May 11, 2009

The Honorable Edward M. Kennedy
Chairman, Committee on Health, Education, Labor and Pensions
United States Senate
317 Russell Senate Office Building
Washington D.C. 20510

Dear Mr. Chairman:

On behalf of the Association of National Advertisers (ANA), the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF), we are writing to express our opposition to several of the marketing provisions of S.982, the "Family Smoking Prevention and Tobacco Control Act."

We take no position on the provisions of the bill that would generally grant the Food and Drug Administration (FDA) the authority to regulate tobacco products. However, we strongly believe that regulatory authority over the advertising of tobacco products should remain with the Federal Trade Commission (FTC). The FTC has broad authority to block any false, deceptive or unfair tobacco ads. The Commission also has demonstrated its willingness to use this authority to regulate tobacco advertising.

Some in the Congress have recently been critical of the FDA's enforcement efforts under its existing authority. Providing the FDA vast new regulatory authority over the advertising of tobacco products is not likely to improve the agency's current regulatory efforts. Given the long experience of the FTC in this area, we strongly believe that the regulatory authority over tobacco advertising should remain with the FTC.

We oppose section 102 of the bill, which would direct the Secretary of Health and Human Services to publish an interim final rule that is "identical in its provisions" to the proposed rule promulgated by the FDA in 1996. Legal experts from across the political spectrum agree that the sweeping and unprecedented restrictions in that proposal, which would result in a *de facto ban* on tobacco advertising, would violate the First Amendment. In fact, the U.S. Supreme Court held in *Lorillard Tobacco Company v. Thomas Reilly, Attorney General of Massachusetts*, 533 U.S. 525 (2001) that a Massachusetts tobacco regulation that was virtually identical to one part of the FDA proposal was unconstitutional.

Section 201 of the bill would add new disclosure requirements for all tobacco advertising on top of those contained in the FDA's 1996 proposed rule. In addition, the bill would require the FDA to conduct a rulemaking to determine whether it should mandate the inclusion of tar and nicotine yields in all labels and advertising. All of the various disclosure requirements of S.982 place the government in the role of copywriter. By "seizing" a substantial portion of every tobacco ad for government-mandated disclosures, the bill raises First Amendment concerns about "compelled speech" and could result in an unconstitutional "taking" of a company's commercial property in violation of the Fifth Amendment.

We also oppose section 203 of S.982, which would grant new authority to state and local governments to impose "specific bans or restrictions on the time, place and manner" of tobacco advertisements. Much of the advertising for tobacco products occurs in interstate commerce. Allowing individual states and local governments to impose their own bans or restrictions would result in a crazy-quilt of inconsistent laws, making tobacco advertising virtually impossible.

Enacting the FDA's 1996 Tobacco Advertising Restrictions Would Violate the First Amendment

We believe that the sweeping tobacco advertising restrictions promulgated by the FDA in 1996 violate the First Amendment rights of tobacco companies to communicate with adults. The FDA's proposal would impose the following restrictions on tobacco advertising:

- Ban all outdoor advertising for tobacco products within 1,000 feet of any elementary or secondary school or playground;

- Require all permitted tobacco advertising, including direct mail, to be black text on a white background, except in magazines, newspapers or other periodicals with adult readership of 85% or more, or fewer than 2 million readers under the age of 18;

- Require all advertisements and labels to identify the tobacco product as a "nicotine delivery device";

- Require all advertisements to contain a government-dictated "brief statement" (in addition to the current Surgeon General's warning) to serve as a warning about possible dangers associated with the use of tobacco products;

- Ban the use of promotional items such as hats or T-shirts containing the name or logo of a tobacco product, and prohibit other promotional techniques such as product give-aways, rebates or refunds;

- Require sponsorship of athletic, musical, social or other cultural events in corporate name only regardless of the age of the audience;

- Require all advertisers of tobacco products to fund and participate in a national public education campaign designed to discourage the use of tobacco products by minors. The FDA would require the annual fund established for this campaign to total $150 million;

- Require compliance with more stringent requirements as enacted by state and local governments; and

- Authorize the enactment of additional restrictions seven years after implementation of a final rule if the number of minors who use tobacco products has not decreased by 50% from 1994 levels.

The net effect of the FDA proposal would be a *de facto* ban on advertising tobacco products. This regulatory package violates the First Amendment protections for commercial speech.

The U.S. Supreme Court has made it clear that truthful, nondeceptive commercial speech cannot be banned or restricted unless the restriction "directly and materially advances" a "substantial governmental interest" and is "narrowly tailored" to "reasonably fit" that interest. See *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980).

In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), a unanimous Supreme Court reaffirmed that all truthful, nondeceptive advertising about a legal product is entitled to the same level of First Amendment protection, regardless of the product.

In the *Lorillard* case, the Supreme Court struck down a regulation promulgated by the Attorney General of Massachusetts that was similar in many respects to the FDA's proposed rule. The Massachusetts regulation banned outdoor ads within 1,000-feet of schools, parks and playgrounds and also restricted point-of-sale advertising for tobacco products. *Lorillard,* 533 U.S. at 524-25.

In finding that the Massachusetts regulation was not narrowly tailored, Justice O'Connor actually noted a similar problem with the FDA regulation:

> First, the Attorney General did not seem to consider the impact of the 1,000-foot restriction on commercial speech in major metropolitan areas. The Attorney General apparently selected the 1,000-foot distance based on the FDA's decision to impose an identical 1,000-foot restriction when it attempted to regulate cigarette and smokeless tobacco advertising. (Citations omitted) But the FDA's 1,000-foot regulation was not an adequate basis for the Attorney General to tailor the Massachusetts regulations. The degree to which speech is suppressed—or

> alternative avenues for speech remain available – under a particular regulatory scheme tends to be case specific. (Citations omitted) And a case specific analysis makes sense, for although a State or locality may have common interests and concerns about underage smoking and the effects of tobacco advertisements, the impact of a restriction on speech will undoubtedly vary from place to place. The FDA's regulations would have had widely disparate effects nationwide. Even in Massachusetts, the effect of the Attorney General's speech regulations will vary based on whether a locale is rural, suburban, or urban. The uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring. *Id.* at 562-63. (Emphasis added)

Thus, the Supreme Court has already examined one provision of the FDA proposal – the 1,000-foot ban on outdoor ads – and suggested that it violates the First Amendment because it is not narrowly tailored.

The Supreme Court rejected the efforts of the Massachusetts Attorney General to "childproof" the flow of information in our society. Children deserve to be protected from inappropriate or harmful material, but the government may not use the guise of protecting children to impose sweeping restrictions on information intended for adults. In *Bolger v. Youngs Drug Products Corporation*, 463 U.S. 60 (1980), the Court stated that efforts to restrict advertising cannot lower discourse in society "to the level of the sandbox" and citing *Butler v. Michigan*, 353 U.S. 383 (1957), that "Government may not reduce the adult population...to reading only that which is fit for children." 463 U.S. at 73.

One of the most vocal critics of the tobacco industry, Harvard Law School Professor Laurence Tribe, argued that the tobacco advertising bans included in the master settlement agreement between the tobacco companies and the states, if legislated, would raise serious First Amendment concerns. Professor Tribe argued that:

> Given the extensive regulation of tobacco manufacturing (for example, the creation of manufacturing standards, the regulation of cigarette ingredients, and so on) elsewhere in the proposed legislation, and the mandates for new and improved warnings, it would be difficult to defend the sweeping restrictions on advertising as being narrowly tailored to an important governmental interest. The paternalistic view that tobacco advertising must be restricted because adult consumers might find it persuasive is antithetical to the assumptions on which the First Amendment is based.

So have a broad range of public policy groups, from the Washington Legal Foundation to the American Civil Liberties Union (ACLU). In testimony to the Senate Judiciary Committee on February 20, 1998, the ACLU stated:

> The ACLU believes that … both legislation and proposed regulation by the Food and Drug Administration (FDA) … on tobacco advertisements … is wholly

> unprecedented and, if enacted, will most likely fail to withstand constitutional challenge. Moreover, we believe that the enactment of the proposed tobacco advertising restrictions would impose a drastic curtailment of commercial speech and could have a chilling effect on the right of the public and businesses to engage in free speech about controversial subjects.

A number of legal scholars, including Judge Robert Bork; Burt Neuborne, Professor of Law at New York University School of Law; Rodney Smolla, Professor of Law at the College of William & Mary; and First Amendment expert Floyd Abrams have all publicly testified regarding the constitutional problems with legislating this type of speech restriction. In a Washington Legal Foundation publication in 1996, Judge Bork stated:

> [T]he recent proposal of the Food and Drug Administration (FDA) to restrict severely the First Amendment rights of American companies and individuals who, in one way or another, have any connection with tobacco products [is] patently unconstitutional under the Supreme Court's current doctrine concerning commercial speech as well as under the original understanding of the First Amendment.

In more recent commercial speech cases, the Supreme Court has raised the bar government regulators need to hurdle to impose restrictions on advertising even higher. Justice Sandra Day O'Connor, speaking for the majority of the court, for example, in *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), stated, "If the First Amendment means anything, it means that regulating speech must be a last -- not first -- resort." *Id.* at 373.

While the government has a legitimate interest in fighting the use of tobacco products by minors, the FDA's proposed regulations sweep far too broadly and result in massive censorship of truthful speech aimed at adults.

New Disclosure Requirements Would Overload Advertisements

As noted above, the FDA's proposed rule from 1996 would require that all ads identify the tobacco product as a "nicotine delivery device" and contain a government-dictated "brief statement," in addition to the current Surgeon General's warnings. Section 201 of S.982 would add another layer of disclosures to all ads. It would require the "label statement" to comprise at least 20% of the area of the ad, to be placed at the top of each ad with specific type-sizes. Further, section 206 of the bill requires an FDA rulemaking to determine whether the agency should also mandate the inclusion of tar and nicotine yields in all labels and advertising.

These various disclosure requirements would result in information overload for all tobacco product ads. By mandating these disclosures and requiring specific type sizes, the bill would place the government in the role of copywriter. It raises serious First

Amendment concerns about "compelled speech." It could ultimately result in an unconstitutional "taking" of the company's commercial message in violation of the Fifth Amendment. Advertising is not free. When a tobacco company purchases advertising space, it acquires an important property interest. The multiple disclosure requirements of S.982 would literally "seize" a substantial portion of the company's space and conscript it for government-mandated messages. This would be an interference with both free speech and property rights.

The "Tombstone Advertising" Provisions of the Proposed Rule Would Violate the First Amendment

Section 897.32 of the proposed rule requires that ads "use only black text on a white background." A similar blanket restriction on ad content was found unconstitutional by the Supreme Court.

In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), it rejected a rule in the Ohio Code of Professional Responsibility that prohibited the use of illustrations in ads for legal services. The Court held that the use of illustrations in ads are entitled to the same First Amendment protections afforded verbal commercial speech and any restrictions must also withstand scrutiny under the *Central Hudson* test. *Id.* at 647. Pictures and illustrations in ads cannot be banned merely because the visual content may in some circumstances be deceptive or manipulative. *Id.* at 649. Thus, the "tombstone advertising" provisions in the rule are overly restrictive.

New State/Local Ad Restrictions Would Make Tobacco Advertising Impossible

We are strongly opposed to section 203 of S.982. This provision would authorize states and thousands of local governments to impose "specific bans or restrictions on the time, place and manner, but not content," of tobacco advertising. This could result in a crazy quilt of inconsistent advertising restrictions, both intra-state and inter-state. For example, tobacco advertising is often placed in publications with regional or national distribution. How could a tobacco company place an ad in a popular magazine that complies with hundreds or potentially thousands of inconsistent restrictions on the "time, place and manner" of tobacco ads?

This provision would make tobacco advertising impossible on a regional or national basis and result in a *defacto* ban on this category. It would authorize state and local governments to engage in censorship of one form of speech based solely on its content.

Conclusion

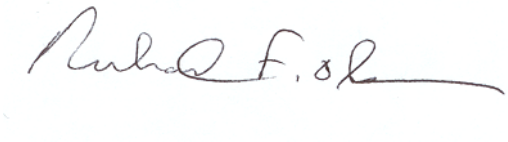
Some claim that tobacco products are unique, so that it is permissible to ignore the First Amendment just for those products. The Supreme Court has rejected this theory in a series of cases, including *Lorillard* and the *44 Liquormart* case. What you do to tobacco advertising today, you will be urged to do to advertising for many other "controversial" products tomorrow. Justice Thomas recognized this in his concurring opinion in the *Lorillard* case: "Nevertheless, it seems appropriate to point out that to uphold the Massachusetts tobacco regulations would be to accept a line of reasoning that would permit restrictions on advertising for a host of other products."

Don't start down this road to content-based censorship of advertising. We urge you to remove these marketing provisions from S.982. The government can take strong, effective steps to restrict tobacco sales and access to minors without trampling on the First Amendment.

Thank you for your consideration of our views.

Sincerely,

Daniel L. Jaffe
Executive Vice President
Association of National Advertisers
1120 20th Street, NW, Suite 520-S
Washington, DC 20036
(202) 296-1883
djaffe@ana.net



Richard F. O'Brien
Executive Vice President
American Association of Advertising Agencies
1203 19th Street, NW, Fourth Floor
Washington, DC 20036
(202) 331-7345
dobrien@aaaadc.org

Jeffry L. Perlman
Executive Vice President
American Advertising Federation
1101 Vermont Avenue. NW, Suite 500
Washington, DC 20005
(202) 898-0089
jperlman@aaf.org

The Association of National Advertisers leads the marketing community by providing its members insights, collaboration and advocacy. ANA's membership includes 340 companies with 9000 brands that collectively spend over $100 billion in marketing communications and advertising. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs and advance, promote and protect all advertisers and marketers. For more information, visit www.ana.net.

The American Association of Advertising Agencies (AAAA), founded in 1917, is the national trade association representing the American advertising agency business. Its nearly 500 members, comprised of large multi-national agencies and hundreds of small and mid-sized agencies, maintain 2,000 offices throughout the country. Together, AAAA member advertising agencies account for nearly 80 percent of all national, regional and local advertising placed by agencies in newspapers, magazines, radio and television in the United States. AAAA is dedicated to the preservation of a robust free market in the communication of commercial and noncommercial ideas. More information is available at www.aaaa.org

As the "Unifying Voice for Advertising," the American Advertising Federation (AAF), headquartered in Washington, D.C., with a Western Region office in Newport Beach, California, is the trade association that represents 50,000 professionals in the advertising industry. AAF's 130 corporate members are advertisers, agencies and media companies that comprise the nation's leading brands and corporations. AAF has a national network of 210 ad clubs and connects the industry with an academic base through its 210 college chapters. More information is available at www.aaf.org