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Tobacco Advertising: Whether the FDA's Restrictions Violate Freedom of Speech

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Tobacco Advertising: Whether the FDA's Restrictions Violate Freedom of Speech

Summary

This report considers whether the provisions of the FDA's final rule restricting the advertising of cigarettes and smokeless tobacco products violates the First Amendment's guarantee of freedom of speech. The purpose of the advertising regulations "is to decrease young people's use of tobacco products by ensuring that the restrictions on access are not undermined by the product appeal that advertising for these products creates for young people."

Most of the restrictions on tobacco advertising were scheduled to take effect August 28, 1997. However, on April 25, 1997, a federal district court ruled that the Food, Drug, and Cosmetic Act did not authorize the FDA to restrict tobacco advertising (though the court ruled that the FDA did have the authority otherwise to regulate tobacco products). The court ordered that the FDA shall not implement the regulations, pending further orders by the court.

The final rule restricts tobacco advertising in several ways. *First*, it bans, "outdoor advertising for cigarettes and smokeless tobacco, including billboards, posters, or placards . . . within 1,000 feet of the perimeter of any public playground . . . elementary school or secondary school." *Second*, it permits other outdoor advertising, and advertising in newspapers, magazines, and periodicals, but only in "black text on a white background." *Third*, it limits labeling and advertising in audio format "to words only with no music or sound effects," and in video format "to static black and white text only on a white background." *Fourth*, it requires all advertisements for tobacco products to contain the words "A Nicotine-Delivery Device for Persons 18 or Older." *Fifth*, it prohibits the sale of "any item (other than cigarettes or smokeless tobacco) or service, which bears the brand name . . . , logo," etc., identical or similar to any brand of cigarettes or smokeless tobacco. *Sixth*, it prohibits offering any gift or item (other than cigarettes or smokeless tobacco) to any person purchasing cigarettes or smokeless tobacco. *Seventh*, it prohibits sponsoring "any athletic, musical, artistic or other social or cultural event, or any entry or team in any event, in the brand name . . . , logo," etc., identical or similar to any brand of cigarettes or smokeless tobacco.

As a type of commercial speech, tobacco advertising is entitled to some, but not full, First Amendment protection. Assuming that the advertising is not misleading, a governmental restriction will be constitutional only if it directly advances a substantial governmental interest by a means that represents a reasonable "fit" with the government's ends and is not substantially more restrictive of speech than is necessary. In the case of the FDA's restrictions on tobacco advertising, a court would almost certainly find the governmental interest in preventing minors from smoking to constitute a substantial governmental interest. Whether a court would find that the restrictions directly advance that interest by a means that represents a reasonable fit with the government's ends will depend upon the evidence that the FDA presents to the court. A court could uphold some of the restrictions and strike down others, in whole or in part.

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Tobacco Advertising: Whether the FDA's Restrictions Violate Freedom of Speech

I. The FDA's Final Rule

This report considers whether the provisions of the Food and Drug Administration's final rule restricting the advertising of cigarettes and smokeless tobacco products violates the First Amendment's guarantee of freedom of speech. The purpose of the final rule as a whole "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 . . . ."[1] The purpose of the advertising regulations in particular "is to decrease young people's use of tobacco products by ensuring that the restrictions on access are not undermined by the product appeal that advertising for these products creates for young people."[2]

The restrictions on tobacco advertising were scheduled to take effect August 28, 1997, except for the seventh one (see the list in the next paragraph), which was scheduled to take effect February 28, 1998. However, on April 25, 1997, a federal district court ruled that the Food, Drug, and Cosmetic Act did not authorize the FDA to restrict tobacco advertising (though the court ruled that the FDA did have the authority otherwise to regulate tobacco products). The court ordered "that the Food and Drug Administration shall not implement any of the additional Regulations set for implementation on August 28, 1997, pending further orders by the court."[3]

The final rule restricts tobacco advertising in several ways. *First*, it bans, "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."[4] *Second*, it permits other outdoor advertising, and advertising in newspapers, magazines, and periodicals, but only in "black text on a white background." This restriction does not apply, however, "[i]n any facility where vending machines and

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[1] 61 Fed. Reg. 44,616 (1996) (to be codified at 21 C.F.R. § 897.2).

[2] 61 Fed. Reg. 44,465 (1996).

[3] Coyne Beahm Inc. v. Food and Drug Administration, No. 2:95CV00591 (M.D. N.C. Apr. 25, 1997).

[4] 61 Fed. Reg. 44,617 (1996) (to be codified at 21 C.F.R. § 897.30(b)).

self-service displays are permitted,"[5] or in any "adult publication," as the regulation defines the term.[6] *Third*, it limits labeling and advertising in audio format "to words only with no music or sound effects," and in video format "to static black and white text only on a white background."[7] *Fourth*, it requires all advertisements for tobacco products to contain the words "A Nicotine-Delivery Device for Persons 18 or Older."[8] *Fifth*, it prohibits the sale of "any item (other than cigarettes or smokeless tobacco) or service, which bears the brand name . . . , logo, symbol, 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."[9] *Sixth*, it prohibits any manufacturer, distributor, or retailer from offering "any gift or item (other then [sic] cigarettes or smokeless tobacco) to any person purchasing cigarettes or smokeless tobacco in consideration of the purchase thereof . . . ."[10] *Seventh*, it prohibits 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." They may, however, sponsor such events "in the name of the corporation which manufactures the tobacco product, provided that both the registered corporate name and the corporation were registered and in use in the United States prior to January 1, 1995, and that the corporate name does not include any 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."[11]

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[5] They are permitted, under the final rule, "in facilities where the retailer ensures that no person younger than 18 years of age is present, or permitted to enter, at any time." 61 Fed. Reg. 44,617 (1996) (to be codified at 21 C.F.R. § 897.16(c)(2)(ii)).

[6] 61 Fed. Reg. 44,617 (1996) (to be codified at 21 C.F.R. § 897.32(a)).

[7] 61 Fed. Reg. 44,617 (1996) (to be codified at 21 C.F.R. § 897.32(b)). Audio that accompanies video is subject to the same restriction as audio alone; *i.e.*, music and sound effects are prohibited. The exceptions applicable to the prohibition of color advertisements -- *i.e.*, "adult" publications and facilities where vending machines and self-service displays are permitted -- apparently apply here as well. These exceptions appear in subsection (a), which prohibits color advertisements, and not in subsection (b), which restricts audio and video advertisements, but the exceptions state that they apply to "This section," rather than to "This subsection." In addition, application of subsection (b) to "adult" publications and "adults only" facilities might be unconstitutional, and the Supreme Court construes statutes "where fairly possible so as to avoid substantial constitutional questions." United States v. X-Citement Video, Inc., 115 S. Ct. 464, 467 (1994).

[8] 61 Fed. Reg. 44,617 (1996) (to be codified at 21 C.F.R. § 897.32(c)). This subsection is apparently also subject to the exceptions applicable to subsection (a).

[9] 61 Fed. Reg. 44,617 (1996) (to be codified at 21 C.F.R. § 897.34(a)).

[10] 61 Fed. Reg. 44,617-44,618 (1996) (to be codified at 21 C.F.R. § 897.34(b)).

[11] 61 Fed. Reg. 44,618 (1996) (to be codified at 21 C.F.R. § 897.34(c)).

II. The First Amendment: Applicability To 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. . . ." This language restricts government both more and less than it would if it were applied literally. It restricts government more in that it applies not only to Congress, but to all branches of the federal government, and to all branches of state and local government.[12] It restricts government less in that 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."[13]

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."[14] 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."[15]

In May 1996, in *44 Liquormart, Inc. v. Rhode Island*, the Supreme Court increased the protection that the *Central Hudson* test guarantees to commercial speech by making clear 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

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[12] Herbert v. Lando, 441 U.S. 153, 168 n.16 (1979).

[13] Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 482 (1989) (emphasis in original).

[14] Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989).

[15] 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., 115 S. Ct. 2371, 2377 (1995), the Court referred to the *Central Hudson* test as having three parts, and referred to its second, third, and fourth prongs as, respectively, it 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.

regulation designed "to protect consumers from misleading, deceptive, or aggressive sales practices."[16]

III. 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. In considering the FDA's final rule, 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.[17] We will assume that the advertisements concern a lawful activity for two reasons. First, even if, as some critics charge, some tobacco advertisements are aimed at children, they apparently do not overtly solicit minors to buy tobacco products, whether explicitly in words, by showing pictures of minors smoking, or by appearing in publications designed specifically for children or teenagers. Second, the FDA's final rule limits adults' access to tobacco advertising, as adults as well as children see billboards, for example, within 1,000 feet of a school or playground. If we did not assume that the advertisements concern a lawful activity, then any governmental restriction placed on them would be constitutional, and our analysis would end here. Although it is conceivable that a court could take this approach, it seems unlikely, in light of the two factors just mentioned. Therefore, we will proceed to apply the rest of the *Central Hudson* test.

IV. 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."[18] 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 the FDA's final rule would satisfy the second prong. It is on the next two prongs that the case likely will turn, as these prongs address whether the government's restriction on commercial speech is a reasonable way to further that interest.

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[16] 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.

[17] 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*.

[18] 478 U.S. 328, 341 (1986).

V. 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).[19] 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."[20]

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*,[21] 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*,[22] 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*."[23]

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.'"[24]

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.[25] 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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[19] *Id*. at 341-342.

[20] *Id*. at 342, citing Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).

[21] 507 U.S. 761 (1993).

[22] 436 U.S. 447 (1978).

[23] 507 U.S. at 775.

[24] 114 S. Ct. 2084, 2089 (1994).

[25] 115 S. Ct. 1585 (1995).

Government's regulatory scheme."[26] 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."[27]

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.[28] 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,"[29] 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."[30]

By contrast, in *44 Liquormart*, the Court found that "any conclusion that elimination of the ban [on alcoholic beverage price advertising] 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."[31]

With respect to its restrictions on tobacco advertising, the FDA 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."[32] If this is true, then the advertising restrictions would apparently satisfy the third prong of the *Central Hudson* test. Of course, it is possible for a court to find one of the restrictions constitutional but another unconstitutional. If eliminating billboard advertising near schools and playgrounds reduces smoking by children, it does not necessarily mean that eliminating color from advertisements will have that effect.

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[26] *Id*. at 1592.

[27] 116 S. Ct. at 1509.

[28] 115 S. Ct. 2371 (1995).

[29] *Id*. at 2376.

[30] *Id*. at 2377.

[31] 116 S. Ct. at 1510.

[32] 61 Fed. Reg. 44,474 (1996).

The FDA writes: "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."[33] 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.

VI. Applying *Central Hudson*: Fourth Prong

We turn now to the fourth and final requirement of the *Central Hudson* test -- that restrictions on commercial speech be "not more extensive than is necessary" to serve the asserted governmental interest. The Supreme Court, subsequent to *Central Hudson*, held that this requirement is not to be interpreted "strictly" to require the legislature to use the "least restrictive means" available to accomplish its purpose. Instead, the Court held, legislation regulating commercial speech satisfies the fourth prong if there is a reasonable "fit" between the legislature's ends and the means chosen to accomplish those ends.[34]

As evidenced by the decision in *Cincinnati v. Discovery Network, Inc.*, this looser interpretation does not guarantee that a restriction will satisfy the fourth prong. The Supreme Court in that case struck down a Cincinnati regulation that banned newsracks on public property if they distributed commercial publications, but not if they distributed news publications.[35] 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."[36] The city, therefore, did not establish "the `fit' between its goals and its chosen means that is required by our opinion in *Fox*."[37]

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

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[33] *Id.*

[34] Board of Trustees of the State University of New York v. Fox, *supra* note 13, at 480. The Court does "not equate this test with the less rigorous obstacles of rational basis review." *Florida Bar, supra* note 28, 115 S. Ct. at 2380. In other words, although a restriction on commercial speech need not constitute the least restrictive means to satisfy the fourth prong, it must be more than merely rational.

[35] 507 U.S. 410 (1993)

[36] *Id.* at 424 (emphasis in original).

[37] *Id.* at 428.

either by direct regulation or by increased taxation. . . . Even educational campaigns . . . might prove to be more effective."[38]

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 drawn. The FDA's final rule may more likely be upheld, on the grounds that, even if it not the least restrictive alternative, it does not "burden substantially more speech than necessary to further the government's legitimate interests,"[39] and there are not "numerous and obvious less burdensome alternatives"[40] available to further these interests. The FDA states that it "considered the alternatives suggested by the comments [to its rule as originally proposed] and [found] that none of them is an appropriate alternative . . . ."[41]

One commentator wrote, after *44 Liquormart,* that the FDA's "prohibition on school-zone billboards that advertise liquor [sic] -- which, of course, are read by people who are not schoolchildren -- might fall as being less effective than nonspeech alternatives. These alternatives could include direct prohibition on the sale of cigarettes in school zones, and federal mandating and funding of educational campaigns in schools to stress the health dangers of smoking."[42] The FDA might respond that, as for the alternative of prohibiting the sale of cigarettes in school zones, the problem is not the *sale* of cigarettes in school zones; it is the advertising of cigarettes in school zones, which cause minors to purchase them outside of school zones. As for educational campaigns, the FDA might argue that cigarette advertisements undercut the effectiveness of such campaigns, and may be prohibited on that basis. In any case, because its final rule does not impose a total ban on particular speech, as did the statute struck down in *44 Liquormart,* a reasonable fit between its ends and its means is all that is required.

VII. Consideration in Light 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

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[38] *44 Liquormart, supra* note 16, 116 S. Ct. at 1510.

[39] United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993).

[40] *Florida Bar, supra* note 28, 115 S. Ct. at 2380.

[41] 62 Fed. Reg. 44,499 (1996).

[42] Jerome L. Wilson, *A Toast to Commercial Speech,* LEGAL TIMES, July 29, 1996, at S 42. The Supreme Court itself, in *44 Liquormart* (as quoted in the text accompanying footnote 38, *supra*), commented that, as a means to reduce alcohol consumption, "educational campaigns . . . might prove to be more effective" than a speech ban.

from misleading, deceptive, or aggressive sales practices."[43] This language would make it less likely that a total ban on tobacco advertising would be upheld than prior to *44 Liquormart*, but does it have any implications for the constitutionality of the FDA's final rule?

The FDA argues that the language just quoted from *44 Liquormart* "has no application to the restrictions that FDA is imposing for two reasons. First, FDA is not entirely prohibiting the dissemination of commercial messages about cigarettes and smokeless tobacco. . . . Second, the restrictions are 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."[44]

The FDA's first reason seems correct, although an opponent of the restrictions might argue that the restrictions amount to something closer to a total prohibition than might appear. If, for example, it turned out that, in some urban areas, most or even all places where outdoor advertising exists are "within 1,000 feet of the perimeter of any public playground or playground area in a public park, . . . elementary school or secondary school," then a court might find *44 Liquormart* more relevant. The same might be the case if, under the FDA's definition, there are relatively few "adult publications" with wide circulation or facilities "where vending machines and self-service displays are permitted." Even if an opponent of the FDA's restrictions could demonstrate any of this to be true, however, the FDA could still argue that the restrictions did not amount to the *total* prohibition that troubled the Court in *44 Liquormart*.

The FDA's second reason -- that "the restrictions are 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" -- seems more questionable, because the issue is arguably more whether minors are competent to resist the advertisements than whether they are competent to use the products. Although the FDA's restrictions may be related to the bargaining process, it seems that they are more directly intended as a public health measure.

Nevertheless, the FDA could argue that its proposal is aimed at protecting children, and every state's law already bans the sale of tobacco products to children.[45] Therefore, the FDA could argue, state law has proved inadequate to prevent children from smoking, and its advertising restrictions are needed. The Court in *44 Liquormart* was ruling on a total ban on price advertising, not on a regulation aimed at protecting children, when it said "that attempts to regulate speech are more dangerous than attempts to regulate conduct." Its statement arguably would not apply to a regulation of speech intended to protect children by supplementing a regulation of conduct that has proved inadequate.

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[43] *Id*. at 1507, quoted in the text accompanying note 16, *supra*.

[44] 61 Fed. Reg. 44,470 (1996).

[45] *See*, note 17, *supra*.

The fact that the FDA's proposal is designed to protect children seems important. 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.[46]

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."[47] Justice Scalia, concurring, "share[s] Justice Stevens' aversion toward paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them."[48] Justice Thomas, in his concurring opinion, refers to "the antipaternalistic premises of the First Amendment."[49]

The ban on price advertising in *44 Liquormart*, it should be emphasized, was designed to reduce the sale of alcohol generally, and not to reduce the illegal sale of alcohol to children in particular. The FDA's final rule, by contrast, is aimed at children, and the Justices would seem likely to have significantly less objection to governmental paternalism toward children than toward adults. In *Federal Communications Commission v. Pacifica Foundation*, the Supreme Court, upholding an FCC regulation that limited the hours during which "indecent" material could be broadcast on the radio, found "that the government's interest in the `well-being of its youth' . . . justified the regulation of otherwise protected expression."[50] In *Sable Communications of California, Inc. v. Federal Communications Commission*, the Supreme Court found that the "compelling interest in protecting the physical and psychological well-being of minors . . . extends to shielding minors from the influence of literature that is not obscene by adult standards."[51] Arguably, this interest would also extend to shielding minors from advertisements that may not be kept from adults.

At the same time, the Supreme Court has said that the government may not "reduce the adult population . . . to reading only what is fit for children."[52] Thus, for example, indecent material may not be banned from the airwaves for 24 hours a

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[46] 116 S. Ct. at 1508.

[47] *Id*. at 1510.

[48] *Id*. at 1515 (Scalia, J., concurring).

[49] *Id*. at 1517 (Thomas, J., concurring).

[50] 438 U.S. 726, 749 (1978). In Denver Area Educational Television Consortium, Inc. v. Federal Communications Commission, 116 S. Ct. 2374, 2386 (1996), the Court applied its reasoning in *Pacifica* to uphold a restriction on indecent material on cable television.

[51] *Sable*, *supra* note 14, 492 U.S. at 126.

[52] Bolger v. Youngs Drug Products, Inc., 463 U.S. 63, 73 (1983); *Sable*, *supra* note 14, 492 U.S. at 128.

day,[53] and a restriction on tobacco advertising designed to protect children would be unconstitutional if it overly restricted adults' access.

In conclusion, it appears that a strong case can be made that *44 Liquormart* does not alter the way a court would apply the *Central Hudson* test to the FDA's proposal. It may be, however, that *44 Liquormart* is part of a trend on the Court's part to increase the First Amendment protection it accords to commercial speech. If so, and if this trend continues, then the Court might strike down the FDA's final rule, or parts of it, despite what one might glean from its holdings to date.

VIII. The *Penn Advertising* Case

The U.S. Court of Appeals for the Fourth Circuit has upheld municipal restrictions on billboard advertisements of tobacco products and alcoholic beverages. In *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, the court of appeals upheld a city ordinance that prohibits, except in certain commercially and industrially zoned areas of the city, any billboard that advertises cigarettes.[54] The Supreme Court vacated and remanded to the Fourth Circuit "for further consideration in light of *44 Liquormart . . . .*" In *Anheuser-Busch, Inc. v. Schmoke*, a Baltimore ordinance prohibiting billboards that advertise alcoholic beverages was also upheld by the Fourth Circuit and vacated and remanded by the Supreme Court "for further consideration in light of *44 Liquormart . . . .*"[55]

On November 14, 1996, 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.[56] 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

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[53] 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).

[54] 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 2575 (1996).

[55] 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded*, 116 S. Ct. 1821 (1996).

[56] Anheuser-Busch v. Schmoke, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 137 L.Ed.2d 714 (1997); Penn Advertising v. Mayor and City Council of Baltimore, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 137 L.Ed.2d 715 (1997).

> 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 out "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. . . . .[57]

IX. Conclusions

The FDA's final rule would satisfy the first prong of the *Central Hudson* test, given our assumption that it would regulate advertising that is lawful and not misleading. It would also almost certainly satisfy the second prong, as the Supreme Court has found that the government has a substantial interest in public health, safety, and welfare. The constitutionality of the final rule, therefore, will likely turn upon whether its restrictions directly and materially advance this interest (third prong), and whether there is a reasonable fit between the government's ends and means (fourth prong). We now consider the constitutionality of each of the seven features ("First" through "Seventh") of the regulation we outlined in the second paragraph of this report.

First, the FDA's ban on billboard advertising within 1,000 feet of any playground or school would appear constitutional, provided the government can present credible evidence, if challenged, that these restrictions would be likely to reduce tobacco consumption by minors. If the FDA can show that billboard advertising

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[57] Citations have been omitted throughout the quotation.

increases the number of minors who smoke, then it would seem to follow that restricting such advertising would have the opposite effect.[58]

Second, the prohibition on color advertising for tobacco products, in all but "adult" publications and facilities "where vending machines and self-service displays are permitted," would also appear constitutional if the government can present credible evidence that the prohibition would reduce tobacco consumption by minors.[59] A causal relationship between color advertising and minors' tobacco use might be more difficult to establish than one between billboard advertising and minors' tobacco use, but the FDA cites studies that it claims "demonstrate the impact that images and colors, cartoons, and pictures and other graphic material have on children and adolescents."[60]

Third, the prohibition of music or sound effects in audio advertising, and of pictures and color text in video advertising, would be subject to the same analysis as the first two prohibitions just discussed.[61]

Fourth, the compelled speech requirement ("A Nicotine-Delivery Device for Persons 18 or Older") in all tobacco advertisements would appear likely to be found constitutional, as the Supreme Court has held that an advertiser's

> constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. . . . [A]n advertiser's rights are reasonably protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. . . . The right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right.[62]

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[58] The billboard restriction might be problematic, however, if it turns out that there are few areas in a typical city that are not within 1,000 feet of a school or playground. *See*, pages 9-10, *supra*. In its first decision in *Penn Advertising*, *supra* note 54, the Fourth Circuit wrote (quoting itself in *Anheuser-Busch*, *supra* note 55): "If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have its focus more efficiently on reaching minors, the City would have to consider those alternatives. But . . . [i]n the face of a problem as significant as that which the City seeks to address, the City must be given some reasonable latitude." 63 F.3d at 1316, 1325-1326.

[59] Again, provided that the restriction is not viewed as equivalent to a total restriction; *see*, pages 9-10, *supra*.

[60] 61 Fed. Reg. 44,509 (1996).

[61] As discussed in note 7, *supra*, it appears that this restriction would be construed to contain exceptions for "adult" publications and facilities "where vending machines and self-service displays are permitted."

[62] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651, 652 n.14 (1985) (emphasis in original).

In *44 Liquormart*, the Court confirmed that when a state "requires the disclosure of beneficial consumer information," the requirement is entitled to "less than strict review."[63]

Fifth, the prohibition on the sale of items or services, other than tobacco products, with tobacco products' brand names or symbols appears to be a way to reduce what is a form of tobacco advertising, and, as such, might be comparable to the billboard restriction. A difference, however, is that this prohibition does not have as direct a connection with children. Whereas the billboard restriction is limited to billboards within 1,000 feet of schools and playgrounds, the prohibition of cigarette brand names on non-tobacco products is not limited to products used widely by minors. Therefore, an opponent of the prohibition might charge that it is overbroad. The FDA might respond that there are not many products that are purchased predominantly by teenagers under 18, so there would be no effective way to limit the prohibition. However, the Supreme Court has said that the government may not "reduce the adult population . . . to . . . only what is fit for children."[64] The FDA might respond that its regulation does not do that, as adults will continue to have access to tobacco advertising in media other than packages containing non-tobacco products. In short, it seems uncertain whether this restriction is constitutional.

Sixth, the prohibition on offering gifts in consideration of purchasing tobacco products does not restrict speech and therefore raises no First Amendment issue.

Seventh, the prohibition on sponsoring events in a brand name, logo, etc., identifiable with one used for a tobacco product appears, for constitutional purposes, comparable to the prohibition on the sale of items or services, other than tobacco products, with tobacco products' brand names or symbols. It limits a form of tobacco advertising, but is not limited to events attended predominantly by teenagers under 18, and for that reason it seems uncertain whether this prohibition is constitutional.

Even if this prohibition is upheld generally, one aspect of it might be found unconstitutional. The prohibition does not apply to sponsorships in a corporate name that does not include a brand name, logo, etc., if "both the corporate name and the corporation were registered and in use in the United States prior to January 1, 1995." The FDA writes that the distinction "is intended to prevent manufacturers from circumventing this restriction by incorporating separately each brand that they manufacture for use in sponsorship."[65] It is unclear why the FDA considers that harmful, as its rule in all cases prohibits use of a corporate name that includes a brand name. The effect on smoking by minors would seem to be the same whether a corporate name and a corporation were registered before or after January 1, 1995. Perhaps, though, if this aspect of the restriction were challenged, the FDA could persuade a court that the distinction was justifiable.

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[63] *44 Liquormart*, *supra* note 16, 116 S. Ct. at 1507.

[64] *See*, note 52.

[65] 61 Fed. Reg. 44,534 (1996).

In summary, as a type of commercial speech, tobacco advertising is entitled to some, but not full, First Amendment protection. Assuming that the advertising is not misleading, a governmental restriction will be constitutional only if it directly advances a substantial governmental interest by a means that represents a reasonable "fit" with the government's ends and is not substantially more restrictive of speech than is necessary. In the case of the FDA's restrictions on tobacco advertising, a court would almost certainly find the governmental interest in preventing minors from smoking to constitute a substantial governmental interest. Whether a court would find that the restrictions directly advance that interest by a means that represents a reasonable fit with the government's ends will depend upon the evidence that the FDA presents to the court. A court could uphold some of the restrictions and strike down others, in whole or in part.