



Congress Daily (August 11, 2004)

Advertisers Taking Aim At FDA Filtering Of Tobacco Ads ...

Media companies and the advertising industry are mobilizing to stop Senate-passed language they say would infringe on the First Amendment by giving FDA authority to regulate tobacco advertising. Advertising agencies, ad buyers, marketers and media groups say they may challenge the regulations in court if they become law. At stake are billions in advertising dollars the tobacco industry spends each year. The Senate tobacco buyout legislation would require the FDA to re-issue regulations it first proposed in 1996, before courts ruled the agency lacked the authority to regulate tobacco.

The advertising industry has opposed several of those rules, including a requirement that tobacco ads in publications geared to young readers must be restricted to black-and-white text, ending the run of colorful cigarette ads. Richard O'Brien, executive vice president for the American Association of Advertising Agencies, said that would constitute a "de facto ban on advertising." Another rule from 1996 that raised the ire of the advertising industry was one that banned tobacco companies from sponsoring sports or entertainment events. "Taken together, these would have significant impact and if they pass, it would become almost impossible to advertise tobacco nationally," said Dan Jaffe, executive vice president for the Association of National Advertisers, a group that includes some of the nation's largest companies, including a few tobacco makers.

The groups also object to a Senate provision that would require 20 percent of any print tobacco ad to consist of a government-issued warning about tobacco's health dangers. In a letter sent to lawmakers this spring when Sens. **Edward Kennedy**, D-Mass., and **Mike DeWine**, R-Ohio, first introduced the FDA bill, advertising and media groups said the provision would cast the government "in the role of copywriter." The groups said the requirement also could infringe on a tobacco company's property rights, since advertising is a purchased space. The legislation also allows states and localities to restrict tobacco advertising, a provision that critics say would hinder national advertising campaigns if states adopted different requirements.

-- by Emily Heil

As Foes Caution About 'Slippery Slope' Of Regulations

Advertisers and media groups say their biggest concern with proposed restrictions on tobacco advertising is not revenue that might be lost from those ads, but rather the precedents that might be set for other kinds of advertising. Richard O'Brien, executive

vice president for the American Association of Advertising Agencies, said he and others are concerned that products such as alcohol, prescription drugs and even fast food might be next, they say. "It's the domino effect that we have to protect against," he said. Paul Boyle, senior vice president of the Newspaper Association of America, said newspapers receive less than 1 percent of tobacco advertising dollars and that many newspapers have adopted policies banning or limiting such ads. But he also worries that about the impact of the bill on advertising in general. "We're very concerned about opening that door," he said.

While the 1998 settlement between tobacco companies and states restricted tobacco advertisements, including limiting sponsorship of sports and entertainment events and banning billboards, tobacco advertising is still lucrative business. Tobacco companies spent \$9.57 billion marketing cigarettes in 2000, including \$51.7 million on newspaper advertising and \$294.9 million on magazines, according to records maintained by the FTC. In 2001, they also spent \$236.7 million promoting smokeless tobacco products. But advertisers and media groups say tobacco advertising has become less profitable since the 1998 industry settlement.

Matt Myers, president of the Campaign for Tobacco-Free Kids, dismisses the "slippery slope" argument, saying FDA already has the regulatory authority over advertising for other types of products. "We're not creating a slippery slope here -- it's already there and it hasn't been so slippery," he said. Both sides expect that the law, if enacted, ultimately will face a court challenge. Myers said the proposed regulations are modest and would be narrowly tailored to allow advertisers to get their message across. But Dan Jaffe, executive vice president for the Association of National Advertisers, insisted that legal precedent is on his side. If the government wants to impose limits on commercial speech, it must meet a high standard.

These are very broad, multilayered restrictions, and if you look at them on an individual basis, the court has rejected them," Jaffe said.

The FDA provision is part of the Senate legislation that would buy out tobacco farmers for their tobacco allotments in return for regulation. The House version includes a buyout but no regulation. Both versions were added as amendments to an unrelated foreign sales corporation/extraterritorial income tax bill. The package is headed to a House-Senate conference committee.

-- by *Emily Heil*