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Federal Advertising Law: An Overview

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Summary

This report provides a brief overview of federal law with respect to five selected advertising issues: alcohol advertising, tobacco advertising, the Federal Trade Commission Act, advertising by mail, and advertising by telephone.¹ There are numerous federal statutes regulating advertising that do not fit within any of these categories; as random examples, the Food, Drug, and Cosmetic Act requires disclosures in advertisements for prescription drugs²; the Truth in Lending Act governs the advertising of consumer credit³; and a federal criminal statute makes it illegal falsely to convey in an advertisement that a business is connected with a federal agency.⁴

Alcohol Advertising

The Federal Alcohol Administration Act makes it unlawful to engage in interstate or foreign commerce in distilled spirits, wine, or malt beverages, unless such products conform to regulations of the Bureau of Alcohol, Tobacco and Firearms, which is in the Department of the Treasury. The Act requires that these regulations, among other things, "prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene, or indecent."⁵ A 1988 amendment to the Act requires that alcoholic beverages sold or distributed in the United States, or to members of the Armed Forces outside the United States, contain a specified health warning.⁶

¹ On the issue of constitutional protection for advertising, see, *Freedom of Speech and Press: Exceptions to the First Amendment* (CRS Report 95-815 A).

² 21 U.S.C. § 352.

³ 15 U.S.C. §§ 1661-1665b.

⁴ 18 U.S.C. § 709.

⁵ 27 U.S.C. § 205(e)(4).

⁶ 27 U.S.C. § 215.

In 1995, the Supreme Court held unconstitutional a provision of the Act that prohibited beer labels from displaying alcohol content unless state law requires such disclosure.⁷ The Court found the provision to violate the First Amendment, concluding that, although the government had a legitimate interest in curbing "strength wars" by beer brewers who might seek to compete for customers on the basis of alcohol content, the ban "cannot directly and materially advance" this "interest because of the overall irrationality of the Government's regulatory scheme."⁸ This irrationality was evidenced by the fact that the ban did not apply to beer advertisements, and that the statute *required* the disclosure of alcohol content on the labels of wines and spirits.

Federal law does not prohibit the advertising of alcoholic beverages on radio or television, but, since 1936 for radio and 1948 for television, the industry voluntarily refrained from advertising hard liquor on radio or television. On November 7, 1996, however, the Distilled Spirits Council of the United States said that it would lift the ban, but that it had "drawn up 26 guidelines for the industry to follow -- guidelines that will avoid a younger audience but also allow this industry to compete more effectively"⁹ The four major television networks announced that they would not air liquor advertisements.

Tobacco Advertising

Advertising of tobacco products is restricted by the Federal Cigarette Labeling and Advertising Act, which requires specified warning labels on all cigarette packages distributed in the United States and on all cigarette advertisements within the United States. The warnings must be rotated quarterly in accordance with Federal Trade Commission regulations. The statute also prohibits advertising of cigarettes and little cigars on any medium of electronic communications subject to the jurisdiction of the Federal Communications Commission.¹⁰

In 1996, the Food and Drug Administration (FDA) adopted a final rule restricting the advertising of cigarettes and smokeless tobacco products. The purpose of the final rule "is to establish restrictions on the sale, distribution, and use of cigarettes and smokeless tobacco in order to reduce the number of children and adolescents who use these products"¹¹ The rule has not gone into effect, however, because a federal district court ruled

⁷ *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (striking down 27 U.S.C. § 205(e)(2)). In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Supreme Court struck down a state statute that prohibited disclosure of retail prices in advertisements for alcoholic beverages.

⁸ *Id.* at 1592.

⁹ *Washington Post*, Nov. 8, 1996, p. A1.

¹⁰ 15 U.S.C. §§ 1331-1341. In addition, 15 U.S.C. § 4402 requires warning labels on smokeless tobacco product packages and advertisements (other than outdoor billboard advertising), and prohibits advertising smokeless tobacco on any medium of electronic communications subject to the jurisdiction of the Federal Communications Commission. No similar law applies to cigars.

¹¹ 61 Fed. Reg. 44615 (1996) (to be codified at 21 C.F.R. § 897).

that the FDA lacked the statutory authority to restrict tobacco advertising.¹² This decision is being appealed, and Congress, meanwhile, is considering legislation to implement the proposed June 20, 1997 settlement between the states and the tobacco industry; this settlement would also limit tobacco advertising.¹³

The FDA final rule would restrict tobacco advertising in several ways, such as by banning "outdoor advertising for cigarettes and smokeless tobacco, including billboards, posters, or placards . . . within 1,000 feet of the perimeter of any public playground or playground area in a public park, . . . elementary school or secondary school," and permitting other outdoor advertising, and advertising in newspapers, magazines, and periodicals, only in "black text on a white background." It would also prohibit any manufacturer, distributor, or retailer from sponsoring "any athletic, musical, artistic or other social or cultural event, or any entry or team in any event, in the brand name . . . , logo, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarettes or smokeless tobacco."

The June 20, 1997 tobacco settlement, if enacted by Congress, would, among other things, ban all outdoor advertising of tobacco products, ban the use of human and cartoon images in tobacco advertising and packaging, and ban tobacco advertising on the Internet, unless it is designed to be inaccessible in or from the United States.

Federal Trade Commission Act

Section 5 of the Federal Trade Commission Act is the basic federal statute prohibiting unfair or deceptive advertising. Subsection (a) of section 5 reads:

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.¹⁴

Subsection (n) of section 5, added in 1994, provides that an act or practice is illegal only if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumer or to competition." Section 12 of the Act makes it unlawful to disseminate any false advertisement for "foods, drugs, devices, services, or cosmetics."¹⁵ The Federal Trade Commission Act does not provide for lawsuits by individual consumers. Rather, consumers may file complaints with the Federal Trade Commission (FTC), which may take legal action when it deems it appropriate.

¹² *Coyne Beahm, Inc. v. United States*, 958 F. Supp. 1060 (M.D. N.C. 1997). On the constitutionality of the FDA restrictions (a question the court did not reach), see, *Tobacco Advertising: Whether the FDA's Restrictions Violate Freedom of Speech* (CRS Report 96-825 A).

¹³ See, *The Tobacco Industry-State Attorneys General Proposed Settlement - An Overview* (CRS Report 97-664 SPR).

¹⁴ 15 U.S.C. § 45(a).

¹⁵ 15 U.S.C. § 52.

The Federal Trade Commission Act does not apply to banks, savings and loan institutions, Federal credit unions, common carriers (railroads and airlines), or "persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act of 1921" ¹⁶ All these entities, and their advertising, are regulated by federal agencies other than the FTC.

Advertising by Mail

A federal statute provides that a person who receives in the mail "any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative" may request the Postal Service to issue an order directing the sender to refrain from further mailings to the addressee, and the Postal Service must do so. ¹⁷ If the Postal Service believes that a sender has violated such an order, it may request the Attorney General to apply to a federal court for an order directing compliance. This statute applies to any unwanted advertisement, regardless of content. ¹⁸

Another section of the statute provides that any person may file with the Postal Service a statement "that he desires to receive no sexually oriented advertisements through the mails." ¹⁹ The Postal Service shall make the list available, and "[n]o person shall mail or cause to be mailed any sexually oriented advertisement to any individual whose name and address has been on the list for more than 30 days." If the Postal Service believes that any person is violating this provision, it may request the Attorney General to commence a civil action against such person in a federal district court.

Another section of the statute provides that unordered merchandise sent through the mails "may be treated as a gift by the recipient," and the sender may not bill for it. ²⁰ Various other federal statutes prohibit mail fraud and other deceptive mailing practices. ²¹ In addition, the Federal Trade Commission has adopted a trade regulation rule entitled "Mail or Telephone Order Merchandise," which requires, among other things, that sellers who solicit buyers to order merchandise through the mails or by telephone ship such merchandise within the time the seller states or, if no time is stated, within 30 days after receipt of the order. Where a seller is unable to ship the merchandise within such time, it must offer the buyer the option to cancel the order and receive a prompt refund. ²²

¹⁶ 15 U.S.C. § 45(b).

¹⁷ 39 U.S.C. § 3008.

¹⁸ *Rowan v. Post Office Department*, 397 U.S. 728, 738 (1970) ("We . . . categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another.")

¹⁹ 39 U.S.C. § 3010.

²⁰ 39 U.S.C. § 3009.

²¹ *E.g.*, 18 U.S.C. §§ 1341, 1342, 39 U.S.C. §§ 3001 *et seq.*

²² 16 C.F.R. Part 435.

Advertising by Telephone

The Telephone Consumer Protection Act of 1991 makes it illegal to, among other things, "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message," or "use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."²³ Victims of these practices may file a complaint with the Federal Communications Commission and may sue and recover actual monetary damages or \$500, whichever is greater, and the court may increase the award up to three times if it finds that the defendant acted willfully or knowingly.

The Telemarketing and Consumer Fraud and Abuse Prevention Act, enacted in 1994, required the Federal Trade Commission to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices."²⁴ Such rules must include:

- (A) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right of privacy,
- (B) restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers, and
- (C) a requirement that a person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services.

The FTC's Telemarketing Sales Rule prohibits sellers from, among other things, calling a person who has previously informed the seller that he or she does not wish to be called, or calling any consumer without prior consent before 8 a.m. or after 9 p.m.²⁵

The Telephone Disclosure and Dispute Resolution Act of 1992 requires the FTC to prescribe rules "to prohibit unfair and deceptive acts and practices in any advertisement [in any medium] for pay-per-call services."²⁶ Such rules must require, among other things, that the person offering such services "clearly and conspicuously disclose in any advertisement the cost of the use of such telephone number," and "the odds of being able to receive [any] prize, award, service, or product [offered] at no cost or reduced cost."

²³ 47 U.S.C. § 227. A federal court of appeals has held that this statute does not violate the First Amendment. *Destination Ventures v. Federal Communications Commission*, 46 F.3d 54 (9th Cir. 1995); *Moser v. Federal Communications Commission*, 46 F.3d 970 (9th Cir. 1995), *cert. denied*, 515 U.S. 1161 (1995).

²⁴ 15 U.S.C. §§ 6101 *et seq.*

²⁵ 16 C.F.R. Part 310.

²⁶ 15 U.S.C. §§ 5711 *et seq.* The FTC rules appear at 16 C.F.R. Part 308.