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Federal Advertising Law: An Overview

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Henry Cohen
Legislative Attorney
American Law Division

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Summary

This report provides a brief overview of federal law with respect to six selected advertising issues: alcohol advertising, tobacco advertising, the Federal Trade Commission Act, advertising by mail (including junk mail), advertising by telephone, and commercial e-mail (spam). There are numerous federal statutes regulating advertising that do not fit within any of these categories. As random examples, the Food, Drug, and Cosmetic Act requires disclosures in advertisements for prescription drugs; the Truth in Lending Act governs the advertising of consumer credit; and a federal criminal statute makes it illegal falsely to convey in an advertisement that a business is connected with a federal agency.

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This report provides a brief overview of federal law with respect to six selected advertising issues: alcohol advertising, tobacco advertising, the Federal Trade Commission Act, advertising by mail, advertising by telephone, and commercial e-mail (spam).[1] There are numerous federal statutes regulating advertising that do not fit within any of these categories. As random examples, the Food, Drug, and Cosmetic Act requires disclosures in advertisements for prescription drugs[2]; the Truth in Lending Act governs the advertising of consumer credit[3]; and a federal criminal statute makes it illegal falsely to convey in an advertisement that a business is connected with a federal agency.[4]

Alcohol Advertising

The Federal Alcohol Administration Act makes it unlawful to engage in interstate or foreign commerce in distilled spirits, wine, or malt beverages, unless such products conform to regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, which is in the Department of the Justice.[5] The act requires that these regulations, among other things, prohibit statements on labels and in advertisements "that are disparaging of a competitor's products or are false, misleading, obscene, or indecent."[6] A 1988 amendment to the act requires that alcoholic beverages sold or distributed in the United States, or to members of the Armed Forces outside the United States, contain a specified health warning label.[7]

In 1995, the Supreme Court held unconstitutional a provision of the act that prohibited beer labels from displaying alcohol content unless state law requires such disclosure.[8] The Court found the provision to violate the First Amendment,

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[1] On the issue of constitutional protection for advertising, see CRS Report 95-815 A, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Henry Cohen.

[2] 21 U.S.C. § 352.

[3] 15 U.S.C. §§ 1661-1665b.

[4] 18 U.S.C. § 709.

[5] The Homeland Security Act of 2002, P.L. 107-296, § 1111, added the word "Explosives" to the name of the Bureau, and transferred it from the Department of the Treasury.

[6] 27 U.S.C. § 205(e)(4), (f)(4). The Federal Trade Commission can also regulate alcoholic beverage advertising and labeling under its general power to regulate unfair or deceptive commercial practices; see page 3, below.

[7] 27 U.S.C. § 215.

[8] Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down 27 U.S.C. § 205(e)(2)).
(continued...)

concluding that, although the government had a legitimate interest in curbing "strength wars" by beer brewers who might seek to compete for customers on the basis of alcohol content, the ban "cannot directly and materially advance" this "interest because of the overall irrationality of the Government's regulatory scheme."[9] This irrationality was evidenced by the fact that the ban did not apply to beer advertisements, and that the statute *required* the disclosure of alcohol content on the labels of wines and spirits.

Federal law does not prohibit the advertising of alcoholic beverages on radio or television, but, since 1936 for radio and 1948 for television, the industry voluntarily refrained from advertising hard liquor on radio or television.[10] On November 7, 1996, however, the Distilled Spirits Council of the United States said that it would lift the ban, but that it had "drawn up 26 guidelines for the industry to follow – guidelines that will avoid a younger audience but also allow this industry to compete more effectively . . . ."[11] The four major television networks announced at the time that they would not air liquor advertisements.

Next, in December, 2001, NBC announced that it would accept liquor ads, but imposed 19 rules to govern them, including limiting them to after 9 p.m E.S.T., requiring that actors in them be at least 30 years old, and requiring the liquor companies to run social-responsibility messages on subjects like designated drivers and drinking moderately. Then, in March 2002, NBC announced that it would no longer accept liquor ads.

Tobacco Advertising

Advertising of tobacco products is restricted by the Federal Cigarette Labeling and Advertising Act, which requires specified warning labels on all cigarette packages distributed in the United States and on all cigarette advertisements within the United States. The warnings must be rotated quarterly in accordance with Federal Trade Commission regulations. The statute also prohibits advertising of cigarettes and little cigars on any medium of electronic communications subject to the jurisdiction of the Federal Communications Commission.[12] This apparently would include radio, and broadcast, cable, and satellite television.

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[8] (...continued)
In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Supreme Court held to violate the First Amendment a state statute that prohibited disclosure of retail prices in advertisements for alcoholic beverages.

[9] *Id.* at 1592.

[10] See CRS Report RL31239, *Prohibiting Television Advertising of Alcoholic Beverages: A Constitutional Analysis*, by Henry Cohen.

[11] *Washington Post*, Nov. 8, 1996, p. A1.

[12] 15 U.S.C. §§ 1331-1341. In addition, 15 U.S.C. § 4402 requires warning labels on smokeless tobacco product packages and advertisements (other than outdoor billboard advertising), and prohibits advertising smokeless tobacco on any medium of electronic communications subject to the jurisdiction of the Federal Communications Commission. No similar law applies to cigars.

In 1996, the Food and Drug Administration (FDA) adopted a final rule restricting the advertising of cigarettes and smokeless tobacco products. The purpose of the final rule "is to establish restrictions on the sale, distribution, and use of cigarettes and smokeless tobacco in order to reduce the number of children and adolescents who use these products . . . ."[13] The rule did not go into effect, however, because a federal court ruled that the FDA lacked the statutory authority to restrict tobacco advertising.[14] The Supreme Court later held that the FDA lacked the statutory authority to regulate tobacco products at all.[15]

The FDA final rule would have restricted tobacco advertising in several ways, such as by banning "outdoor advertising for cigarettes and smokeless tobacco, including billboards, posters, or placards . . . within 1,000 feet of the perimeter of any public playground or playground area in a public park, . . . elementary school or secondary school," and permitting other outdoor advertising, and advertising in newspapers, magazines, and periodicals, only in "black text on a white background." It would also have prohibited any manufacturer, distributor, or retailer from sponsoring "any athletic, musical, artistic or other social or cultural event, or any entry or team in any event, in the brand name . . . , logo, motto, selling message, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarettes or smokeless tobacco."

On November 23, 1998, attorneys general from 46 states, the District of Columbia, and the five U.S. territories signed an agreement with the major tobacco companies to settle all the lawsuits the states have brought to recover the public health costs of treating smokers. (The four other states – Mississippi, Texas, Florida, and Minnesota – had previously settled.) The settlement had to receive court approval in each state before it took effect, but it did, and it has. It limits tobacco advertising in various ways, including banning the use of cartoons, banning public transit advertising, and limiting billboard and retail-store advertising.[16]

Federal Trade Commission Act

Section 5 of the Federal Trade Commission Act is the basic federal statute prohibiting unfair or deceptive advertising. Subsection (a) of section 5 reads:

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[13] 61 Fed. Reg. 44615 (1996).

[14] Coyne Beahm, Inc. v. United States, 958 F. Supp. 1060 (M.D. N.C. 1997), *rev'd on other grounds*, 153 F.3d 155 (4th Cir. 1998), *aff'd sub nom.*, Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

[15] *Id.*

[16] For additional information, see CRS Report RL30058, *Tobacco Master Settlement Agreement (1998): Overview, Implementation by States, and Congressional Issues*, by C. Stephen Redhead. See also [http://tobaccofreekids.org/research/factsheets/pdf/0057.pdf].

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.[17]

A 1980 amendment to the FTC Act provides:

> The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on May 28, 1980, or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce.[18]

The rule that this amendment foreclosed would have banned television advertising, aimed at children, of foods containing added sugar; the FTC's theory behind the rule was that, because children are unable "to understand the selling purpose of, or otherwise comprehend or evaluate, commercials," such commercials may be unfair and deceptive even if literally truthful.[19] The 1980 statute allows such a rule only if it is "based upon acts or practices that are 'deceptive'"[20]; unfairness alone is not adequate.

A 1994 amendment to the FTC Act provides that an act or practice is illegal only if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumer or to competition."[21] Section 12 of the act makes it unlawful to disseminate any false advertisement for "foods, drugs, devices, services, or cosmetics."[22] The Federal Trade Commission Act does not provide for lawsuits by individual consumers. Rather, consumers may file complaints with the Federal Trade Commission (FTC), which may take legal action when it deems it appropriate.

The Federal Trade Commission Act does not apply to banks, savings and loan institutions, Federal credit unions, common carriers (railroads and airlines), or "persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act of 1921 . . . ."[23] All these entities, and their advertising, are regulated by federal agencies other than the FTC.

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[17] 15 U.S.C. § 45(a).

[18] 15 U.S.C. § 57a(h).

[19] 43 Fed. Reg. 17967, 17969 (1978).

[20] H. Conf. Rep. 96-917, 96th Cong., 2d Sess. (1980) at 31; *reprinted at* 1980 U.S.C.C.A.N. 1148.

[21] 15 U.S.C. § 45(n).

[22] 15 U.S.C. § 52.

[23] 15 U.S.C. § 45(a)(2).

Advertising by Mail

A federal statute provides that a person who receives in the mail "any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative" may request the Postal Service to issue an order directing the sender to refrain from further mailings to the addressee, and the Postal Service must do so.[24] If the Postal Service believes that a sender has violated such an order, it may request the Attorney General to apply to a federal court for an order directing compliance. This statute applies to any unwanted advertisement, regardless of content.[25]

Another section of the statute provides that any person may file with the Postal Service a statement "that he desires to receive no sexually oriented advertisements through the mails."[26] The Postal Service shall make the list available, and "[n]o person shall mail or cause to be mailed any sexually oriented advertisement to any individual whose name and address has been on the list for more than 30 days." If the Postal Service believes that any person is violating this provision, it may request the Attorney General to commence a civil action against such person in a federal district court.

Another section of the statute provides that unordered merchandise sent through the mails "may be treated as a gift by the recipient," and the sender may not bill for it.[27] Various other federal statutes prohibit mail fraud and other deceptive mailing practices.[28] In addition, the Federal Trade Commission has adopted a trade regulation rule entitled "Mail or Telephone Order Merchandise," which requires, among other things, that sellers who solicit buyers to order merchandise through the mails or by telephone ship such merchandise within the time the seller states or, if no time is stated, within 30 days after receipt of the order. Where a seller is unable to ship the merchandise within such time, it must offer the buyer the option to cancel the order and receive a prompt refund.[29]

In 1999, Congress enacted the Deceptive Mail Prevention and Enforcement Act, Public Law 106-168, which contains restrictions and requires disclosures with respect to mailed sweepstakes promotions.

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[24] 39 U.S.C. § 3008.

[25] Rowan v. Post Office Department, 397 U.S. 728, 738 (1970) ("We . . . categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another.")

[26] 39 U.S.C. § 3010.

[27] 39 U.S.C. § 3009.

[28] E.g., 18 U.S.C. §§ 1341, 1342, 39 U.S.C. §§ 3001 *et seq*.

[29] 16 C.F.R. Part 435.

Advertising by Telephone

The Telephone Consumer Protection Act of 1991 makes it illegal to, among other things, "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message," or "use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."[30] Victims of these practices may file a complaint with the Federal Communications Commission and may sue and recover actual monetary damages or $500, whichever is greater, and the court may increase the award up to three times if it finds that the defendant acted willfully or knowingly. The Junk Fax Prevention Act of 2005, P.L. 109-21, amended the Telephone Consumer Protection Act of 1991 to add the exception, previously promulgated by the FCC,[31] that allows senders who have an established business relationship with a recipient to send unsolicited fax advertisements to that recipient. The 2005 statute also requires senders of fax advertisements to place a clear and conspicuous notice on the first page of every fax informing the recipient of how to opt out of future faxes.[32]

The Telemarketing and Consumer Fraud and Abuse Prevention Act, enacted in 1994, required the Federal Trade Commission to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices."[33] Such rules must include:

> (A) a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right of privacy,
>
> (B) restrictions on the hours of the day and night when unsolicited telephone calls can be made to consumers, and
>
> (C) a requirement that a person engaged in telemarketing for the sale of goods or services shall promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services and make such other disclosures as the Commission deems appropriate, including the nature and price of the goods and services.

The FTC's Telemarketing Sales Rule, adopted pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act, prohibits telemarketers from, among

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[30] 47 U.S.C. § 227. Federal courts of appeals have held that this statute does not violate the First Amendment. Destination Ventures v. Federal Communications Commission, 46 F.3d 54 (9th Cir. 1995) (unsolicited faxes); Moser v. Federal Communications Commission, 46 F.3d 970 (9th Cir. 1995), *cert. denied*, 515 U.S. 1161 (1995) (prerecorded telemarketing calls); Missouri, ex rel. Nixon v. American Blast Fax, Inc., 323 F.3d 649 (8th Cir. 2003), *cert. denied*, 540 U.S.1104 (2004) (unsolicited faxes).

[31] 47 C.F.R. § 64.1200(a)(2)(iv).

[32] See CRS Report RS21647, *Facsimile Advertising Rules Under the Telephone Consumer Protection Act of 1991 and the Junk Fax Prevention Act of 2005*, by Patricia Moloney Figliola.

[33] 15 U.S.C. §§ 6101 *et seq*.

other things, calling a person's residence, without the person's prior consent, before 8:00 a.m. or after 9:00 p.m.[34] It also prohibits initiating a call to a person who has previous stated that he or she does not wish to receive a call from the seller or charitable organization, or who has placed his or her telephone number on the "do-not-call" registry maintained by the FTC.[35]

On September 23, 2003, a federal district court in Oklahoma held that the FTC does not have the authority to promulgate a national do-not-call registry, but, in response, Congress enacted a law (Public Law 108-82 (2003)) to ratify that it does.[36] On September 25, 2003, a federal district court in Colorado enjoined implementation of the do-not-call registry on the ground that it violated the First Amendment because it applied only to commercial solicitors and not to other types of speech, such as charitable or political solicitations.[37] The FTC appealed, however, and, on October 7, 2003, the court of appeals granted a stay of the lower court's order, allowing the do-not-call registry to remain in effect pending final resolution of the appeal on the merits. On February 17, 2004, the court of appeals reversed the district court's decision, finding that the do-not-call registry does not violate the First Amendment. The discrimination against commercial solicitors, the court of appeals found, was justified "based on findings that commercial telephone solicitation was significantly more problematic than charitable or political fundraising calls."

The Federal Communications Commission also addresses the do-not-call issue; it requires persons who initiate a telephone solicitation to a residential phone number to institute procedures for "maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity."[38] The Do-Not-Call Implementation Act, Public Law 108-10 (2003), requires the FCC, by September 7, 2003, to "issue a final rule it began on September 18, 2002, under the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.) In issuing such rule, the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission (16 CFR 310.4(b))."

In addition, more than 20 states have enacted statutes to establish statewide do-not-call registries.[39]

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[34] 16 C.F.R. Part 310.4(c).

[35] 16 C.F.R. § 310.4(b)(iii)(B), as amended at 68 Fed. Reg. 4580, 4672 (Jan. 29, 2003).

[36] U.S. Security v. Federal Trade Commission, 282 F. Supp.2d 1285 (W.D. Okla. 2003).

[37] Mainstream Marketing Services, Inc. v. Federal Trade Commission, 283 F. Supp.2d 1151 (D. Colo. 2003), *stay granted*, 345 F.3d 850 (10th Cir. 2003), *rev'd*, No. 03-1429 (10th Cir., Feb. 17, 2004).

[38] 47 C.F.R. § 64.1200(e)(2).

[39] For additional information on federal and state do-not-call registries, and on the court cases mentioned above, see CRS Report RL31642, *Regulation of the Telemarketing Industry: State and National Do Not Call Registries*, by Angie Welborn. See also CRS Report RL30763, *Telemarketing: Dealing with Unwanted Telemarketing Calls*, by James R. Riehl.

The Telephone Disclosure and Dispute Resolution Act of 1992 requires the FTC to prescribe rules "to prohibit unfair and deceptive acts and practices in any advertisement [in any medium] for pay-per-call services."[40] Such rules must require, among other things, that the person offering such services "clearly and conspicuously disclose in any advertisement the cost of the use of such telephone number," and "the odds of being able to receive [any] prize, award, service, or product [offered] at no cost or reduced cost."

Commercial E-Mail (Spam)

The CAN-SPAM Act of 2003, Public Law 108-187,[41] effective January 1, 2004, establishes civil or criminal penalties for various actions related to any "protected computer" (which as defined in section 3 of the statute effectively means any computer). These include accessing a protected computer without authorization and intentionally initiating the transmission of multiple commercial e-mails, transmitting multiple commercial e-mails with intent to deceive or mislead recipients, sending a commercial e-mail with header information that is materially false or materially misleading, sending a commercial e-mail that does not contain a functioning return e-mail address or other Internet-based mechanism that a recipient may use to request not to receive future commercial e-mails from that sender, transmitting a commercial e-mail more than 10 days after receipt of such a request, and initiating a sexually oriented commercial e-mail to a recipient who has not given prior affirmative consent to its receipt, unless the e-mail includes marks or notices prescribed by the Federal Trade Commission.

On April 19, 2004, the FTC issued a final rule implementing the CAN-SPAM Act of 2003.[42] It requires, effective May 19, 2004, that commercial electronic e-mail that includes sexually oriented material must "exclude sexually oriented material from the subject heading . . . and include in the subject heading the phrase 'SEXUALLY-EXPLICIT:' in capital letters as the first nineteen (19) characters at the beginning of the subject line." The rule also requires –

> that the content of the message that is initially viewable by the recipient when the message is opened by any recipient and absent any further actions by the recipient, include only the following information:
>
> (i) the phrase "SEXUALLY-EXPLICIT:" in a clear and conspicuous manner;
> (ii) clear and conspicuous identification that the message is an advertisement or a solicitation;

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[40] 15 U.S.C. §§ 5711 *et seq.* The FTC rules appear at 16 C.F.R. Part 308.

[41] "CAN-SPAM" is an acronym for "Controlling the Assault of Non-Solicited Pornography and Marketing." For additional information on the CAN-SPAM Act of 2003, see CRS Report RL31953, *"Spam": An Overview of Issues Concerning Commercial Electronic Mail*, by Marcia S. Smith; and CRS Report RL31488, *Regulation of Unsolicited Commercial E-Mail*, by Angie A. Wellborn.

[42] 69 Fed. Reg. 21204 (2004), 16 C.F.R. Part 316; [http://www.ftc.gov/opa/2004/04/adultlabel.htm].

(iii) clear and conspicuous notice of the opportunity of a recipient to decline to receive further commercial electronic mail messages from the sender;
(iv) a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that . . . a recipient may use to submit . . . a reply . . . requesting not to receive future commercial electronic mail messages from the sender . . . .”

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