Legal Backgrounder

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202.588.0302

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ALCOHOL ADVERTISING: FEDERAL & STATE REGULATORS SHOULD TREAD LIGHTLY

by

David Versfelt and Adonis Hoffman

In March 2006, the Federal Trade Commission ("FTC") solicited public comments on proposed information requests to U.S. marketers of beer, wine and distilled spirits. The proposed information requests seek data and information relating to, *inter alia*, (a) industry advertising and marketing expenditures in both measured and non-measured media; (b) compliance with voluntary guidelines of the alcoholic beverage industry prohibiting advertising in media having an underage audience (*i.e.*, 20 years or younger) of 30 percent or more (herein "30% standard"); and (c) operation of several voluntary compliance review mechanisms overseeing industry self-regulatory efforts.[1]

The Commission's notice resulted in the filing of scores of public comments, primarily from public interest organizations concerned with underage drinking, and also from the attorneys general ("AGs") of 19 states. Most of the comments urged the Commission to obtain data that could support a tightening of the 30% standard to a 15% standard, and to modify some industry initiatives to attain what the commenters urge should be a more demanding process for external review of alcohol advertising. The letter from the attorneys general summarized their preferred policy goal as follows: "We are convinced that industry should and can do more to reduce the level of underage consumption of alcohol." Translation: The AGs see the FTC's current request for data as a springboard for additional restrictions on alcoholic beverage advertising.

No matter how zealous critics of the alcohol industry may be in seeking further restrictions on alcohol advertising, they cannot evade well-established legal protections for advertising of alcoholic beverages to consumers 21 years and older. Neither can critics gloss over credible research questioning the existence of a presumed cause and effect relationship between advertising and the conduct of underage viewers. Nor should critics ignore the real progress over the last few years by the beer, spirits and wine industries through pro-active self-regulation. At bottom, the Commission must remember that in formulating requests for industry data, and in considering additional restrictions on advertising, the First Amendment through its protection of commercial speech, requires the government to exercise a healthy measure of caution.

The First Amendment Encompasses Advertising for Alcoholic Beverages. Any constitutional basis for

[1] 71 Fed. Reg. 11659 (March 8, 2006). The Commission anticipated that the companies receiving the information requests would spend an estimated 4800 hours, and more than $1 million in total, to provide the data and information.

David Versfelt is a partner with the law firm Kirkpatrick & Lockhart Nicholson Graham LLP in New York City. **Adonis Hoffman** is Senior Vice President and Counsel with the American Association of Advertising Agencies in Washington, D.C.

denying First Amendment protection for "commercial" speech has been eliminated by a series of Supreme Court decisions in the decades since *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (invalidating a state ban on price advertising of prescription drugs). Successive Supreme Court decisions have established the commercial speech doctrine to protect the rights of advertisers to disseminate, and consumers to receive, information about lawful commercial products.

Under the doctrine, a governmental restriction on speech that proposes a commercial transaction must satisfy four criteria to survive First Amendment scrutiny: 1) the speech must concern lawful activity and not be misleading; 2) the asserted governmental interest in restricting it must be substantial; 3) the restriction must directly and materially advance the governmental interest asserted; and 4) the restriction must be no more extensive than necessary to serve that governmental interest. *Central Hudson Gas & Elect. Corp. v. Public Serv. Comm'n of NY*, 447 U.S. 557, 566 (1980), reaffirmed in *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down state ban on alcohol price advertising).[2] Proponents of additional restrictions on alcoholic beverage advertising face significant hurdles in connection with the first, third and final tests of *Central Hudson*.

Ads That Are Truthful and Not Misleading Are Protected Even When Seen by Underage Viewers. Under the first test, alcohol beverage advertising must concern a lawful activity and not be misleading – a test satisfied by virtually all alcohol industry messages, despite contrary assertions that adult messages seen by the underage are somehow improper. Free speech protection is not measured by the lowest common denominator or the most vulnerable member of society. As the Supreme Court has explained, the government may not "reduce the adult population…to reading only what is fit for children." *Bolger v. Youngs Drug Products Corp.*, 463 U.S.60, 73 (1983); see also *id.* at 74 ("The level of discourse … simply cannot be limited to that which would be suitable for a sandbox.") Indeed, the Court has *never* upheld a restriction on speech that effectively precluded appropriate communications to adults on the basis that children might also be exposed to them.

In connection with another "controversial" product – tobacco – the Supreme Court in 2001 struck down state restrictions on advertising within 1,000 feet of schools despite arguments that the restrictions were needed to protect impressionable children. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 534-36 (2001). In *Lorillard*, the Court crystallized the regulatory hurdle:

> The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity …. In a case involving indecent speech on the Internet we explained that "the governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults."

533 U.S. at 564, citing *Reno v. ACLU*, 521 U.S. 844, 875 (1997).

Nor can a restriction of non-misleading messages to adults be supported by an argument that the advertising "legitimizes" drinking to those underage. *See, e.g., Carey v. Population Services, Int'l*, 431 U.S. 678 (1977) (contraceptive advertising cannot be banned on basis that it "legitimizes" sexual activity of minors); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959) (portrayal of adultery cannot be banned on basis that it depicts adultery in an "attractive" light).

Thus, even if there is a "substantial" interest in preventing underage individuals from drinking alcohol, under the second test of *Central Hudson* there can be no "substantial" governmental interest in preventing adults from engaging in lawful consumption. Any significant restriction of advertising to that adult audience would be overbroad under *Central Hudson*'s standard.

The Newest Academic Studies Question the Causal Connection Between Advertising and Underage Drinking. Critics of alcoholic beverage advertising must confront *Central Hudson*'s third test: the government

[2]Significantly, in applying the *Central Hudson* test, the Court has explicitly warned that there is no extra latitude to restrict advertising for "controversial" products such as alcohol. *Rubin v. Coors Brewing Co*., 514 U.S. 476 (1995) (alcohol); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (contraceptives).

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must demonstrate that a proposed restriction on commercial speech will "directly advance" the interest in preventing underage drinking. Many opponents have simply *assumed* that advertising is what drives consumer behavior, and they have thus concluded that alcohol advertising seen by underage viewers *causes* them to drink. There appears to be, however, only thin support for the notion that limiting alcohol advertising will be the panacea to solve the problem of underage drinking.

Opponents of alcohol advertising have lauded as definitive a recent report by the activist Center on Alcohol Marketing and Youth (CAMY). The report noted that youth exposure to alcohol advertising in magazines actually *declined* by 31% from 2001 to 2004. However, in the face of that finding, the report managed to conclude that advertising for a few brands caused youth to continue to be "exposed more per capita" than legal-age adults. *Youth Exposure to Alcohol Advertising in Magazines, 2001*-2004: *Good News, Bad News,*" CAMY, May 2006. Significantly, the study fails to prove that alcohol ads are a significant factor determining the conduct of underage drinkers.

Several reports released this year undermine the assumption that alcohol ads seen by underage viewers entice them to consume forbidden products, suggesting that CAMY researchers have failed to recognize other factors implicated in illegal drinking, such as: peer pressure, environment, and parental influence. *See* Dr. Jon Nelson, *Alcohol Advertising in Magazines: Do Beer, Wine and Spirits Ads Target Youth?* 24 CONTEMP. ECON. POLICY, 357-69 (July 2006); Dr. R. Smart and Dr. D. Schultz, *Limitations of Study on Alcohol Advertising Effects on Youth Drinking*, 160 ARCHIVES OF PEDIATRICS & ADOLESCENT MEDICINE, 857 (Aug. 2006); Dr. John Luik, *Ideology Masked as Scientific Truth: The Debate About Advertising and Children*, WLF MONOGRAPH (Aug. 2006), available at http://www.wlf.org/upload/Luik%2006.pdf. While these studies will not soften the rhetoric coming from fervent critics of alcohol advertising, they dramatically demonstrate that there is scant empirical support for many of the fundamental assumptions advanced by industry critics. For every study purporting to correlate underage drinking with advertising, there is an equally credible study disputing any causal link.

Exposure to advertising and recognition of product images do not automatically induce consumer behavior, which involves a much more complex set of variables. Thus, without proof that any proposed restriction will "directly advance" the government's policy goals, the restriction will fail to satisfy the First Amendment.

There Are Numerous Alternative, Less Restrictive Means to Combat Underage Drinking. *Central Hudson*'s fourth test presents yet another hurdle to those who would use the FTC request for information as a springboard for further advertising restrictions because there are a number of less restrictive means of preventing underage drinking without restricting commercial speech. Alcoholic beverages cannot be purchased by minors at retail without conduct by them or by others that violates state and municipal laws. Hence, regulatory efforts within the purview of the states (and their attorneys general) should appropriately be focused on tighter state enforcement of requirements for proof of age at time of purchase; additional compliance checks for entities licensed to sell alcohol; programs to train retail sales clerks; prosecution of sales violations; and tightening of laws governing the serving of alcohol to minors in private homes. Each of these and other state-level regulatory avenues is available without restricting commercial speech to adults, a point emphasized by every Justice in the several opinions of *44 Liquormart, supra*. The availability of alternate forms of regulation to control conduct leaves the regulation of advertising both unnecessary and unlawful.

The Alcoholic Beverage Industry Has Undertaken Significant Voluntary Efforts to Combat Underage Drinking, and Those Efforts Should Be Encouraged, Not Criticized. Underage alcohol consumption levels decreased from 1980 through the mid-1990s, but in the following years some markers appeared to rise. The alcoholic beverage industry responded with self-directed initiatives designed to tighten voluntary codes, including those of industry sectors and those of individual companies; to strengthen mechanisms of independent third-party advertising reviews; and to implement other "best practices."[3] These initiatives have proven effective, and should be confirmed by the Commission as demonstrating that industry self-regulation and social responsibility have brought widespread compliance and positive outcomes, while preserving First Amendment protections.

[3]The Commission itself lauded these efforts in Reports it issued in September 1999 and September 2003. *See* FTC, *Self-Regulation in the Alcohol Industry* (1999); FTC, *Alcohol Marketing and Advertising: A Report to Congress* (2003).

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It Is Too Soon to Urge the Change of the 30% Standard. Critics of the alcoholic beverage industry urge the Commission to require alcohol advertisers to move from the current 30% standard to a 15% standard, *i.e.*, that no alcohol advertisement may be placed in any media having 15% or more of its intended audience younger than 21 years. The submission of the state attorneys general asserts: "Given the absence of a reduction in underage drinking since the industry adopted the 30% standard, we encourage the Commission … to explore ... the reduction of the industry standard from 30% to 15% …." They justify the proposed change by pointing out that youth aged 12 to 20 do not constitute as much as 30% of the U.S. population. But the comparison to overall population evades many complications with the data. In many media, especially broadcast and cable TV, the ages from 14 through 24 are heavily over-represented while older age groups are barely measurable. And apparently lost on the attorneys general is the fact that a minor increase in underage drinking may be attributable to a host of other factors that have little or nothing to do with advertising. This is a critical point under a *Central Hudson* analysis.

Before the Commission hastens a tightening of the 30% standard, it should be mindful that the 30% standard has been applied widely in the industry for fewer than 24 months.[4] Both prudence and sound public policy would permit a longer period for the implementation and application of the standard before calling for its rejection.

The Industry's Third-Party Review Mechanisms Are Active. Each segment of the alcohol industry – beer, wine and spirits – has its own self-regulatory code which is administered and enforced through its national trade association.[5] A number of companies have instituted a range of additional practices that go beyond the industry codes. Following the Commission's 2003 Report, the beer, wine and spirits industries amended their codes to reflect even stronger measures, and there are several new changes being implemented this year.[6] Each of the Codes sustains a comprehensive external review process for complaints or violations pertaining to alcohol advertising. Advertising reviews are typically conducted by a panel of independent experts who can recommend a range of remedies, including changing the advertisements or pulling them altogether. Of course, the processes differ from industry to industry, reflecting the diversity among the industry segments and their respective histories with self-regulation and code enforcement.

There are those who want the Commission to require fully independent, perhaps governmental, pre-clearance of all alcohol advertising. But it should be clear by now that any such mandatory review procedure not only would violate the standard of *Central Hudson*, but also would constitute a prior restraint of speech. Under any analysis, government pre-clearance of advertising – unless it were voluntary – would not pass constitutional muster. Further, the number of consumer complaints or questionable ads so far remains relatively low, suggesting that it is far too soon to draw any substantive conclusions. At the very least, the Commission should allow the industry review mechanisms ample time to succeed. Twenty-four months is neither an ample nor a reasonable time frame to judge.

Conclusion. Opponents of alcohol advertising are readying their troops to transform the Commission's recent request for data into tighter restrictions on alcohol advertising. But the Commission would be wise to resist any such activism, for alcohol advertising is protected commercial speech by an industry whose voluntary efforts of self-regulation and social responsibility deserve praise, not criticism.

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[4]The Beer Institute adopted the 30% placement standard some months after the Commission's 2003 Report to Congress; it has only been implemented during the past 20 months.

[5]The Beer Institute Code, the Wine Institute Code and the Distilled Spirits Council of the U.S. (DISCUS) Code.

[6]For example, now included in the DISCUS Code is a requirement for semi-annual post audits for advertisements placed or aired after January 1, 2006 to verify that past placements met the Code's 30% standard.

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