

An hourglass-shaped graphic with a globe of the Earth inside. The top bulb is dark blue, and the bottom bulb is light blue. The hourglass is centered on the page.

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February 2, 2009

Congressional Research Service

Report 98-466

*TOBACCO MARKETING AND ADVERTISING  
RESTRICTIONS IN S. 1415, 105TH CONGRESS: FIRST  
AMENDMENT ISSUES*

Henry Cohen, American Law Division

Updated May 15, 1998

**Abstract.** Sections 122-123 of S. 1415, 105th Congress, would prohibit, among other things, outdoor tobacco advertising on billboards, tobacco advertising with human or animal images of cartoon characters, and most tobacco advertising on the Internet. Although the First Amendment provides only limited protection to commercial speech, S. 1415's marketing and advertising restrictions, to the extent that they deny adults access to tobacco advertising more than is necessary to protect children, may be unconstitutional.

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# CRS Report for Congress

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## Tobacco Marketing and Advertising Restrictions in S. 1415, 105th Congress: First Amendment Issues

May 15, 1998

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## **ABSTRACT**

Sections 122-123 of S. 1415, 105<sup>th</sup> Congress, would prohibit, among other things, outdoor tobacco advertising on billboards, tobacco advertising with human or animal images or cartoon characters, and most tobacco advertising on the Internet. Although the First Amendment provides only limited protection to commercial speech, S. 1415's marketing and advertising restrictions, to the extent that they deny adults access to tobacco advertising more than is necessary to protect children, may be unconstitutional.

# Tobacco Marketing and Advertising Restrictions in S. 1415, 105<sup>th</sup> Congress: First Amendment Issues

## Summary

This report considers whether the restrictions on tobacco marketing and advertising in §§ 122-123 of S. 1415, 105<sup>th</sup> Congress, as reported by the Senate Committee on Commerce, would, in general, violate the First Amendment's guarantee of freedom of speech. These sections would prohibit, among others, the following forms of tobacco advertising and labeling: (1) advertising or labeling with a human or animal image or cartoon character, (2) outdoor advertising, including advertising in enclosed stadia, (3) advertising without a disclaimer that words such as "light" or "low tar" describing the product do not render the product less hazardous than any other tobacco product, (4) advertising or labeling not reviewed by the Secretary of Health and Human Services before it is first used, (5) advertising on the Internet "unless such advertising is designed to be inaccessible in or from the United States to all individuals under the age of 18 years," and (6) advertising with other than black text on white background except at locations where individuals under 18 are not permitted and in publications whose readers under the age of 18 constitute 15 percent or less of the total readership.

The First Amendment provides only limited protection to commercial speech, such as tobacco advertising. The Supreme Court has prescribed the *Central Hudson* test to determine the constitutionality of governmental restrictions of commercial speech. This test requires that restrictions of non-misleading commercial speech directly advance a substantial governmental interest in a manner that is not overbroad. In 1996, in *44 Liquormart, Inc. v. Rhode Island*, the Supreme Court increased the protection that the *Central Hudson* test guarantees to commercial speech, expressing skepticism of "regulations that seek to keep people in the dark for what the government perceives to be their own good." One may apparently infer from this decision that restrictions on truthful tobacco advertising that is not aimed at minors may be unconstitutional.

Subsequent to *44 Liquormart*, a federal court of appeals upheld a Baltimore ordinance that prohibited tobacco advertisements on billboards, except in certain commercially and industrially zoned areas of the city. It reasoned that, although the ordinance reduced the opportunities for adults to receive tobacco advertising, it did not preclude them, and the ordinance constituted a reasonable way to attempt to limit underage smoking. S. 1415's total ban on billboards with tobacco advertisements, by contrast, would seem more likely to raise constitutional questions. Similar questions may be raised with respect to other marketing and advertising restrictions, to the extent that they deny adults access to tobacco advertising more than is necessary to protect children. However, the fact that S. 1415's restrictions would not be as encompassing as the restrictions on price advertising that the Supreme Court struck down in *44 Liquormart*, and would allow some tobacco advertising to continue, might increase the likelihood of the restrictions' being upheld.

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# Tobacco Marketing and Advertising Restrictions in S. 1415, 105<sup>th</sup> Congress: First Amendment Issues

This report considers whether the restrictions on tobacco marketing and advertising in §§ 122-123 of the Universal Tobacco Settlement Act, S. 1415, 105<sup>th</sup> Congress, as reported May 1, 1998, by the Senate Committee on Commerce, would, in general, violate the First Amendment's guarantee of freedom of speech. Section 122 would prohibit, among others, the following forms of tobacco advertising and labeling: (1) advertising or labeling with a human or animal image or cartoon character, (2) outdoor advertising, including advertising in enclosed stadia, (3) advertising without a disclaimer that words such as "light" or "low tar" describing the product do not render the product less hazardous than any other tobacco product, (4) advertising or labeling not reviewed by the Secretary of Health and Human Services before it is first used, (5) advertising on the Internet "unless such advertising is designed to be inaccessible in or from the United States to all individuals under the age of 18 years," and (6) advertising with other than black text on white background except at locations where individuals under 18 are not permitted and in publications whose readers under the age of 18 constitute 15 percent or less of the total readership.

Section 122 would also prohibit payments to be made to ensure that "a logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification" appear in a movie, program, or video game. It would also, apparently inconsistently with respect to movies, prohibit payments "for the purpose of promoting the image or use of the tobacco product through print or film media that appeals to individuals under the age of 18 years or through a live performance by an entertainment artist that appeals to such individuals." Section 122 would also prohibit "a logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia . . . identifiable with a tobacco product" to be "used for any item (other than a tobacco product) . . . marketed, licensed, distributed, or sold by the tobacco product manufacturer or distributor of the tobacco product."

Section 123 would limit the size and placement of, and prohibit color in, point-of-sale advertising at any location in which an individual under 18 years of age is permitted.

## **First Amendment Protection for Commercial Speech**

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Despite its absolute language, it provides no protection to some types of speech and only limited protection to others. One type of speech to which it applies only limited

protection is commercial speech, which is “speech that *proposes* a commercial transaction.”<sup>1</sup>

Commercial speech may be banned if it advertises an illegal product or service, and, unlike fully protected speech, may be banned if it is unfair or deceptive. Even when it advertises a legal product and is not unfair or deceptive, the government may regulate commercial speech more than it may regulate fully protected speech.

Fully protected speech may be restricted only “to promote a compelling interest” and only by “the least restrictive means to further the articulated interest.”<sup>2</sup> For commercial speech, by contrast, the Supreme Court has prescribed the four-prong *Central Hudson* test to determine its constitutionality. This test asks initially (1) whether the commercial speech at issue is protected by the First Amendment (that is, whether it concerns a lawful activity and is not misleading) and (2) whether the asserted governmental interest in restricting it is substantial. “If both inquiries yield positive answers,” then to be constitutional the restriction must (3) “directly advance[ ] the governmental interest asserted,” and (4) be “not more extensive than is necessary to serve that interest.”<sup>3</sup> In *Board of Trustees of the State University of New York v. Fox*, the Supreme Court made it easier for the government to satisfy the fourth prong of the *Central Hudson* test. It held that the fourth prong is not to be interpreted “strictly” to require the legislature to use the least restrictive means available to accomplish its purpose.<sup>4</sup> Instead, the Court held, legislation regulating commercial speech is to be upheld if there is a “‘fit’ between the legislature’s ends and the means chosen to accomplish those ends,” — “a fit that is not necessarily perfect, but reasonable . . . .”<sup>5</sup> The Court, however, does “not equate this test with the less rigorous obstacles of rational basis review.”<sup>6</sup> In other words, although, to satisfy the fourth prong, a restriction on commercial speech need not constitute the least restrictive means to advance the asserted governmental interest, it must be more than merely rational.

In 1996, in *44 Liquormart, Inc. v. Rhode Island*, the Supreme Court increased the protection that the *Central Hudson* test guarantees to commercial speech by indicating that “when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair

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<sup>1</sup> *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 482 (1989) (emphasis in original).

<sup>2</sup> *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989).

<sup>3</sup> *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). In *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the Court referred to the *Central Hudson* test as having three parts, and referred to its second, third, and fourth prongs as, respectively, the first, second, and third. In *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1521 (1996), the Justices seemed to return to the traditional numbering.

<sup>4</sup>*Fox*, *supra* note 1, at 476.

<sup>5</sup>*Id.* at 480.

<sup>6</sup> *Florida Bar v. Went For It, Inc.*, *supra* note 3, at 632.

bargaining process,” the restriction will be subject to a stricter review by the courts than a regulation designed “to protect consumers from misleading, deceptive, or aggressive sales practices.”<sup>7</sup> The prohibition in *44 Liquormart* was on advertising the price of alcoholic beverages, not on all advertising of alcoholic beverages. Therefore, when the Court referred to “entirely” prohibiting the dissemination of truthful, nonmisleading commercial messages, it apparently included entirely prohibiting the dissemination of any particular item of truthful, nonmisleading information.

We will now discuss the application of each of the four prongs of the *Central Hudson* test to §§ 122-123, considering their provisions in general, rather than considering each of their restrictions on tobacco advertising separately. Then we will consider whether *44 Liquormart* affects our general conclusion. Finally we will consider the constitutionality of some of the specific restrictions.

### **Applying *Central Hudson*: First Prong**

The first prong of the *Central Hudson* test asks whether the restricted speech concerns a lawful activity and is not misleading. We will assume that the advertising is not misleading, as if it is, it is already illegal under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which prohibits “unfair or deceptive acts or practices in or affecting commerce.” We will also assume that the advertisements concern a lawful activity, even though the sale of tobacco products to minors is illegal in every state.<sup>8</sup> We will assume that the advertisements concern a lawful activity because some of the restrictions in §§ 122-123 would affect tobacco advertisements aimed at adults as well as at minors.

### **Applying *Central Hudson*: Second Prong**

The second prong of the *Central Hudson* test asks whether the asserted governmental interest in restricting the commercial speech in question is substantial. The Supreme Court, in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, held that a government’s “interest in the health, safety, and welfare of its citizens constitutes a ‘substantial’ governmental interest.”<sup>9</sup> Although Part VI of the Court’s opinion in *44 Liquormart* questioned some aspects of *Posadas*, this was not one of them, and there seems no doubt that S. 1415 would satisfy the second prong.

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<sup>7</sup> 116 S. Ct. 1495, 1507 (1996). The nine Justices were unanimous in striking down the law, which prohibited advertising the price of alcoholic beverages, but only parts of Justice Stevens’ opinion for the Court were joined by a majority of Justices. The quotations above, for example, are from Part IV of the Court’s opinion, which was joined by only Justices Kennedy and Ginsburg besides Justice Stevens.

<sup>8</sup> U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, *State Laws on Tobacco Control — United States, 1995*.

<sup>9</sup> 478 U.S. 328, 341 (1986).



## Applying *Central Hudson*: Third Prong

In *Posadas*, the Supreme Court, applying the third prong of the *Central Hudson* test, found reasonable the Puerto Rico legislature’s view that restricting advertising would directly advance the asserted governmental interest by reducing the demand for the product advertised (which, in this case, was gambling).<sup>10</sup> The Court also cited with approval a statement from an earlier case that the third prong of *Central Hudson* is satisfied where the legislative judgment is “not manifestly unreasonable.”<sup>11</sup>

In subsequent cases, however, the Court has not deferred as readily to legislative judgments that a restriction directly advances the asserted governmental interest. In *Edenfield v. Fane*,<sup>12</sup> for example, the Court struck down a Florida ban on solicitation by certified public accountants, even though the Court had previously, in *Ohralik v. Ohio State Bar Association*,<sup>13</sup> upheld a ban on solicitation by attorneys. The Court found that the government had substantial interests in the ban, including the prevention of fraud, the protection of privacy, and the need to maintain CPA independence and to guard against conflicts of interest. However, the Court found no evidence that the ban directly advanced these interests, and noted, among other things, that, “[u]nlike a lawyer, a CPA is not ‘a professional trained in the art of persuasion,’” and “[t]he typical client of a CPA is far less susceptible to manipulation than the young accident victim in *Ohralik*.”<sup>14</sup>

In *Ibanez v. Florida Board of Accountancy*, the Court held that the Florida Board of Accountancy could not reprimand an accountant for truthfully referring to her credentials as a Certified Public Accountant and a Certified Financial Planner in her advertising and other communication with the public, such as her business cards and stationery. The Court applied the *Central Hudson* test, noting that “the State ‘must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.’”<sup>15</sup>

In *Rubin v. Coors Brewing Co.*, the Court struck down a federal statute, 27 U.S.C. § 205(e), that prohibits beer labels from displaying alcohol content unless state law requires such disclosure.<sup>16</sup> The Court found sufficiently substantial to satisfy the second prong of the *Central Hudson* test the government’s interest in curbing “strength wars” by beer brewers who might seek to compete for customers on the basis of alcohol content. However, it concluded that the ban “cannot directly and materially advance” this “interest because of the overall irrationality of the

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<sup>10</sup> *Id.* at 341-342.

<sup>11</sup> *Id.* at 342, citing *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

<sup>12</sup> 507 U.S. 761 (1993).

<sup>13</sup> 436 U.S. 447 (1978).

<sup>14</sup> *Edenfield*, *supra* note 12, at 775.

<sup>15</sup> 512 U.S. 136, 143 (1994).

<sup>16</sup> 514 U.S. 476 (1995).

Government's regulatory scheme."<sup>17</sup> This irrationality is evidenced by the fact that the ban does not apply to beer advertisements, and by the fact that the statute *requires* the disclosure of alcohol content on the labels of wines and spirits.

Finally, in *44 Liquormart*, the Court, in striking down a prohibition on advertising the price of alcoholic beverages, found that Rhode Island had not met its burden of showing that the "ban will significantly advance the State's interest in promoting temperance."<sup>18</sup> "[T]he State's own showing," the Court wrote, "reveals that any connection between the ban and a significant change in alcohol consumption would be purely fortuitous. . . . [A]ny conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest."<sup>19</sup>

Cases like *Edenfield*, *Ibanez*, *Rubin*, and *44 Liquormart* indicate that, to satisfy the third prong of the *Central Hudson* test, the government must present evidence to support its claim that its restriction on commercial speech directly and materially advances a substantial governmental interest. In *Florida Bar v. Went For It, Inc.*, the Court upheld a rule of the Florida Bar that prohibited personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster.<sup>20</sup> The Bar argued "that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers,"<sup>21</sup> and the Court found that "[t]he anecdotal record mustered by the Bar" to demonstrate that its rule would advance this interest in a direct and material way was "noteworthy for its breadth and detail"; it was not "mere speculation and conjecture."<sup>22</sup>

When the Food and Drug Administration promulgated tobacco advertising restrictions, it concluded "that tobacco advertising plays a concrete role in the decision of minors to smoke, and that each specific restriction on this advertising that it is adopting will contribute to limiting its effect and thus to protecting the health of children and adolescents under the age of 18."<sup>23</sup> If this is true, then the advertising restrictions would, in general, apparently satisfy the third prong of the *Central Hudson* test. Of course, it is possible for a court to find some of the restrictions in S. 1415 constitutional but others unconstitutional.

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<sup>17</sup> *Id.* at 488.

<sup>18</sup> 116 S. Ct. at 1509.

<sup>19</sup> *Id.* at 1510.

<sup>20</sup> *Florida Bar*, *supra* note 3.

<sup>21</sup> *Id.*, 515 U.S. at 624.

<sup>22</sup> *Id.* at 627.

<sup>23</sup> 61 Fed. Reg. 44,474 (1996). These regulations have not taken effect because a federal court held that the FDA lacked the statutory authority to implement them. *Coyne Beahm, Inc. v. United States*, 958 F. Supp. 1060 (M.D. N.C. 1997).

The FDA, in connection with its regulations, wrote: “It is not necessary in satisfying this prong of *Central Hudson* for the agency to prove conclusively that the correlation [between advertising and minors’ smoking] in fact (empirically) exists, or that the steps undertaken will completely solve the problem. . . . Rather, the agency must show that the available evidence, expert opinion, surveys and studies provide sufficient support for the inference that advertising does play a material role in children’s tobacco use.”<sup>24</sup> This seems accurate, given the Court’s acceptance of anecdotal evidence (albeit anecdotal evidence “noteworthy for its breadth and detail”) in *Florida Bar v. Went For It, Inc.*, even though anecdotal evidence by itself cannot conclusively prove general propositions.

In sum, it appears likely that the restrictions in S. 1415 would satisfy the third prong if the government can present evidence that they will reduce the demand for tobacco and thereby reduce the incidence of tobacco-related illnesses.

### Applying *Central Hudson*: Fourth Prong

We now turn to the fourth and final requirement of the *Central Hudson* test — that restrictions on commercial speech represent a reasonable “fit” between the legislature’s ends and the means chosen to accomplish those ends. As noted above, this prong requires that a restriction be more than merely rational, but not necessarily the least restrictive means to advance the asserted governmental interest.<sup>25</sup> In *Cincinnati v. Discovery Network, Inc.*, the Supreme Court struck down a Cincinnati regulation that banned newsracks on public property if they distributed commercial publications, but not if they distributed news publications.<sup>26</sup> The Court found that the asserted governmental interest in safety and esthetics was substantial, but that the distinction between commercial and noncommercial speech “bears no relationship *whatsoever* to the particular interests that the city has asserted.”<sup>27</sup> The city, therefore, did not establish “the ‘fit’ between its goals and its chosen means that is required by our opinion in *Fox*.”<sup>28</sup>

In *44 Liquormart*, the Court found it “perfectly obvious that alternative forms of regulation would be more likely to achieve the State’s goal of promoting temperance. As the State’s own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation. . . . Even educational campaigns . . . might prove to be more effective.”<sup>29</sup>

The Court’s strong language in *Cincinnati v. Discovery Network* (“no relationship *whatsoever*”) and in *44 Liquormart* (“perfectly obvious”) suggests that it found the regulations it struck down in those two cases to be particularly poorly

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<sup>24</sup> *Id.*

<sup>25</sup> *See*, text accompanying note 6, *supra*.

<sup>26</sup> 507 U.S. 410 (1993)

<sup>27</sup> *Id.* at 424 (emphasis in original).

<sup>28</sup> *Id.* at 428.

<sup>29</sup> *44 Liquormart*, *supra* note 7, 116 S. Ct. at 1510.

thought-out. S. 1415, in general, does not appear similar in this respect. However, the reasonableness of its restrictions must be considered individually, which we do after we consider the effect of *44 Liquormart*.

### **Effect of *44 Liquormart***

As noted above, the Supreme Court in *44 Liquormart* indicated that a total prohibition on “the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process” will be subject to a stricter review by the courts than a regulation designed “to protect consumers from misleading, deceptive, or aggressive sales practices.”<sup>30</sup> Sections 122-123, like the speech restriction struck down in *44 Liquormart*, appears primarily intended to reduce consumption of a dangerous product rather than to protect consumers from unfair sales practices.<sup>31</sup> Sections 122-123, however, unlike the speech restriction struck down in *44 Liquormart*, would not impose a total prohibition on any information sought to be advertised.

In addition, the fact that §§ 122-123 are in part intended to protect minors may help to distinguish it from the Rhode Island statute. A thread that appears to run through *44 Liquormart* is the Justices’ hostility to the paternalistic aspect of Rhode Island’s ban. In Part IV of the Court’s opinion, Justice Stevens writes:

The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.<sup>32</sup>

In Part V, he adds that mere speculation as to whether “a restriction on commercial speech directly advances the State’s asserted interest . . . certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends.”<sup>33</sup> Justice Scalia, concurring, indicated that he “share[s] Justice Stevens’ aversion toward paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them.”<sup>34</sup> Justice Thomas, in his

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<sup>30</sup> *Id.* at 1507, quoted in the text accompanying note 7, *supra*.

<sup>31</sup> The FDA argued that its restrictions were related to the bargaining process, as they “derive from the fact that, at least as a matter of law, minors are not competent to use these products.” 61 Fed. Reg. 44,470. It would seem to strengthen the FDA’s case in this regard if we read this instead to mean that minors are not competent to resist tobacco advertisements. This argument would also seem available to S. 1415, but with less force because, though S. 1415 is intended to protect youth, its restrictions apply to more advertisements aimed at adults, and so seem less designed to protect consumers from misleading, deceptive, or aggressive sales practices. For example, the FDA’s restrictions would ban tobacco billboards within 1,000 feet of a school or playground, whereas S. 1415 would ban all outdoor tobacco billboards.

<sup>32</sup> *44 Liquormart*, *supra* note 7, 116 S. Ct. at 1508.

<sup>33</sup> *Id.* at 1510.

<sup>34</sup> *Id.* at 1515 (Scalia, J., concurring).

concurring opinion, refers to “the antipaternalistic premises of the First Amendment.”<sup>35</sup>

Nevertheless, §§ 122-123 would limit advertisements aimed at adults as well as at children. In the context of “indecent” material, the Supreme Court has reiterated that the government may not “reduce the adult population . . . to reading only what is fit for children.”<sup>36</sup> Thus, for example, indecent material may not be banned from the airwaves for 24 hours a day,<sup>37</sup> and adults’ access to indecent material on the Internet may not be precluded in order to protect children, at least if less restrictive means to protect children are available.<sup>38</sup> This principle may not apply as forcefully to governmental restrictions of commercial speech, however, as adults’ access to indecent material, unlike to commercial speech, receives full First Amendment protection. Nevertheless, the Justices’ discomfort with the paternalism they perceived in the Rhode Island statute suggests that, even if a commercial speech restriction aimed at public health might otherwise pass the *Central Hudson* test, it might not if it unduly restricts adults’ access to truthful, nonmisleading commercial messages. At the same time, the Rhode Island statute totally restricted liquor price advertising, whereas S. 1415 would not totally restrict tobacco advertising, and this distinction could make a difference in a court’s decision as to the constitutionality of S. 1415.

Prior to *44 Liquormart*, the U.S. Court of Appeals for the Fourth Circuit, in two cases, upheld Baltimore ordinances that prohibited tobacco and alcohol advertisements on billboards, except in certain commercially and industrially zoned areas of the city.<sup>39</sup> Then, after *44 Liquormart*, the Supreme Court vacated and remanded both cases “for further consideration in light of *44 Liquormart* . . . .”

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<sup>35</sup> *Id.* at 1517 (Thomas, J., concurring).

<sup>36</sup> *Bolger v. Youngs Drug Products, Inc.*, 463 U.S. 63, 73 (1983); *Sable*, *supra* note 2, 492 U.S. at 128.

<sup>37</sup> *Action for Children’s Television v. Federal Communications Commission*, 932 F.2d 1504, 1509 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992).

<sup>38</sup> *Reno v. ACLU*, 117 S. Ct. 2329 (1997). The Court wrote in that case:

In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. . . . As we have explained, the Government may not “reduc[e] the adult population . . . to . . . only what is fit for children.”

*Id.* at 2346. There is a tension between the second and third quoted sentences with which the Court did not deal: if there are no less restrictive alternatives available, then may the government reduce the adult population to only what is fit for children?

<sup>39</sup> *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2575 (1996); *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996).

Next, the Fourth Circuit, after further consideration in light of *44 Liquormart*, readopted its previous decisions in both cases, and the Supreme Court subsequently declined to review the cases.<sup>40</sup> In *Penn Advertising*, the tobacco advertising case, the court said simply that it was readopting its previous decision for the reasons it gave in its opinion issued the same day in *Anheuser-Busch*, the alcoholic beverage advertising case. In that case, the court wrote that, in its previous decision,

we recognized the reasonableness of Baltimore City’s legislative finding that there is a “definite correlation between alcoholic beverage advertising and underage drinking.” We also concluded that the regulation of commercial speech is not more extensive than necessary to serve the governmental interest. Recognizing that in the regulation of commercial speech there is some latitude in the “fit” between the regulation and the objective, we concluded that “no less restrictive means may be available to advance the government’s interest.” While we acknowledged that the geographical limitation on outdoor advertising may also reduce the opportunities for adults to receive the information, we recognize that there were numerous other means of advertising to adults that did not subject the children to ‘involuntary and unavoidable solicitation [while] . . . walking to school or playing in their neighborhood.’ . . .

In *44 Liquormart*, by contrast, the State prohibited all advertising throughout Rhode Island, “in any manner whatsoever,” of the price of alcoholic beverages except for price tags or signs displayed with the beverages and not visible from the street. . . . While Rhode Island’s blanket ban on price advertising failed *Central Hudson* scrutiny, Baltimore’s attempt to zone outdoor alcoholic beverage advertising into appropriate areas survived our “close look” at the legislature’s means of accomplishing its objective . . . . Baltimore’s ordinance expressly targets persons who cannot be legal users of alcoholic beverages, not legal users as in Rhode Island. More significantly, Baltimore does not ban outdoor advertising of alcoholic beverages outright but merely restricts the time, place, and manner of such advertisements. And Baltimore’s ordinance does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors.<sup>41</sup>

The pertinent question, it seems, is whether the restrictions that S. 1415 would impose would be more like those struck down in *44 Liquormart* or those upheld in the Fourth Circuit cases. Like the ordinances the Fourth Circuit upheld, S. 1415 would not impose a total ban on any information sought to be advertised. However, S. 1415 would not focus as narrowly on advertisements accessible to children as did the ordinances the Fourth Circuit upheld. It is not the case with S. 1415, as it was with the Baltimore ordinances, that it would “not ban outdoor advertising of alcoholic

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<sup>40</sup> *Penn Advertising v. Mayor and City Council of Baltimore*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997); *Anheuser-Busch v. Schmoke*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

<sup>41</sup> 101 F.3d at 327-329 (citations omitted).

beverages outright but merely restricts the time, place, and manner of such advertisements.” But, like Baltimore’s alcoholic beverage ordinance, it would not, except with respect to the Internet, foreclose the “plethora” of other media on which tobacco products may be advertised. At the same time, however, federal law already reduces the size of this “plethora,” as it bans advertisements for cigarettes, little cigars, and smokeless tobacco “on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.”<sup>42</sup> This would be a factor that could be cited to argue that S. 1415 would have a more restrictive effect on adults than might appear from its face. In addition, S. 1415 would restrict the content of advertisements in media in which it would continue to permit advertisements, which is something the Baltimore ordinances do not do.

In conclusion, it appears that the degree of restrictiveness of S. 1415 would lie somewhere between that of the provision struck down in *44 Liquormart* and those upheld in the Fourth Circuit cases. Some of the prohibitions of S. 1415 would seem to include the sort of paternalism to which the Court objected in *44 Liquormart*, but others of its prohibitions seem more narrowly focused on protecting minors. We will distinguish among these in the next section of this memorandum.

First, however, we offer a more general comment. The decision in *44 Liquormart* might, on the one hand, be viewed as part of a trend on the Court’s part to increase the First Amendment protection it accords to commercial speech. If this is in fact a trend, then the likelihood of its striking down substantial portions of S. 1415 would increase. On the other hand, the Court in *44 Liquormart*, as noted above, seemed to view the Rhode Island statute in question as particularly poorly thought-out, with the Court commenting “that any connection between the ban and a significant change in alcohol consumption would be purely fortuitous,” and that “[i]t is perfectly obvious that alternative forms of speech would be more likely to achieve the State’s goal of promoting temperance.” Although S. 1415 would restrict more speech than the Baltimore ordinances do, it does not appear poorly thought-out in the manner that the Supreme Court seemed to think the Rhode Island statute in *44 Liquormart* was. It is also possible that a stronger link can be demonstrated between the restrictions in S. 1415 and “a significant change in [tobacco] consumption.” But now we must examine some of the restrictions in S. 1415 individually, as that is how they will stand or fall.

### **Analysis of S. 1415's Restrictions**

To do this necessitates applying the four prongs of the *Central Hudson* test. However, we will take as a given that all the restrictions in S. 1415 would pass the first prong, as tobacco advertising is legal and we will presume it is not misleading. We will also assume that all the restrictions would pass the second prong, as restricting tobacco advertising would serve the substantial governmental interest of promoting public health. In addition, to the extent that the restrictions would reduce children’s exposure to tobacco advertisements, we will assume that they would directly and materially advance the governmental interest in reducing underage smoking. The constitutionality of most of the restrictions, therefore, will apparently

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<sup>42</sup> 15 U.S.C. §§ 1335, 4402.

turn on the fourth prong, which asks whether, for each restriction, there is a reasonable "fit" between the government's means and ends. The restriction must be more than merely rational, but need not necessarily be the least restrictive means available.

The prohibition of outdoor advertising might be subject to challenge. If it were limited, as the Baltimore ordinance is, to outdoor advertising within 1,000 feet of a school or playground, then there would be a precedent for its constitutionality. The restriction as it stands clearly would reduce children's exposure to tobacco advertising, so it would seem likely to satisfy the third prong of *Central Hudson*. But it would also reduce adults' exposure to tobacco advertising, so the government would apparently have to demonstrate that a restriction limited as the Baltimore ordinance is would leave minors overly exposed to tobacco advertising, and would not overly restrict adults' access to tobacco advertising.

The prohibition of advertising in enclosed stadia may also be challenged, because it does not exempt events or activities that children are unlikely to attend. The government could advance its aim of protecting children without banning advertisements at performances from which children are excluded because they are X-rated (though, admittedly, such performances usually occur in theaters or bars rather than in stadia). There are also performances from which children are not excluded, but which relatively few children attend, such as classical music concerts (other than those designed for children). If few children typically attend a particular type of performance, then one might challenge this restriction on the ground that it would not materially advance the governmental interest in protecting children, and would therefore fail the third prong. Or one might challenge it on the ground that it would unreasonably interfere with the rights of adults, and would therefore fail the fourth prong. These arguments would apply on the assumption that the advertisements in question could be easily taken up and down; if they were relatively permanent, then there would be a stronger argument that banning them would be constitutional.

The prohibition of advertising or labeling with a human or animal image or cartoon character would seem to face similar problems. If the government could present evidence that children respond particularly to human images and cartoon characters, then this restriction would apparently be constitutional to the extent that it would not overly restrict adults' access to the proscribed pictures.<sup>43</sup> It would, however, apparently raise constitutional questions to the extent that it would apply to material unavailable to children, and perhaps also to the extent that it would apply to material with an intellectual content that would attract few minors.

The requirement of disclaimers that words such as "light" or "low tar" describing the product do not render the product less hazardous than any other tobacco product, as well as of other disclosures not noted in the summary of § 122 at the beginning of this report, would apparently be constitutional. This is because the Supreme Court

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<sup>43</sup> Pictures as well as words are protected by the First Amendment. *See, Manuel Enterprises v. Day*, 370 U.S. 478 (1962).



has held that an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."<sup>44</sup>

The requirement that advertising and labeling be reviewed by the Secretary of HHS before it is first used would apparently be constitutional if it is designed solely to enable the Secretary to advise the tobacco company as to whether the advertising and labeling complies with the law, or to seek a court injunction against such advertising if appropriate.

The prohibition of advertising on the Internet "unless such an advertisement is inaccessible in or from the United States to all individuals under the age of 18" may be problematic because the degree of censorship it would impose on adults might cause a court to find that it does not represent a reasonable "fit" under *Central Hudson's* fourth prong. This provision would apparently, in effect, prohibit tobacco advertising on the Internet except for the relatively small percentage of Web sites available to adults only, by subscription only. As discussed above, the Supreme Court, in *Reno v. ACLU*, held a comparable restriction on indecent material unconstitutional, although the fact that indecent material receives a higher level of First Amendment protection than commercial speech increases the possibility that the Supreme Court would uphold this provision of S. 1415.<sup>45</sup>

The prohibition of advertising with other than black text on white background except at locations where individuals under 18 are not permitted and in publications whose readers under the age of 18 constitute 15 percent or less of the total readership appears more likely to be found constitutional than some of the provisions that would more greatly restrict advertising aimed at adults.

As noted, there appears to be an inconsistency in the provision that would prohibit payments to be made to ensure that "a logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification" appear in a movie, program, or video game. Section 122(a)(2) prohibits such payments outright, whereas section 122(a)(3) apparently prohibits them only in the case of "print or film media that appeals to individuals under the age of 18 years or through a live performance by an entertainment artist that appeals to such individuals." Thus, the restriction on advertising in programs or video games would not be limited to those that appeal to minors, while the restriction as to print media and to live performances would be limited in that respect. (The word "programs" presumably means television programs rather than printed programs that are distributed at live performances, but this might be clarified.) However, the restriction on advertising in "movies" would be restricted to those that appeal to minors, while the restrictions as to "films" would not be, which seems inconsistent.

The above restrictions that are not limited to those that appeal to minors may be subject to challenge on the ground that they unduly restrict adults' access to tobacco

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<sup>44</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (emphasis in original).

<sup>45</sup> *See*, text accompanying note 38, *supra*.

advertisements. Even those that are limited, however, may face challenge because of the possible vagueness of the word "appeals."

The prohibition of "a logo, symbol, motto, selling message, recognizable color or pattern of colors, or any other indicia . . . identifiable with a tobacco product" to be used on non-tobacco products would restrict a particular form of tobacco advertising. As such, it might raise constitutional questions because it would not be limited to non-tobacco products to which minors are exposed to a significant degree.

Finally, section 123's limits on point-of-sale advertising at any location in which an individual under 18 is permitted would seem constitutional because they are directed to minors and do not totally restrict advertising aimed at adults.

In summary, it appears that the constitutionality of S. 1415's restrictions will likely turn on whether they represent a reasonable "fit" between the government's means and ends. In *Reno v. ACLU*, in striking down restrictions on indecent material, the Supreme Court reiterated that the government may not "reduce the adult population . . . to reading only what is fit for children." However, *Reno v. ACLU* did not involve commercial speech, which receives less protection under the First Amendment than other speech. Consequently, the courts might find that S. 1415's restrictions, even though they would limit adults' access to tobacco advertising, would represent a reasonable fit between the government's means and its end of reducing underage smoking. The fact that S. 1415's restrictions would not be as encompassing as the restrictions on liquor price advertising that the Supreme Court struck down in *44 Liquormart*, and would allow some tobacco advertising to continue, might increase the likelihood of the restrictions' being upheld. However, this is an area of constitutional law about which it is difficult to make predictions.