



July 17, 2007

The Honorable Edward M. Kennedy
Chairman, Committee on Health, Education, Labor and Pensions
United States Senate
SR-317 Russell Senate Office Building
Washington, DC 20510-2101

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.625, the "Family Smoking Prevention and Tobacco Control Act." Attached is a copy of the detailed statement we submitted to the Committee prior to the hearing in February. The proposed changes to the legislation since then have not mitigated our strong concerns.

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.

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, including Harvard University Law Professor Laurence Tribe, Judge Robert Bork, the American Civil Liberties Union and the Washington Legal Foundation, have all closely examined the proposed rule. All of them 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.625 place the government in the role of copywriter.

By “seizing” a substantial portion of every tobacco ad for government-mandated disclosures, the bill raises serious 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.625, 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 compliance with state laws virtually impossible.

For all of these reasons, we urge you to remove these marketing provisions from S.625. 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,

A handwritten signature in black ink, appearing to read "D. Jaffe", written over a thin red vertical line.

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A handwritten signature in black ink, appearing to read "Richard F. O'Brien", written in a cursive style.

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The Association of National Advertisers leads the marketing community by providing its members insights, collaboration and advocacy. ANA's membership includes 350 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