



Seeing Clearly Through Thick Smoke: Tobacco Advertising on Broadcast Stations

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Notwithstanding the fact that it has been over 35 years 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. One reason is the proliferation of small, independent cigarette manufacturers resulting from the 1998 tobacco settlement. That settlement has caused the price of cigarettes to rise, thereby making it profitable for small companies to become cigarette manufacturers. Given the pressure that these manufacturers and their retail outlets are likely to place on broadcasters to help in promoting these new tobacco products, we offer the following Q&A to aid broadcasters in complying with tobacco advertising restrictions should they be asked by any company to air 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”) makes it unlawful to advertise “cigarettes” and “little cigars” on “any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.” In 1986, Congress enacted the Comprehensive Smokeless Tobacco Health Education Act, extending the broadcast ban to include advertisements for smokeless tobacco products. The broadcast ban of cigarette advertisements survived a Constitutional challenge in *Capital Broadcasting v. Mitchell*. 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, DC 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 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).” “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.” “Smokeless tobacco” is defined as “any finely cut, ground, powdered, or leaf tobacco that is intended to be placed in the oral cavity” (i.e. chewing tobacco, snuff, etc.).

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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. 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, the Federal Trade Commission (“FTC”), which enforces the print advertisement restrictions of tobacco products, recently entered into a settlement agreement with a number of cigar manufacturers which subjects the companies to fines for airing cigar advertisements absent a health risk disclosure. The warnings, which the major cigar companies are required to rotate, include:

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

Cigar companies 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. Therefore, as a cautionary measure, FTC staff has recommended that broadcasters include similar health risk warnings when airing permissible cigar ads.

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



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smoke shops that do not include this prohibited language pose less 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 likely constitute a prohibited advertisement and lead 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 and possible 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” products are sold at the store. In fact, a number of the DOJ’s opinions have demonstrated 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 that an advertisement which was sponsored by a store named “Dirt Cheap” and which 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 may be Constitutional arguments that the DOJ’s position is overly broad, stations should think carefully about deciding to risk running ads for smoke shops, as there are U.S. Attorneys in every state who could hear the ad and 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 Act. 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 under the federal tobacco laws. 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 Act.

Because it is often very difficult to define with precision what will trigger DOJ scrutiny and possible enforcement of the broadcast ban on the advertising of certain tobacco products, and because the risk of liability under the Act is



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substantial, stations should seek the advice of counsel before they agree to accept and air any tobacco-related advertisements.

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