
Tobacco Advertising Q&A

By Scott R. Flick and Paul A. Cicelski

While it has been decades since Congress banned cigarette ads from the airwaves, broadcasters continue to ask for advice on whether they may air certain types of tobacco-related advertisements. In fact, questions in this area of law appear to be on the increase, particularly with the advent of “e-cigarette” advertising. In order to assist broadcasters in complying with tobacco advertising restrictions, we offer the following Q&A for tobacco-related spots.

Q: May broadcasters air advertisements for cigarettes, small cigars and smokeless tobacco?

A: No. The Federal Cigarette Labeling and Advertising Act of 1969 (the “Act”), 15 U.S.C. §§ 1331 *et seq.*, as modified by the Little Cigar Act of 1973,¹ makes it unlawful to advertise “cigarettes” and “little cigars” on “any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.”² In 1986, Congress enacted the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. §§ 4401 *et seq.*, extending the broadcast ban to include advertisements for smokeless tobacco products.³ The broadcast ban of cigarette advertisements survived constitutional challenge in *Capital Broadcasting Co. v. Mitchell*.⁴ The plaintiffs in that case, several broadcasters and the National Association of Broadcasters, contended that the advertising ban under the Act violated their First Amendment right to freedom of speech and their due process rights. The federal district court in Washington, D.C. upheld the broadcast advertising ban, and the Supreme Court affirmed without opinion.

Q: How are “cigarettes,” “little cigars,” and “smokeless tobacco” defined?

A: For purposes of the federal law, “cigarettes” are defined as “(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance



¹ Pub. L. 93-109, Sept. 21, 1973, 87 Stat. 352.

² 15 U.S.C. § 1335.

³ Pub. L. 99-252, Sec. 2, Feb. 27, 1986, 100 Stat. 30.

⁴ 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000, 31 L. Ed. 2d 472, 92 S. Ct. 1289 (1972).

containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).”⁵ “Little cigars” are defined as “any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette) and as to which one thousand units weighs no more than three pounds.”⁶ “Smokeless tobacco” is defined as “any finely cut, ground, powdered, or leaf tobacco that is intended to be placed in the oral cavity”⁷ (i.e., chewing tobacco, snuff, etc.).

Q: How is the broadcast ban enforced?

A: It is the practice of the FCC to refer complaints in this area to the Office of Consumer Litigation of the Department of Justice (“DOJ”) which has primary responsibility for enforcing the laws relating to tobacco advertising. Any violation of the advertising restrictions is considered a misdemeanor, punishable by a fine not to exceed \$10,000.⁸ The DOJ makes decisions as to whether to seek penalties on a case by case basis. While the DOJ does not publish formal rules or guidelines for broadcasters to follow, as discussed in more detail below, the Department has issued a number of informal advisory letters that provide general guidance regarding the agency’s current enforcement intentions.

Q: May broadcasters air advertisements for pipe tobacco and cigars?

A: Yes. Federal law does not prohibit the broadcast advertising of cigars (not defined as little cigars) or pipe tobacco. According to DOJ advisory letters, if an advertisement “specifically relates only to cigars or loose tobacco ... it does not fall within the statutory ban.”

However, as a cautionary note, the Federal Trade Commission (“FTC”), which enforces the print advertisement restrictions of tobacco products, did enter into settlement agreements with the seven largest cigar manufacturers which subject those companies to fines for airing cigar advertisements absent a health risk disclosure. The warnings, which the major cigar companies are required to rotate, include:

1. SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.
2. SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.
3. SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth And Low Birth Weight.
4. SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.
5. SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

According to the FTC, “[t]he orders are intended to create a uniform national system of rotating health warnings.” Thus, the orders contain provisions narrowly preempting state laws requiring different health

⁵ 15 U.S.C. § 1332(1).

⁶ 15 U.S.C. § 1332(7).

⁷ 15 U.S.C. § 4408(1).

⁸ 15 U.S.C. § 1338.

warnings on cigar products. The cigar companies that are subject to the consent decrees are required to display these warnings clearly and prominently in all **audio and video ads**, on packages, in print ads, on the Internet, and on point-of-purchase displays.

Q: May broadcasters advertise shops that sell tobacco products?

A: Generally, yes. There is no specific federal prohibition against advertising smoke shops. However, each commercial message must be scrutinized for content that may be prohibited. According to DOJ informal opinions, examples of prohibited advertisements include the following:

1. advertisements that include the words “cigarette” or “little cigar”;
2. advertisements that include the brand names of cigarettes or little cigars; and
3. advertisements that juxtapose words in such a way as to suggest that cigarettes, little cigars or smokeless tobacco are available and can be purchased at the shop.

In contrast, advertisements for smoke shops that do not include this prohibited language pose less of a risk of scrutiny and DOJ enforcement action.

Q: What are examples of smoke shop advertisements that are problematic?

A: Any mention of the words “cigarette,” “little cigar,” or “smokeless tobacco” in a broadcast spot will usually constitute a prohibited advertisement subject to DOJ scrutiny and enforcement action. For example, the DOJ has found on-air advertisements for “The Stop” and “E-Z Convenience Store” to violate the Act because “cigarettes” were advertised as among the items sold at the stores. Moreover, if the word “cigarette” is included in the name of a smoke shop, as in “Joe’s Cigarette and Smoke Shop,” the station advertisement could lead to DOJ scrutiny/enforcement action. This is true even if the text of the spot has nothing to do with smoking related products. For example, a company named “Joe’s Cigarette and Convenience Store” could not advertise its weekly milk special on broadcast radio or television because the word “cigarette” is in its name.

Similarly, the DOJ has prohibited over-the-air advertisements that include the brand name of cigarettes. Thus, an advertisement for “Joe’s Convenience Store” could not state that “Marlboro” or “Kool” cigarettes are sold at the store. In fact, a number of the DOJ’s opinions have indicated that even the juxtaposition of certain words implying that cigarettes, little cigars and smokeless tobacco are sold at a store can subject a broadcaster to enforcement action. For example, the DOJ has found an advertisement, which was sponsored by a store named “Dirt Cheap” and included the words “smokers” and “tobacco,” would violate the Act if aired. The DOJ has also issued informal opinions prohibiting an advertisement that juxtaposed the shop name “One Stop Tobacco” with “cartons” and “packs,” as well as an ad for a store called the “Smokers Outlet” with included the words “sell name brands.” Although there are constitutional arguments that the DOJ’s position is overly broad, stations should think carefully about deciding to risk running ads for smoke shops, as a U.S. Attorney could decide to take action in accord with the informal interpretations provided by the DOJ.

Q: What are examples of permissible smoke shop advertisements?

A: A smoke shop advertisement that makes no direct or indirect mention of cigarettes, little cigars, chewing tobacco or brand names should not be viewed as violating the law. Based on the DOJ informal opinion letters, smoke shop advertisements that promote the sale of paraphernalia associated with smoking, such as cigar humidors, rolling paper, and pipes, are not likely to be found to be problematic. For example, DOJ informal opinion letters have permitted smoke shop advertisements for “The Tobacco Outlet,” “The Smokers Outlet,” “Smoker Friendly,” and “J&J Discount Tobacco,” because they did not “fall within the statutory ban.” However, as mentioned above, advertisements that juxtapose words in such a way as to suggest that cigarettes, little cigars or smokeless tobacco are available and can be purchased at the shop may violate the law.

Q: May broadcasters air spots for electronic cigarettes?

A: The answer is a qualified yes for now. Electronic cigarettes, also known as e-cigarettes, are battery operated inhalers meant to simulate traditional cigarette smoking. The devices are designed to convert nicotine into a vapor that is inhaled by the “smoker”. Regarding whether or not it is permissible for broadcasters to air advertisements for e-cigarettes, the DOJ responded to an inquiry we made regarding e-cigarettes with the following:

Unlike traditional cigarettes, electronic cigarettes do not consist of a “roll of tobacco” and therefore do not appear to fall within the definition of “cigarette” as it is currently defined in the Cigarette Labeling and Advertising Act.

While the DOJ has primary jurisdiction over tobacco advertising, the DOJ’s response to us noted that the Federal Trade Commission also has general regulatory authority in this area regarding deceptive advertising. In addition, the Food and Drug Administration has taken action against manufacturers of e-cigarettes for allegedly poor manufacturing practices and has stated an intent to create regulations regarding the manufacturing and marketing of e-cigarettes. For the time being, however, it appears the Act does not prohibit the airing of truthful advertisements for e-cigarettes. Broadcasters should be aware that some states have moved to regulate e-cigarettes, and broadcasters considering airing e-cigarette ads should determine whether they are affected by any state law restrictions on e-cigarette advertising before proceeding.

Because it is often very difficult to define with precision what will trigger DOJ scrutiny/enforcement of the broadcast ban on the advertising of certain tobacco products, and because the risk of liability can be substantial, stations should seek the advice of counsel before they agree to accept and air any tobacco-related advertisements.

If you have any questions about the content of this Advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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