probit Regression Model: The Effect of Magazine Readership Characteristics on the Probability of a Cigarette Brand Advertising in a Magazine

Independent Variable*	Coefficient (SE)
Youth readers, %	−0.051 (0.031)†
δ × (% youth readers)	0.113 (0.052)‡
Young adult readers, %	0.004 (0.022)
δ × (% young adult readers)	0.025 (0.037)
Female readers, %	0.007 (0.008)
δ × (% female readers)	−0.009 (0.013)
Black readers, %	0.002 (0.016)
δ × (% black readers)	−0.009 (0.026)
Hispanic readers, %	0.047 (0.046)
δ × (% Hispanic readers)	−0.080 (0.073)

*δ is 0 for adult cigarette brands and 1 for youth cigarette brands.
†Coefficient is significant at the 90% level ($P<.10$).
‡Coefficient is significant at the 95% level ($P<.05$).

cigarette advertisements represented 2085 separate insertions.

Youth readership ranged from 674 000 (*Entertainment Weekly*) to 6.7 million (*TV Guide*), and the proportion of total readership made up of youths ranged from 4.2% (*Family Circle*) to 33.8% (*Sport*) (Table 1).

Probit Regression Analysis

Four variables—the total advertising expenditures of a brand, the annual number of magazine issues, the percentage of readers who consider a magazine their favorite, and the percentage of youth readers—were found to affect significantly the probability that a cigarette brand would advertise in a given magazine. Of all the demographic magazine readership variables examined, only the percentage of youth readers was a significant predictor of whether or not cigarette brands were advertised in a given magazine (Table 2).

The coefficient for the youth readership interaction variable was statistically significant, indicating that the relationship between advertising and youth readership differed for youth and adult brands (Table 2). The probability of advertising in a magazine decreased with the percentage of youth readers for adult brands but increased significantly with the percentage of youth readers for youth brands. In other words, adult brands were increasingly less likely to advertise in magazines as the percentage of youth readers increased, and youth brands were increasingly more likely to advertise in magazines as the percentage of youth readers increased.

Holding all other variables constant at their sample means, the probability of an adult brand advertising in a magazine decreased from 0.73 (95% confidence interval [CI], 0.50-0.96) at a youth readership level of 4% (the lowest level in the sample magazines) to 0.58 (95% CI, 0.48-0.68) at a youth readership of 12% (the mean level for all magazines) to 0.18 (95% CI, 0.00-0.47) at a youth readership level of 34% (the highest level in the sample magazines) (Figure 1). In contrast, the probability of a youth brand advertising in a magazine increased from 0.32 (95% CI, 0.00-0.65) at a youth readership level of 4% to 0.51 (95% CI, 0.38-0.63) at a youth readership level of 12% to 0.92 (95% CI, 0.67-1.00) at a youth readership level of 34%.

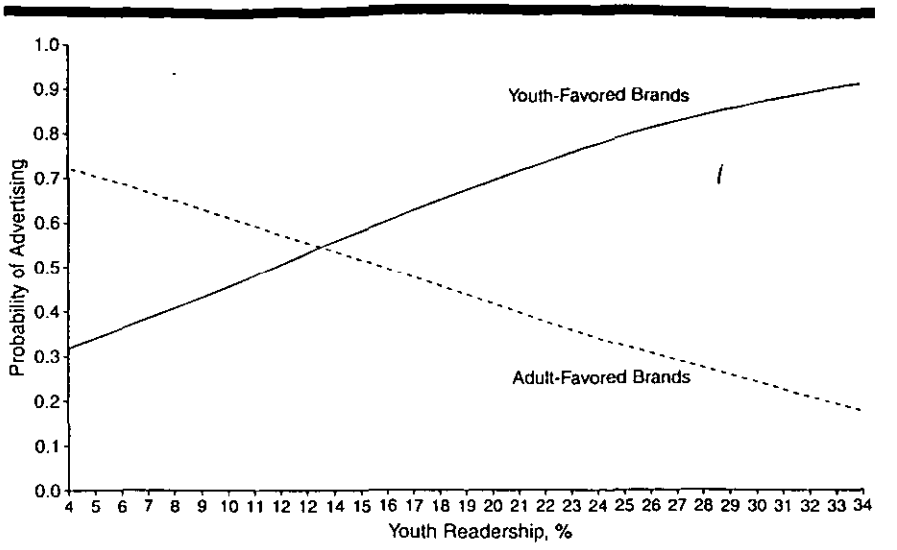

Figure 1.—Probability that a cigarette brand is advertised in a magazine as a function of the magazine's percentage of youth readers, holding all other variables fixed at their mean values in the sample: adult vs youth cigarette brands.

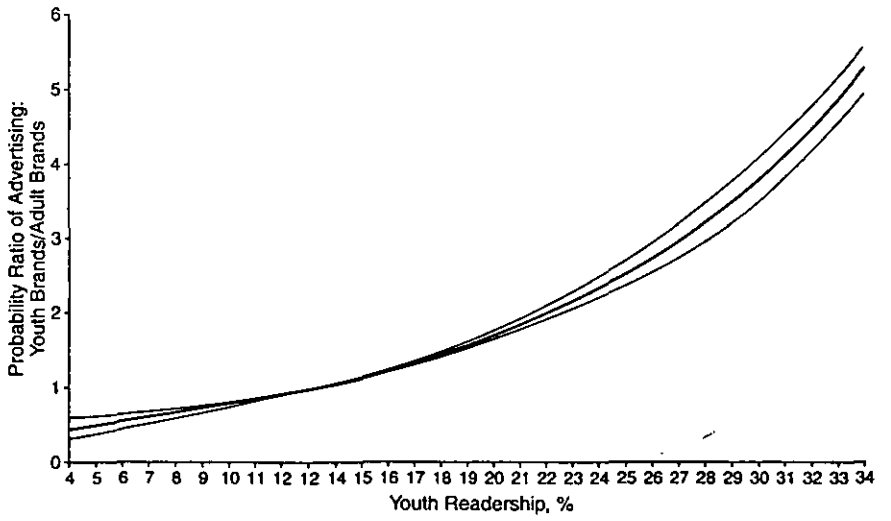

Figure 2.—Ratio of the probability that a youth cigarette brand is advertised in a magazine to the probability that an adult brand is advertised in that magazine as a function of the magazine's percentage of youth readers, holding all other variables fixed at their mean values in the sample (95% confidence intervals shown).

The ratio of the probability of advertising for a youth brand compared to an adult brand increased with increasing youth readership (Figure 2). At a youth readership level of 14% with all other variables evaluated at their mean values, the ratio of advertising probabilities was 1.04 (95% CI, 1.03-1.04), indicating that youth and adult brands were about equally likely to advertise in these magazines. At a youth readership level of 4%, the ratio of probabilities was 0.43 (95% CI, 0.29-0.58), indicating that youth brands were about half as likely to advertise in these magazines. At a youth readership level of 34%, the ratio was 5.21 (95% CI, 4.87-5.54), indicating that youth brands were about 5 times more likely to advertise in such magazines.

COMMENT

To the best of our knowledge, this article is the first to examine systematically the relationship between cigarette brand–specific advertising and youth readership among a large, nearly complete, sample of the most highly read magazines over a full year. This is also

the first study, to our knowledge, of cigarette advertising in magazines that compares advertising patterns for brands smoked by young adolescents with those smoked almost exclusively by adults. We found that youth brands were more likely than adult brands to advertise in magazines with a higher percentage of youth (ages 12-17 years) readers.

Although young adult readership is a potential confounder of the observed relationship between advertising and youth readership in previous studies, our analysis controlled for the effects of young adult readership on the likelihood of cigarette brand advertising in magazines. Both adult and youth brands were more likely (although not significantly) to advertise in magazines as young adult readership increased, but even after controlling for this effect, youth brands were still significantly more likely than adult brands to advertise in magazines with higher youth readership. The magnitude of the effect of youth readership was also greater than that observed for young adult readership. The percentage of youth magazine readers was the only demographic variable that was significantly related to cigarette advertising in magazines.

There are several important limitations to this study. First, although it is unlikely that our findings are explained entirely by the hypothesis that cigarette brand advertising is related to young adult, rather than adolescent, readership, it is probable that some of the observed effect of youth readership may arise from an overlapping effect of young adult readership. The presence of minor multicolinearity is suggested by the simple, pair-wise correlation of youth readers and young adult readers (r = + 0.68). A potential consequence of such multicolinearity would be to diminish the precision with which the coefficients are estimated.

Nevertheless, in the presence of this multicolinearity, our finding that cigarette advertising was significantly related to youth, but not young adult, readership strengthens our conclusion. If the tobacco industry, as it claims, were only attempting to reach 18- to 24-year-olds, one would expect the relationship between advertising and young adult readership to be stronger than that for advertising and youth readership.

Second, the study does not allow us to make inferences regarding the potential role of cigarette advertising in magazines on smoking behavior, including smoking initiation, among adolescents. Third, it is impossible to demonstrate an intent to target youth from an analytic study such as this one, even though the data indicate a brand-specific relationship between advertising and youth readership.

Despite these limitations, our findings provide new evidence that cigarette advertising in magazines is correlated with youth readership, and that this relationship is different for youth and adult cigarette brands. Youths are more heavily exposed to magazine cigarette advertisements for brands that are popular among youth smokers than for brands smoked almost exclusively by adults.

This finding has important public health policy implications. By adding to the evidence that cigarette advertising in magazines is related to youth readership, the results of this study strengthen the justification for regulating cigarette advertising in magazines. Based on the documentation in this and other studies[5-17] of widespread and heavy exposure of youths to cigarette advertising in magazines, public health considerations argue that cigarette advertising in all magazines should be eliminated.

References

1. US Dept of Health and Human Services. *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*. Atlanta, Ga: US Dept of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 1994.
2. Federal Trade Commission. *Federal Trade Commission Report to Congress for 1994: Pursuant to the Federal Cigarette Labeling and Advertising Act*. Washington, DC: Federal Trade Commission; 1996.
3. Regulations restricting the sale and distribution of cigarettes and smokeless tobacco to protect children and adolescents: final rule. *Federal Register* 44396-45313 (1996) (codified at 21 CFR §801, 803, 804, 807, 820, 897).
4. Fox BJ, Lightwood JM, Glantz SA. *Analysis of the Proposed Resolution of the United States Tobacco Litigation*. San Francisco: University of California, San Francisco, Institute for Health Policy Studies; 1997.
5. Albright CL, Altman DG, Slater MD, Maccoby N. Cigarette advertisements in magazines: evidence for a differential focus on women's and youth magazines. *Health Educ Q*. 1988;15:225-233.
6. Krupka LR, Vener AM, Richmond G. Tobacco advertising in gender-oriented popular magazines. *J Drug Educ*. 1990;20:15-29.
7. Altman DG, Slater MD, Albright CL, Maccoby N. How an unhealthy product is sold: cigarette advertising in magazines, 1960-1985. *J Commun*. 1987; 37:95-106.
8. Basil MD, Schooler C, Altman DG, Slater M, Albright CL, Maccoby N. How cigarettes are advertised in magazines: special messages for special markets. *Health Commun*. 1991;5:75-91.
9. Freeman H, Delgado J, Douglas CE. Minority issues. In: Houston TP, ed. *Tobacco Use: An American Crisis*. Washington, DC: American Medical Association; 1993:32-42.
10. Warner KE. *Selling Smoke: Cigarette Advertising and Public Health*. Washington, DC: American Public Health Association; 1986.
11. Hutchings R. A review of the nature and extent of cigarette advertising in the United States. In: *Proceedings of the National Conference on Smoking and Health: Developing a Blueprint for Action*. New York, NY: American Cancer Society; 1981:249-262.
12. King KW, Reid LN, Moon YS, Ringold DJ. Changes in the visual imagery of cigarette ads, 1954-1986. *J Public Policy Marketing*. 1991;10:63-80.
13. Warner KE, Goldenhar LM. Targeting of cigarette advertising in US magazines, 1959-1986. *Tob Control*. 1992;1:25-30.
14. Huang PP, Burton D, Howe HL, Sosin DM. Black-white differences in appeal of cigarette advertisements among adolescents. *Tob Control*. 1992; 1:249-255.
15. Lynch BS, Bonnie RJ, eds, Committee on Preventing Nicotine Addiction in Children and Youths, Division of Biobehavioral Sciences and Mental Disorders, Institute of Medicine. *Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths*. Washington, DC: National Academy Press; 1994.
16. Pollay RW, Lavack AM. The targeting of youths by cigarette marketers: archival evidence on trial. In: McAlister L, Rothschild ML, eds. *Advances in Consumer Research: 20*. Provo, Utah: Association for Consumer Research; 1993:266-271.
17. Warner KE. Tobacco industry response to public health concern: a content analysis of cigarette ads. *Health Educ Q*. 1985;12:115-127.
18. R. J. Reynolds Tobacco Co. We don't advertise to children. *Time Magazine*. April 9, 1984;123:91.
19. Simmons Market Research Bureau Inc. *Simmons Study of Media and Markets: Multi-Media Audiences: Adults (M4)*. New York, NY: Simmons Market Research Bureau Inc; 1994.
20. Leading National Advertisers. *1994 Brand Detail Report*. New York, NY: Leading National Advertisers, Publishers Information Bureau Inc; 1994.
21. SRDS (Standard Rate and Data Service). *SRDS Consumer Magazine Advertising Source*. Des Plaines, Ill: SRDS; 1997.
22. Simmons Market Research Bureau Inc. *Simmons Study of Media and Markets: Publications: Total Audiences (M1)*. New York, NY: Simmons Market Research Bureau Inc; 1994.
23. Simmons Market Research Bureau Inc. *Simmons Study of Media and Markets: Distilled Spirits, Mixed Drinks, Malt Beverages, Wine & Tobacco Products (P14)*. New York, NY: Simmons Market Research Bureau Inc; 1994.
24. Simmons Market Research Bureau Inc. *Simmons Teen Age Research Study (STARS)*. New York, NY: Simmons Market Research Bureau Inc; 1994.
25. Mediamark Research Inc. *Mediamark Research Inc (MRI) Teenmark/Twelve Plus*. New York, NY: Mediamark Research Inc; 1994.
26. Conceptual Software, Inc. *DBMS/COPY: The Tool for Software Connectivity, Combined Manual for Windows and DOS, Version 5.0*. Houston, Tex: Conceptual Software Inc; 1994.
27. SAS Institute Inc. *SAS/STAT Software: Changes and Enhancements, Release 6.10*. Cary, NC: SAS Institute Inc; 1994.
28. Stata Corp. *STATA Statistical Software: Release 5.0*. College Station, Tex: Stata Corp; 1997.
29. Pollay RW, Siddarth S, Siegel M, et al. The last straw? cigarette advertising and realized market shares among youths and adults, 1979-1993. *J Marketing*. 1996;60:1-16.

Tobacco Ad Curbs May Be Illegal, Memo Says

■ Media: White House warning says rules under consideration by Congress might violate industry's free-speech rights.

By ALISSA J. RUBIN
TIMES STAFF WRITER 3/2/98

WASHINGTON—The White House is raising a red flag to deter Congress from imposing sweeping restrictions on cigarette advertising, arguing in a memorandum scheduled for release today that broad legislative curbs would "raise significant constitutional problems."

The memo, a copy of which was obtained Sunday by The Times, casts doubt on the legality of legislating new curbs on industry advertising practices in the absence of a comprehensive settlement acceptable to both sides. It implicitly tells lawmakers that a broad ban on advertising is possible only if tobacco companies voluntarily agree to it.

Therein lies a legislative dilemma. The industry has made clear that the price of a voluntary agreement to curtail advertising is legislation shielding tobacco companies from future class-action lawsuits brought by people who claim their health has been harmed by the companies' products.

If Congress rejects that quid pro quo and maintains the right to allow such legal actions, lawmakers might have to settle for passage of more modest advertising restrictions that would not infringe on the industry's free-speech rights.

Associated Press

Billboard ad for Winston cigarettes in Seattle is covered up last December under a county Board of Health decree.

The White House memo provides detailed answers to questions on tobacco advertising and marketing submitted by Sen. John McCain (R-Ariz.), chairman of a committee with jurisdiction over tobacco legislation.

On another key issue, the Clinton administration said it would oppose any effort by Congress to exempt the industry from antitrust laws so tobacco companies could consult with each other about cigarette prices.

"An antitrust exemption that allowed tobacco firms to set prices jointly could be used by firms to increase prices beyond what is necessary to deter youth smoking and thereby increase profits at the expense of consumers," the memo states.

In addition, the memo says the administration strongly supports the right of states to enact tobacco marketing and advertising restrictions stronger than federal curbs approved by Congress.

Both points underline the legislative objectives of the industry, which has been seeking a broad antitrust exemption as well as the preemption of state tobacco laws.

The memo largely ignores McCain's repeated invitation to make suggestions that would help Congress craft legislation that would move beyond current Food and Drug Administration regulation of tobacco advertising and marketing. Lawmakers have repeatedly criticized the White House for refusing to say specifically what it would accept in a tobacco bill.

Neither McCain nor the White House would comment on the memo.

The tobacco debate is at a critical point in Congress, with several committees scheduled to begin work on legislation this month. McCain's Commerce, Science and Transportation Committee is expected to start work on a bill March 12.

Congressional interest in new tobacco regulation was prompted by a proposed settlement reached last summer between the industry and the attorneys general of 40 states. The agreement, if adopted, would require tobacco companies to pay the states hundreds of billions of dollars over 25 years and accept a virtual moratorium on tobacco advertising, especially ads aimed at teenagers. In exchange, the industry would receive protection from future class-action lawsuits and limits on the amount of future liability payments. In addition, tobacco companies would receive an antitrust exemption to allow them to set prices collectively.

Stringent limits on the advertising and marketing of tobacco products is one of the chief goals of public health groups. They cite recent studies published in the Journal of the American Medical Assn. showing that young people who own promotional tobacco products such as hats and T-shirts and who recognize tobacco ads are far more likely to become smokers than those who do not.

These groups have been urging Congress to legislate many of the advertising restrictions that were proposed in the settlement, including bans on billboard and online advertising, as well as ads depicting human figures or cartoon characters such as Joe Camel.

All of the proposed restrictions would almost certainly be challenged on 1st Amendment grounds if imposed by Congress over industry objections, according to the White House memo.

The Supreme Court has said limitations on commercial speech must be narrowly tailored. A ban on billboard ads designed to appeal to adults as well as to children might not meet the court's test. Similarly, a prohibition on using cartoon characters and human images in ads published by magazines that are read largely by adults might be ruled unconstitutional.

The White House memo argues that the FDA's new tobacco advertising and marketing regulations, which are being challenged in federal court, represent the extent of what the government can do without raising 1st Amendment problems.

Under the FDA rules, billboards are banned if they are near schools, parks and playgrounds. Advertisements must use black text on a white background unless they appear in publications whose readership is at least 85% adult and includes less than 2 million children. Advertisements in convenience and grocery stores would be limited to text only.

The administration memo also raises questions about the constitutionality of the settlement's proposal to prohibit the glamorization of tobacco products by film and sports stars and the prohibition of color advertisements.

The White House position on tobacco advertising restrictions reflects the view of some 1st Amendment lawyers, who say many provisions of last year's settlement would be unconstitutional if legislated by Congress.

tobacco - settlement - advertising

Tobacco - media - advertising

Cynthia A. Rice 03/02/98 08:11:20 PM

Record Type: Record

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

cc: Peter G. Jacoby/WHO/EOP, kburke1 @ os.dhhs.gov @ inet, Laura Emmett/WHO/EOP
Subject: FTC Testimony

Thanks to Tom, we have the FTC testimony. It lays out FTC's history of tobacco legislation, noting that in the FTC shares jurisdiction with FDA over regulation of food, over-the-counter drugs, medical devices, and cosmetics.

It then calls for a reaffirmation of the FDA's authority while saying the FTC is willing to do more, saying: "We believe the FDA's efforts have been valuabler in promoting public health and that Congress should affirm FDA's authority to regulation tobacco products as it would any other drug or device. We also believe that the FTC can make a significant contribution to any post-settlement regulation of tobacco advertising."

The testimony goes on to say that:

1) At a minimum, legislation should not alter the FTC's current authority over unfair or deceptive acts and practices in the advertising or marketing of tobacco products.

2) Should Congress determine that FTC has a role to play in administering the advertising provisions of the settlement, it would do so "vigorously and competently."

The testimony then gives a strong statement against the anti-trust provisions of the settlement -- after a detailed discussion, it concludes "the Commission believes that the industry has not established a need for any antitrust exemption in order to implement the proposed settlement."

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Thomas L. Freedman/OPD/EOP
Mary L. Smith/OPD/EOP
Jerold R. Mande/OSTP/EOP

Tobacco - ext - advertising and notes + memos

Marketing, Advertising, and Labeling

The Administration understands that separate and apart from any legislation, the tobacco industry will voluntarily agree in consent decrees and contracts to restrict its advertising and marketing of tobacco products. These voluntary limitations will include but go beyond restrictions imposed by the FDA in its August 1996 rule.

Notwithstanding these agreements, the Administration will press for legislative language that confirms the FDA's authority to regulate the advertising and marketing of tobacco products, as asserted in its August 1996 rule. The Administration will carefully review any legislative language relating or referring to the industry's consent decrees or contracts to ensure that such language does not limit or in any way interfere with the FDA's use of this authority. The Administration also will carefully review such language to ensure consistency with constitutional requirements.

The Administration supports legislation to require "Canadian-style" warning labels -- i.e., strengthened warnings (such as "cigarettes cause cancer" and "smoking can kill you") that appear on 25% of the front or display panel of tobacco products, printed in alternating black-on-white or white-on-black type. The Administration also supports legislation to require warnings of similar prominence on advertisements for tobacco products.

Internal notes:

The advertising and marketing restrictions in the settlement are very strong. They include all the restrictions in the FDA rule -- most notably, requirements of black-on-white advertising and bans on tobacco brand names in non-tobacco merchandise. The district court struck down these restrictions as inconsistent with the FDA's statutory authority. The Court of Appeals clearly will not reverse this decision, and the Supreme Court probably will leave it alone as well. The settlement also includes restrictions on advertising and marketing going far beyond the FDA rule, such as restrictions on point-of-sale advertising and bans on outdoor advertising, Internet advertising, the use of human images and cartoon characters, and payments for tobacco product placement in movies and other media. Congress could not enact such restrictions consistent with the Constitution.

The above statement is written to emphasize that the restrictions on advertising are part of consent decrees and other contracts -- not part of our proposed legislation. To the extent the restrictions are a part of the legislation -- or seen as a condition of the legislation -- serious constitutional issues will arise. To the extent the restrictions are a part only of the settlement agreements, they probably will be permissible as voluntary relinquishments of rights.

The statement insists on statutory confirmation of FDA authority over the advertising and marketing of tobacco products. This grant of authority is valuable even though the settlement agreements go further than the FDA could, because the FDA will have no authority to enforce

the contracts between the industry and the states. With a specific grant of authority, the FDA itself could enforce the restrictions contained in its 1996 rule, as well as any other constitutionally permissible restrictions it might wish to impose in the future.

The statement contemplates that the legislation may refer to the consent decrees. Such a reference could make sense to bolster enforcement of the agreements, to include them within a broader severance scheme (e.g., what happens if a court invalidates part of an agreement?), or for certain other reasons. The statement, however, makes clear that the Administration will carefully scrutinize any reference of this kind to ensure that it does not interfere with FDA authority -- and more important, to ensure that it does not bring the advertising restrictions so far within the legislative scheme as to increase their vulnerability to constitutional challenge.

The part of the statement relating to labels on packages and advertisements is consistent with the provisions of the settlement agreement. These provisions would strengthen significantly the existing warning labels, both in the starkness of the message and in its size and placement on tobacco products.

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Tobacco - settlement - advertising

Tobacco Settlement

I. Existing and Proposed Speech Restrictions

FDA Regulations

- tombstone in nonadult publications
- no outdoor advertising within 1000 ft of schools or playground areas
- tombstone on all outdoor advertising
- no brandname sponsorship of athletic, social, & cultural events
- no brandname marketing of nontobacco products
- 30 day notice of advertising in new media

Additional Restrictions Contemplated by the Proposed Resolution

- no human images or cartoon characters in any advertising (effectively adding this restriction only as to adult publications)
- no outdoor advertising
- no advertising on the internet
- no payments for product placement in movies, tv programs, or video games
- no payments to "glamorize" tobacco use in media appealing to minors
- rotational warnings and additional disclaimers on cigarette packages and cartons
- limited tombstone point-of-sale advertising except in adult-only stores and tobacco outlets
- corporate culture limitations on lobbying and requirement that Tobacco Institute be dissolved

If the restrictions are to apply to settling as well as nonsettling parties and if they are to apply nationwide, the restrictions would have to be included in federal law, whether by statute or regulation.

II. Outline of Restrictions Assuming the Government Asserts an Interest in Protecting Children

o Any federal statute that conditions the limitation of a manufacturer's liability for tobacco-related injury claims on the manufacturer's entry into an agreement with the states should not reference (either implicitly or explicitly) any speech restrictions that may be contained in those state agreements.

o A federal statute would confirm FDA authority over tobacco advertising and distribution, and adopt the FDA's (or make its own) findings regarding the need for regulating tobacco advertising.

o Whether or not the existing FDA advertising restrictions would be separately included in a federal statute, they would continue to have the force of law as regulations.

o A federal statute would expressly waive Dormant Commerce Clause constraints on state regulation of the tobacco industry.

o A federal statute would expressly waive the preemption contained in the Cigarette Labeling Act and authorize the FDA to impose labeling requirements on packages, cartons, and advertising.

o A federal statute or FDA regulations would contain the requirement that cigarette advertising and packaging contain new rotational warnings and additional disclaimers (regarding certain brand styles, such as "light" and "low").

o A federal statute or FDA regulations would contain a requirement that outdoor advertising carry warning messages of appropriate size.

o The restrictions contained in any statute or regulations would also be included as terms in state court consent decrees, but would be redrafted to apply only to settling parties and to activities within the jurisdiction of the court entering the decree. These restrictions are:

FDA restrictions:

- tombstone in nonadult publications
- no outdoor advertising within 1000 ft of schools or playground areas
- tombstone on all outdoor advertising
- no brandname sponsorship of athletic, social, & cultural events
- no brandname marketing of nontobacco products
- 30 day notice of advertising in new media

Additional restriction:

- rotational warnings and additional disclaimers

o Any additional advertising restrictions contemplated by the Proposed Resolution would be considered for inclusion only in the state court consent decrees. At a minimum, the restrictions would have to be amended to apply only to settling parties and to activities within the jurisdiction of the court entering the decree. The risk of successful constitutional challenge to the decree would be lessened if the restrictions were more narrowly tailored to achieve the government's interest in protecting children. Two examples of how such restrictions might be more narrowly tailored would be:

- no outdoor advertising within 1000 ft from areas frequented primarily or in large numbers by children (but not just schools or playground areas)

- no direct payments for product placement in movies, tv programs, or

video games aimed at, primarily viewed by, or viewed in large numbers by children

- The general provision authorizing the FDA to regulate tobacco advertising would permit the FDA to craft additional, constitutionally permissible restrictions, including, for example, restrictions that would apply to the internet and to billboards.

- The federal statute and consent decrees would contain appropriate severance provisions.

Tobacco - ad restrictions
and notes + memos

Marketing, Advertising, and Labeling

The Administration understands that separate and apart from any legislation, the tobacco industry will voluntarily agree in consent decrees and contracts to restrict its advertising and marketing of tobacco products. These voluntary limitations will include but go beyond restrictions imposed by the FDA in its August 1996 rule.

Notwithstanding these agreements, the Administration will press for legislative language that confirms the FDA's authority to regulate the advertising and marketing of tobacco products, as asserted in its August 1996 rule. The Administration will carefully review any legislative language relating or referring to the industry's consent decrees or contracts to ensure that such language does not limit or in any way interfere with the FDA's use of this authority. The Administration also will carefully review such language to ensure consistency with constitutional requirements.

The Administration supports legislation to require "Canadian-style" warning labels -- i.e., strengthened warnings (such as "cigarettes cause cancer" and "smoking can kill you") that appear on 25% of the front or display panel of tobacco products, printed in alternating black-on-white or white-on-black type. The Administration also supports legislation to require warnings of similar prominence on advertisements for tobacco products.

Internal notes:

The advertising and marketing restrictions in the settlement are very strong. They include all the restrictions in the FDA rule -- most notably, requirements of black-on-white advertising and bans on tobacco brand names in non-tobacco merchandise. The district court struck down these restrictions as inconsistent with the FDA's statutory authority. The Court of Appeals clearly will not reverse this decision, and the Supreme Court probably will leave it alone as well. The settlement also includes restrictions on advertising and marketing going far beyond the FDA rule, such as restrictions on point-of-sale advertising and bans on outdoor advertising, Internet advertising, the use of human images and cartoon characters, and payments for tobacco product placement in movies and other media. Congress could not enact such restrictions consistent with the Constitution.

The above statement is written to emphasize that the restrictions on advertising are part of consent decrees and other contracts -- not part of our proposed legislation. To the extent the restrictions are a part of the legislation -- or seen as a condition of the legislation -- serious constitutional issues will arise. To the extent the restrictions are a part only of the settlement agreements, they probably will be permissible as voluntary relinquishments of rights.

The statement insists on statutory confirmation of FDA authority over the advertising and marketing of tobacco products. This grant of authority is valuable even though the settlement agreements go further than the FDA could, because the FDA will have no authority to enforce

the contracts between the industry and the states. With a specific grant of authority, the FDA itself could enforce the restrictions contained in its 1996 rule, as well as any other constitutionally permissible restrictions it might wish to impose in the future.

The statement contemplates that the legislation may refer to the consent decrees. Such a reference could make sense to bolster enforcement of the agreements, to include them within a broader severance scheme (e.g., what happens if a court invalidates part of an agreement?), or for certain other reasons. The statement, however, makes clear that the Administration will carefully scrutinize any reference of this kind to ensure that it does not interfere with FDA authority -- and more important, to ensure that it does not bring the advertising restrictions so far within the legislative scheme as to increase their vulnerability to constitutional challenge.

The part of the statement relating to labels on packages and advertisements is consistent with the provisions of the settlement agreement. These provisions would strengthen significantly the existing warning labels, both in the starkness of the message and in its size and placement on tobacco products.

Tobacco - settlement - advertising

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First Amendment Issues in the June 20th Proposed Resolution on Tobacco

The June 20, 1997 Proposed Resolution on Tobacco ("Resolution") contains many restrictions on advertising and other expressive activities that raise serious questions under the First Amendment to the United States Constitution. Moreover, analysis of these questions is complicated by the fact that the Resolution is unclear as to which speech restrictions would be included in (a) a generally applicable federal statute; (b) a more limited federal statute that conditioned the receipt of certain benefits (such as immunity from punitive damage awards) on either compliance with the restrictions or entry into state consent decrees that contained the restrictions; or (c) consent decrees between the States and the tobacco companies.

For ease of analysis, we assume in Section I of this Memorandum that each of the speech restrictions in the Resolution would be made mandatory and would be incorporated without condition in a federal statute. As we explain below, the Department of Justice currently is defending against First Amendment challenge the Food and Drug Administration's recent advertising and promotion regulations, which are incorporated in the Resolution; and the Department believes that there is a good chance that the courts ultimately will uphold most, if not all, of those restrictions. We also believe, however, that there is a substantial risk courts would conclude that the First Amendment prohibits most of the restrictions in the Resolution that go beyond the FDA restrictions.[1]

In Section II, we consider whether otherwise unconstitutional restrictions could be salvaged by enacting a federal statute that makes such restrictions conditional, i.e., that offers certain legal immunity in exchange for agreement to abide by those restrictions. We conclude that -- although the question is far from clear -- courts most likely would conclude (based upon the so-called "unconstitutional conditions" doctrine) that otherwise unconstitutional speech restrictions are not remedied merely by offering immunity from liability in exchange for an agreement to refrain from protected speech.

In Section III, we consider whether the restrictions of doubtful constitutionality can be included in consent decrees to which the federal government will not be a party. The caselaw is very sparse on the question of whether, and under what circumstances, consent decrees between state and private parties may include terms that impose otherwise unconstitutional restrictions on the private parties' exercise of their First Amendment rights. We conclude that although the speech restrictions in question are more likely to survive constitutional challenge if they are part of a consent decree than if they are imposed by way of a "conditional" statute, there nonetheless is a significant risk that any restrictions that would be unconstitutional if imposed by a generally applicable statute also would be deemed unenforceable terms of the consent decrees.

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[1] Indeed, including these more questionable restrictions in a statute along with the FDA restrictions would endanger the fate of the FDA restrictions, unless Congress were to make clear that courts are to consider the two sets of restrictions entirely severable.

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In conclusion, we recommend, based on our legal review, that the federal statute include, in a generally applicable form, those advertising and related restrictions that track the FDA restrictions.[2] We also recommend that if the Administration considers critical or essential any other restrictions contained in the Resolution, such restrictions should, where necessary and possible, be conformed to constitutional requirements and then enacted as part of the generally applicable federal statute.

I. GENERALLY APPLICABLE STATUTE

We begin our substantive analysis by assuming, in section A, that the Resolution's speech restrictions are intended to serve the government's interest in protecting children from advertising about products that may not lawfully be sold to them, and considering whether those restrictions are sufficiently tailored to serve that interest. On this assumption, we review the proposed restrictions that track the FDA regulations that have already been promulgated (and which the Department is currently defending) as well as the proposed restrictions that go beyond the present FDA regulations. We conclude that several of the restrictions that go beyond the FDA regulations may be insufficiently tailored to serve the governmental interest in protecting children.

We then consider, in section B, a different and more controversial potential defense of the speech restrictions -- namely, that they are intended to serve the government's interest in protecting all consumers (including adults) from truthful, nonmisleading advertising that promotes a lawful but deadly and highly addictive product. This justification would be controversial because it would require the Supreme Court to recognize that the government has a legitimate interest in banning advertising in lieu of banning a deadly product that could not itself practically be made unlawful (because of its addictive properties and longstanding legality). We note that there is no direct Supreme Court precedent for the recognition of such an interest. We note also that the justification arguably conflicts with the rationale, if not the holdings, of some Supreme Court cases. Nevertheless, the special concerns that are presented by tobacco advertising may lead the Court to uphold restrictions that it would strike down if applied to other products.

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[2] It is important to note, in this regard, that restrictions that would be constitutional if imposed pursuant to a generally applicable federal statute would not necessarily remain constitutional if imposed only as a "condition" of receiving some benefit: in that case, the resulting underinclusiveness of the restriction could fatally undermine the asserted governmental interest that would be advanced to justify the speech restriction. As the Supreme Court recently explained in Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995), selective application of a restriction on commercial speech "brings into question" the true purpose of that restriction. Id. at 1592. If the government imposes advertising constraints on some commercial speakers, but declines to do the same as to an analogous class of speakers, the disparate treatment can "undermine and counteract" the effects of the imposition, and suggest that the government is not truly or fully committed to advancing its claimed interest. Id. at 1592-93.

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A. Assuming a Governmental Interest in Protecting Children

1. Codification of FDA Restrictions.

The hypothetical federal statute would, first, codify the commercial speech restrictions that the FDA recently has promulgated. See 21 C.F.R. §§ 897[fill in cite], 61 Fed. Reg. 44396 (Aug. 28, 1996). The district court in Coyne Beahm, Inc. v. FDA, 958 F. Supp. 1060 (M.D.N.C. 1997), enjoined implementation of those restrictions because it concluded that the FDA lacked statutory authority to impose them. Id. at 1083-86. That decision presently is on appeal to the Fourth Circuit. Because of its statutory holding, the district court had no need to address the constitutional challenges to those restrictions, see id. at 1086 n.33; but the Department of Justice has forcefully argued in the Coyne Beahm case that the FDA restrictions should survive First Amendment challenge under the Central Hudson standard, because they are appropriately tailored attempts to restrict advertising that would be seen by, and appeal to, minors, a group of persons who may not purchase (or, in many states, use) the product advertised. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

The principal FDA restrictions, if implemented, would be the following:

(i) In most media, images and color could not be used in tobacco advertising; instead, such advertising "shall use only black text on a white background" — i.e., what commonly is known as "tombstone" advertising. 21 C.F.R. § 897.32(a). This restriction would not apply to advertising 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). This includes, for instance, publications such as Newsweek. In such periodicals, colors and images would be unrestricted.

(ii) There could be no 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. 21 C.F.R. § 897.30(b). Outside that 1,000-foot radius, outdoor advertising of tobacco products would be restricted to tombstone advertising.

(iii) Tobacco manufacturers could not sponsor athletic, social, and cultural events "in the brand name" of a tobacco product. 21 C.F.R. § 897.34(c). Manufacturers would remain free to sponsor such events; the regulation simply would require them to do so in their own corporate name rather than in the name of their tobacco products.

(iv) Tobacco manufacturers and distributors could not market non-tobacco products and services under tobacco brand names. This restriction is designed to reach items such as tee shirts, caps, sporting goods, and other items bearing tobacco brand names. 21

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C.F.R. § 897.34(a).

(v) Tobacco manufacturers, distributors, and retailers would have to provide written notice to the FDA 30 days prior to using new advertising media; and the notice "shall describe the medium and discuss the extent to which the advertising . . . may be seen by persons younger than 18." 21 C.F.R. § 897.30(a)(2). The object of the notice requirement is to "giv[e] the agency an opportunity to review the problems presented by a new media and to design new regulations or adapt current ones." 61 Fed. Reg. 44501. This would not impose any restriction on the use of new media for tobacco advertising. In particular, it would not require manufacturers, distributors, or retailers to obtain permission or approval from FDA before using new media.[3]

The cumulative effect of these regulations — in particular the first two — together with the statutory prohibition on radio and television advertising of cigarettes and little cigars, 15 U.S.C. § 1335, would be that (i) tobacco advertising could not include color or images except in so-called "adult" publications; and (ii) all tobacco advertising would be prohibited within 1000 feet of a school or playground, on radio and television, in "sponsored" events, and on nontobacco products (such as t-shirts).

The FDA has attempted to tailor its regulations to restrict advertising in a manner directly related to the "unlawful" aspects of tobacco advertising — namely, advertising that effectively is an offer of sale to minors of a product that they may not lawfully purchase. The agency would be able to do this without any constitutional constraint were it not for the incidental effect that such restrictions would have on receipt by adults of such advertising. In performing the Central Hudson analysis,[4] courts should be cognizant of the fact that the restrictions are aimed at the Government's wholly legitimate and compelling interest in curtailing minors' use of tobacco products, rather than at restricting adults' rights to receive information about their consumer choices.

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[3] The Resolution, citing FDA regulation § 897.30(a)(2), would purport to "[r]estrict tobacco advertising to FDA-specified media." Resolution at 8. In fact, as explained in the text, there is nothing in the FDA regulation that would restrict tobacco advertising in new media. The cited regulation merely would require manufacturers to give written notice to the FDA 30 days prior to using new advertising media. There would be no requirement that FDA approve use of new media — it would be merely a "preview," or "first-look," requirement that would provide the agency a reasonable opportunity to examine the possible effect of such advertising on minors and take appropriate prophylactic steps, if necessary, to ameliorate any negative effect that such advertising might create. We are assuming that the federal statute contemplated in the Resolution would simply track the FDA "preview" regulation, and would not actually prohibit advertising in new media.

[4] The Central Hudson analysis asks as a threshold question ("first prong") whether the regulated speech is "related to unlawful activity" or is misleading. 447 U.S. at 564. If so, the speech can be freely regulated by the Government; if not, the next issues to be considered are: "whether the asserted governmental interest is substantial" ("second prong"); "whether the regulation directly advances the governmental interest asserted" ("third prong"); and "whether [the regulation] is not more extensive than is necessary to serve that interest" ("fourth prong"). Id. at 566.

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There can be no doubt that the Government has a sufficiently substantial interest in discouraging the use of tobacco products by minors. Accordingly, the second Central Hudson prong is met without question. Moreover, we think the FDA was plainly justified (as Congress would be, especially if it took notice of the FDA's evidentiary record) in concluding that significant limitations on children's access to tobacco product advertising -- especially to the powerful use of color and imagery in such advertising -- will help to reduce significantly minors' demand for, and use of, such products, and thereby benefit public health. Accordingly, the third prong of the Central Hudson inquiry could be satisfied (especially if Congress took notice of the FDA's evidence and findings in incorporating the regulations in a statute).

The only difficult question is whether, under prong four of Central Hudson, the FDA regulations are "more extensive than is necessary to serve [the governmental] interest." 447 U.S. at 566.[5] An important factor that courts must consider in applying this prong of Central Hudson is whether, in protecting minors, the government entirely or unnecessarily restricts adult access to truthful, nonmisleading information about products that may lawfully be sold to them. As the Court explained in striking down a restriction on advertising for contraceptives in Bolger v. Youngs' Drug Products Corp., 463 U.S. 60 (1983), "the government may not 'reduce the adult population . . . to reading only what is fit for children.'" Id. at 73-74 (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

The Department of Justice's district court brief in the Coyne Beahm litigation argues that the FDA regulations satisfy prong four, by (i) carefully targeting the types of advertising that are most appealing to minors, and imposing greater restrictions on advertising in the media in which minors are most likely to encounter tobacco advertising; and by (ii) permitting the continued availability of alternative channels for manufacturers and sellers of tobacco products to communicate important information regarding their products, a fact that weighs heavily in assessing the fit between the Government's regulatory means and ends under prong four of Central Hudson. See Florida Bar v. Went for It, Inc., 115 S. Ct. 2371, 2380-81 (1995).

With respect to the latter point, the Department's brief in Coyne Beahm argues that the FDA regulations have been carefully tailored to preserve, rather than impair, the ability of manufacturers to provide to potential adult consumers pertinent information that might permit those consumers to make "'intelligent and well informed'" private economic decisions. 44

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[5] In Board of Trustees of the State Univ. of N.Y. v. Fox, the Court held squarely that this inquiry does not amount to a "least restrictive means" test. 492 U.S. 469 (1989). Instead, the Court's decisions require

> a "'fit' between the [government's] ends and the means chosen to accomplish those ends,'" a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Id. at 480 (citations omitted).

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Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1505 (1996) (principal opinion) (quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976)). See also Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977). Moreover, with the sole exception of outdoor advertising within 1000 feet of schools and playgrounds, which poses special risks with respect to children, the FDA regulations would allow certain and important product information to be conveyed.[6] And, to the extent that the regulations affect the form of tobacco advertising, for example by restricting the use of images and colors, they would do so not in order to limit the flow of information to adults, but rather solely to reduce the effect of the advertising on children, an audience that plaintiffs have no First Amendment interest in reaching, and one that the manufacturers publicly disavow any desire to sell to. FDA's adoption of its restrictions on images reflects a careful effort to reduce the special appeal of tobacco advertising to minors without intruding unduly on the ability of the tobacco industry to provide valuable factual product information about their products to adults so that those adults may make intelligent and well-informed economic decisions.

2. Additional Advertising Restrictions.

In addition to the FDA-promulgated restrictions, the hypothetical legislation also would (i) ban all use of human images and cartoon characters and (ii) ban all tobacco advertising outdoors and on the Internet. Resolution at 9. We are assuming for purposes of this section that Congress's reason for enacting these additional advertising restrictions, like the rationale for the FDA restrictions, would be to reduce advertising's seductive effect on minors and thereby decrease the incidence of teenage use of tobacco products. Nevertheless, this combination of additional prohibitions would raise serious constitutional questions because it would appear that, under the proposed legislation, the only media that would remain available for tobacco advertising would be direct mail, magazines and newspapers. And even in those media, nothing but "tombstone" black-and-white text would be allowed, except in so-called "adult" publications, which could contain color and image tobacco advertising, so long as it did not depict human figures or cartoon characters.

a. The Additional Image Restrictions.

We believe that it will be much harder to persuade courts that the additional image restrictions will materially advance the government's interest in diminishing teenagers' use of

[6] The FDA would prohibit even tombstone advertising within 1000 feet of a school or playground, despite the agency's determination that, in all other settings, tombstone advertising would not present such a serious risk to children. It might be argued, then, that a similar "tombstone-only" limitation should have sufficed for outdoor advertising near schools. Nonetheless, the FDA banned tombstone advertising in that setting because the agency concluded that outdoor advertising in the vicinity of schools and playgrounds intrudes on children in a way that other advertising media do not — it results in prolonged exposure of tobacco advertising to an effectively captive audience. FDA therefore determined that the less restrictive alternative of image and color restrictions would not suffice to ameliorate the message conveyed to children by such advertising. 61 Fed. Reg. 44507-08.

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tobacco products. The FDA regulations are based on the assumption that image advertising in adult publications — i.e., publications whose readership is at least 85 percent adults and includes less than two million children — did not create a significant problem with respect to children. FDA identified magazines that were of substantial interest to children under 18, and an 85 percent figure appeared to distinguish those magazines from others that were not as interesting to children. 61 Fed. Reg. 44513. FDA supplemented the 85 percent figure with a limit of two million young readers because youth readership of more than two million "is so great that the publication can no longer be considered to be of no interest to those under 18." 61 Fed. Reg. 44514.

The legislation would go beyond this and ban the bulk of image advertising even in periodicals that are overwhelmingly read by adults and to which the FDA found it unnecessary to extend its image prohibition. Of course, eliminating human and cartoon figures from "adult" periodicals -- such as Newsweek -- will have some marginal beneficial effect on the smaller group of children who read such publications. However, the fate of such a restriction would be questionable, in light of the fact that it would eliminate the only remaining effective outlet for disseminating such image advertising to adults. Courts may well conclude that in order to be "carefully tailored" to serve an asserted governmental interest in protecting kids, a regulation must leave available -- as the FDA regulations would -- sufficient means by which images can be disseminated to adults. See Bolger, 463 U.S. at 73-74.

Indeed, for this reason, inclusion of the "additional" image prohibitions might well undermine the government's ability to justify the FDA's narrower restrictions on image and color tobacco advertising, since the provision would entirely prohibit the conveyance of such images and color to adults. Therefore, we believe that the marginal benefits that might be realized by closing the "adult publication" loophole with respect to image advertising likely are outweighed by the substantial risks that such a restriction would create (at least insofar as the government attempts to justify the restrictions on the theory that it may regulate advertising that is directed at unlawful consumers).[7]

b. The Additional Media Restrictions.

Even more difficult to sustain (as we explain below) would be the legislation's prohibition on tombstone advertising about the function, price, etc., of tobacco products (i) outdoors and (ii) on the Internet. What is more, enacting these broad prohibitions on tombstone advertising might well threaten the constitutionality of the whole "combination" of statutory advertising restrictions, because the practical effect — when such prohibitions are overlaid on the remainder of the advertising restrictions — is that tobacco manufacturers and retailers essentially would be

[7] Moreover, courts may well find that the additional restriction on cartoons and human figures is fatally underinclusive, since it would not reach other images, including most prominently (nonanimated) images of animals. Unless Congress has some evidence that animation and human images create a greater risk of underage use of tobacco products than, say, images of real animals, then at the very least this discrepancy probably should be eliminated.

reduced to conveying information about their products in "adult" publications and direct mail. As a result, courts may simply invalidate the advertising restrictions wholesale: rather than trying to pick and choose from among provisions in a comprehensive regulatory scheme, courts might well decline to engage in severance analysis, and instead send the matter back to Congress to come up with a coherent and constitutional framework from scratch. See Reno v. ACLU, No. 96-511, slip op. at 39 & n.49 (June 26, 1997).

i. Outdoors. Courts likely would conclude that the restriction on tombstone advertising outdoors is "more extensive than necessary" to serve the government's interest in reducing the appeal to children (thus failing prong four of the Central Hudson test), in light of the FDA's conclusion that such tombstone advertising causes little harm to children outside the unique "captive audience" context near schools.[8]

ii. The Internet. As for the Internet, it would be reasonable for Congress to conclude that children might be especially susceptible to tobacco advertising — even tombstone advertising — in that new medium.[9] Nevertheless, Congress presumably could, in lieu of prohibiting tobacco advertising on the Internet, simply require tobacco advertisers to "tag" their advertisements in a manner that allows parents readily to block their children's access to such advertising. If this obvious less restrictive alternative would satisfy the government's interest to virtually the same extent as an absolute prohibition, courts almost certainly would invalidate the more extreme restriction. See Reno v. ACLU, No. 96-511, slip op. at 33 (June 26, 1997) (explaining that compelled tagging schemes are an obvious less restrictive alternative to banning Internet transmission of content harmful to minors). Other less restrictive means may also be available, such as limiting restrictions to those Internet sites as to which there is some evidence that children are likely to constitute a substantial or predominant percentage of the users.

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[8] The risk of invalidation would be especially acute in a legal challenge brought by vendors, who would be prohibited from using "brand" advertising "directed outside from a retail establishment." Resolution at 9. For example, a convenience store owner apparently could not post a sign on her storefront that reads "We sell Camels," even if that store is more than 1000 feet from any school or playground. Such a vendor might have little other means — and certainly no effective means that is not prohibitively expensive — of advising the adult public that she sells Camels. Accordingly, this application of the legislation almost certainly would be declared unconstitutional. See Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 93 (1977). By contrast, the proposed "point-of-sale" advertising restrictions, see Resolution at 9 and Appendix VII, would still permit vendors significant opportunity to inform in-store customers about the products they sell.

[9] We note, however, that -- unlike the media as to which the FDA accumulated evidence for purposes of its regulations -- there is not likely to be any current evidence demonstrating the risk to children of Internet advertising. An Internet restriction would be easier to sustain after development of some evidence that there is advertising on the Internet that causes harm.

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3. Product Placement.

The hypothetical legislation would ban "direct and indirect payments for tobacco product placement" in movies, television, etc. Resolution at 9. This prohibition is intended to refer to brand-name product placement. If we are correct about this, the provision is analogous to the proposed FDA restrictions on sponsorship and merchandising. We have argued in Coyne Beahm that such restrictions are constitutional, since a brand-name product placement for all intents and purposes is a proposal to engage in a commercial transaction, which is the definition of commercial speech. See Board of Trustees of SUNY v. Fox, 492 U.S. 469, 473-74, 482 (1989). As with the FDA's sponsorship restriction, the proposed ban on brand-name product placement would be designed to "reduce the 'friendly familiarity' [among children] that [such placement] generates for a [tobacco] brand," 61 Fed. Reg. 44527, by eliminating a principal means by which minors are exposed to brand-name appeals. We note, however, that insofar as it were easy to identify certain categories of movies to which children have little or no access (such as NC-rated films), or certain hours at which children rarely watch television, the prohibition should not extend that far.

4. Funding for "Glamorizing".

The legislation also would prohibit manufacturers from making "direct and indirect payments to 'glamorize' tobacco use in media appealing to minors, including [music]." Resolution at 9. This prohibition on "glamorizing" presents particularly novel questions. Depending on the context, speech restricted by this prohibition could be considered commercial speech subject to Central Hudson, political speech subject to traditional First Amendment scrutiny, or some novel category of speech subject to an entirely separate constitutional standard of review. In any event, the term "glamorizing" could lead to vagueness and overbreadth challenges. Insofar as this provision would prohibit manufacturers of tobacco products, not from "generic" advertising or "brand-name" product placement, but instead simply from paying other persons to include, in their popular media, expression that implicitly extols the use of cigarettes and smokeless tobacco -- for example, paying a movie studio to have characters in its movies smoke cigarettes -- such conduct might not be relegated to the category of "commercial speech," since it is not obvious that the funding itself nor the expression that is funded would typically be perceived as a proposal to engage in a commercial transaction. See Fox, 492 U.S. at 473-74, 482. On such a theory, the restriction would be subject to strict scrutiny under the First Amendment. It is unlikely that it could survive such scrutiny, since governmental attempts to restrict (or permit liability for) fully protected speech simply because that speech makes dangerous behavior "attractive" to children generally are impermissible.[10]

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[10] See, e.g., Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York, 360 U.S. 684 (1959), (State could not refuse to grant a license for exhibition of the film "Lady Chatterley's Lover" simply because that film allegedly "present[s] . . . adultery as a desirable, acceptable and proper pattern of behavior," id. at 685); Video Software Dealers Ass'n v. Webster, 968 F.2d 684 (8th Cir. 1992) (invalidating on constitutional grounds state statute prohibiting the sale or rental to minors of videos "depicting violence"); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (First Amendment bars liability against magazine where reader

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5. Restrictions on Trade Associations.

Under Title I.G. of the Resolution (pages 22-23 & Appendix IV), the Tobacco Institute and the Council for Tobacco Research would be dissolved. If done by statute, this arguably could be an impermissible bill of attainder, assuming there is not substantial evidence of wrongdoing by such associations.[11] And, insofar as such trade organizations are principally engaged in protected activities, such as petitioning, the compelled dissolution also would be a fairly clear violation of the constituent members' First Amendment rights of expressive association, unless such dissolution were necessary to address a compelling state interest. See Roberts v. United States Jaycees, 468 U.S. 609, 61X-XX (1984); Sanitation & Recycling Industry, Inc. v. City of New York, 107 F.3d 985, 998-1000 (2d Cir. 1997).

Manufacturers of tobacco products also would be prohibited from forming new trade associations except in accordance with strict procedures and federal oversight designed to ensure compliance with antitrust and other applicable laws. Resolution at 50. These continuing restrictions on future trade associations, including "continuing oversight" by the Department of Justice of the "structure, by-laws and activities" of such organizations, id., might violate members' rights to expressive association, unless there were evidence of misconduct (including antitrust violations) by such organizations, or unless such restrictions would otherwise satisfy the strict scrutiny required under Roberts.

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accidentally committed suicide while attempting technique of autoerotic asphyxiation described therein), cert. denied, 485 U.S. 959 (1988); Eclipse Enterprises v. Gulotta, 942 F. Supp. 801 (E.D.N.Y. 1996) (invalidating on constitutional grounds local law criminalizing sale to minors of trading cards depicting a "heinous crime, an element of a heinous crime, or a heinous criminal"); Watters v. TSR, Inc., 715 F. Supp. 819 (W.D. Ky. 1989) (First Amendment bars liability against manufacturer of "Dungeons and Dragons" game for failure to warn, where "mentally fragile" person committed suicide after having become consumed with the role-playing nature and fantasy of the game), aff'd on other grounds, 904 F.2d 378 (6th Cir. 1990); Zamora v. CBS, 480 F. Supp. 199 (S.D. Fla. 1979) (First Amendment bars liability against television networks to recover damages where television violence allegedly caused viewer to become addicted and desensitized to violent behavior, resulting in his killing an 83-year-old woman); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) (First Amendment bars liability against producer of motion picture where viewers killed a youth while allegedly imitating the violence depicted therein); DeFilippo v. NBC, Inc., 446 A.2d 1036 (R.I. 1982) (First Amendment bars liability against television network where viewer accidentally committed suicide while attempting hanging stunt he saw on the "Tonight Show"); Olivia N. v. NBC, Inc., 126 Cal. App. 3d 488 (Cal. Ct. App. 1981) (First Amendment bars liability against television network where viewers raped a minor with a bottle while allegedly imitating such a rape depicted in television drama); Walt Disney Productions, Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981) (First Amendment barred liability against producer and broadcaster of television program where child sustained injuries while seeking to reproduce a sound effect demonstrated for children on "Mickey Mouse Club").

[11] If it had been demonstrated that the associations in question had been engaged in widespread unlawful conduct, compelled dissolution might be permissible to prevent similar future misconduct. See, e.g., Hartford-Empire Co. v. United States, 323 U.S. 386, 428 (1945); Sanitation & Recycling Industry, 107 F.3d at 999.

6. Requiring Commitment to Corporate Principles and Restricting Lobbying Activity Not in Conformity with Such Principles

Manufacturers of tobacco products would be required to "promulgat[e] corporate principles that express and explain the company's commitment to compliance, reductions of underage tobacco use, and development of reduced risk tobacco products." Resolution at 22. If this simply requires companies to publish a commitment not to engage in certain proscribed conduct, this would not appear to raise serious constitutional problems. See, e.g., Reno Hilton Resorts, 319 NLRB 1154, ____ (1995). (It would, for example, be analogous to the common employer notice to the effect that "We do not discriminate and are an equal-opportunity employer.") But insofar as manufacturers would be required not only to state what they are doing and will do as required by law, but also to state that they are doing so because of "principles" to which they are "committed," that would raise compelled-speech problems. This provision should be drafted in a manner that makes clear that companies are not required to swear to a belief that certain conduct is not only mandated, but morally correct. See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943). Cf. Pacific Gas & Elec. Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986).

In addition, lobbyists for manufacturers would be required to agree in writing that, in their lobbying activity, they will "fully abide by the manufacturer's business conduct policies and any other policies and commitments as they apply, especially those related to prevention of youth tobacco usage." Resolution at 22. This seems to contemplate that manufacturers and/or their lobbyists would be prohibited from lobbying to achieve certain ends, and therefore it would appear to violate the First Amendment right to petition. See, e.g., City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379 (1991).

7. Government Speech Using Earmarked Funds.

Manufacturers of tobacco products would be required to pay large sums of money to the United States, some of which would be earmarked for an extensive anti-smoking campaign by the Department of Health and Human Services. Resolution at 36-37. It could be argued that this would raise compelled-speech problems, but we think that the First Amendment does not restrict the government from engaging in anti-tobacco speech that is paid for by a tax on tobacco products, at least so long as there is no threat that the speech would reasonably be attributed to the manufacturers.

B. Assuming a Governmental Interest in Protecting All Consumers, Including Adults

When taken together, the advertising regulations in the Resolution would appear to ban tobacco advertising in all media except for direct mail, magazines and newspapers. And even in those media, nothing but "tombstone" black-and-white text would be allowed, except in so-called "adult" publications, which could contain color and image tobacco advertising, so long

as it didn't depict human figures or cartoon characters. Although for the reasons that we have set forth we believe that the breadth of some of the restrictions may undermine the contention that they are carefully tailored to protect minors, that very breadth might support an argument that the restrictions directly advance a governmental interest in reducing the general use by consumers (adults and minors alike) of a product that is (i) extremely dangerous but (ii) impossible to ban without giving rise to an extensive black market (due to the highly addictive nature of the product).

Although dependent on a novel and controversial argument, a ban (or near ban) on tobacco advertising, it might be argued, would provide the only effective means of reducing consumption given the severe societal costs and relative ineffectiveness of banning the product. On this view, the very fact that the restrictions are so comprehensive makes them less constitutionally suspect. The highly addictive nature of tobacco, when combined with its severe, adverse health consequences, makes it in some sense unique among lawfully available products. In this respect, it could be argued that the government has an interest in suppressing the promotion of tobacco that is analogous to its interest in suppressing the promotion of other addictive and dangerous drugs such as cocaine, heroin, and marijuana. Although the sale of cocaine, heroin, and marijuana has been banned, this fact arguably should not be dispositive. For example, if the government would be free to prohibit the promotion of the use of marijuana if it were to determine for law enforcement reasons that the drug should be decriminalized, the government arguably also should be permitted to continue the ban on advertising about that product, which would have remained banned but for the unacceptably high societal costs (such as black markets) of the ban. Moreover, to the extent that tobacco may be analogous to other lawful products, alcohol would appear to be the only one that shares with tobacco the twin properties of being both addictive and physically dangerous. (Although gambling might be said to be equally addictive, it is not physically dangerous.) Given the nation's unhappy experience with the prohibition of alcohol, the analogy between alcohol and tobacco might lend support to the government's contention that banning tobacco advertising constitutes a legitimate means of reducing consumption and avoiding the certain adverse consequences of prohibition. (The government could further conclude, however, that tobacco is unlike alcohol in an important respect -- namely, that even the use of a small daily quantity of tobacco is dangerous, typically addicting and has no measurable benefits to health.) Thus, the argument that tobacco is a unique product is not inherently implausible, and, for that reason, the government would at most be arguing for a limited exception to the general rule that the government may not ban all (or nearly all) truthful, nonmisleading advertising about a lawful product.

Such an argument would not require the Court to overhaul commercial speech doctrine. Indeed, the argument could draw support from the fact that it arguably comports with all prongs of the prevailing Central Hudson standard: the government has a substantial interest in reducing tobacco consumption as a result of its adverse health consequences; a ban on advertising directly advances that interest by suppressing the demand for the product; and a ban is narrowly tailored to the goal of reducing consumption given the practical impossibility of banning the sale or use of an addictive product that has been legal for so long. On this view, the purpose of the Central Hudson test is not to prohibit the government from banning advertising about certain lawful

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products, but merely to ensure that such bans are in fact designed to serve the claimed governmental interest. Although the Court struck down regulations of alcohol advertising in both Rubin and 44 Liquormart, neither case technically forecloses this reading of Central Hudson. In each of those cases, the Court's holding ultimately rested on the underinclusiveness of the regulation at issue, not the impermissibility of the governmental interest in reducing consumption by banning promotion. Moreover, the Court has not directly addressed an argument that a ban on advertising of a lawful addictive product may be necessary due to the certain adverse consequences that would attend the ban of such a product.

We caution that such an argument would be very controversial. The Court likely would view it as a variation of the argument that the government's supposedly greater power to ban a product affords it the lesser power to ban advertising about the product. That argument appears to be one that has fallen into disfavor with the Court. Although the Court relied on the rationale in upholding Puerto Rico's ban on in-state gambling advertising, see Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986), the Court recently described that portion of Posadas as mere dicta in striking down a federal restriction on advertising about the alcohol content of beers. See Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1589 n.2 (1995). Moreover, two terms ago, in striking down a state law banning alcohol price advertising in 44 Liquormart Inc. v. Rhode Island, 116 S.Ct. 1495 (1996), all nine Justices agreed that Posadas applied too lenient a version of the Central Hudson test. The lead opinion in that case expressly rejected the greater-includes-the-lesser argument because it was premised on an impermissibly paternalistic assumption about the capacity of adults to make rational judgments regarding lawful products. See 116 S. Ct. at 1510-1513 (opinion of Stevens, Kennedy, Ginsburg, and Thomas, JJ.); accord id. at 1517 (Thomas, J.). We are also concerned that the Court would not look favorably on an argument premised on the peculiarly dangerous (and addictive) nature of tobacco, as both Rubin and Liquormart involved regulations of alcohol advertising. In fact, the lead opinion in Liquormart expressly rejected the notion that there was a vice exception to the First Amendment. See id. at 1513.

Perhaps even more importantly, it might prove difficult to show it is by no means clear that a ban on advertising would in fact satisfy the final prongs of the Central Hudson test. The government would have to show, first, that a ban on advertising directly advances the governmental interest in reducing consumption. It may be difficult to prove that advertising not covered by the FDA restrictions actually serves to attract new users and not simply to affect brand preferences. In addition, the government would have to show that a complete ban would be narrowly tailored to serve the governmental interest in reducing consumption of a deadly product. The decision in 44 Liquormart suggests that such a showing could be difficult. In that case, the lead opinion emphasized the special dangers that attend complete bans on truthful, nonmisleading advertising about a lawful product by relying on Central Hudson itself, which noted that "bans" had not previously been upheld and should be treated with "special care." See Central Hudson, 447 U.S. at 566 n.9 ("We review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. See Virginia Pharmacy Board, 425 U.S. at 780 n.8 (Stewart, J., concurring). Indeed

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in recent years this Court has not approved a blanket ban on commercial speech unless the expression is itself flawed in some way, either because it was deceptive or related to unlawful activity."). Moreover, in her 44 Liquormart concurrence, Justice O'Connor applied a vigorous version of the Central Hudson test in concluding that less restrictive means than a price advertising ban could have been employed to effect the state's interest in promoting temperance. She identified in particular such less restrictive alternatives as imposing taxes and engaging in counterspeech. Both of these options would appear to be available here, as would a third: requiring the production of a safer product. The critical point is that, to succeed under Central Hudson, the government would have to be able to show not simply that a ban on advertising would reduce consumption, but that a ban on all advertising constitutes a "narrowly-tailored" means of reducing consumption. The evidentiary basis would have to be substantial, particularly when one considers that -- prior to the FDA regulations -- governmental attempts at reducing smoking through means other than banning speech have been relatively minimal. Moreover, the evidentiary basis would almost certainly have to be included in congressional findings and not put forth post-hoc for the first time in litigation.

We note further that the regulations in the Resolution do not in fact effect a complete ban on tobacco advertising. For example, they would permit some advertising to be made available in some "adult" media, and, in those media, they would permit tobacco companies to engage in some image and color advertising. That gap in the restrictions, which permits promotional advertising, may undermine a claimed governmental interest in reducing consumption by new users. We note also that we are unaware of any evidence or even indication that the government has in fact concluded that a product ban would be unworkable (or that it would be desirable). The government may be hesitant to commit itself to a position that such a ban would be infeasible (particularly if it wishes to keep that regulatory option open). On the other hand, to the extent that the government in fact believes that a ban would be inappropriate because individuals should be able to choose to smoke if they wish to do so, a complete ban on advertising would be hard to justify.

In sum, the rationale of existing caselaw would appear to be in great tension with the argument that the government may ban tobacco advertising without banning tobacco. At the same time, a ban on tobacco advertising has always been the paradigmatic test case of the commercial speech doctrine. Even Justice Blackmun, the earliest and strongest defender of the view that commercial speech should be entitled to full protection, suggested that tobacco advertising could be treated differently. See R.A.V. v. St. Paul, 505 U.S. 377, 415 (1992) (Blackmun, J. concurring). It is therefore possible that such a ban would be upheld, on the theory described above or on some other theory that is not apparent from the Court's prior decisions. Nevertheless, we are reluctant to recommend the adoption of sweeping regulations on the speculative possibility that the Court might create a tobacco exception to commercial speech doctrine, particularly when there is more solid doctrinal support for regulations that are tailored to restricting advertising that reaches those persons -- such as children -- who may not lawfully purchase the product. See, e.g., 44 Liquormart, 116 S.Ct. at 1505 n.7; Florida Bar v. Went For It, 115 S.Ct. 2371, 2376 (1995) ("Under Central Hudson, the government may freely regulate commercial speech that concerns unlawful activity or is misleading."); Bolger v.

Young Drug Products Corp., 463 U.S. 60, 69 (1983) ("The State may also prohibit commercial speech related to illegal behavior."); Central Hudson, 447 U.S. at 563-64 ("The government may ban * * * commercial speech related to illegal activity." (citations omitted)); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973). Moreover, we emphasize that the risk of invalidation of a complete advertising ban would be almost certain in the absence of congressional findings that would support a conclusion that such a ban is an appropriately narrow means of reducing tobacco consumption.

II. CONDITIONAL STATUTE

In this Section, we consider whether those speech restrictions in the Resolution that would be extremely vulnerable to constitutional challenge if imposed directly -- such as many of those that go beyond the existing FDA regulations -- may be saved by enacting a federal statute that "conditions" the receipt of some governmental benefit (such as certain kinds of nationwide tort immunity) on the agreement to abide by such speech restrictions.

A federal statute that would make compliance with the advertising restrictions an express condition of receiving certain nationwide tort immunities -- such as nationwide immunity from punitive damages -- would be extremely vulnerable to constitutional challenge. Such legislation should be treated under the traditional unconstitutional conditions doctrine. Under that doctrine, the statute likely would be invalidated to the extent that it contains restrictions that could not be constitutionally imposed directly by statute. There would be no way in which a party could obtain the benefits contemplated in the proposed federal legislation without agreeing to refrain from expressing First Amendment rights. In this respect, the proposed legislation differs from the statute restricting lobbying activities by certain tax exempt organizations that was upheld in Taxation with Representation v. Regan, 461 U.S. 540 (1983), and is more like the statute prohibiting editorializing by recipients of public television grants that was struck down in F.C.C. v. League of Women Voters, 468 U.S. 364 (1984).[12]

We note, however, the unprecedented circumstances surrounding this agreement. The restrictions involve commercial speech, and they have not been made a condition of the manufacturers' right to sell their products. They have instead been made conditions of the manufacturers' receipt of extraordinary immunities from the liabilities that may be imposed under the existing common law legal regime. Moreover, as we have suggested in our substantive First Amendment analysis, restrictions on cigarette advertising have long been thought to constitute the test case for the commercial speech doctrine, and thus the product at issue may have some bearing on the constitutional analysis. Nevertheless, we are very doubtful

[12] The Supreme Court adopted an extremely lenient approach to conditioning First Amendment rights in Buckley v. Valeo, 424 U.S. 1 (1976). There, the Court held that the federal government could condition a presidential candidate's receipt of public campaign financing on his agreement not to expend private funds for the campaign. We doubt that this exceptional standard would be applicable here, particularly given that the purported condition would not facilitate additional speech in any respect.

that in the end these potentially distinguishing characteristics would suffice to spare from invalidation a federal statute that expressly conditioned tort immunities on sweeping advertising restriction.

The constitutional analysis probably would not change if the statute merely conditioned the benefits on entry into specific consent decrees that contain the speech restrictions. To the extent that the statute would specifically reference the contents of the settlement agreements, it would, in effect, condition the relief from liability on the relinquishment of the manufacturers' First Amendment rights. In so doing, the statute would appear to impose an unconstitutional condition no less directly than if the government imposed the restrictions expressly.

We note that there is little precedent that bears directly on this point. Although there are cases in which the government was found to have unconstitutionally conditioned the receipt of tax exemptions, public employment, and unemployment benefits on speech restrictions, there are few cases that involve legislation tied to settlement or other agreements between a government and a private party. We are skeptical, however, that a court would attribute much weight to the fact that the statute would reference litigation settlements. It was the representatives of state governments who conducted the negotiations and reached the settlement agreement, not the federal government. Thus, as one district court pointed out in rejecting the federal government's argument that federal restrictions on cable operators were justified as part of the quid pro quo of states' granting monopoly cable franchises, "the sovereign which purportedly provided the benefit to the [private parties] is not the same sovereign that placed the consideration on the benefit." Chesapeake and Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993). By parity of reasoning, to the extent that the government is accorded more leeway in imposing speech restrictions as terms of settlement agreements (a proposition we consider below), there is a substantial argument that only the government involved in the settlement should so benefit from the relaxation of First Amendment scrutiny.[13]

III. CONSENT DECREES

In this Section, we consider a different way in which the problematic speech restrictions in the Resolution might be "conditionally" imposed on tobacco manufacturers: by including such restrictions as terms in the contemplated state court consent decrees. A substantial argument can be made that the inclusion of such restrictions in the consent decrees should survive constitutional challenge, so long as the restrictions do not apply to non-parties and do not purport to restrict advertising in other states. Nevertheless, the only analogous precedent for upholding the inclusion of the restrictions in the decrees is distinguishable. For example, unlike the other cases we have examined, here the state governments are seeking the speech restrictions as a condition for dropping suits that the states themselves have initiated in order to impose economic

[13] The constitutional analysis likely would differ, however, if a federal statute were to condition the receipt of immunity on manufacturers' resolution of state-initiated lawsuits, without requiring (either expressly or implicitly) that settlements of such lawsuits contain speech restrictions.

sanctions, not incident to a settlement resolving a suit brought by private parties against the states. Thus, although we believe that this approach has a significantly greater likelihood of success than the "conditional statute" alternative we discussed in Section II, nonetheless there still would be a substantial risk that courts would conclude that the "settlements" constitute little more than mechanisms by which the states have attempted to impose unconstitutional conditions upon the First Amendment rights of private parties. It is important to emphasize that none of these conclusions is free from doubt, and that the precedent directly bearing on these questions is sparse.

A.

Before proceeding to a consideration of the appropriate First Amendment analysis, it is important to set forth two threshold points.

First, the Court has held that settlements ordinarily may not bind the legal rights of third parties. Cf. Martin v. Wilks, 490 U.S. 755 (1989). We therefore believe it very likely that a court would review those speech restrictions that would apply to non-parties under the ordinary rules that govern the direct imposition of speech restrictions. Moreover, it is unclear to us what legal basis a state court would have for entering settlement terms that apply to non-parties, such as the restrictions on vendor advertising. Accordingly, we assume below that the only restrictions to be included in consent decrees are those that would restrict the expression of parties to the decrees.

Second, even if advertising restrictions that would otherwise violate the First Amendment may be included in state consent decrees, there remains a substantial question regarding the limits that the Constitution places on the territorial scope of state consent decrees containing such restrictions. While a state attorney general may be able to enforce a decree to preclude a tobacco company from advertising within the state in which the decree was entered, it is by no means clear that the same state attorney general would have the constitutional authority to enforce the decree to preclude a tobacco company from advertising in another state. The limits that the Constitution may place on the territorial scope of the decrees stem from dormant commerce clause concerns as well as principles of state comity.[14]

On this second point, the Supreme Court's recent decision in BMW v. Gore, 116 S.Ct. 1589 (1996), sets forth the basic limiting principles. There, the Court considered whether an Alabama jury's verdict that imposed punitive damages on a multinational car manufacturer could be sustained against a due process challenge as an appropriate punishment for harms imposed nationwide. The Court concluded that the verdict could not be sustained on this ground. It explained that even though Congress could impose a nationwide rule that would subject a manufacturer to punitive damages for its wrongful conduct throughout the nation, "it is clear that

[14] As we discuss below, the extra-territorial scope of the restrictions may also lead a court to conclude that their inclusion in a state consent decree is invalid for First Amendment purposes.

no single state could do so, or even impose its own policy choice on neighboring states." Id. at 1596-1597. The Court explained that this restriction on state power stemmed not only from the dormant commerce clause, but also from "the need to respect the interests of other states." Id. It concluded that "it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other states." Id. In reaching that conclusion, the Court relied on a series of cases that set forth the general rule regarding the limits on one state's power to regulate beyond its borders. See, e.g., Healy v. Beer Institute, 491 U.S. 324, 335-336 (1989) (the Constitution has a "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual states within their respective spheres") (footnote omitted); Edgar v. MITE Corp., 457 U.S. 624 (1982); Bigelow v. Virginia, 421 U.S. 809, 824 (1975) (striking down an advertising restriction and explaining that "[a] State does not acquire power or supervision over the internal affairs of another state merely because the welfare and health of its own citizens may be affected when they travel to that State").[15]

It is not clear whether the settlement context would substantially alter the state comity analysis that BMW sets forth. BMW concerned a state's imposition of a restriction on an "unwilling" company, rather than the enforcement of a restriction agreed to in the course of a settlement. A state may be freer to contract (or settle cases) on the condition that certain out-of-state activity not occur. However, one state's attempt to preclude advertising in another state against the latter state's arguably will offend principles of state comity in a manner similar to one state's attempt to impose economic sanctions against a company for engaging in lawful behavior in another state.

One solution might be for Congress expressly to authorize nationwide consent decrees entered into by individual states or a group of states, thereby abrogating comity limitations in a manner similar to Congress's waiver of dormant commerce clause limitations on states' authority to regulate interstate conduct.[16] However, even assuming Congress has the power to authorize such consent decrees, or to waive comity limitations generally, such a statute likely would implicate Congress directly in the speech restrictions contained in such decrees. An act of Congress that authorized one state to restrict advertising in another state might itself be subject to a substantial First Amendment challenge. Thus, a congressional waiver of comity limitations arguably would undermine a central purpose of the consent decrees, which is to establish legally enforceable advertising restrictions that the First Amendment would prevent Congress (or a state) from imposing directly by statute.

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[15] We do note, however, that a state may have an interest in the out-of-state business practices of a settling corporation. Whether that interest would suffice to permit a state court to enjoin out-of-state activity, or rather give rise to some other remedy (such as revocation of the corporate charter), is unclear.

[16] One mechanism for accomplishing this outcome would be for Congress to approve an interstate compact.

A better solution lies in restricting the scope of the consent decrees to accord with state boundary lines. As the proposed consent decrees would potentially be adopted in some 40 states, such a territorial restriction may not in practical terms be of great consequence. That is particularly true given the First Amendment concerns that settlements involving restrictions on advertising would raise. Even if one assumes that states may in general seek to include terms in contracts or settlements that attempt to affect out-of-state activity, there are particular reasons to be skeptical that they may do so in order to restrict protected speech. Cf. Bigelow, supra.

B.

We now address whether restrictions on speech that could not constitutionally be imposed directly or conditionally by statute nevertheless could be included in a settlement agreement or consent decree that would resolve pending state litigation between the state attorneys general and the tobacco companies. The Supreme Court has not directly addressed the proper standard for evaluating the constitutionality of settlements with the government that purport to preclude private parties from exercising their First Amendment rights. Among the few lower federal court cases that have considered the question, two basic approaches have emerged.[17]

Some courts have approached the problem as one that implicates only the general doctrine of waiver of constitutional rights that the Supreme Court established in Johnson v. Zerbst, 304 U.S. 458 (1938). Relying on Zerbst, these cases have held that individuals may settle litigation with the government by agreeing to refrain from exercising First Amendment rights so long as they do so in a knowing, intelligent, and voluntary manner. See Wilkicki v. Brady, 882 F. Supp. 1227, 1232 (D.R.I. 1995) (noting the two approaches). In applying this test, these courts have focused primarily on whether the purported waiver was clear and whether the parties were of equal bargaining power and engaged in genuine, arms-length negotiations. See Miami Telecommunications, Inc. v. City of Miami, 743 F.Supp. 1573, 1578 (S.D. Fla. 1990) (invalidating agreement after characterizing it as a "contract of adhesion").

Other courts have considered whether some agreements that would meet the Johnson standard should nonetheless be prohibited. Drawing on the unconstitutional conditions doctrine, and the Supreme Court's analysis of the waiver of claims under 42 U.S.C. § 1983, see Newton v. Rumery, 480 U.S. 386 (1987), these courts have considered three related factors in addition to voluntariness: the legitimacy of the government's interest in requesting that the right be waived; the nexus between the right and the underlying litigation; and the public policies pertaining to the right involved (as they relate both to the public generally and to the individual purporting to effect the waiver). See, e.g., Leonard v. Clark, 12 F.3d 885 (9th Cir. 1994) (applying Newton standard); Davies v. Grossmont Union High School, 930 F.2d 1390 (9th Cir. 1991) (same); Louisiana Pacific Corporation v. Beazer Materials & Services, 842 F. Supp. 1243, 1253 (E.D. Ca. 1994) (applying unconstitutional conditions analysis).

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[17] Although the consent decrees at issue here would be entered in state court, federal law determines the standard for determining the propriety of the waiver of a federal constitutional right. See Brookhart v. Janis, 384 U.S. 1, 4 (1966).

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We believe that the Supreme Court would be likely to apply the latter, more exacting standard. When a person waives a constitutional right in the context of a settlement, he or she does so in order to receive a benefit from the opposing side. Settlement with the government raises the concern that the government may be misusing the settlement context to achieve indirectly what it could not impose directly. This abuse can occur in one of two ways. Either the government may use its unequal bargaining power to coerce the relinquishment of the right, see, e.g., Miami Telecommunications, Inc., 743 F.Supp. at 1578 (discussing unequal bargaining), or it may use the settlement context to bargain for the surrender of constitutional rights that are unrelated to a legitimate interest regarding the underlying litigation, see, e.g., Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987) ("The evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."); Louisiana Pacific Corporation v. Beazer Materials & Services, 842 F. Supp. 1243, 1253 (E.D. Ca. 1994) ("the litigation context may be given its full, but not undue weight, by permitting offers of waiver of judicial process as a condition of settlement when the waiver is rationally and fairly related to both a legitimate government interest and to the benefit conferred"). While the Zerbst voluntariness test addresses the coercion concerns, it does not protect against the inclusion of extraneous considerations. Indeed, in Newton -- the Supreme Court case most closely on point -- Justice O'Connor (in her controlling opinion) declined to adopt a pure voluntariness test for reviewing agreements to waive § 1983 claims in return for governmental promises not to prosecute, largely because of her concern about the potential for intrusion of "extraneous considerations" into the bargaining process. 480 U.S. at 399, 400 (O'Connor, J., concurring in part and concurring in the judgment) ("By introducing extraneous considerations into the criminal process the legitimacy of that process may be compromised.").[18]

Our analysis of how the more exacting standard might apply is informed by two appellate courts cases from the Ninth Circuit, Davies v. Grossmont Union High School, 930 F.2d 1390 (9th Cir. 1991) and Leonard v. Clark, 12 F.3d 885 (9th Cir. 1994).

Davies, the sole case that we have found in which a federal court has struck down on public policy grounds a settlement in which a party agreed to waive First Amendment rights, concerned the enforceability of a consent decree in which the school district agreed to pay Davies $39,000 in return for his dismissal of the case and his promise not to seek employment with the district. Over a year later, Davies ran for election to the school board and won. The district court held Davies in contempt for violating the agreement not to seek office. The court of appeals held that the settlement was unenforceable because it violated public policy, even though Davies had knowingly and voluntarily waived his right to seek elective office. Applying the standard described in Newton, the court of appeals concluded that the school district had no legitimate interest in prohibiting Davies from running for office. Aside from the district's interest in terminating litigation (which is present in every settlement agreement), the only

[18] We note, however, that Newton involved concerns about protecting the integrity of the criminal process that are not implicated here. There may be less reason to fear the intrusion of extraneous considerations when, as here, bargaining takes place outside the context of criminal prosecutions.

interest advanced by the district was its interest in avoiding the harm to its constituents that would result from Davies' participation in the operation of the district as an elected school board member. The court rejected the legitimacy of this interest, noting that it ran contrary to the very foundation of democratic government. The court further noted that there was no nexus between the right being waived and the underlying litigation. "A legitimate reason will almost always involve a close nexus -- a tight fit -- between the specific interest the government seeks to advance in the dispute underlying the litigation involved and a specific right waived." Davies, 930 F.2d at 1399.

Leonard involved a union's collective bargaining agreement with the city that employed members of the bargaining unit, Article V of which provided that in the event of "any legislative issues specifically endorsed or sponsored by the [union] that result[s] in action by the state legislature and which result[s] in any new economic or benefit improvement causing increased payroll costs to the city beyond those stipulated [in the contract], such costs shall be charged against applicable salary agreements whenever the changes become effective." 12 F.3d at 886. The union challenged, on First Amendment grounds, the enforceability of Article V's restriction on the union's right to "endorse[] or sponsor[]" certain legislative initiatives. The district court held that the union had waived its First Amendment rights by entering into the agreement. The court of appeals affirmed.

After finding that the union had knowingly and intelligently waived its First Amendment rights and that the agreement "resulted from the give and take of negotiations between parties of relatively equal bargaining strength," the court found that the agreement was "narrowly tailored" to achieve legitimate governmental interests more significant than the interest in securing private settlements generally. First, the court noted that the public interest in the finality of collective bargaining agreements was stronger than that of enforcing ordinary private settlements and weighed in favor enforcement. Second, the court noted that the public interest in the finality of a compensation package between a city and its employees provided additional support for enforcement. Although the court recognized the public policy in favor of the union's unfettered ability to present its views to the state legislature, it concluded that this policy was insufficient to compel nonenforcement in light of the tailored nature of the speech restrictions:

> Were Article V a complete ban on all union political speech, we might well hold that the public interest in allowing and hearing such speech outweighs the public interests in enforcing the waiver.
>
> However, Article V . . . only penalizes (a) endorsements of (b) payroll-increasing legislation (c) enacted by the state legislature. Article V is thus narrowly tailored to achieve the city's goal of budgetary predictability.

12 F.3d at 891. The court of appeals added that the narrowly tailored nature of the restrictions ensured the "close nexus" that was lacking in Davies. Id. at 892 n.10.

It is a close and difficult question whether consent decrees containing speech restrictions

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in the Resolution should pass constitutional muster, even if the restrictions would not satisfy the Central Hudson standard if imposed directly (a question considered in Section I). Although lower courts have divided on the standards to be applied in examining waivers of First Amendment rights in settlements, all have agreed that some such waivers are enforceable. These cases strongly suggest that there is no per se bar to settlements involving conditions that would violate the First Amendment if imposed directly.

It is arguable that here, as in Leonard, the restrictions are sufficiently tailored to a legitimate governmental interest to be upheld as permissible terms of a settlement. In the underlying litigation, the state attorneys general are seeking the recovery of costs associated with the adverse health effects of smoking. The reduction of smoking through the reduction in advertising would, of course, reduce such health costs in the future. It could therefore be argued that the advertising restrictions are sufficiently related to the underlying litigation, in a similar manner that the restrictions in Leonard were tailored to the underlying collective bargaining agreement. In each instance, the government has requested speech restrictions that are intended to reinforce the other terms of the underlying agreement. In Leonard, the government asked for the restrictions in order to preserve a fixed salary package for municipal employees. Here, the states would be seeking the restrictions in order to contain state medicaid liability. Thus, even if the restrictions might not survive Central Hudson if imposed directly, some precedent suggests they may survive as terms of state consent decrees.

In addition, as we have noted in our discussions of the constitutionality of federal legislation that would impose advertising restrictions directly or conditionally, the tobacco settlement arguably presents a special First Amendment context. Courts may be more sympathetic to permitting companies to bargain away advertising rights for economic gains than they would be to permitting them to bargain away non-commercial speech rights. What is more, the arguably unique concerns posed by tobacco advertising may lead courts to uphold restrictions that the companies have adopted themselves as part of a resolution of substantial litigation risks. The consent decrees will have been the consequence of intensive negotiations between two well-funded, powerful parties, each of whom had the benefit of able counsel. The bargaining process therefore might not raise suspicions under the voluntariness tests that courts have applied.[19]

We caution, however, that neither Davies nor Leonard, nor any other case that we have found, provides a direct analogy to the circumstances presented by the agreement at issue here. In Davies, the government was the defendant and sought the speech restriction in return for the

[19] We note, however, that the Resolution apparently contemplates federal legislation that would provide great incentives for manufacturers to enter into state consent decrees. For example, the Resolution could be read to contemplate legislation that would require distributors to refrain from distributing products manufactured by non-settling tobacco companies in order to obtain immunity from certain types of liability. Resolution at 29. Depending on how effective an incentive that provision proves to be for distributors, the statute may significantly reduce the distribution stream of non-settling parties. It therefore is possible that tobacco companies would argue that their decision to settle was less than fully voluntary. This concern may be mitigated by the fact that the manufacturers could indemnify distributors' against such liability.

settlement of a suit that had been initiated by the party that agreed to that restriction. In Leonard, the speech restriction was part of an agreement that was reached in the context of collective bargaining, and applied only to certain potential union speech that would have had the specific purpose and effect of directly affecting the agreed-upon terms benefits packages in the collective bargaining agreement. Thus, neither case casts direct light on the analysis that should apply when, as here, the government is the plaintiff and the individual is being asked to relinquish First Amendment rights in order to have the government cease litigation that the government has itself initiated.

Where the government is the plaintiff,[20] a court may be less inclined to apply the standard used in Davies or Leonard. There is a substantial risk that a court would conclude that the "settlements" are in fact simply instances in which the government has brought its substantial power to bear on a private party in order to exact impermissible concessions. Courts might therefore analyze the contemplated settlements under the straight unconstitutional conditions rubric, considered above in Section II.

That the speech restrictions in question are broad in scope and indefinite in duration adds to our concern. One might argue that there is a substantial public interest in the receipt of the advertising that would be barred by the decree. If all the restrictions that went beyond the FDA regulations were to be included in the decrees, they would constitute sweeping restrictions on truthful nonmisleading advertising. A court may be concerned by an agreement that effectively purports to impose a broad-based, legally enforceable restriction on the ability of a private party to provide the public with information regarding consumer choices.[21]

Finally, to the extent the restrictions apply out of state, it would be difficult to argue that they are closely related to a legitimate state interest in the underlying litigation. Accordingly, they could be subject to substantial challenge, such as in Davies. Cf. Bigelow v. Virginia, 421 U.S. 809, 823-824 (1975) (striking down an abortion advertising restriction and noting that one state may not regulate advertising in another state). We therefore would recommend that if the speech restrictions are included in the consent decrees, they be tailored to accord with state boundaries.

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[20] In none of the other cases that we have reviewed was the government the plaintiff in an action that was eventually settled. Although in Newton the government was bringing a criminal prosecution, the Court did not consider the settlement as one that required the relinquishment of expressive rights.

[21] It is unclear, however, to what extent third parties seeking the information precluded by the agreement could challenge the settlements. Cf. Virginia Pharmacy (noting that third-party challenges are permissible only when a willing speaker exists).

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FREEDOM TO ADVERTISE COALITION

July 3, 1997

The Honorable Elena Kagan
Deputy Assistant to the President
for Domestic Policy
The White House
2nd Floor, West Wing
Washington, D.C. 20500

Re: Request to Appear Before Tobacco Settlement Review Panels on Regulatory and Legal Issues

Dear Ms. Kagan:

I understand that you have been appointed to chair two of the four panels of the Administration's task force to review the tobacco settlement. The Freedom to Advertise Coalition, representing a broad cross-section of advertising, publishing and media interests, requests the opportunity to appear before the review panels on regulatory and legal issues. The Coalition strongly supports the effort to reduce tobacco use by children. We believe, however, that the advertising restrictions proposed by the settlement raise serious First Amendment issues regarding the protection of truthful commercial speech, and could set a dangerous precedent for similar restrictions on other legal products and services.

The tobacco settlement imposes sweeping restrictions on every tobacco advertising media. If adopted by the Congress and approved by the President, the restrictions will constitute the broadest advertising censorship ever proposed by the federal government. As such, legislation which included the restrictions would likely fail a court challenge under the test set forth for commercial speech regulation in Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) and other cases.

To be sure, any private organization may voluntarily relinquish its advertising rights without running afoul of the First Amendment. If the proposed advertising restrictions are truly voluntary, and are to be contained solely in private contracts and consent decrees, no precedent would be set for similar restrictions on other products and services. If Congress mandates advertising restrictions through the enactment of law, however, that enactment clearly implicates the First Amendment. Indeed, the First Amendment says that "Congress shall make no law . . . abridging the freedom of speech . . . ."

If permitted to appear before your panels, the Freedom to Advertise Coalition will (1) describe the breadth and potential effect of the proposed advertising restrictions; (2) encourage the Administration to recommend to Congress that the advertising restrictions not be included in legislation; and (3) describe the First Amendment implications raised by the restrictions if they are included in legislation.

The Freedom to Advertise Coalition was formed in 1987 out of concern for the right to truthfully and nondeceptively advertise all legal products and services. The Coalition's members include the American Advertising Federation, the American Association of Advertising Agencies, the Association of National Advertisers, the Direct Marketing Association, the Magazine Publishers of America, the Outdoor Advertising Association of America, and the Point-of-Purchase Advertising Institute.

We would welcome the opportunity to contribute to your deliberations.

Sincerely,

John Fithian, Counsel
Freedom to Advertise Coalition

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Tobacco settlement - advertising

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EK

FREEDOM TO ADVERTISE COALITION

August 8, 1997

The Honorable Donna E. Shalala
Secretary of Health and Human Services
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

The Honorable Bruce N. Reed
Assistant to the President for Domestic Policy
The White House
2nd Floor, West Wing
Washington, D.C. 20500

Dear Secretary Shalala and Mr. Reed:

Thank you for involving us in the Administration's review of the proposed tobacco settlement. As we discussed at our meeting, we share the goal of reducing underage tobacco use, but are concerned with the First Amendment implications of codifying the settlement's advertising restrictions. In particular, the federal enactment of the proposed advertising restrictions would set a dangerous precedent for similar measures involving other legal products and services.

Indeed, numerous officials and scholarly commentators also have voiced this concern. For instance, at a recent Senate Judiciary Committee hearing, Harvard Law School Professor Lawrence Tribe opined that "the proposed restrictions on tobacco advertising would raise very serious First Amendment implications if they were to be enacted in law by Congress." Likewise, civil liberties scholar Rodney Smolla of the Marshall-Wythe School of Law at The College of William & Mary has stated that "codification of the advertising provisions of the agreement would turn a voluntary, self-imposed restriction by the tobacco industry into an act of Congress, triggering the protections of the First Amendment."

Similarly, Senator Patrick Leahy, the ranking Democrat on the Judiciary Committee, commented at a hearing that "if we put a government-imposed restriction, then we've got a real problem, a First Amendment problem on commercial free speech." In fact, Attorney General Michael Moore of Mississippi at

a recent Senate Commerce Committee hearing stated that "if you passed it [the advertising restrictions] in Congress, it might get struck down on First Amendment challenges."

By comparison, any private individual or organization voluntarily may relinquish its advertising rights without running afoul of the First Amendment. As Congress begins to consider legislation, and as the contours of the proposed national protocol contract agreement become evident, we look forward to working with you to ensure that the important health policy goals can be achieved without violating the First Amendment. Thank you again for your consideration,

Sincerely,

John Fithian, Counsel
Freedom to Advertise Coalition

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cc: Ms. Margaret Jane Porter
Ms. Judy Wilkenfeld
Mr. James O'Hara III

tobacco settlement — advertising

P-1-97 Retailers / advertisers

* Freedom to Advert Coal:

Advert restrictions will viol 1A if incorporated into leg.

If vol – an ag – we will not oppose it – no bad const precedent.

Current ag in indiv case – OK [2] (even tho not happy abt it)

Protocol may be somewhere in middle – depends how implemented.

Several people – goes much further than FDA rule

→ None of our args would challenge if this were a vol. ag.

Convenience stores – agt this settlement – won't b kids smoking.

Penalizes retailers for actn over which he may have no control – e.g. fake IDs

Bans on vending just make big cos. unavailable – no competitors.

HR2034 Bishop ?(_ – Ga) – licensure statute w/ civil sanctions

Put Retailer, clerk, + kid in booth.

Vending industry

Cost 2.1 b in lost profits

10,500 people to lose jobs

90% of machines are in bars

Will bring suit –

Bishop bill is good. Or go w/ settlement – but give us compensation

Tobacco –
settlement –
advertising etc.

6-30 Access, Advrt, Labelling

50% reduc over 7 yrs – P's goal
18 – right age? FDA – have auth to raise the age?
In gen'l – need auth to adjust generally

After 5 yrs – can we do what we want?

I. Access
- Ban vending machines – not insignificant
Prob in this area – compliance
Funding here is great for this. (curr. – this year 17m)
– Enforcement – huge advantage ~ 300 m.
• Penalty provisions weaker here? – less discretion – espec as to chains
– Can revoke license – good!
? how does this work though?
who does it?? (IOA ?'s here)
huge burden? do we want this??
p. 26 – no more restriction by states? Preemption issue

Anything further? – get rid of adult-only exception for this –
self-service displays – and 18 + age

II. Advertising
?? Net result – about same as what we did
Drafting issues – Bans on trinkets + trash – use diff wds – issue re definitions
Sponsorship – events only (new) or just teams/entries
Existing permiss uses of advert – Basic requirement – no other media (e.g. internet) – perhaps more narrow than we would want
Billboard – total ban – not so diff from what we did

Disclosures – major improvement – infinitely superior warnings

producing advtg. ¿ ← Low tar / lite advertising – poss prob – comments

Human / cartoon – modest improvement – more symbol.

Glamorization – good to say, but how real? Window dressing.

Better than our rule

(Obvious drafting issues all over place) Huge if our rule goes down

III. Labelling

Warnings are strong, good, large.

(Front + back)
(plain pkg)
(black + white text only generally)

Education / ctradvert. GREAT

But: Funding ends after yr 8??

Should it be govt?

~ btr fr [illegible] purposes.