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## Prohibited Product Advertising

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**To: Attendees, ABA Program – Representing Your Local Broadcaster**  
**From: Gregg P. Skall**

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Questions frequently arise regarding the legality of advertising certain “red flag” products. The products that might be placed in the “red flag” category include alcohol, tobacco, casino gaming and weight-loss plans.

### Alcohol

The Supreme Court’s decision in *44 Liquormart, Inc. v. Rhode Island*<sup>i</sup> struck down as unconstitutional a Rhode Island statute which barred sellers of alcohol from advertising alcohol prices except at the point of purchase (and even there retailers were limited to doing so in a manner not visible from outside the premises). The Court emphasized that, as an outright ban on truthful, nonmisleading advertisements with a specific content, the Rhode Island law violated the Constitution despite the state’s interest in promoting temperance. Justice Thomas’ concurring opinion cites *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>ii</sup>, where the Court held that speech that does “no more than propose a commercial transaction” was protected by the First Amendment, and struck down a ban on price advertising regarding prescription drugs. The Court asserted that a “particular consumer’s interest in the free flow of commercial information” may be as keen as, or keener than, his interest in “the day’s most urgent political debate.”

Following *44 Liquormart* almost all prohibition on the outright ban of alcohol advertising has fallen away. However, one is well advised to note that the nine Justices agreed on only one thing unanimously, and that was the unconstitutionality of the Rhode Island statute. Otherwise, the Court was severely fractured as to how far First Amendment commercial speech doctrine need be stretched to protect advertising and to reach the judgment in the case. The Court issued four different opinions, each with its own rationale, with two of the opinions being signed by four Justices each. One of those two opinions explicitly declined to extend commercial speech law any further than it already exists. The other “plurality” opinion, which worked the greatest advancement of the commercial speech doctrine toward stricter application against government regulation, also garnered only four votes but secured only three votes for the most far-reaching section of the opinion.

This is important in light of more recent concerns over alleged alcohol advertising to underage consumers. Efforts are underway in several states to curb such advertising and the Federal Trade Commission has recently issued a report on self-regulation by the beverage industry, *Self-Regulation in the Alcohol Industry*, to avoid promoting alcohol to teenagers and young adults.

The report concludes that alcohol ad placement and content and the product placement “best practices” currently followed by some companies should be more widely adopted to reduce underage exposure to alcohol ads by changing the current placement standards that allow advertising in media when as much as 50 percent of the audience is under 21.

Significantly, the report was prepared in response to a joint request from the House and Senate Committees on Appropriations and recommends that all industry members adopt and build upon the industry’s current best practices—enforcement policies that go beyond minimum code requirements. The best practices identified by the report are as follows:

- *For ad placement:* Reduce the percentage of the underage audience, bar placement on television series and in other media with the largest underage audiences, and conduct regular audits of previous product placements.
- *For ad content:* Prohibit ads with substantial underage appeal, even if they also appeal to adults; or target ads to persons 25 and older.
- *For product placement in movies and television:* Restrict the promotional placement of alcohol products to “R” and “NC-17” rated films (or, if unrated, to films with similarly mature themes) and apply the standards for placing traditional advertising to product placement on television.
- *For online advertising:* Use available mechanisms to reduce underage access and avoid content that would attract underage consumers.
- *For college marketing:* Curb on-campus and spring break sponsorships and advertising.

Three trade associations, The Beer Institute, which represents the interests of more than 200 brewers that produce more than 90 percent of the beer brewed in the U.S. and comprises a majority of the imported beer consumed in the U.S.; the Distilled Spirits Council of the United States, which represents most of the major U.S. distilled spirits marketers and whose members produce over 85 percent of the distilled spirits sold in the U.S.; and the Wine Institute, which represents over 300 California vintners and whose members market over 75 percent of the wine sold in the United States, as well as most of the American wines sold abroad reported their own advertising codes. All three association codes contain similar provisions about the placement and content of ads designed to prevent the marketing of alcohol to underage consumers.

The FTC has now asked for comment on a proposal to require alcohol advertisers to submit information about advertising placement and compliance with voluntary advertising codes. Comments are requested by May 8, 2006.<sup>iii</sup> This indicates serious interest by the FTC to continue in this area.

Some states are seeking legislation in this area as well. For example, there is legislation under consideration in California that would amend its Alcoholic Beverage Control Act, which currently subjects to criminal penalty the use of alcoholic beverages in any advertisement that encourages minors to drink alcoholic beverages.

California Senate bill SB 1180, would prohibit advertising in a manner that targets minors and encourages the illegal consumption or purchase of alcoholic beverages by minors. It is based on a study published in the *Archives of Pediatric and Adolescent Medicine*<sup>iv</sup>, where it was found that alcohol advertising contributes to significant increases in youth drinking.

Key findings in that study related to youth exposure to alcohol ads include the following:

- Youth ages 15 to 26 who reported seeing more alcohol advertisements drank more on average, with each additional ad increasing the number of drinks consumed by 1 percent.
- Youth living in media markets with greater alcohol advertising expenditures drank more, with each additional dollar spent per capita increasing the number of drinks by 3 percent.

Based on these data, the study reported that alcohol advertising educates adolescents about alcohol brands, brand preference, current drinking behaviors, brand loyalty and ultimately creates an environment that promotes underage drinking. The causes of alcohol use among youth is a major public health concern and can result in a wide range of negative consequences such as alcohol addiction, risky sex, and car accidents.

While current law does not strictly prohibit any alcohol advertising, the FTC report and efforts in state legislatures reveal a definite trend to curb it when it is perceived to appeal to underage audiences. Such curbs might well pass muster under the *44 Liquormart* decision. Broadcasters might consider it prudent to adopt their own voluntary standards that equal those recommended by the FTC report.

Any challenge to alcohol advertising by the FTC would likely come under the FTC's authority to prohibit advertising that is deemed "unfair." When determining "unfairness," an important consideration is the ability of consumers to protect themselves, with the assumption that children need greater levels of protection than adults. Thus, the FTC has a tradition of challenging ads and activities directed at children and other vulnerable constituencies that they might not challenge otherwise. In this vein, the FTC last year held a two-day conference on the issue of the relation of marketing to the rising rate of obesity in children.

### **The Big Fat Lie**

In 2004, the Federal Trade Commission launched its "Operation Big Fat Lie," a nation-wide law enforcement sweep against six companies making false weight-loss claims in national advertisements. Operation Big Fat Lie is a part of the FTC's efforts to: stop deceptive advertising and provide refunds to consumers harmed by unscrupulous weight-loss advertisers; encourage media outlets not to carry advertisements containing bogus weight-loss claims; and educate consumers to be on their guard against companies promising miraculous weight loss without diet or exercise.

These cases followed the FTC's December 2003 "Red Flag" initiative to encourage the media to adopt standards that would screen out weight-loss advertisements containing false claims. As part of the Red Flag initiative, the FTC staff has sent reminder letters to media outlets that ran advertisements challenged in its law enforcement actions. The letters were aimed at assisting media in identifying and rejecting weight-loss ads that contain facially false claims. The media letters included: (1) a copy of the problem advertisement; (2) a copy of the Commission's Reference Guide for Media on Bogus Weight Loss Claim Detection; and (3) a description of

each Red Flag Claim contained in the problem advertisement. The FTC also created a website to assist media in identifying false weight loss claims.

<http://www.ftc.gov/bcp/online/edcams/redflag/index.html>

The site provides the following keys for identifying weight loss false claims. It advises that the next time media get an ad or spot for a nonprescription drug, dietary supplement, skin patch, cream, wrap, earring or other product that is worn on the body or rubbed into the body containing claims like the ones below, *Red Flag* the ad. A claim is too good to be true if it says the product will...

- Cause weight loss of two pounds or more a week for a month or more without dieting or exercise
- Cause substantial weight loss no matter what or how much the consumer eats
- Cause permanent weight loss (even when the consumer stops using product)
- Block the absorption of fat or calories to enable consumers to lose substantial weight
- Safely enable consumers to lose more than three pounds per week for more than four weeks
- Cause substantial weight loss for all users
- Cause substantial weight loss by wearing it on the body or rubbing it into the skin

## **Tobacco**

Section 6 of the Federal Cigarette Labeling and Advertising Act<sup>v</sup> makes it unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission. The prohibition has also been extended to smokeless and chewing tobacco. The law does not ban the advertising of smoking accessories, cigars, pipes, pipe tobacco, or cigarette-making machines. Frequently the question arises whether one may advertise the name of a business with the word “cigarette” in it but where the ad is clearly for a product other than cigarettes, little cigars, smokeless tobacco or chewing tobacco. The Department of Justice has the exclusive authority to enforce the legal ban and determinations on the applicability of the section are within its prosecutorial discretion. Thus, it is for the Department of Justice, and ultimately the courts, to determine whether the presentation of tobacco advertisements would be prohibited by 15 U.S.C. Sec. 1335. Justice Department attorneys have declined to opine whether advertisements with cigarette in the name of the advertiser are prohibited. Therefore, the answer is unclear and it would be prudent to adjust the ad to avoid any reference to the prohibited products.

## **Casino Gambling and Advertiser Contests**

In the 1997 case *Valley Broadcasting Company v. USA*, the U.S. Court of Appeals for the Ninth Circuit struck down the federal prohibition on the advertisement of lotteries by broadcast stations. In 1999, the United States Supreme Court held that the law against the broadcast of lottery

information, 18 U.S.C. § 1304, “may not be applied to advertisements of private casino gambling . . . broadcast by radio or television stations located in [a state] . . . where such gambling is legal.” *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 176 (1999). In light of the *Greater New Orleans Broadcasting Association* decision, the FCC has decided not to enforce the federal law that prohibits the advertisement of commercial casino establishments.

A further exception to the law against advertising casino gambling exists for games conducted by Indian tribes on Indian Tribal lands. *See* Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §2720. The statute specifically provides that 18 U.S.C. § 1304, “shall not apply to any gaming conducted by an Indian Tribe pursuant to this Act.”

Indian gaming is divided into three classes. Class I gaming is defined as social games solely for prizes of minimal value or traditional forms of Indian gaming in connection with tribal ceremonies. Class II gaming is defined as (1) bingo, including pull-tabs, lotto, punch boards, tip jars, and instant bingo, and (2) card games that are explicitly authorized by the state, or otherwise not explicitly prohibited, and are played at any location in the state. Class III gaming is defined broadly as all other forms of gambling and generally includes banking card games such as baccarat and blackjack (21), as well as roulette, craps, and slot machines.<sup>vi</sup>

The IGRA permits the advertising and depiction of casino gambling conducted by Indian tribes under the following conditions:

1. Gaming must occur on tribal land and be operated by the tribe.
2. The gaming must be allowed by state law.
  - State law is not preempted.
  - If bingo is completely forbidden in the state, then bingo also cannot be played on the Indian reservation located in the state and, thus, cannot be advertised.
3. For Class III gaming, there must be a “tribal-state compact” between the state and the tribe; and the compact must be approved by the National Indian Gaming Commission before the Class III gaming can be advertised.<sup>vii</sup>

The *Valley* and *Greater New Orleans* cases did not, however, rule on any state laws restricting such advertising. Therefore, in the case of Indian gaming it is important that section 2720 exempts advertising about tribal casino gambling even if the broadcaster is located in or broadcasts to a jurisdiction with anti-gambling laws and policies. *See Greater New Orleans Broadcasting Association, Inc. v. U.S.*, 527 U.S. 173 (1999) (“the exemptions in both of these 1988 statutes [referring to the IGRA and the Charity Games Advertising Clarification Act of 1988, 18 U.S.C. § 1307(a)(2)] are not geographically limited; they shield messages from §1304’s reach in States that do not authorize such gambling as well as those that do”). Broadcasters can check the status of a compact by contacting the National Indian Gaming Commission at (202) 632-7003.

In situations other than Indian gaming, however, broadcasters must still look to state law to assure that their advertisements are legal. Many such state statutes are confusing at best, and at worst seem to prohibit this form of advertising.

Finally, broadcasters should also note that the Commission has now recognized in its rules an exception to the lottery advertising prohibition where conducted as a promotional activity and it is clearly only an occasional activity and is ancillary to the primary business of that organization.

Even where the occasional and ancillary test is not met, the question is frequently presented whether having to go to a store or other location constitutes consideration such that the test of a lottery—prize, chance and consideration—is met. For the answer to this question, it is worth reviewing an earlier FCC staff letter in the response to a request for a declaratory ruling in *Greater New Orleans Broadcasting Association*.<sup>viii</sup> The staff ruled that, although entrants were required to travel 40 to 90 miles from the New Orleans area to Biloxi to obtain a game card from a booth outside the casino, this travel did not constitute “consideration.” Consideration is present when the contestant must pay money or give something of value for the chance to win a prize. An entrant who must travel a certain distance to appear at the promoter’s place of business in order to enter the contest has not provided any “money or thing of value,” even if the travel takes an hour or two of the entrant’s time.

**Broadcast Hoaxes:** The FCC prohibits the broadcast of hoaxes containing false information concerning a crime or catastrophe. It defines a “crime” as any act or omission subject to criminal punishment and a “catastrophe” as a disaster involving violent or sudden events affecting the public. Thus, the rule does not cover a broadcast that might upset some listeners but does not pose a substantial threat to public health or safety. While few advertisements might contain such false information, it is conceivable that “creative” copywriters can come up with a catastrophe or two to “peak” listener or viewer interest. So beware and remember, a violation of the hoax rule requires a finding of the following three elements:

1. Licensee knowledge of falsity: the licensee must have known that the broadcast concerning the crime or catastrophe was false. A licensee will be held accountable for the actions of its employees and, therefore, must monitor their actions.
2. Foreseeability of substantial public harm: the FCC deems public harm to have been foreseeable if the licensee could expect with a reasonable degree of certainty that substantial harm would occur.
3. Direct causation of substantial public harm: the FCC defines public harm as damage to the health or safety of the general public, diversion of law enforcement or other public health or safety authorities from their duties and damage to property. The public harm must begin immediately after the broadcast and result in actual damage, rather than a mere threat of harm.

**Disclosures of Commercial Interests:** The Communications Act requires that any announcement or promotion aired by a broadcast station for which money or anything else of value is paid to the station must include an announcement that the matter being broadcast is a paid promotion or advertisement. Moreover, an employee of the licensee who accepts something of value for broadcasting any information or announcement must disclose that payment, in

advance of the broadcast to the station's management. Failure to make such disclosures could result in the violation of the FCC's "payola" and "plugola" rules and federal statutes.

Payola is defined as the undisclosed payment of something of value to a station employee for the on-air promotion of goods, services, or events. Payment to a station employee for broadcast of a particular recording is a classic form of payola. Plugola is the promotion by a station of an item or event in which the licensee or one of its employees has an undisclosed financial interest. An example of this would be an on-air promotion or discussion of a concert in which a station employee has a commercial interest. Such a promotion is permissible if the management of the station is aware of the interest and when appropriate sponsorship information is announced. If disclosure is not made, federal law is violated, which can lead to the loss of a license.

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ENDNOTES:

<sup>i</sup> *44 Liquormart Inc. v. Rhode Island* 517 U.S. 484 (1996)

<sup>iii</sup> , 425 U.S. 748, 762 (1976)

<sup>iii</sup> *Federal Register* Vol. 71, No. 45 Wednesday, March 8, 2006 / Notices, p. 11659

<sup>iv</sup> Snyder, Leslie B. *Effects of Alcohol Exposure on Drinking Among Youth*, *Archives of Pediatrics and Adolescent Medicine*. Vol. 160, No. 1, January 2006

<sup>v</sup> 15 U.S.C. §1335; 47 CFR 4055

<sup>vi</sup> Under the IGRA, the tribe is the sole regulator of Class I games; Class II games, such as bingo, are regulated by both the tribe and the National Indian Gaming Commission; and Class III gaming is regulated by the tribes and their states through the negotiated gaming compacts. Before a Tribe may lawfully conduct class III gaming, the following conditions must be met: (1) the particular form of Class III gaming that the Tribe wants to conduct must be permitted in the state in which the tribe is located; (2) The Tribe and the state must have negotiated a compact that has been approved by the Secretary of the Interior, or the Secretary must have approved regulatory procedures; and (3) The Tribe must have adopted a Tribal gaming ordinance that has been approved by the Chairman of the Commission.

<sup>vii</sup> See 47 C.F.R. § 73.1211(c)(3); *Amendment of Sections 73.1211 ("Broadcast of lottery information") and 76.213 ("Lotteries") of the Commission's Rules*, 4 FCC Rcd 4590 (1989).

<sup>viii</sup> *Greater New Orleans Broadcasting Association*, 77 RR 2d 1352, 10 FCC Rcd 3804, 1995 FCC LEXIS 2312