Advertising

This chapter covers some of the most important provisions of the North Carolina General Statutes and Administrative Code that regulate advertising in North Carolina. Although federal statutes and rules also regulate advertising in a variety of important ways, and often cover advertising that also is regulated under state laws, detailed analysis of federal advertising regulation is beyond the scope of this chapter. Instead, the chapter includes some of the key federal statutes and rules that apply in contexts in which few or no state laws apply. The chapter first covers relevant portions of the state Unfair and Deceptive Trade Practices Act and its media exemption, and then covers advertising regulations in the specific contexts of adoptions and child care services; alcoholic beverages; drug paraphernalia; employment; fireworks; food, drugs, medical devices and cosmetics; gaming including lotteries, raffles, bingo games and prize-giveaways; housing sales and rentals; legal notices; motor vehicles; musical performances and productions; political candidates and ballot measures; tobacco products; and wholesale, close-out sales and distress sales.

When are media outlets liable for deceptive and false advertising?

In North Carolina, newspapers, periodicals, broadcast stations and other media outlets that publish or disseminate advertisements to the public generally cannot be held liable under the state Unfair and Deceptive Trade Practices Act (UDTPA) for publishing or disseminating false, misleading or deceptive advertisements.[1] However, the exemption does not apply when an "owner, agent or employee" of the media outlet had knowledge of the "false, misleading or deceptive character of the advertisement" but published it anyway.[2] In addition, the exemption does not apply when the media outlet has a "direct financial interest in the sale or distribution of the . . . product or service" that was advertised in a false, misleading or deceptive manner.[3] Anyone claiming exemption from liability under the UDPTA has the burden of proving that the exemption applies under the circumstances.[4]

Unlike many other states, North Carolina does not have a state trade commission that regulates false, misleading and deceptive advertising.. Although the Federal Trade Commission (FTC) has jurisdiction to regulate much of the advertising that is published and disseminated in North Carolina, the agency focuses primarily on national and regional advertising. Although FTC regulation of advertising is beyond the scope of this chapter,[5] it is important to note that there is no specific media exemption from federal

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[1] N.C. GEN. STAT. § 75-1.1(c).

[2] *Id.*

[3] *Id.*

[4] *Id.* at (d).

[5] For an excellent general overview of this topic published in 2010, *see generally* Anne V. Maher & Lesley Fair, *The FTC's Regulation of Advertising*, 65 FOOD & DRUG L.J. 589 (2010).

liability for unfair or deceptive acts or practices regulated by the FTC, which include dissemination of deceptive or unfair advertising.[6] The FTC defines "deception" in advertising as any "representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment,"[7] and describes "unfairness" as an act or practice that causes – or is likely to cause – substantial consumer injury that cannot be reasonably avoided by consumers and is not outweighed by countervailing benefits to consumers or competition.[8] A good resource for information and documents regarding FTC regulation of advertising and marketing by the agency's Division of Advertising Practices (DAP) within the Bureau of Consumer

[6] Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce" and empowers the FTC to enforce this prohibition against all "persons, partnerships, or corporations" except for certain entities like banks, savings and loans, federal credit unions and airlines. 15 U.S.C. § 45(a)(1)-(2). In addition, Section 12 of the FTC Act specifically makes it unlawful to "disseminate, or cause to be disseminated" false advertising for "food, drugs, devices, services, or cosmetics" and incorporates by reference this type of false advertising as an "unfair or deceptive act or practice affecting commerce" under Section 5 of the act. 15 U.S.C. §52(a)-(b). In a 1971 memorandum of understanding between the FTC and the Food and Drug Administration (FDA), the FDA has primary responsibility for regulating prescription drug advertising (and labeling) while the FTC has primary responsibility for advertising for foods, over-the-counter drugs, devices and cosmetics (while the FDA has primary authority for labeling for these products). Memorandum of Understanding Between Federal Trade Commission and the Food and Drug Administration, 36 Fed. Reg. 18,539 (Sept. 9, 1971) (hereinafter *1971 Memorandum of Understanding*).

[7] FTC Policy Statement on Deception (Oct. 14, 1983), *appended to* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-decpt.htm.

[8] FTC Policy Statement on Unfairness (Dec. 17, 1980), *appended to* Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm. In 1994, Congress amended Section 5 of the FTC Act and included the definition of "unfairness" as an "act or practice [that] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumer themselves and not outweighed by countervailing benefits to consumers or to competition." Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691 (codified at 15 U.S.C. § 45(n)).

Protection (BCP), visit *Advertising and Marketing* on the FTC website.[9] The FTC also has provides a list of advertising screening tips for media on its website.[10]

In one particular advertising category – weight loss advertising – the FTC has published guidelines for media outlets and listed specific "red flag" claims for products like non-prescription drugs, dietary supplements, skin patches, creams, wraps and jewelry. The FTC has *A Reference Guide for Media on Bogus Weight Loss Claim Detection* available online on its website.[11] Advertising managers for media outlets that publish weight loss advertising should consult this guide carefully.

What are the restrictions on adoption and childcare service advertising?

Adoptions. The N.C. General Statutes regulate adoption advertising in public media like newspapers, periodicals and broadcast outlets. Only a county department of social services, "adoption facilitator," or "agency" licensed by the N.C. Department of Health and Human Services may advertise in public media for the "place[ment] or accept[ance of] a child for adoption."[12] The statutes define an "adoption facilitator" as "an individual or a nonprofit entity that assists biological parents in locating and evaluating prospective parents without charge."[13] An "agency" is defined as "a public or private association, corporation, institution or other person or entity" that can legally "place minors for

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[9] http://www.business.ftc.gov/advertising-and-marketing (last visited June 23, 2012). For an overview of the FTC Division of Advertising Practices on the FTC website, visit *Division of Advertising Practices*, http://www.ftc.gov/bcp/bcpap.shtm (page last modified April 21, 2011).

[10] http://ftc.gov/bcp/edu/microsites/redflag/whatyoucando.html (scroll down to "All-Purpose Advertising Screening Tips") (last visited June 25, 2012).

[11] http://www.ftc.gov/bcp/edu/microsites/redflag/index.html (last visited June 25, 2012).

[12] N.C. GEN. STAT. § 48-10-101(b).

[13] N.C. GEN. STAT. § 48-1-101(3a).

adoption" under the laws of the jurisdiction in which the agency operates.[14] Adoption agencies licensed by other states are not expressly prohibited from placing adoption advertisements in North Carolina.

By statute, an individual seeking a child to adopt may advertise but only in a newspaper or periodical, on radio, on broadcast or cable television, or on the Internet.[15] Before placing such an advertisement, the person must be assessed by a state-approved adoption agency and found "suitable" to adopt a child.[16] The advertisement must state that the person seeking a child to adopt "has a completed preplacement assessment" and was found "suitable to be an adoptive parent." The advertisement also must include the name of the agency that completed the assessment and the date the assessment was completed.[17] The advertisement may state that the person seeking a child to adopt is willing to pay statutory expenses related to the adoption including birth-related medical, hospitalization and travel expenses; legal expenses related to the adoption; and other expenses permitted by statute.[18]

Anyone who violates state adoption advertising requirements is subject to criminal misdemeanor charges.[19] However, the statutes do not indicate whether media outlets can be prosecuted for publishing adoption advertisements that fail to comply with the law.

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[14] *Id.* at (4).

[15] N.C. GEN. STAT. § 48-10-101(b1).

[16] *Id.*

[17] *Id.*

[18] *See id. See also* N.C. GEN. STAT. § 48-10-103.

[19] N. C. GEN. STAT. § 48-10-101(c).

Nonetheless, the statutes broadly authorize district courts to enter injunctions to prohibit anyone from violating state restrictions on placement and advertising in connection with adoptions.[20]

Childcare services. North Carolina also prohibits anyone from offering childcare services to the public without first complying with state child welfare statutes.[21] Under these statutes, "child care" means:

> A program or arrangement where three or more children less than 13 years old, who do not reside where the care is provided, receive care on a regular basis or at least once per week for more than four hours but less than 24 hours per day from persons other than their guardians or full-time custodians or from persons not related to them by birth, marriage, or adoption.[22]

Under these provisions, an advertisement for childcare services as defined in the statutes must include the identifying number that is on the provider's required state license or letter of compliance.[23]

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[20] *Id.* at (d).

[21] N.C. GEN. STAT. § 110-98(1).

[22] N.C. GEN. STAT. § 110-86. There are various exemptions to this definition including public schools, Bible schools when "conducted during vacation periods" and "[c]operative arrangements among parents to provide care for their own children as a convenience rather than for employment," among others. *Id.* at (2)a-j.

[23] N.C. GEN. STAT. § 110-98(2).

How does the state regulate alcoholic beverage advertising?

North Carolina law requires that alcoholic beverage advertising disseminated in the state comply with rules enacted by the state Alcoholic Beverage Control Commission.[24] In its extensive and complicated sets of rules, the ABC Commission defines "advertising" as publicizing "alcoholic beverages by brand name, manufacturer's name or by other reference" including publicizing the "trade name" of a retailer in connection with the licensed sale of alcoholic beverages.[25] The commission does not regulate editorial

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[24] N.C. GEN. STAT. § 18B-105(a). The statute gives the ABC Commission specific authority to enact rules that:

> (1) Prohibit or regulate advertising of alcoholic beverages by permittees in newspapers, pamphlets, and other print media;
> (2) Prohibit or regulate advertising by on-premises permittees of brands or prices of alcoholic beverages via newspapers, radio, television, and other mass media;
> (3) Prohibit deceptive or misleading advertising of alcoholic beverages;
> (4) Require all advertisements of alcoholic beverages to disclose fully the identity of the advertiser and the products being advertised;
> (5) Prohibit advertisements of alcoholic beverages on the premises of a permittee, or regulate the size, number, and appearance of those advertisements;
> (6) Prohibit or regulate advertisement of prices and alcoholic beverages on the premises of a permitee;
> (7) Prohibit or regulate alcoholic beverage advertisements on billboards;
> (8) Prohibit alcoholic beverage advertisements on outdoor signs, or regulate the nature, size, number, and appearance of those advertisements;
> (9) Prohibit or regulate advertising of alcoholic beverages by mail;
> (10) Prohibit or regulate contests, games, or other promotions which serve or tend to serve as advertisement for a specific brand or brands of alcoholic beverages; and
> (11) Prohibit or regulate any advertising of alcoholic beverages which is contrary to the public interest.

Id. at (b). The term "permitee" is defined in the ABC Commission rules as any person to whom the commission has issued a "permit," which means a "written or printed authorization to engage in some phase of the alcoholic beverage industry." 4 N.C. ADMIN. CODE § 2R.0103(8)-(9). Other rules require that permittees and affiliates comply with all commission rules when advertising alcoholic beverages in any advertising medium and only advertise brands listed as approved by the commission at the time the advertising is published. 4 N.C. ADMIN. CODE § 2S.1004(a), (d).

[25] 4 N.C. ADMIN. CODE § 2S.1001(2). The term "advertising" also includes "any display intended to attract attention by a combination of letters, pictures, objects, lighting effects, illustrations, etc." *Id.* Among other exclusions, advertising does not include labeling although there are restrictions in the rules that specifically apply to labeling. *See id.* at (2)(a).

content in media, of course, so long as the content has not been directly or indirectly paid for by anyone subject to the authority of the commission.[26]

Generally, retailers with permits to sell malt beverages (such as beer), wine and mixed beverages may advertise price and brand of these alcoholic beverage products for sale using media including newspapers, magazines, circulars, radio, television and the Internet.[27] The rules define the term "magazines" as those with a general circulation that publish at least every three months, and the term "newspapers" as those that publish at least once a month.[28] Notably, the rules prohibit retailers from advertising alcoholic beverages on billboards and outdoor signs except for certain signs on their premises as specified in the rules.[29]

The rules often treat "industry members" – defined as "any manufacturer, bottler, importer, vendor, representative, or wholesaler of alcoholic beverages"[30] – differently from retailers for purposes of alcoholic beverage advertising. For example, under the rules, industry members may advertise malt beverages and wine "on outdoor billboards, by radio, television, newspaper or magazine, and by similar means." [31] Industry members

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[26] *Id.* at (b) (stating that alcoholic beverage advertising and publicity do not include "any editorial for which no money or other valuable consideration is paid or promised, directly or indirectly, by any person subject to [the ABC Commission] Rules").

[27] 4 N.C. ADMIN. CODE § 2S.1008(d).

[28] 4 N.C. ADMIN. CODE §2S.1001(7) (defining "magazines"), (8) (defining "newspapers").

[29] N.C. ADMIN. CODE § 2S.1008(b)(2). However, industry members like manufacturers and wholesalers who also have a retail permit may advertise tastings on billboards and outdoor signs. *Id.*

[30] 4 N.C. ADMIN. CODE § 2R.0103(7).

[31] 4 N.C. ADMIN. CODE § 2S.1009(a). Industry members may not advertise malt beverages and wine on outdoor billboards or signs "on the premises of any retail permittee's establishment nor in areas where the sale of that product is unlawful." *Id.*

also may advertise spirituous liquors on outdoor billboards and by "radio, television, newspaper, magazine or internet, and by other similar means." [32] However, the rules prohibit retailers and industry members from directly or indirectly participating in cooperative advertising for alcoholic beverages with the exceptions of point-of-sale advertising and certain promotions that are allowed under the ABC Commission rules.[33] It is important to note here that the rules specifically prohibit any alcoholic beverage advertising during radio and television broadcasts of any events and activities connected with an elementary or secondary school – such as a high school football game – and also in the programs for these events and activities.[34] In addition, the rules prohibit alcoholic beverage advertising using sound trucks and advertising for spirituous liquors on motion picture screens.[35] In addition to these general rules, there are myriad other rules that apply specifically to alcoholic beverage advertising by retailers and industry members.

False and misleading claims in alcoholic beverage advertising. The ABC Commission rules generally prohibit claims in alcoholic beverage advertising that are materially false or misleading in any manner.[36] Specific provisions in the commission rules restrict the

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[32] 4 N.C. ADMIN. CODE § 2S.1011(c). Industry members may not advertise spirituous liquors on outdoor billboards or signs located "on the premises of any retail permittee's establishment nor in areas where the sale of that product is unlawful." *Id.* Under the rules, when using print advertisements that are targeted to college students and promote a malt beverage or wine product, industry members must submit the advertisements in advance to the ABC Commission for approval – two months in advance is recommended. 4 N.C. GEN. STAT. § 2S.1009(f).

[33] 4 N.C. ADMIN. CODE § 2T.1007.

[34] 4 N.C. ADMIN. CODE 2S.1006(c) (applies to alcoholic beverage advertising sponsored by retailers and also "industry members" like wholesalers and vendors, for example).

[35] *Id.* at (d), (e).

[36] *Id.* at (a)(1). This provision covers labeling for alcoholic beverages as well, so depictions of alcoholic beverage products and their labeling in advertising seemingly also would be covered. *See id.*

use of "analysis, standards or tests" to advertise alcoholic beverages in any manner that is likely to mislead consumers.[37] In addition, false "place of origin" claims are prohibited. That means that advertisements may not falsely represent that an alcoholic beverage product was made or imported from someplace other than its place of "actual origin" or was made by someone other than the "actual producer or processor."[38] The rules prohibit alcoholic beverage advertising from offering a guaranty that is likely to mislead consumers and prescribe the following specific wording for a guaranty offered in alcoholic beverage advertising: "We will refund the purchase price to the purchaser if he [or she] is in any manner dissatisfied with the contents of this package," or substantially similar wording.[39]

Prohibited claims related to the government. The ABC Commission rules generally restrict various statements in alcoholic beverage advertising that relate to the government. For instance, an advertising claim that an alcoholic beverage was "produced, blended, made, bottled, packed or sold under or in accordance with any authorization, law or regulation" of any government or branch of government – domestic or foreign – is prohibited unless the statement is required or specifically authorized by the governmental entity mentioned in the advertisement.[40] Also, if a government-issued permit number is

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[37] 4 N.C. ADMIN. CODE § 2S.1005(a)(4) (applies "irrespective of falsity").

[38] *Id.* at (a)(15).

[39] *Id.* at (a)(5) (applies "irrespective of falsity").

[40] *Id.* at (a)(6).

included in alcoholic beverage advertising, the commission rules prohibit "any additional statement" that comments on that number.[41]

Similarly, the rules prohibit alcoholic beverage advertising that includes government symbols – meaning a "flag, seal, coat of arms, crest or other insignia" – that are likely to mislead consumers into believing that the beverage being advertised has been "endorsed, made or used by, produced for or under the supervision of or in accordance with the specifications of the government [entity]" this is represented by the particular symbol depicted in the advertisement.[42] The rules also prohibit using "any statement, design, device or pictorial representation of or relating to or capable of being construed as relating to the armed forces of the United States or the American Flag, state flag, or any emblem, seal, insignia or decoration associated with any such flag of armed forces of the United States."[43]

Prohibited claims related to athletes and athleticism. The ABC Commission rules prohibit advertising claims that are likely to mislead consumers into thinking that there is a positive correlation between alcoholic beverage consumption and enhanced athletic performance. For instance, the rules specifically prohibit alcoholic beverage advertising that includes a "statement, picture or illustration" that implies to consumers that

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[41] *Id.*

[42] *Id.* at (16). The ABC Commission rules also prohibit the use of such symbols that are associated with an "organization[]," a "family" or an "individual" when the use of the symbol is "likely to mislead" consumers into falsely concluding that the organization, family or individual either makes, uses or endorses the product or otherwise supervises or provides specifications for the manufacturer of the product. *Id.*

[43] *Id.*

"consumption of alcoholic beverages enhances athletic prowess."[44] In addition, in alcoholic beverage advertisements, the rules prohibit any "statement, picture or illustration referring to any known athlete" that implies or reasonably infers to readers that using the advertised alcoholic beverage "contributed to [the] athlete's athletic achievements."[45]

Other specific claims prohibited in alcoholic beverage advertising. The ABC Commission rules also contain a number of provisions that generally prohibit other specific content and claims in alcoholic beverage advertising. For instance, the commission rules prohibit advertising with "direct or indirect references to the intoxicating effect" of alcoholic beverages including the use of terms such as "high test," "high proof," "full strength" and "extra strong."[46] The rules also prohibit content – meaning any "statement, picture or illustration" – that "induc[es] persons under 21 years of age to drink"[47] and content that is either "inconsistent with the spirit of safety or safe driving programs"[48] or "contrary to state laws and rules governing sale, storage and consumption of alcoholic beverages."[49]

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[44] *Id.* at (a)(7).

[45] *Id.*

[46] *Id.* at (a)(17).

[47] *Id.* at (a)(10).

[48] *Id.* at (a)(11).

[49] *Id.* at (a)(12).

Additionally, the rules forbid statements in alcoholic beverage advertising that are "disparaging of a competitor's product"[50] and also prohibit depictions of nudity along with "obscene" and "indecent" content in alcoholic beverage advertising.[51] Even more broadly, the rules prohibit "any picture or illustration depicting the use of alcoholic beverages in a scene which is undignified, immodest or in bad taste."[52] However, the legality – including First Amendment constitutionality – of some of these content restrictions is questionable to the extent they prohibit content in alcoholic beverage advertising that is not false or misleading, obscene, or otherwise illegal. For instance, in 1999, an administrative law judge in North Carolina ruled that the ABC Commission's blanket ban on nudity in alcoholic beverage advertising and labeling exceeded the statutory authority of the commission, was void and thus could not be used to prohibit the sale of two beer products with labels that depicted nudity but were not obscene.[53]

Two provisions in the rules apply specifically to advertising for branded alcoholic beverage products. First, statements in advertisements for a branded alcoholic beverage product must be consistent with the product's labeling statements.[54] In addition, the rules

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[50] *Id.* at (a)(2).

[51] *Id.* at (a)(3).

[52] *Id.* at (a)(8).

[53] Shelton v. N.C. Alcoholic Beverage Control Comm'n, 99 A.B.C. 1641 (Dec. 7, 1999). The commission also suggested there were First Amendment constitutional concerns regarding the blanket ban on depictions of non-obscene nudity but noted that constitutional issues needed to be decided in the courts and simply ordered the commission to consider the constitutionality of the ban on non-obscene nudity under the First Amendment. *Id. See also* Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F.3d 87, 91, 101 (2d Cir. 1998) (not dealing with nudity or obscenity but holding that the State of New York could not constitutionally ban the use of a cartoon frog depicted as giving "the finger" on the labeling of "Bad Frog" beer products sold in the state on findings that the illustration was "combative in nature").

[54] 4 N.C. ADMIN. CODE 2S.1005(a)(13).

prohibit false claims – and claims that are likely to be misleading – that using a branded alcoholic beverage product will have "curative or therapeutic effects."[55]

Price and advertising for alcoholic beverages. As mentioned, a retailer that holds an ABC Commission permit to sell malt beverages (such as beer), wine or mixed beverages may advertise price and brand via circulars, newspapers, magazines, radio, television and the Internet.[56] On the other hand, commission rules prohibit alcoholic beverage manufacturers, bottlers, importers, vendors, representatives and wholesalers – again, called "industry members" under the rules – from advertising the price of any malt beverage or wine product for sale.[57] However, the constitutionality of state bans on truthful, non-misleading price advertising for lawful alcoholic beverages is suspect. For example, in 1996, the U.S. Supreme Court held that a Rhode Island statute that banned truthful, non-misleading price advertising for lawful alcoholic beverages sold by retailers, manufacturers, wholesalers and shippers was unconstitutional under the First Amendment protection for commercial speech (such as advertising) and could not be constitutionally enforced.[58]

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[55] *Id.* at (a)(14).

[56] 4 N.C. ADMIN. CODE § 2S.1008(d).

[57] 4 N.C. ADMIN. CODE §§ 2R.0103(a)(7) (defining the term "industry members"); 2S.1009(e) (containing the ban on price and brand advertising for "industry members"). The rules, however, allow industry members to provide a "wholesale price list that contains the brand names and prices of his products to retail permittees." 4 N.C. ADMIN. Code § 2S.1009(e).

[58] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996). The statutory ban applied to malt beverages, cordials, wine and distilled liquor. *Id.* at 490. Also, other statutory provisions at issue in the case specifically prohibited media outlets in the state from accepting any price advertising for alcoholic beverages. *Id*.

Promotions sponsored by alcoholic beverage brands. Unless exempt under the rules, the ABC Commission must approve in advance promotions sponsored by alcoholic beverage industry members (manufacturers, bottlers, importers, vendors, representatives and wholesalers).[59] The rules define a "promotion" as "any advertising publicity or sponsorship activity in connection with any special event, function or holiday that is outside the scope of routine sales and marketing" including "fundraisers, concerts, sporting events, festivals, celebrations, anniversaries, ceremonies, operations, observances, sweepstakes [and] contests."[60] The approval process for such promotions includes submission of "copies of broadcast and print advertisements" by the sponsoring industry recommended no later than two months before the scheduled promotion.[61] Under the rules, alcoholic beverage advertising may not promote "prizes, premiums or merchandise to individuals for which any purchase of alcoholic beverages is required."[62] This includes a promotion for prizes, premiums or merchandise that requires consumers to bring in empty containers of the sponsoring brand's alcoholic beverage product.[63]

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[59] *Id.* at (a) (requiring advance approval by the ABC Commission of promotions sponsored by an "industry member" as defined in 4 N.C. ADMIN. CODE § 2R.0103(a)(7)). The rules exempt from the approval process specified activities including certain sponsorships of non-profit organizations, certain point-of-sale advertising and retail specialty or novelty items, promotions that occur on a "regular basis" in a similar format that already has been approved by the ABC Commission and sponsorship of individual amateur sports teams so long as the teams are not composed of employees of the alcoholic beverage-related sponsor, all as more fully described in the rules. *See id.* at (1)-(4). The term "point-of-sale advertising" is defined in the rules as "advertising material such as signs, posters, banners, and decorations that bears conspicuous and substantial product advertising matter, that has no secondary value to the retailer, and that is designed and intended to be used inside a retailer's licensed premises where alcoholic beverage products are displayed or sold." 4 N.C. ADMIN. CODE 2T.0702(2).

[60] 4 N.C. ADMIN. CODE § 2T.0702(3).

[61] 4 N.C. ADMIN. CODE § 2T.0717(c)(3), (g).

[62] 4 N.C. ADMIN. CODE § 2S.1006(f).

[63] *Id.*

However, this does not include a promotion in which a consumer may bring in an empty container of any brand of a type of similar alcoholic beverage product and receive the same prize, premium or merchandise, even if the brand is different than the advertised brand that is sponsoring the promotion.[64]

Discounts and refund offers in alcoholic beverage advertising. Under the ABC Commission rules, no advertisements for alcoholic beverages may include a coupon or offer for a free drink at a retail establishment that sells alcoholic beverages.[65] In addition, the rules limit who may legally advertise discounts with coupons, rebates and loyalty/discount/membership cards (collectively referred here to as "loyalty cards") for retail purchases of malt beverage and wine, and under what conditions.[66] The permissible uses of these types of discounts vary depending on the type of licensed alcoholic beverage retailer running the advertisement, as explained more fully below. In addition, manufacturers, importers, distillers, rectifiers and bottlers of spirituous liquors may advertise a "refund offer" in the state under certain conditions, as explained below.[67]

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[64] *Id.*

[65] *Id.* at (b). The rules define a "coupon" as "a part of a retail permittee's advertisement that is redeemed to the retail permittee to obtain a discount at the time of sale." *Id.* at (a)(1).

[66] *Id.* at (b). The rules define a "rebate" for retail permittees as "a promise by the retail permitee to return a portion of the amount paid by the purchaser upon the condition the purchaser completes a rebate form and the purchaser meets the terms and conditions of the rebate form's requirements." *Id.* at (a)(3). The rules define a "loyalty card, discount card, or membership card" as "a card that is issued by a retail permittee to customers that, upon presentation to the retail permittee, provides for the purchaser to receive a [card] or coupon discount on a portion of the amount paid by the purchaser for off-premises beer or wine consumption sales at the time of sale." *Id.* at (a)(2).

[67] 4 N.C. ADMIN. CODE 2S.1020(a), (d). A "refund offer" is defined in the rules as "an offer to a consumer for a rebate of money or merchandise from a liquor industry member, obtained by mailing a form." *Id.* at (b).

Retailers licensed to sell malt beverages or wine for either on-premises or off-premises consumption, and licensed wine shops, may advertise discounts with coupons or rebates but only for consumers purchasing malt beverage and wine products that the retailer sells to drink off of the premises.[68] These coupons and rebates may not be honored for consumers under the legal drinking age, may not exceed 25 percent of the advertised retail price of the malt beverage or wine product being sold, may not be advertised in publications produced by or for institutions of higher education like colleges and universities, and must include the statement "Drink Responsibly-Be 21" in the coupon or rebate in the advertisement.[69] These retailers may require the use of a loyalty card to obtain the advertised discount, under the same conditions just mentioned, with the requirement that the statement "Drink Responsibly-Be 21" be printed on any loyalty card that is printed in the advertisement.[70] Licensed retailers may not cooperate directly or indirectly with industry members (like manufacturers) on marketing, redeeming or

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[68] 4 N.C. ADMIN. CODE § 2S.1006 (b)(1)(A)-(B).

[69] *Id.* at (b)(1)(C)-(E). The retailer may require the use of a loyalty card with a coupon or rebate to obtain the discount. *Id.* at (b)(1)(B).

The constitutionality of state ABC Commission rules limiting alcoholic beverage advertising in college and university publications has not been addressed in a published court opinion to date. However, the U.S. Court of Appeals for the Fourth Circuit – whose rulings are binding on federal trial courts in North Carolina – ruled in 2010 that various state limitations on alcoholic beverage advertising in college student publications in Virginia did not violate the First Amendment protection for commercial speech. Educ. Media Co. at Va. Tech, Inc. v. Swecker, 602 F.3d 583, 591 (4th Cir. 2010). The decision may be in conflict with a seemingly contrary decision by the U.S. Court of Appeals for the Third Circuit in which the court stuck down a Pennsylvania statute banning alcoholic beverage advertising in publications affiliated with colleges and universities. *See* Pitt News v. Pappert, 379 F.3d 96 (3d Cir. 2004). Decisions of the Third Circuit are not binding on the Fourth Circuit Court of Appeals or federal trial courts in North Carolina. To date, the U.S. Supreme Court has not addressed the constitutionality of state restrictions on alcoholic beverage advertising in college and university publications.

[70] 4 N.C. ADMIN. CODE § 2S.1006(b)(2).

funding discounts allowed under the rules for malt beverage and wine products whether by coupon, rebate or loyalty card.[71]

As mentioned above, the rules allow refund offers including rebates in connection with the purchase of spirituous liquor products when the offer is made by a "manufacturer, importer, distiller, rectifier or bottler of spirituous liquor." [72] The rules allow these offers to be advertised by "newspapers, magazines or direct mail."[73] However, the redemption form for the refund may not be published in the advertisement itself but instead must be made available on the product packaging or container, or on a "tear-off pad" at the store. [74] These refund offers may be made only to "purchasers of the manufacturer's original unopened container of liquor [when] purchased from a local [state-operated] ABC store." [75] The refund offer must be applicable across the entire state, have an expiration date and explain pertinent redemption procedures; and the refund only may be redeemed by mail sent to either to the industry member offering the refund or a designated agent that may not include a retailer or wholesaler licensed in the state to sell alcoholic beverages.[76]

Advertisements for "happy hours." Bars, taverns and other establishments that hold permits to sell alcoholic beverages for on-premises consumption may not advertise drink specials such as "2 for 1," "buy 1 get 1 free" or "any other similar statement indicating

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[71] *Id.*

[72] 4 N.C. ADMIN. CODE § 2S.1020(a), (b)(1).

[73] *Id.* at (d).

[74] *Id.* at (d), (b)(3).

[75] *Id.* at (b)(2).

[76] *Id.* at (b)(4)-(6), (c).

that a patron must buy more than one drink."[77] They also may not conduct or advertise "happy hours" that involve selling more than one drink to a consumer for one price, offering a single price that requires the purchase of more than one drink or serving more than one drink to a consumer at a time.[78] They may offer and advertise free and reduced-price drinks only if the offer is good for a full business day or longer and available to all patrons and not just women or men, for example.[79] In addition, they may offer and advertise a package that includes alcoholic beverages with a meal or entertainment,[80] or a meal and alcoholic beverage at a single price as long as the total price includes the full retail price of the drink.[81]

Additional requirements for wine advertising. In addition to the rules discussed above, there are even more ABC Commission rules that apply specifically to wine advertisements. Wine advertisements may include the number of a bonded wine cellar or winery "in direct conjunction with the name and address of the person operating such winery or storeroom" stated in one of the following manners: "Bonded Winecellar No. _____," "B.W.C. No. _____," "Bonded Winery No. _____," or "B.W. No. _____."[82] No

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[77] 4 N.C. ADMIN. CODE § 2S.1006(g).

[78] 4 N.C. ADMIN. CODE § 2S.0232(a)(1)-(3). This section of the rules regulates the conduct of "happy hours" but another section prohibits advertising "happy hours" that are prohibited under the rules. 4 N.C. ADMIN. CODE § 2S.1006(g). The rules define a "drink" as one that "contains the amount of alcoholic beverages usually and customarily served to a single patron as a single serving" and includes drinks with "two alcoholic beverages served separately at the same time to a single patron . . . [if it] is a customary combination, such as a shot of spirituous liquor with a malt beverage." 4 N.C. ADMIN. CODE § 2S.0232(C).

[79] 4 N.C. ADMIN CODE § 2S.0232(b).

[80] *Id.* at (d).

[81] *Id.* at (e).

[82] 4 N.C. ADMIN. CODE § 2S.1005(b)(1).

additional references regarding these numbers are permitted, and wine advertising in the state may not "convey the impression" that the advertised wine product was "made or matured under United States Government or any state government supervision," or under any governmental "specifications or standards."[83]

Under the rules, wine advertisements may not include any "statement, design or representation" relating to "alcoholic content" including content that "may convey the impression that a wine is 'unfortified' or has been 'fortified' or has intoxicating qualities."[84] In addition, wine advertisements may not contain any "statement of age or dates, or any statement of age or representation relative to age."[85] However, a wine advertisement may include the vintage year when the year also appears on the product label[86] and also may state the date of bottling in the following form: "'Bottled in _____ (inserting the year in which the wine was bottled)."[87] In addition, wine advertisements may include "[t]ruthful references of a general and informative nature" concerning "storage and aging" of a wine such as "This wine has been mellowed in oak casks," "Stored in small barrels" or "Matured at regulated temperatures in our cellars."[88]

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[83] *Id.*

[84] *Id.* at (b)(2). It is unlikely at this time that a state could constitutionally enforce a ban on the truthful publication of alcohol content information in product advertising or labeling. In 1995, the U.S. Supreme Court struck down on First Amendment grounds a federal regulatory scheme to the extent that it prohibited beer manufacturers from including the truthful alcohol content percentage on labeling for beer products. *See* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

[85] 4 N.C. ADMIN. CODE 2S.1005(b)(3).

[86] *Id.* at (b)(3)(A).

[87] *Id.* at (b)(3)(B).

[88] *Id.*

Other than vintage year and bottling date, any other dates that appear in wine advertising must be accompanied by a disclosure explaining their "significance."[89] This would include the "date of establishment of any business, firm or corporation," for instance.[90] When required under the rules, the explanation for a date in wine advertising must appear in the "same size and kind of printing" as the date itself.[91]

Out-of-state wine manufacturers and sellers. In light of recent court decisions, out-of-state wine manufacturers and sellers probably can lawfully advertise offers to ship wine for sale to adult consumers in North Carolina despite seemingly contrary provisions in the state statutes that only allow such sales to licensed wine wholesalers in the state.[92] In 2003, the U.S. Court of Appeals for the Fourth Circuit ruled that these provisions unconstitutionally discriminated against interstate commerce and thus could not be lawfully enforced by North Carolina to the extent that they prevented out-of-state wine manufacturers and sellers from shipping their products to adult consumers in the state.[93]

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[89] *Id.*

[90] *Id.* Under the rules, the "date of establishment of any business, firm or corporation" in wine advertising "shall be stated without undue emphasis and in direct conjunction with the name of the person, firm or corporation to whom it refers." *Id.*

[91] *Id.* Courts have not ruled on the constitutionality of these specific disclosure requirements in any published rulings to date. However, the U.S. Supreme Court held in 2010 that to be constitutional under the First Amendment, in general, government disclosure requirements for commercial advertising must be reasonably related to the goal of preventing consumer deception from false claims, or from actually or inherently misleading claims; or must directly advance some other reasonable government goal in a manner that is narrowly tailored for that purpose, The latter standard is a more rigorous constitutional test, according to the Court. Millavetz, Gallop & Millavetz, P.A. v. United States, 130 S. Ct. 1324, 1340-41 (2010).

[92] N.C. GEN. STAT. § 18B-102.1(a).

[93] *See* Beskind v. Easley, 325 F.3d 506, 517-20 (4th Cir. 2003). In the case, the statute was challenged in federal court by a California winery and a group of North Carolina consumers. *Id.* at 509.

Decisions of the Fourth Circuit are binding precedent on all federal trial courts in North Carolina. In 2005, the U.S. Supreme Court struck down similar statutory provisions in Michigan and New York to the extent that those provisions limited out-of-state wine shipments to adult consumers in those states.[94]

Additional requirements for spirituous liquor advertising. In addition to the rules already discussed, the ABC Commission has additional rules that apply specifically to advertising of spirituous liquors. Terms such as "bond," "bonded" and "bottled in bond" are prohibited under the rules in a spirituous liquor advertising unless the term also appears on the product labeling and is presented in the advertisement in the same "manner and form" as it appears on the label.[95] In addition, the rules for spirituous liquor advertising prohibit the term "pure" unless it is part of the "bona fide name" of the advertiser, and also prohibit terms like "double distilled" and "triple distilled."[96]

The rules prohibit "statements of age" in spirituous liquor advertising including "any statement, design or device directly or by implication concerning age or maturity of any brand or lot of spirituous liquor" unless the same information appears on the labeling for the advertised product.[97] When a statement of product age is permitted in a spirituous liquor advertisement, any qualifying information that appears on the labeling also must appear in the advertisement next to the date itself with "substantially equal

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[94] *See* Granholm v. Heald, 544 U.S. 460 (2005).

[95] 4 N.C. ADMIN. CODE 2S.1005(c)(1).

[96] *Id.* at (c)(3)-(4).

[97] *Id.* at (c)(2).

conspicuousness" as the date.[98] However, when advertising whisky or brandy that does not include a specific age on its label, or rum that is more than four years old, the advertisement may use "inconspicuous age, maturity or other similar representation[s]" such as "aged in wood" or "mellowed in fine oak casks."[99]

Are drug paraphernalia ads legal?

Generally, no, they are not. Since 1994, it has been a misdemeanor in North Carolina for anyone to "purchase or otherwise procure" advertisements in media like newspapers, magazines and "other publications" with the intent "to promote the sale of objects designed or intended for use as drug paraphernalia."[100] However, it can be difficult to determine whether an advertisement actually involves "drug paraphernalia." Generally, the statutes define "drug paraphernalia" as "all equipment, products and material of any kind that are used to facilitate, or intended or designed to facilitate" any violations of controlled substances laws including "planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, and concealing controlled substances and injecting, ingesting, inhaling, or otherwise introducing controlled substances into the human body."[101]

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[98] *Id.*

[99] *Id.*

[100] N.C. GEN. STAT. § 90-113.24.

[101] N.C. GEN. STAT. § 90-113.21(a).

Examples of "drug paraphernalia" in the statutes include equipment used for growing or harvesting plants that produce controlled substances; scales and other equipment used to weigh or measure controlled substances; chemicals used in the processing of controlled substances; and devices used to inject, ingest or inhale controlled substances into the body including syringes and pipes.[102] Obviously, otherwise legal items could be

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[102] *Id.* Specifically, the statutes include the following non-exclusive list of examples of "drug paraphernalia" that may not be advertised:

(1) Kits for planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance can be derived;
(2) Kits for manufacturing, compounding, converting, producing, processing, or preparing controlled substances;
(3) Isomerization devices for increasing the potency of any species of plant which is a controlled substance;
(4) Testing equipment for identifying, or analyzing the strength, effectiveness, or purity of controlled substances;
(5) Scales and balances for weighing or measuring controlled substances;
(6) Diluents and adulterants, such as quinine, hydrochloride, mannitol, mannite, dextrose, and lactose for mixing with controlled substances;
(7) Separation gins and sifters for removing twigs and seeds from, or otherwise cleaning or refining, marijuana;
(8) Blenders, bowls, containers, spoons, and mixing devices for compounding controlled substances;
(9) Capsules, balloons, envelopes, and other containers for packaging small quantities of controlled substances;
(10) Containers and other objects for storing or concealing controlled substances;
(11) Hypodermic syringes, needles, and other objects for parenterally injecting controlled substances into the body;
(12) Objects for ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the body such as[:]
a. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
b. Water pipes;
c. Carburetion tubes and devices;
d. Smoking and carburetion masks;
e. Objects, commonly called roach clips, for holding burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
f. Miniature cocaine spoons and cocaine vials;
g. Chamber pipes;
h. Carburetor pipes;
i. Electric pipes;
j. Air-driven pipes;
k. Chillums;
l. Bongs; [and]
m. Ice pipes or chillers.

advertised or promoted in connection with the production or use of illegal controlled substances. Under the statutes, whether a particular item is considered illegal "drug paraphernalia" under the circumstances depends on a number of factors including the manner in which the item is described or depicted in advertising.[103] Therefore, the context of an advertisement involving suspected drug paraphernalia is important to review carefully with these points in mind.

What laws govern employment ads?

There are both state and federal laws that apply to employment-related advertising in North Carolina, including "help-wanted" advertising. The most important topic here relates to discriminatory employment practices including discriminatory employment advertising, which is discussed first. North Carolina also regulates employment advertising by personnel and job listing services operated in the state as well as advertising for "work-at-home" schemes.

Discriminatory employment advertising. Federal and state laws apply to discriminatory employment practices, including employment advertising. The federal Civil Rights Act of 1964 (CRA) makes it unlawful for an employer to fail or refuse to hire someone because of his or her "race, color, religion, sex, or national origin."[104] These provisions

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Id.

[103] *Id.* at (b)(9).

[104] 42 U.S.C. § 2000e-2(a). In addition, these provisions also make it an unlawful employment practice for an employer to fire someone or "discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment" for any of these grounds. *Id.* There are similar provisions that apply to "employment agencies," "labor organizations" and "training programs," as defined in the statutes. *Id.* at (a), (b), (c), (d).

apply to employers engaged in interstate commerce with 15 or more employees who have worked each business day during at least 20 weeks of the current or preceding calendar year, but the term "employer" under the CRA does not include the United States (or any corporation that the United States owns entirely), Native American tribes or tax-exempt private membership clubs, for example.[105]

Employers covered by the CRA may not use employment advertisements that "indicat[e] any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin."[106] The CRA allows employers to advertise jobs with a preference based on religion, sex or national origin only when the factor is a *bona fide* occupational qualification (BFOQ) of the job.[107] The U.S. Supreme Court has interpreted the BFOQ exception narrowly under the CRA in the context of a gender case to include "objective, verifiable requirements [that] concern job-related skills and aptitudes."[108] In addition, the CRA specifically allows religious organizations, such as churches and parochial schools, for example, to hire an individual of a specified religion to perform work connected with the activities of the organization.[109] Thus, under these provisions,

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[105] 42 U.S.C. § 2000e(b)(1)-(2). To be exempt, a private membership club must be *bona fide* and exempt from taxation under 26 U.S.C. § 501(c). *Id.* at (b)(2).

[106] 42 U.S.C. § 2000e-3(b). These provisions also apply to "labor organizations," "employment agencies," and "on-the-job training programs," among others, as specified in the federal statutes. *Id.*

[107] *Id.*

[108] Int'l Union, UAW v. Johnson Controls, 499 U.S. 187, 201 (1991).

[109] 42 U.S.C. § 2000e-1(a). This exemption applies to "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *Id.*

religious organizations may advertise jobs for employees with a particular religious affiliation without violating the CRA regardless of whether the narrower BFOQ exemption applies. In light of all of this, publishers should be cautious in screening for employment advertising that seems to violate provisions in the CRA.

The federal Age Discrimination in Employment Act of 1967 (ADEA) protects individuals age 40 and older from employment discrimination[110] and applies to employers engaged in interstate commerce with 20 or more employees who have worked each business day of at least 20 weeks in the current or preceding year.[111] The ADEA defines "employer" to include state governments and their agencies, and interstate agencies. The term does not include the United States or any corporation the United States owns entirely.[112] The ADEA generally prohibits covered employers from discriminating based on age in the context of employment[113] and specifically prohibits covered employers from using employment advertisements that "indicat[e] any preference, limitation, specification, or discrimination, based on age."[114] The ADEA has exceptions, including a BFOQ exception when hiring someone of a certain age is "reasonably necessary to the normal operation of the particular business."[115]

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[110] 29 U.S.C. §§ 621 *et seq*. The purpose of the ADEA is "to promote employment of older persons based on their ability rather than age," among stated purposes. 29 U.S.C. § 621(b).

[111] 29 U.S.C. § 630(b). An "employer" includes "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups or persons" that are "engaged in an industry affecting commerce." *Id.* at (a)-(b).

[112] *Id.* at (b). These prohibitions also would apply to an "employment agency" and a "labor organization." *Id.* These terms are defined elsewhere in the ADEA. 29 U.S.C. § 630(c), (d).

[113] 29 U.S.C. § 623(a)(1)-(3).

[114] *Id.* at (e).

[115] 29 U.S.C. § 623(f).

More specifically, under federal rules enacted by the Equal Employment Opportunities Commission (EEOC) , it is a violation of the ADEA to discriminate against individuals in employment because they are age 40 or older unless one of the statutory exceptions applies, such as the BFOQ exception mentioned above.[116] Thus, under the rules, unless exempt, "help wanted" advertisements may not deter older workers with terms such as "age 25 to 35, young, college student, recent college graduate, boy, girl, or others of similar nature."[117] On the other hand, the EEOC rules allow employers to *favor* an older individual over a younger one even if the younger one is 40 years old or older (also within the protected class).[118] In other words, an employer can favor a 65-year-old individual over an individual who is either 20 years old or even 45 years old without violating the ADEA. Thus, EEOC rules permit "help wanted" advertisements that specifically seek older individuals using wording such as "over age 60, retirees, or supplement your pension."[119]

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[116] 29 C.F.R. § 1625.2. *See also Age Discrimination*, EEOC, http://www.eeoc.gov/laws/types/age.cfm (last visited June 18, 2012).

[117] 29 C.F.R. § 1625.4(a).

[118] 29 C.F.R. § 1625.2. The rules specifically state that employers are not required to favor older workers and also state that the ADEA does not affect state or local laws that otherwise prohibit preferences for older workers. *Id.*

[119] *Id.* Prior to 2007, this rule actually prohibited these terms. But, in 2004, the U.S Supreme Court held that an employer did not unlawfully discriminate under the ADEA against its workers ages 40 to 49 at the time by eliminating its retiree health program for all workers under the age of 50 at the time. Gen'l Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (stating "the [ADEA] does not mean to stop an employer from favoring an older worker over a younger one"). In response, the EEOC initiated a rulemaking. Notice of Proposed Rulemaking, 71 Fed. Reg. 46,177 (EEOC Aug. 11, 2006). The EEOC ultimately amended its rule to allow the previously prohibited terms in employment advertising effective July 1, 2007. Final Rule, 72 Fed. Reg. 36,873 (EEOC July 6, 2007) (codified at 29 C.F.R. Part 1625).

Employers in the state that regularly employ 15 or more employees also are subject to the N.C. Equal Employment Practices Act (NCEEPA).[120] The NCEEPA makes it state public policy to "protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, color, national origin, age, sex or handicap."[121] Violations of the NCEEPA are investigated by the state Human Relations Commission of the Department of Administration. The NCEEPA does not state anything about advertising, specifically; and federal courts have consistently held that the NCEEPA does not provide a private cause of action.[122] At least one federal trial court in the state has ruled that age discrimination charges under the NCEEPA should be evaluated under the same standards used for the federal ADEA.[123] In addition to the NCEEPA, North Carolina statutory law similarly requires all state departments and agencies, and all local political subdivisions in the state to "give equal opportunities for employment and compensation, without regard to race, religion, color, creed, national origin, sex, age, or handicapping condition." These state statutes do not mention advertising specifically.

In addition to the federal and state statutes and rules discussed above, the federal Americans with Disabilities Act of 1990 (ADA)[124] prohibits employers who are engaged

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[120] N.C. GEN. STAT. § 143-422.1 *et seq.*

[121] N.C. GEN. STAT. § 143-422.2.

[122] *See*, *e.g.*, Royster v. Costco Wholesale Corp., 378 F.Supp.2d 595, 607-08 (M.D.N.C. 2005).

[123] Rishel v. Nationwide Mut. Ins. Co., 297 F.Supp.2d 854, 975 (M.D.N.C. 2003). In addition, federal rules enacted under the federal ADEA specifically indicate that states do not have to allow preferences for older workers as are permitted under the ADEA and its rules. *See supra* note 118 and accompanying text.

[124] 42 U.S.C. § 12101 *et seq.*

in interstate commerce and have 15 or more employees (who have worked each working day for at least 20 weeks in the current or preceding calendar year) from discriminating against a job applicant or an employee based on a disability when the individual could perform the "essential functions of the employment position" either with or without "reasonable accommodations."[125] At the state level, the N.C. Persons with Disabilities Protection Act (PDPA)[126] generally prohibits job discrimination against disabled people by private employers with more than 15 full-time employees in the state.[127] Neither the federal ADA nor the state PDPA specifically mentions advertising, but publishers should be cautious before accepting employment advertisements that seem to be contrary to either or both of these acts.

Personnel and job listing services. Under state statutes, a private personnel service[128] operated in the North Carolina for profit must be licensed[129] and it may not advertise falsely or fraudulently, or without including the name of the service along with the term

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[125] 42 U.S.C. § 12111(2), (5)(A), (8); 42 U.S.C. § 12112(a).

[126] N.C. GEN. STAT. §§ 168A.1 *et seq.*

[127] N.C. GEN. STAT. § 168A-5. *See* N.C. GEN. STAT. § 168A-3 for the definitions of "employer" and "employment agency" among other relevant definitions.

[128] The statutes define "private personnel services" as

> . . . any business operated in the State of North Carolina by any person for profit which secures employment or by any form of advertising holds itself out to applicants as able to secure employment or to provide information or service of any kind purporting to promote, lead to or result in employment for the applicant with any employer other than itself, where any applicant may become liable of the payment of a fee to the private personnel service, either directly or indirectly.

N.C. Gen. Stat. § 95-47.1(16). The definition has a number of exclusions including "educational, religious, charitable, fraternal or benevolent organization[s]" that do not accept a fee for services in securing employment for people, for example. *Id.*

[129] N.C. GEN. STAT. § 95-47.2(a).

"personnel service" in the advertisement.[130] In addition, private personnel services may not use any symbols or names – including in their advertising – that consumers are likely to confuse with a government unit or agency at either the state or federal level.[131] Similarly, a private job listing service[132] operated in the state for profit must be licensed, [133] and it must advertise using the business name of the service along with the term "job listing service."[134] Job listing services may only advertise listings for which they have received and recorded an actual job order from an employer and may not include any information in the advertised listing that is not included in the job order.[135] Job listing services may not publish any information they know or should reasonably know is false or deceptive, and their advertisements may not include the term "no fee" or any similar term that suggests that applicants will not have to pay a fee to the service.[136] Among

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[130] N.C. Gen. Stat. § 95-47.6(2), (3).

[131] *Id.* at (8).

[132] The statutes define a "job listing service" as

> . . . any business operated in the State of North Carolina by any person for profit which publishes, either orally or in writing, lists of specific positions of employment available with any employer other than itself or which holds itself out to applicants as able to provide information about specific positions of employment available with any employer other than itself, which charges a fee to any applicant for its services or purported services and which performs none of the activities of a private personnel service other than the publishing of job listings.

N.C. GEN. STAT. § 95-47.19. The definition has a number of exclusions including "educational, religious, charitable, fraternal or benevolent organization[s]" that do not accept a fee for services in securing employment for people, for example. *Id.*

[133] N.C. GEN. STAT. § 94-47.21.

[134] N.C. GEN. STAT. § 95-47.26(a).

[135] *Id.* at (b). A "job order" is defined in the statutes as "an oral or written communication from a job listing service to refer applicants for a position the employer has available." N.C. GEN. STAT. § 94-47.19 (modifying by reference the definition stated in N.C. GEN. STAT. § 95-47.1(11)).

[136] N.C. GEN. STAT. § 95-47.26(c), (d).

other statutory exclusions, the terms "private personnel service" and "job listing service" do *not* include "[a]ny newspaper of general circulation or other business engaged primarily in communicating information other than information about specific positions of employment and that does not purport to adapt the information provided to the needs or desires of an individual subscriber."[137] This means that the typical employment section of the classified advertisements published in a general circulation newspaper, for example, would not be a "private personnel service" or "job listing service" under the statutes.

"Work-at-home" schemes. Provisions in the N.C. General Statutes prohibit anyone from advertising work-at-home opportunities in the state like "stuffing envelopes, addressing envelopes, mailing circulars, [or] clipping newspaper and magazine articles" unless the advertiser "pays a wage, salary, set fee, or commission" for the advertised work and the work opportunity does not require the purchase of, or a deposit on, materials like "instructional booklets, brochures, kits [or] programs."[138] Advertising managers should carefully screen for non-compliant "work-at-home" advertisements.

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[137] N.C. GEN. STAT. §§ 95-47.1(16)d; 95-47.19(4).

[138] N.C. GEN. STAT. § 75-31(1)-(2). These provisions apply to any "person, firm, association, or corporation" that advertises work-at-home solicitations. *Id.*

What are the restrictions on advertising fireworks sales or displays?

Under the N.C. General Statutes, it is illegal to sell or advertise "any pyrotechnics of any description whatsoever"[139] in the state, though the statute does not apply to such items as sparklers, explosive caps for toy pistols, snakes and glow worms, trick noisemakers, and party poppers, among others listed.[140] The term "pyrotechnics" also does not include ammunition for firearms.[141]

There are exceptions for conducting fireworks displays at public events such as concerts, fairs and carnivals so long as they are approved in advance by the appropriate county board of commissioners and supervised by county-approved experts.[142] However, under the statutes, a fireworks display authorized by the University of North Carolina at Chapel Hill and conducted on its property does not require county approval so long as the display is supervised by university–approved pyrotechnics experts.[143] Advertising that promotes statutorily-approved fireworks displays is not prohibited under the statutes.

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[139] N.C. GEN. STAT. § 14-410(a).

[140] N.C. GEN. STAT. § 14-414. The term "pyrotechnics" is defined as "any and all kinds of fireworks and explosives, which are used for exhibition or amusement purposes" with exemptions listed in the statutes. *Id.*

[141] *Id.*

[142] N.C. GEN. STAT. § 14-410(a).

[143] *Id.*

What is the law governing ads for food, drugs, medical devices and cosmetics?

The N.C. Food, Drug and Cosmetic Act (NCFDCA) prohibits false and misleading advertising for food, drugs, medical devices and cosmetics.[144] The U.S. Food and Drug Administration (FDA) and the Federal Trade Commission (FTC) regulate advertising for these products as well depending on the agencies' jurisdiction and regulatory emphasis in these product categories.

Under the NCFDCA, an "advertisement" is defined in the statutes as "all representations disseminated in any manner or by any means, other than by labeling, for the purposes of inducing, or which are likely to induce, directly or indirectly, the purchase of food, drugs, [medical] devices or cosmetics."[145] Determining whether an advertisement is misleading under the act takes into account a number of factors, including but not limited to "representations made or suggested by statement, word, design, device, sound, or any combination therefore, [and] also the extent to which . . . [the] advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the . . . [product]" as prescribed or as is

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[144] N.C. GEN. STAT. § 106-122(5); N.C. GEN. STAT. § 106-138(a). The statutes also prohibit advertising any of these products that misbrand the product. N.C. GEN. STAT. § 106-122(1).

[145] N.C. GEN. STAT. § 106-121(1). "Food" is defined as including "[a]rticles used for food or drink for man or other animals" including chewing gum. *Id.* at (8)a-c. A "drug" is defined as including "[a]rticles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals" and "[a]rticles (other than food) intended to affect the structure of any function of the body of man or other animals." *Id.* at (6)a-d. A "device" is defined to include "instruments, apparatus and contrivances, including their components, parts and accessories," that are intended "[f]or the use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals" or "[t]o affect the structure or any function of the body of man or other animals." *Id.* at (5)a-b. A "cosmetic" is defined as including "[a]rticles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance;" and "[a]rticles intended for use as a component of any such articles but does not include soap." *Id.* at (4).

customary. In other words, the determination takes into account explicit and implicit claims in the advertisement and also omissions of material information.[146]

In addition to generally prohibiting false and misleading advertisements for foods, drugs, medical devices and cosmetics, the NCFDCA specifically states that an advertisement disseminated to the public (direct-to-consumer) is false if it claims that a drug or medical device has "any effect" on a number of designated diseases and conditions including appendicitis, cancer, diabetes, heart and vascular diseases, high blood pressure, pneumonia, prostate gland disorders, sexual impotence and sinus infections.[147] The state Department of Agriculture and Consumer Services may authorize by regulation direct-to-consumer (DTC) advertisements for drugs that have "curative or therapeutic effect" on any of these diseases and conditions when "advance[s] in medical science" establish that "self-medication" for any of the diseases or conditions is "safe."[148]

The statutes empower North Carolina's commissioner of agriculture to impose civil penalties up to $2,000 on anyone violating the NCFDCA[149] and to seek either a temporary or permanent injunction from a superior court to prevent violations of these

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[146] N.C. GEN. STAT. § 106-121(15).

[147] N.C. GEN. STAT. § 106-138(b). The complete list is as follows: Albuminuria, appendicitis, arteriosclerosis, blood poison, bone disease, Bright's disease, cancer, carbuncles, cholecystitis, diabetes, diphtheria, dropsy, erysipelas, gallstones, heart and vascular diseases, high blood pressure, mastoiditis, measles, meningitis, mumps, nephritis, otitis media, paralysis, pneumonia, poliomyelitis, infantile paralysis, prostate gland disorders, pyelitis, scarlet fever, sexual impotence, sinus infection, smallpox, tuberculosis, tumors, typhoid, uremia and venereal diseases. *Id.* This subsection does not apply to advertisements that are directed to "members of the medical, dental, pharmaceutical, or veterinary professions, or appear[] only in the scientific periodicals of these professions." *Id.*

[148] *Id.*

[149] N.C. GEN. STAT. § 106-124.1(a).

provisions.[150] In addition, violations of the NCFDCA can draw criminal misdemeanor charges.[151] Media outlets – meaning any "publisher, radio-broadcast licensee, or agency or medium for the dissemination of an advertisement" – cannot be held criminally liable for disseminating a false or deceptive food, drug or cosmetic advertisement unless they refuse a request from the commissioner to identify – by name and address – the person or company that placed the advertisement.[152]

At the federal level, under a 1971 working agreement between the FDA and FTC, the FDA takes primary responsibility for regulating prescription drug advertising (*and* labeling), while the FTC takes primary responsibility for regulating advertising for food, over-the-counter (OTC) drugs, devices and cosmetics (although the FDA takes primary responsibility for the *labeling* of these products).[153] Detailed discussion of this complex federal statutory and regulatory framework, including relevant court opinions and agency actions, is beyond the scope of this chapter. However, DTC prescription drug advertising is among the most extensively regulated categories of advertising and promotion at the federal level and is monitored specifically by the FDA's Division of Drug Marketing, Advertising, and Communications (DDMAC). For an excellent overview of FDA regulation of direct-to-consumer prescription drug advertising, visit and download

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[150] N.C. GEN. STAT. § 106-123.

[151] N.C. GEN. STAT. § 106-124(a).

[152] *Id.* at (c). The media outlet must furnish the "name and post-office address of the manufacturer, packer, distributor, seller or advertising agency residing in the State of North Carolina who caused him to disseminate [the false or misleading] advertisement." *Id.*

[153] *1971 Memorandum of Understanding*, *supra* note 6. For an excellent general discussion of the somewhat complex FDA-FTC regulatory scheme published in 2010, *see* Maher & Fair, *supra* note 5, at 602-605.

Prescription Drug Advertising: Questions and Answers from the official DDMAC website,[154] including downloadable samples of correct and incorrect examples of print-format direct-to-consumer prescription drug advertisements that are either regulated product claim advertisement, reminder advertisement or help-seeking advertisement type.[155]

What is the law governing ads for lotteries, bingo, raffles and prize-giveaways?

Lotteries. It is unlawful in North Carolina for anyone to operate or promote a lottery except as allowed in connection with the official North Carolina Education Lottery established in 2005 and operated under the jurisdiction of the N.C. State Lottery Commission.[156] Except for advertising authorized by the commission for the official state lottery (and meeting extensive guidelines for these advertisements),[157] the general statutes otherwise prohibit advertising a lottery or publishing "an account of a lottery" regardless

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[154] http://www.fda.gov/Drugs/ResourcesForYou/Consumers/PrescriptionDrugAdvertising/UCM076768.htm (page last updated June 23, 2009).

[155] http://www.fda.gov/Drugs/ResourcesForYou/Consumers/PrescriptionDrugAdvertising/ucm168421.htm (page last updated June 24, 2009).

[156] N.C. GEN. STAT. § 14-290. The state-operated lottery was established by the North Carolina State Lottery Act of 2005, N.C. GEN. STAT. §§ 18C-101 *et seq*.

[157] The commission has statutory authority to authorize advertising for the state lottery, but the statutes require state lottery advertising to "include resources for responsible gaming information." State statutes also prohibit any state lottery advertising that "intentionally target[s] specific groups or economic classes," that is "misleading, deceptive, or present[s] any lottery game as a means of relieving any person's financial or personal difficulties;" or that has "the primary purpose of inducing persons to participate in the Lottery." N.C. GEN. STAT. § 18C-114(a)(2)a-d. In addition, by statute, advertising for the state lottery must be "tastefully designed and presented in a manner to minimize the appeal of the lottery games to minors" and may not include "cartoon characters" or "false, misleading, or deceptive information." N.C. GEN. STAT. § 18C-130(e). State lottery advertising must include the "actual or estimated overall odds of winning the game." *Id.*

of whether the lottery is held in North Carolina or not.[158] Violating the advertising and publishing ban for lotteries is a Class 2 misdemeanor.[159] However, the statutes include an exemption for published content "in connection with a lawful activity of [a] news medium."[160] The statutes define a "news medium" as "[a]ny entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public."[161]

Bingo games. Only licensed tax-exempt organizations in North Carolina may lawfully conduct and advertise bingo games and offer prizes.[162] As examples of exempt organizations, the statutes list "bona fide nonprofit charitable, civic, religious, fraternal, patriotic [and] veterans' organization[s]," "nonprofit volunteer fire department[s]," and "nonprofit volunteer rescue squad[s]."[163] These groups are limited to offering prizes – cash or merchandise – worth no more than $500 per game and $1,500 per bingo session.[164] However, a group that offers only one bingo session per week can offer prizes totaling

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[158] N.C. GEN. STAT. § 14-289. The prohibited promotional details of a lottery include "stating how, when or where [the lottery] is to be or has been drawn, or what are the prizes . . . , or the price of a ticket or any share or interest therein, or where or how it may be obtained." *Id.*

[159] *Id.*

[160] *Id.*

[161] N.C. GEN. STAT. § 8-53.11(a)(3).

[162] N.C. GEN. STAT. § 14-309.5(a)-(b). Under the statutes, a "bingo game" is defined as "a specific game of chance played with individual cards having numbered squares ranging from one to 75, in which prizes are awarded on the basis of designated numbers on such cards conforming to a predetermined pattern of numbers." N.C. GEN. STAT. § 14-309.6(2). A "bingo game" under the statutes does not include "instant bingo," meaning "a game of chance played by the selection of one or more prepackaged cards, with winners determined by the appearance of a preselected designation on the card." *Id.*

[163] N.C. GEN. STAT. § 14-309.6(1).

[164] N.C. GEN. STAT. § 14.309.9(a).

$2,500 per weekly session.[165] The state allows "beach bingo," which is defined as bingo games with prizes of cash or merchandise worth $10 or less per game.[166] However, beach bingo games may not be advertised or promoted in connection with other lawful bingo games under the statutes and also may not be used as a promotion to obtain anything of value in excess of the $10 limit.[167]

Raffles. Nonprofit organizations recognized by the N.C. Department of Revenue as tax-exempt may lawfully conduct and advertise a "raffle." [168] The statutes define a "raffle" as any "game in which the prize is won by random drawing of the name or number of one or more persons purchasing chances."[169] Under the statutes, these organizations may hold up to two raffles offering up to $125,000 in prizes of cash or merchandise per calendar year.[170] However, the statutes allow these organizations to offer up to $500,000 worth of real estate per year as raffle prizes.[171]

Prize give-aways. When a commercial business advertises the chance for consumers to win a prize in a contest or promotion in connection with selling or leasing goods or services, the advertisement must clearly identify the sponsoring business along with "all

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[165] *Id.*

[166] N.C. GEN. STAT. §§ 14.309.6(6), 14.309.14(1).

[167] N.C. GEN. STAT. § 14-309.14(2).

[168] N.C. GEN. STAT. § 14-309.15(a).

[169] *Id.* at (b).

[170] *Id.* at (c)-(d).

[171] *Id.* at (g).

material conditions" that participants must meet to be eligible.[172] In addition, "immediately adjacent to the description of the item or prize" being given away, the advertisement must "clearly and prominently" disclose the actual retail value of the item or prize, the actual total number of each of the items or prizes that will be given away and the "odds of receiving each item or prize."[173] The disclosure requirements do not apply to broadcast radio, broadcast television or cable television advertisements so long as the required disclosure information is made available for free to anyone who requests it.[174] Media outlets are not liable for publishing or disseminating advertisements for unlawful prize giveaways sponsored by commercial businesses unless the publisher, owner, agent or an employee of the outlet had actual knowledge that the giveaway was illegal.[175]

How does the law regulate ads for housing sales and rentals?

The federal Fair Housing Act of 1968 (FHA),[176] which prohibits discrimination against anyone with regard to the sale or rental of housing based on "race, color, religion, sex, handicap, familial status, or national origin,"[177] prohibits advertisements or publications

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[172] N.C. GEN. STAT. § 75-33(a). None of these requirements applies to prize giveaways in which entrants only need to "complete and mail, or deposit at a local retail establishment, an entry blank obtainable locally or by mail, or call in their entry by telephone," and are not at any time "asked to listen to a sales presentation." *Id.* at (b).

[173] *Id.* at (a)(1)-(3).

[174] *Id.* at (c).

[175] *Id.* at (d).

[176] 42 U.S.C. §§ 3601 *et seq.*

[177] 42 U.S.C. § 3604(a)-(f) (quoting specifically from § 3604(c)).

in connection with the sale or rental of a dwelling that indicate a preference or discriminate based on any of these grounds.[178] Under rules enacted and enforced by the federal Department of Housing and Urban Development (HUD) to implement the FHA, it is unlawful to "make, print or publish . . . any notice, statement or advertisement with respect to the sale or rental of a dwelling which indicates any preference, limitation or discrimination because of race, color, religion, sex, handicap, familial status, or national origin."[179]

Under HUD rules, examples of FHA violations include:

> (1) Using words, phrases, photographs, illustrations, symbols or forms which convey that dwellings are or are not available to a particular group of persons because of race, color, religion, sex, handicap, familial status, or national origin.
>
> . . . .
>
> (3) Selecting media or locations for advertising the sale or rental of dwellings which deny particular segments of the housing market information about housing opportunities because of race, color, religion, sex, handicap, familial status, or national origin.
>
> (4) Refusing to publish advertising for the sale or rental of dwellings or requiring different charges or terms for such advertising because of race, color, religion, sex, handicap, familial status, or national origin.[180]

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[178] *Id.* at (c).

[179] 24 C.F.R. § 100.75(a).

[180] *Id.* at (c)(1), (c)(3)-(4).

HUD takes the position in its guidelines that a publisher can be held liable for publishing an advertisement that, on its face, violates the FHA.[181] This includes, but is not limited to, an advertisement that violates the following published HUD guidelines:

1. Race, color, national origin. Real estate advertisements should state no discriminatory preference or limitation on account of race, color, or national origin. Use of words describing the housing, the current or potential residents, or the neighbors or neighborhood in racial or ethnic terms (i.e., white family home, no Irish) will create liability under [the FHA].

However, advertisements which are facially neutral will not create liability. Thus, [the] use of phrases such as master bedroom, rare find, or desirable neighborhood [will not create liability under the FHA].

2. Religion. Advertisements should not contain an explicit preference, limitation or discrimination on account of religion (i.e., no Jews, Christian home). Advertisements which use the legal name of an entity which contains a religious reference (for example, Roselawn Catholic Home), or which contain a religious symbol, (such as a cross), standing alone, may indicate a religious preference. However, if such an advertisement includes a disclaimer (such as the statement "This Home does not discriminate on the basis of race, color, religion, national origin, sex, handicap or familial status") it will not violate the Act. Advertisements containing descriptions of properties (apartment complex with chapel), or services (kosher meals available) do not on their face state a preference for persons likely to make use of those facilities, and are not violations of the Act.

The use of secularized terms or symbols relating to religious holidays such as Santa Claus, Easter Bunny or St. Valentine's Day images, or phrases such as "Merry Christmas", "Happy Easter", or the like does not constitute a violation of the Act.

3. Sex. Advertisements for single family dwellings or separate units in a multi-family dwelling should contain no explicit preference, limitation or discrimination based on sex. Use of the term master bedroom does not constitute a violation of either the sex discrimination provisions or the race discrimination provisions. Terms such as "mother-in-law suite" and

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[181] Guidance Regarding Advertisements Under § 804(c) of the Fair Housing Act, 2 (HUD Jan. 9, 1995), http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_7784.pdf. The guidance does not address the use of human models in housing advertisements. *Id.* at 1 n.1.

"bachelor apartment" are commonly used as physical descriptions of housing units and do not violate the [FHA].

4. Handicap. Real estate advertisements should not contain explicit exclusions, limitation, or other indications of discrimination based on handicap (i.e., no wheelchairs). Advertisements containing descriptions of properties (great view, fourth-floor walk-up, walk-in closets), services or facilities (jogging trails), or neighborhoods (walk to bus-stop) do not violate the Act. Advertisements describing the conduct required of residents ("non-smoking", "sober") do not violate the [FHA]. Advertisements containing descriptions of accessibility features are lawful (wheelchair ramp).

5. Familial status. Advertisements may not state an explicit preference, limitation or discrimination based on familial status. Advertisements may not contain limitations on the number or ages of children, or state a preference for adults, couples or singles. Advertisements describing the properties (two bedroom, cozy, family room), services and facilities (no bicycles allowed) or neighborhoods (quiet streets) are not facially discriminatory and do not violate the [FHA].[182]

However, publishers are not liable for publishing advertisements that "might indicate a preference, limitation or discrimination" that is not "readily apparent to an ordinary reader."[183]

There are exemptions in the FHA. For instance, religious organizations that own or operate noncommercial housing can lawfully limit the sale, rental or occupancy of such housing to persons of the same religion so long as membership in the religion is not restricted based on "race, color, or national origin."[184] Similarly, private clubs that offer lodging on a noncommercial basis can limit rental or occupancy to its own members or

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[182] *Id.* at 3-4 (bold and underlined emphases in original have been omitted).

[183] *Id.* at 2.

[184] 42 U.S.C. § 3607(a).

give them preference over nonmembers.[185] Moreover, the provisions regarding familial status do not apply to "housing for older persons," which means housing intended solely for occupancy by residents that are age 62 and older, or housing in which at least 80 percent of the units are occupied by at least one person age 55 or older. [186] In addition, the FHA exempts single-family homes that are sold or rented by their owners so long as the owner does not own more than three such properties at a time, does not use the services of a real estate broker or rental service, and does not utilize advertisements that specifically violate the FHA, among other requirements.[187]

Websites that allow third parties to post housing advertisements may, or may not, have federal statutory immunity under § 230 of the federal Communications Decency Act (CDA)[188] when an advertisement violates the FHA, depending on the circumstances. Generally, § 230 says that providers (and users) of "interactive computer services" are not legally liable for information posted on a website by a third party[189] The legal

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[185] *Id.*

[186] *Id.* at (b)(1)-(2). Under the latter option, to qualify for the exemption, "at least 80 percent of the occupied units [must be] occupied by at least one person who is 55 years of age or older," "the housing facility or community [must] publish[] and adhere[] to policies and procedures that demonstrate [such an] intent," and the facility or community must abide by federal rules for "verification of occupancy." *Id.* at (a)(2)(C)(i)-(iii).

[187] 42 U.S.C. § 3603(b)(1). If the individual owner of the single-family house is not the current resident at the time of the sale, or the most recent resident prior to the sale, then only one such sale is exempted within a 24-month period. *Id.* The FHA also exempts the rental of "rooms, units or dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his [or her] residence." *Id.* at (b)(2).

[188] 47 U.S.C. § 230.

[189] *Id.* at (c)(1). Under, the so-called "Good Samaritan" provisions, an interactive computer service does not loose the immunity for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." *Id.*

immunity does not apply if the provider (or user) of the interactive computer service created or provided the third-party content or helped to do so.[190] Courts have specifically applied the immunity provisions under the CDA to online housing advertisements that allegedly violate the FHA. Online media sites that include third-party housing advertising, including classified advertisements, should be aware of the applicable scope and specifics of federal statutory immunity under the CDA, although a full discussion of this fairly complex area of federal statutory law is beyond the scope of this chapter.[191]

What are the statutory requirements for newspaper publication of legal notices?

Before accepting and publishing legal notices that are required or permitted under state law in North Carolina, a newspaper must have filed a sworn affidavit with the clerk of the superior court in the county where the newspaper is published listing and verifying the actual rates across various classes of advertising that the newspaper typically offers to commercial advertisers.[192] The owner or manager of a newspaper that fails to comply

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The term "interactive computer service" is defined in the CDA as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or service offered by libraries or educational institutions." *Id.* at (f)(s).

The term "information content provider" is defined in the CDA as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service. *Id.* at (f)(3).

[190] *See id.* at (f)(2), (3).

[191] For an overview of online housing advertising and the CDA, published in 2010, *see generally* Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 IND. L. REV. 1125 (2010).

[192] N.C. GEN. STAT. § 1-596. Legal notice here means "a notice of any other paper, document or legal advertisement of any kind or description . . . authorized or required by any of the laws of the State of North Carolina, heretofore enacted, or by any order judgment of any court of [the] State to be published or advertised in a newspaper." N.C. GEN. STAT. § 1-597.

with this requirement can be charged with a Class 1 misdemeanor.[193] In addition, state and municipal officers and boards may not contract with a newspaper to pay more than the local commercial rates offered by the newspaper when they are required or permitted by law to provide legal notice by newspaper publication.[194]

Not every newspaper is qualified under the statutes to publish legal advertisements that are effective under the law. A newspaper must meet three criteria under the statutes to be legally qualified to publish effective legal advertisements: First, the newspaper must have a "general circulation to actual paid subscribers" when the legal notice is published; second, the newspaper must "have been admitted to the United States mails in the Periodicals class in the county or political subdivision where [the] publication, advertisement or notice is required to be published;" and, third, the newspaper must "have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published, at least one day in each calendar week for at least 25 of the 26 consecutive weeks immediately preceding the date of the first publication of [the] advertisement, publication or notice."[195] However, a newspaper that meets these qualifications, but for some reason has "fail[ed] for a period not exceeding four weeks in any calendar year to publish one or more of its issues," remains qualified under the statutes to publish legal notices.[196]

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[193] N.C. GEN. STAT. § 1-596.

[194] *Id.*

[195] N.C. GEN. STAT. § 1-597.

[196] *Id.*

The "general circulation" requirement is not defined in the statutes but includes both qualitative and quantitative aspects. Most importantly, according to the N.C. Supreme Court, the term implicitly means that a newspaper must have content that appeals to the general public and that includes general interest items such as "national, state or county news; editorials; human interest stories; and advice columns, among others."[197] In addition, the court has said that the term "general circulation" also inherently requires more than a *de minimis* number of readers in the area targeted for legal notice, which is measured under the statutes by the number of "actual paid subscribers" and not copies sold in newsstands or distributed for free.[198] Although there is no minimum number that automatically meets this standard, the number of subscribers must be high enough for the newspaper to reach a "diverse group of people" in the area targeted for legal notice.[199] When a city or town spans two or more adjoining counties, a newspaper published in that city or town is qualified to publish legal notices in that city or town, and in each of the counties in which the city or town is located, if the newspaper is admitted to the mails in one of the counties the city or town spans and the newspaper otherwise meets the statutory qualifications for publishing effective legal notice in the other county or counties in which the city or town is located.[200] Under these circumstances, the newspaper does not need to have facilities or be admitted to the mails in each of the

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[197] Great S. Media, Inc. v. McDowell Cnty., 284 S.E.2d 457, 467 (N.C. 1981) (explaining also that the "newspaper may be targeted to a particular locality or group, [but] must nevertheless contain some items of interest to persons who do not live in that locality or who are not members of that group").

[198] *Id.*

[199] *Id.* (*quoting* Moore v. State, 553 P.2d 8, 21-22 (Alaska 1976)).

[200] N.C. GEN. STAT. § 1-597.

counties in which the city or town is located.[201] For example, assume that a newspaper is published in City A, and that City A lies in both County 1 and County 2. Assume also that the newspaper is admitted to the mails in County 1 and has its facilities in a portion of City A that also is located in County 1. Under these circumstances, the newspaper would be qualified to accept legal notices required to be published in County 2 so long as the newspaper meets all of the other statutory requirements to publish effective legal notices in County 2.

According to a separate section of the statutes, county and municipal tax liens must be published "at least one time in one or more newspapers having general circulation in the taxing unit."[202] Tax liens must be advertised between March 1 and June 30 each year. According to the N.C. Supreme Court, to qualify to publish tax liens under the statutes, a newspaper must have a "general circulation to actual paid subscribers in the taxing unit," a standard that has four criteria: (1) The newspaper "must have a content that appeals to the public generally;" (2) the newspaper "must have more than a *de minimis* number of actual paid subscribers in the taxing unit;" (3) the newspaper's "paid subscriber distribution must not be entirely limited geographically to one community, or section, of the taxing unit;" and (4) the newspaper "must be available to anyone in the taxing unit who wishes to subscribe to it."[203]

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[201] *Id.*

[202] N.C. GEN. STAT. § 105-369(c).

[203] Great S. Media, Inc. v. McDowell Cnty., 284 S.E.2d 457, 467 (N.C. 1981). In that case, the state supreme court held that newspaper publication of tax liens must satisfy the "general circulation" provisions of N.C. GEN. STAT. §§ 1-597 and 105-369(d). *Id.* at 460-61.

Proof that a newspaper is qualified to publish legal notices may be secured by sworn affidavit on behalf of the newspaper. Under the statutes, when the "owner, partner, publisher, or other authorized officer or employee" of a newspaper swears in a written statement before a notary public that the newspaper satisfies the statutory criteria on a particular date, then all state courts must accept that statement in legal proceedings as sufficient proof that the newspaper indeed met the statutory requirements on that date.[204] The same holds true if such a sworn statement is filed with the clerk of the superior court in which the publication of a legal advertisement was required. These provisions do not preclude the use of "any other competent evidence" aside from an affidavit to prove that a newspaper was qualified by statute to publish legal advertisements as of a certain date.[205]

The statutory qualifications for newspapers to accept legal advertisements as well as the affidavit requirements mentioned above do not apply in counties where there are no newspapers that meet the statutory qualifications to accept legal notices for publication.[206] However, the commercial rate requirements discussed above still apply in such a situation. When legal notice by newspaper publication is required in a county where there is no qualified newspaper, a qualified newspaper in an adjoining county or in a county within the same district court district may be used so long as the qualified

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[204] N.C. GEN. STAT. § 1-598

[205] *Id.*

[206] N.C. GEN. STAT. § 1-599

newspaper has a general circulation in the county where the legal notice is required to be published.[207]

Proof of publication and the date of publication of a legal notice in a newspaper can be made by affidavit sworn under oath by the "publisher, proprietor, editor, managing editor, business or circulation manager, advertising, classified advertising or any other advertising manager or foreman of the newspaper."[208] For a newspaper published by a corporation, the "president, vice president, secretary, assistant secretary, treasurer, or assistant treasurer of the corporation" may make the affidavit.[209] The statutes allow proof of publication or date of publication by other "competent evidence" although a qualifying affidavit is considered *prima facie* evidence of these elements.[210]

How are ads for motor vehicle sales, rentals and repairs regulated?

State statutes regulate advertisements placed by licensed motor vehicle dealers, manufacturers, distributors and wholesalers (collectively referred to here as "licensees") in North Carolina. By statute, an advertisement placed by a licensee in a newspaper or other publication in the state must include the actual name of the licensee.[211] In other words, for example, licensees cannot lawfully place classified advertisements that appear to be offering motor vehicles for sale by private individuals.

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[207] N.C. GEN. STAT. § 1-597.

[208] N.C. GEN. STAT. § 1-600(a)-(b).

[209] *Id.*

[210] *Id.* at (b)-(c).

[211] N.C. GEN. STAT. § 20-290(a), (c).

The state statutes also prohibit licensees from "[k]nowingly advertising by any means, any assertion, representation or statement of fact which is untrue, misleading or deceptive in any particular" relating to their license or conduct with regard to the sale of motor vehicles in the state and from using "unfair methods of competition or unfair deceptive (*sic*) acts or practices."[212] The state attorney general has opined that it is unfair or deceptive for a licensee to advertise the retail price of a motor vehicle without including all of the charges that the consumer will ultimately have to pay, except for state sales tax.[213] The statutes also prohibit licensed motor vehicle dealers, manufacturers, distributors and wholesalers from "[k]nowingly advertising a used motor vehicle for sale as a new motor vehicle."[214] In addition, no one may lawfully advertise in North Carolina any device for sale, installation or use that will alter the actual number of miles recorded by odometers on motor vehicles.[215]

Provisions in the federal Truth in Lending Act (TLA)[216] and Consumer Leasing Act (CLA),[217] along with corresponding federal rules that implement these statutes, regulate consumer credit and lease offers including those advertised in connection with motor

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[212] N.C. GEN. STAT. § 20-294(6), (7).

[213] Op. of Att'y Gen. to Mr. Gonzalie Rivers, License and Theft Div., Dep't of Motor Vehicles, 43 N.C.A.G. 135 (1973).

[214] *Id.* at (8).

[215] N.C. GEN. STAT. § 20-342 (also defining the "true mileage" of a motor vehicle as the "mileage driven by the vehicle as registered by the odometer within the manufacturer's designed tolerance").

[216] 15 U.S.C. §§ 1601 *et seq.*

[217] 15 U.S.C. §§ 1667 *et seq.* The Consumer Leasing Act defines a "consumer lease" as a "contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding $50,000, primarily for personal, family, or household purposes." 15 U.S.C. § 1667(1).

vehicle sales and leasing. However, media are exempt from liability for disseminating an advertisement that violates either the TLA[218] or the CLA.[219] For example, under the CLA, an advertisement for a consumer lease that includes a specific lease payment, or states that "no initial payment" is due, must include a clear and conspicuous disclosure of specified information including the fact that the advertised transaction is a lease, the total amount of all initial payments the consumer must make, the amount of any security deposit, and the number and total amount of all payments due under the lease.[220] In addition, under the CLA, there are requirements for broadcast radio advertisements for consumer leases to provide alternate means for consumers to obtain more information, such as a print advertisement in a newspaper that circulates generally in the same market served by the radio station that broadcasts the advertisement.[221] Such print advertisements must run for three days prior to the broadcast of the related radio advertisement and then for 10 days afterward.[222]

State statutes also regulate advertising for automobile repairs and rentals in North Carolina. Businesses that advertise the cost of a specified vehicle repair also must disclose any additional charges that routinely apply to that type of repair, except for taxes

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[218] 15 U.S.C. § 1665 (stating "[t]here is no liability under this chapter . . . on the part of any owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated").

[219] 15 U.S.C. § 1667c(b) (stating "[n]o owner or employee of any entity that serves as a medium in which an advertisement appears or through which an advertisement is disseminated, shall be liable under this section").

[220] 15 U.S.C. § 1667c(a).

[221] *Id.* at (c).

[222] *Id.*

and other fees that are required by law.[223] If the advertisement fails to comply with these statutory requirements, the consumer is required to pay only the advertised price. In addition, advertising in violation of these requirements is defined as an unfair trade practice under the state Unfair and Deceptive Trade Practices Act (UDPTA)[224] although, as mentioned earlier in this chapter, media outlets are immune from liability under the UDPTA unless they publish an advertisement with actual knowledge that it violates the act.[225]

Rental car companies that advertise in the state must include the full and actual rate – exclusive of taxes and mileage charges – that consumers will be charged to rent a vehicle for a specified time period.[226] Any restrictions that apply to the advertised rate – such as mileage or geographic driving limitations – must be "clearly disclosed" in the advertisement.[227] Additionally, rental car advertisements must disclose the daily rate the company charges for collision damage waivers but must advise consumers that such waivers are not required and that they should verify whether their own automobile insurance covers damage to automobiles they rent.[228] Finally, if a rental car company

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[223] N.C. GEN. STAT. § 66-285. This section applies only to services or repairs provided by businesses for "private passenger vehicles." *Id.*

[224] *Id.* at (c) (referring to N.C. GEN. STAT. § 75-1.1).

[225] N.C. GEN. STAT. § 75-1.1(c).

[226] N.C. STAT. § 66-202(a).

[227] *Id.* at (b).

[228] *Id.* at (c).

advertises a rental rate for an airport location, then the advertisement must "clearly and conspicuously disclose the existence and actual amount of the airport charges or fees."[229]

How are ads for musical performances and productions regulated?

The N.C. Truth in Music Advertising Act (TMA Act),[230] enacted and effective in 2009, prohibits advertisements for a live musical performance or production that falsely or deceptively represent to consumers that the performing group is connected or affiliated with a group that has previously released a commercial recording of the music being performed.[231] Instigated by the lobbying efforts of the Vocal Group Hall of Fame in Pennsylvania, more than 30 states now have enacted such laws.[232] In basic terms, so-called "Truth in Music" laws are an attempt by states to limit the conditions under which groups can promote and hold a live musical performance using the name of a well-known commercial recording group.[233]

North Carolina's TMA Act applies to musical groups performing in the state when they "seek[] to use the name of another group that has previously released a

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[229] *Id.* at (d). If the advertisement references car rental rates for more than one airport location, then the advertisement must disclose the range of applicable airport charges or fees. *Id.*

[230] N.C. GEN. STAT. § 75-125, *et seq.*

[231] N.C. GEN. STAT. § 75-126.

[232] Matthew D. Bunker, *You Can't Handle the Truth (In Music): Does the Lanham Act Preempt State "Truth in Music" Laws?*, 16 COMM. L. & POL'Y 1, 3-5 (2011).

[233] *See id.* at 2, 4.

commercial sound recording under that name."[234] The act specifically makes it illegal to "advertise or conduct a live musical performance or production [in North Carolina] through the use of a false, deceptive, or misleading affiliation between a performing group and a recording group."[235] Each performance or production that violates the act subjects violators to a civil penalty of between $5,000 and $15,000.[236] However, by its terms, the act does not apply to a performing group that has no connection or affiliation with a recording group and conducts a live musical performance or production that is advertised as a "tribute" or "salute" to the recording group.[237] It is important to note here that anyone performing music and/or lyrics that are copyrighted under federal law should have the permission of the copyright owner to perform the work in public.[238]

North Carolina's TMA Act does not apply if the performing group is the owner of the group name it uses and has the name registered with the U.S. Patent and Trademark Office.[239] In addition, the act does not apply if at least one member of the performing

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[234] N.C. GEN. STAT. § 75-125(b)(1) (defining "performing group"). The TMA Act defines a "recording group" as a "vocal or instrumental group" that contains at least one member who "has previously released a commercial sound recording under that group's name and [has] a legal right by virtue of use or operation under the group name without having abandoned the name or affiliation with the group." N.C. GEN. STAT. § 75-125(b)(2). A "sound recording" is defined in the act as a "work that results from the fixation on a material object of a series of musical, spoken, or other sounds regardless of the nature of the material object, such as a disk, tape, or other phono-record, in which the sounds are embodied." *Id.* at (b)(3). The act does not apply to advertisements for live music performances or productions in other states. N.C. Gen. Stat. § 75-126(4).

[235] N.C. GEN. STAT. § 75-126.

[236] N.C. GEN. STAT. § 75-127. The civil penalties under the TMA Act are "in addition to any other relief which may be granted under other applicable laws." *Id.*

[237] N.C. GEN. STAT. § 75-126(3).

[238] *See generally* 17 U.S.C. §§ 101, 102, 106.

[239] N.C. GEN. STAT. § 75-126. The extent to which North Carolina's TMA Act is in conflict with, or preempted by, federal statutes related to trademark law (specifically, covering federal regulation of service marks) remains undecided by the federal courts. For a general discussion of the relationship between state

group was a member of the group that previously released commercial recordings of the music being performed and has a legal right to perform under the recording group's name; does not apply if the performing group is so different from the recording group that consumers are unlikely to be confused or misled into thinking that there is a connection or affiliation between the two groups; and also does not apply if the recording group has expressly authorized the performing group to use the recording group's name. [240]

What are the rules for political advertising?

The N.C. General Statutes regulate advertising related to elections for state, county, municipal and district offices in North Carolina and to advertising related to any referendum or other ballot measure that North Carolina voters will decide on a statewide or local level.[241] The state statutory requirements reviewed in this section do not apply to political advertising related to an election for a federal office. Two especially informative resources provided by the State of North Carolina are the *Election Law Index* [242] and the *2012 Campaign Finance Manual*.[243] These may be accessed online and

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"Truth in Music" statutes and federal trademark law including remedies that might be available under the federal Lanham Act, *see generally* Bunker, *supra* note 232.

[240] *Id.* at (2), (3), (5).

[241] *See* N.C. GEN. STAT. §§ 163-278.6(4), (6), (9), (9a), (18), (18a); 163-278.38Z(1).

[242] N.C. STATE BD. OF ELECTIONS, ELECTION LAW INDEX, *available at* http://www.ncsbe.gov/getdocument.aspx?ID=337 (last updated May 17, 2012). Be sure to obtain the most current version of this publication.

[243] N.C. STATE BD. OF ELECTIONS, 2012 CAMPAIGN FINANCE MANUAL, *available at* http://www.ncsbe.gov/GetDoument.aspx?id=2514.

consulted for answers to questions about state regulation of political advertising, but always be sure to obtain the most current version of these or similar publications.

The discussion of federal statutes and rules that apply to federal elections is beyond the scope of this chapter. More information about federal election laws can be found at the official website of the U.S. Federal Elections Commission (FEC),[244] including a page about current legal developments in federal election law.[245] These can be accessed online and should be monitored frequently for changes to federal election laws and for relevant court decisions. Again, be sure to access the most recent information.

In addition to federal campaign finance laws, federal statutes and corresponding Federal Communications Commission (FCC) rules provide requirements for broadcast and cable television licensees with regard to political candidate advertising. First, under the FCC's Equal Opportunities Rule, licensed broadcast stations and cable television systems must treat all legally-qualified political candidates running for the same federal, state or local office equally with regard to *availability* and cost of advertising time during an election cycle.[246] In addition, under the FCC's Reasonable Access Rule, legally-qualified political candidates for federal office – but not state or local office – must be given "reasonable access" to licensed broadcast stations and direct broadcast satellite (DBS) systems, or

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[244] FEC, http://www.fec.gov (last visited June 20, 2012).

[245] FEC, *Recent Developments in the Law*, http://www.fec.gov/law/recentdevelopments.shtml (last visited June 20, 2012).

[246] 47 U.S.C. § 315(a), (b). Corresponding rules have been enacted by the FCC as well. *See* 47 C.F.R. §§ 73.1941-41 (for broadcasting stations), 76.205-06 (for cable television systems), §25.701 (for DBS systems).

reasonable opportunities to purchase advertising time on them.[247] A full discussion of these complex federal requirements is beyond the scope of this chapter but remain critical for affected FCC licensees to monitor for compliance.[248]

State disclosure requirements for media advertisements. Under state election laws , advertisements that constitute "expenditures," "independent expenditures," "electioneering communications" or "contributions" – all as defined in the statutes – are subject to mandatory disclosure requirements. These requirements vary for print and broadcast media. However, before reviewing the complex disclosure requirements themselves, it is important to know how the statutes define "expenditure," "independent expenditure," "contribution" and "electioneering communication" in the context of political advertising.

An "expenditure" is defined as "any purchase, advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value . . . to support or oppose the nomination, election, or passage of one or more clearly identified candidates, or ballot measure."[249] An "independent expenditure" is defined as an expenditure made to support or oppose one or more clearly identified candidates that is not coordinated with a candidate or candidate's campaign committee or, if the expenditure is made to support or oppose a ballot measure, is not coordinated

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[247] 47 U.S.C. § 312(a)(7). A corresponding rule has been enacted by the FCC to implement these requirements. 47 C.F.R. §73.1944.

[248] A list of the federal statutes and rules for candidate appearances and advertising is available at the FCC website. FCC, *FCC Statutes and Rules on Candidate Appearances & Advertising*, http://transition.fcc.gov/mb/policy/political/candrule.htm (last visited June 20, 2012).

[249] N.C. GEN. STAT. § 163-278.6(9).

with a referendum committee that supports the ballot measure that the expenditure supports (or opposes the measure that the expenditure opposes).[250]

Under the statutes, determining whether a communication is made "to support or oppose the nomination or election of one or more clearly identified candidates" – often referred to as "express candidate advocacy" – depends on the specific words and phrasing used in the message.[251] The statutes include the following list of so-called "magic words" as evidence that a communication is express candidate advocacy:

> "[V]ote for", "reelect", "support", "cast your ballot for", "(name of candidate) for (name of office)", "(name of candidate) in (year)", "vote against", "defeat", "reject", "vote pro-(policy question)" or "vote anti-(policy position) accompanied by a list of candidates clearly labeled 'pro-(policy position)' or 'anti-(policy position)'", or communications of campaign words or slogans, such as posters, bumper stickers, advertisement, etc., which say "(name of candidate)'s the One", "(name of candidate) '98", "(name of candidate)!", or the names of two candidates joined by a hyphen or slash.[252]

The statutes exempt any communications that appear in news, commentary or editorial content distributed by a media outlet (i.e., newspaper, magazine or broadcasting station) as long as the outlet is not "owned or controlled by any political party, or political committee."[253]

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[250] *Id.* at (9a). "Coordination" means "in concert or cooperation with, or at the request or suggestion of." *Id.* at (6h).

[251] N.C. GEN. STAT. § 163-278.14A.

[252] *Id.* at (a). These provisions previously included a "contextual" test for determining express candidate advocacy when the communication did not utilize any of the "magic words" or equivalent terms. The contextual test was found unconstitutional in 2008 by the U.S. Court of Appeals, Fourth Circuit, in *North Carolina Right to Life, Inc. v. Leake* (525 F.3d 274, 283-86 (4th Cir. 2008) (relying on the U.S. Supreme Court decision in *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652, 2666-67, 2669 n.7 (2007)), and was removed from the statutes by the state legislature by amendment effective Aug. 2, 2008. 2008 N.C. Sess. Laws 150.

[253] N.C. GEN. STAT. § 163-278.14A (b)(1). In addition, corporate communications "distributed . . . solely to a corporation's stockholders and employees" and labor union communications directed "solely to its

The term "electioneering communication" is defined as a "broadcast, cable, or satellite communication, or mass mailing, or telephone bank" that refers to a "clearly identified candidate" and "[i]s aired or transmitted within 60 days of the time set for absentee voting to begin . . . for that office." An electioneering communication also must be received by either "50,000 or more individuals in the State for an election for statewide office or 7,500 or more individuals in any other election in the form of broadcast, cable, or satellite communication" or by "20,000 or more households, cumulative per election for statewide office, or 2,500 households, cumulative per election, in any other election if in the form of mass mailing or telephone bank."[254] Broadcast news stories, commentary and editorials are exempted unless the broadcast facility is owned or controlled by a candidate, or a political party or committee.[255]

North Carolina's disclosure requirements .for political ads incorporate the terms defined above. A political advertisement in print media or on radio or television that would be an expenditure, an independent expenditure, an electioneering communication or a contribution must include the following disclosure (called a "legend" in the statutes): "Paid for by . . . [Name of candidate, candidate campaign committee, political party organization, political action committee, referendum committee, individual, or other sponsor]."[256] If the advertisement supports or opposes a ballot measure, the sponsor must

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members or to subscribers or recipients of its regular publications, or made available to individuals in response to their request, including through the Internet" may not be considered regulated express candidate advocacy under the statutes. *Id.* at (b)(2).

[254] *Id.* at (8j).

[255] *Id.* at 8(k).

[256] N.C. GEN. STAT. § 163-278.39(a)(1). The name in the legend must be the name appearing on the statement of organization as mandated elsewhere in the statutes. *Id.* at (2) (referring to N.S. GEN. STAT. §§

state whether it is for or against the measure.[257] If the advertisement is jointly sponsored, all the sponsors must be named in the required disclosure.[258]

Generally, if an advertisement in print media supports or opposes nomination or election of "one or more clearly identified candidates," a written disclosure (called a "visual legend" in the statutes) is required stating one of the following as applicable: "Authorized by [name of candidate], candidate for [name of office]" or "Not authorized by a candidate."[259] If a print advertisement identifies a candidate it is opposing and the sponsor has coordinated with that candidate about the advertisement or expenditures for the advertisement, the sponsor must clearly identify the name of the candidate the advertisement is intended to benefit.[260] Also, when a print advertisement is an independent expenditure or an electioneering communication, the sponsor must disclose

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163-278.7(b)(1), 163-278.12C(a)). Also, generally, the disclosure requirements this part of the statutes do not apply to "an individual who makes uncoordinated independent expenditures aggregating less than [$1,000] in a political campaign" or "who incurs expenses with respect to a referendum." N.C. GEN. STAT. § 163-278.39C(1)-(2).

[257] N.C. GEN. STAT. § 163-278.39(a)(4). The constitutionality of this provision is suspect, however. A federal trial court ruled that a similar provision that required the sponsor of a political advertisement to state whether the sponsor was for or against the candidate was unconstitutional and enjoined the state from enforcing the provision. North Carolina Right to Life, Inc. v. Leake, 108 F.Supp.2d 498, 511-13 (E.D.N.C. 2000). This court ruling applied to a statutory provision that was subsequently repealed effective Aug. 1, 2001. 2001 N.C. Sess. Laws (repealing N.C. GEN. STAT. § 163-278.39(a)(3), which prohibited any print or broadcast advertisement that constituted a "contribution" or an "expenditure" unless "[t]he sponsor states in the advertisement its position for or against the candidate, provided that this subdivision applies only if the advertisement supports or opposes the nomination or election of one or more clearly identified candidates").

[258] N.C. GEN. STAT. § 163-178.39(a).

[259] *Id.* at (5). This requirement does not apply if the advertisement is sponsored by the candidate who is supported in the advertisement, or that candidate's committee. *Id.*

[260] *Id.* at (6).

the identities of its five largest donors for the six-month period prior to the publication of the advertisement.[261]

Generally, all state-mandated disclosures in political advertising have to comply with prominence requirements set out in the statutes.[262] In print media, required disclosures must be "at least five percent (5%) of the height of the printed space of the advertisement" but "in no event…less than 12 points in size."[263] However, in newspapers or newspaper inserts, the required disclosure need not comply with the 5 percent requirement so long as the disclosure is "at least 28 points in size."[264] In television advertisements, the required disclosure must be "made by visual legend,"[265] and the "text must constitute four percent (4%) of vertical picture height in size."[266] In radio advertisements, the required disclosure must be at least two seconds in length and "spoken so that [the] contents may be easily understood."[267]

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[261] *Id.* at (7), (8). These provisions apply only to donations that are required to be reported elsewhere in the statutes. *Id.* (citing N.C. Gen. Stat. § 163-278.12 – the reporting provisions).

[262] N.C. Gen. Stat. §§ 163-278.39(b), 163-278.39A. Notwithstanding these requirements, oral and visual disclosures in regulated television and radio political advertisement must comply with the size and placement requirements for federal political advertising, which are generally incorporated in the state size and placement requirements. N.C. GEN. STAT. § N.C. Gen. Stat. § 163-278.39A(d), (g) (citing 47 U.S.C. §§ 315, 317).

[263] N.C. GEN. STAT. § 163-278.39(b). If one advertisement spans "multiple pages, folds, or faces, the disclosure requirement . . . applies only to one page, fold, or face." *Id.*

[264] *Id.*

[265] *Id.* at (a)(1).

[266] *Id.* at (b).

[267] N.C. GEN. STAT. § 163-278.39(b).

The statutes also include "expanded" disclosure requirements specifically for *television* and *radio* advertisements that support or oppose the nomination or election of one or more clearly identified candidates (express candidate advocacy).[268] To the extent that the expanded disclosure requirements include the same information required by the general disclosure requirements mentioned above, the radio or television advertisement needs to meet only the expanded requirements but otherwise still must meet the applicable general disclosure requirements as described above.[269] The specific expanded disclosure requirements vary depending on the sponsor and publication medium (television or radio) of the advertisement.

Under the expanded disclosure requirements, for television and radio advertisements sponsored by a *candidate* (or her or his campaign), which include the name, picture (in television advertisements), voice or other representation of an opposing candidate running for the same office as the sponsoring candidate, the following disclosure spoken by the sponsoring candidate must be included: For *television* – "I am (or 'This is…') [name of candidate], candidate for [name of office], and I (or 'my campaign') sponsored this ad" (for television); and for *radio* – "I am (or 'This is…') [name of candidate], candidate for [name of office], and this ad was paid for (or 'sponsored' or 'furnished') by [name of candidate campaign committee that paid for the advertisement.]."[270] There are similar sponsorship disclosure requirements for radio and

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[268] N.C. GEN. STAT. § 163-278.39A.

[269] *Id.* at (a).

[270] *Id.* at (b)(1), (c)(1).

television advertisements that support or oppose the nomination or election of one or more clearly identified candidates (express candidate advocacy) sponsored by political parties,[271] political action committees,[272] individuals[273] and other sponsors, such as corporations;[274] and for "electioneering communications" that are sponsored by individuals and other organizations (not a candidate, candidate's campaign committee, political party organization or political action committee).[275] Under the expanded

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[271] For *television*, the required disclosure must state at least: "The [name of political party organization] sponsored this ad opposing/supporting [name of candidate] for [name of office]." *Id.* at (b)(2).

For *radio*, the required disclosure must state at least: "This ad opposing/supporting [name of candidate] for [name of office] was paid for (or 'sponsored' or 'furnished') by [name of candidate campaign committee that paid for the advertisement]." *Id.* at (c)(2).

[272] For *television*, the required disclosure must state at least: "The [name of political action committee] political action committee sponsored this ad opposing/supporting [name of candidate] for [name of office]." *Id.* at (b)(3).

For *radio*, the required disclosure must state at least: "This ad opposing/supporting [name of candidate] for [name of office] was paid for (or 'sponsored' or 'furnished') by [name of political action committee] political action committee. *Id.* at (c)(3).

[273] For *television*, the required disclosure must state at least: "I am [individual's name], and I sponsored this advertisement opposing/supporting [name of candidate] for [name of office]." *Id.* at (b)(4).

For *radio*, the required disclosure must state at least: "I am [individual's name], and this ad opposing/supporting [name of candidate] for [name of office] was paid for (or 'sponsored' or 'furnished') by me." *Id.* at (c)(4).

[274] For *television*, the required disclosure must state at least: "[Name of sponsor] sponsored this ad." *Id.* at (b)(5). If the sponsor is "corporation that has the purpose of promoting social, educational, or political ideas," the television advertisement must state, "For donor information contact [Name of board of elections with whom information is filed]." *Id.*

For *radio*, the required disclosure must state at least: "[Name of sponsor] paid for (or 'sponsored' or 'furnished') this ad." *Id.* at (c)(5). If the sponsor is a "corporation that has the purpose of promoting social, educational, or political ideas," the radio advertisement must state aurally, "For donor information contact [Name of board of elections with whom information is filed]." *Id.*

[275] For *television*, electioneering communications sponsored by individual at least must state, "I am [individual's name'], and I sponsored this advertisement opposing/supporting [name of candidate] for [name of office];" and those sponsored by others (not including a candidate, candidate campaign committee, political party organization or political action committee) at least must state, " [Name of sponsor] sponsored this ad." *Id.* at (b)(7). If the sponsor of the electioneering communication is a "corporation that has the purpose of promoting social, educational, or political ideas," the television advertisement must state, "For donor information contact [Name of board of elections with whom information is filed]." *Id.*

For *radio*, electioneering communications sponsored by an individual at least must state, "I am [individual's name], and this ad opposing/supporting [name of candidate] for [name of office] was paid for

disclosure requirements for radio and television political advertising, if the advertisement is jointly sponsored, all sponsors must be disclosed; and, if a candidate is one of the sponsors, the candidate must be the disclosing individual in the advertisement.[276] Under the expanded disclosure requirements for express candidate advocacy in television advertisements that are sponsored by a candidate, political party, political action committee or individual, the disclosure must be made by visual legend. There also must be "an unobscured, full-screen picture containing the disclosing individual, either in photographic form or through the actual appearance of the disclosing individual on camera," which must be the candidate who sponsored the advertisement, the individual who sponsored the advertisement or a designated representative of the political party or political action committee that sponsored the advertisement.[277] If the television advertisement is express candidate advocacy or an electioneering communication sponsored by another organization, such as a corporation, the required disclosure must be spoken by the "chief executive officer or principal decision maker" of the sponsor, although the individual need not appear on screen.[278]

(or 'sponsored' or 'furnished') by me;" and those sponsored by another organization (not a candidate, candidate campaign committee, political party organization or political action committee) at least must state, "[Name of sponsor] paid for (or 'sponsored' or 'furnished') by me." *Id.* at (c)(6). If the sponsor of the electioneering communication is a "corporation that has the purpose of promoting social, educational, or political ideas," the radio advertisement must state, "For donor information contact [Name of board of elections with whom information is filed]." *Id.*

[276] *Id.* at (e1). If more than one candidate has co-sponsored the advertisement, then at least one of those candidates must be the disclosing individual. *Id.*

[277] *Id.* at (a)(1)-(4), (b)(6). If the television advertisement is sponsored by a political party, the disclosing individual must be the "chair, executive director, or treasurer" of the party. *Id.* at (a)(2). If the advertisement is sponsored by a political action committee, the disclosing individual must be the "chief executive officer or treasurer" of the committee. *Id.* at (a)(3).

[278] *Id.* at (3), (6).

Permissible media charges for political advertisers. Newspapers, magazines and other advertising media in North Carolina may not charge a candidate, treasurer, political party or individual more than the "comparable rate charged to other persons for advertising of similar frequency and volume" regarding "any advertising purchased for or in support of or in opposition to any candidate, political committee, or political party."[279] In addition, advertising media outlets must give these political advertisers the same discounts as are available to other advertisers under "comparable conditions and circumstances."[280] An intentional violation of these requirements is a Class 2 misdemeanor.[281] However, unlike the statutory disclosure requirements mentioned above, the statutory limitations on media charges for political advertisers do not apply to political advertising that supports or opposes state or local *ballot* measures.

Recordkeeping requirements. Under state election statutes, media outlets must request "written authority" from "each candidate, treasurer or individual" for each "expenditure" for political advertising that either supports or opposes a clearly identified candidate running for state or local office in North Carolina, or supports or opposes a state or local ballot measure up for vote in the state.[282] These recordkeeping requirements also apply to

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[279] N .C. GEN. STAT. § 163-278.18(b). In addition, media and suppliers of "materials and services" may not "charge or require a candidate, treasurer, political party, or individual to pay a charge for advertising, materials, space, or services purchased for or in support of or in opposition to any candidate, political committee, or political party that is higher than the normal charge" for other customers for comparable advertising materials and services. *Id.* at (a).

[280] *Id.* at (b).

[281] N.C. GEN. STAT. § 163-278.27(a).

[282] N.C. GEN. STAT. § 163-278.17(b). It should be noted here that the statutes prohibit any candidate, political committee or referendum committee from making any expenditures before appointing a treasurer and certifying the treasurer's name to the N.C. State Board of Elections, and the expenditure must be made through the named treasurer. N.C. GEN. STAT. § 163-278.16.

independent expenditures and electioneering communications.[283] Failure to adhere to these recordkeeping requirements is subject to criminal prosecution as a Class 2 misdemeanor.[284] In addition, these written authorizations are considered public records under the statutes and must be kept available for public inspection during normal business hours at the office or offices of the media outlet closest to the place or places of publication or broadcast[285] and must be retained "for at least two years counting from the date of the election to which [the authorizations] refer."[286]

What advertising claims regarding state sales and use taxes are prohibited?

Retailers may not lawfully advertise an offer in the state to absorb sales and use taxes levied under the N.C. Sales and Use Tax Act.[287] Under the statute, a "retailer" includes anyone "[m]aking sales at retail, offering to make sales at retail, or soliciting sales at retail of tangible personal property, digital property, or services for storage, use or consumption" in North Carolina.[288] Retailers covered by the statutes may not "directly or indirectly" advertise that applicable state sales and use taxes are not part of the price that

[283] N.C. GEN. STAT. § 163-278.17(d).

[284] N.C. GEN. STAT. § 163-278.27(a).

[285] N.C. GEN. STAT. § 163-278.17(b).

[286] N.C. GEN. STAT. § 163-278.35.

[287] N.C. GEN. STAT. § 105-164.9.

[288] N.C. GEN. STAT. § 105-164.3(35).

will be charged to consumers.[289] Any violation of these provisions by a retailer covered under the statutes is subject to criminal prosecution as a Class 1 misdemeanor.[290]

What laws regulate tobacco product advertising?

Almost all of the significant legal requirements that apply specifically to tobacco product advertising are federal and not state imposed. For example, for years, federal statutes have banned advertisements for cigarettes – including "little cigars" – and smokeless tobacco on broadcast radio stations and on broadcast and cable television stations (but not the Internet).[291] These statutes do not specifically prohibit advertisements for cigars, pipes and pipe tobacco, smoking accessories, or cigarette-making machines on FCC-regulated electronic media.[292]

As set out more fully in this section, there are federal warning requirements to be aware of regarding advertisements for cigarettes, smokeless tobacco and cigars. In addition, in 2009, the U.S. Congress enacted the Family Smoking Prevention and Tobacco Control Act (FSPTC Act),[293] and the Federal Drug Administration (FDA) subsequently enacted enforcement rules pursuant to its new jurisdiction over tobacco products that Congress

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[289] N.C. GEN. STAT. § 105-164.9.

[290] *Id.*

[291] 15 U.S.C. §§ 1335 (advertising for cigarettes and little cigars on FCC-regulated media banned in 1971), 4402(f) (advertising for smokeless tobacco on FCC-regulated media banned in 1986).

[292] FCC MEDIA BUREAU, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION 23 (2008), *available at* http://www.fcc.gov/guides/public-and-broadcasting-july-2008.

[293] Pub. L. No. 111-31, Div. A, 123 Stat. 1776 (June 22, 2009) (codified and to be codified in various sections of the U.S. Code).

granted in the act.[294] The FSPTC Act and corresponding FDA rules are changing tobacco advertising significantly in the United States (although they do *not* change the above-described ban on most tobacco advertising on FCC-regulated media). As explained more fully below, federal courts have found some of the key tobacco advertising provisions in the FSPTC Act and FDA rules unconstitutional under the First Amendment.[295]

Cigarette advertisements: Federal warnings. Currently, under provisions in the Federal Cigarette Labeling and Advertising Act (FCLAA – often pronounced "fick-lah"), cigarette advertisements must include one of the four following rotational warnings:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks To Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result In Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.[296]

Currently, cigarette advertisers must alternate these warnings in their advertisements in accordance with a plan they must submit for approval by the Federal Trade Commission

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[294] Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 75 Fed. Reg. 13225 (Mar. 19, 2010) (codified at 21 C.F.R. pt. 1140); Required Warnings for Cigarette Packages and Advertisements, 76 Fed. Reg. 36628 (June 22, 2011) (codified at 21 C.F.R. pt. 1141).

[295] Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012); R.J. Reynolds Co. v. FDA, 823 F.Supp.2d 36 (D.D.C. 2012).

[296] 15 U.S.C. § 1333(a)(2).

(FTC).[297] These warnings in advertisements must be printed in "conspicuous and legible type in contrast to typography, layout, or color with all other printed material in the advertisement."[298] The warnings must be boxed and also meet specific size and layout requirements that are specified in the statutes. [299] The statutes require slightly abbreviated versions of the warnings for cigarette advertisements on billboards[300] along with specific size and height requirements for billboard advertisements.[301]

The 2009 FSPTC Act amended the cigarette advertising warning requirements in the FCLAA and ordered the FDA to enact a rule to implement the new warnings.[302] These new warning requirements are scheduled to go into effect beginning Sept. 22, 2012. The U.S. Department of Health and Human Services (DHHS) – the FDA within

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[297] *Id.* at (c)(1).

[298] *Id.* at (b).

[299] *Id.*

[300] *Id.* at (a)(3). The specific warnings for billboards are:

> SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, And Emphysema.
>
> SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Health Risks.
>
> SURGEON GENERAL'S WARNING: Pregnant Women Who Smoke Risk Fetal Injury And Premature Birth.
>
> SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

Id.

[301] *Id.* at (b)(3).

[302] FSPTC Act, Pub. L. No. 111-21, Div. A, §§ 201-202, 123 Stat. at 1842-46 (June 22, 2009) (rewriting and amending the cigarette label and advertising warnings in 15 U.S.C. § 1333). The FSPTC Act also required the FDA to engage in rulemaking to implement the amendments required to the FCLAA. *Id.*

DHHS, specifically – is scheduled to take over the approval process from the FTC.[303] Under the amended FCLAA, cigarette advertisements will have to include one of an expanded list of nine rotating warning statements in an outlined box comprising at least 20 percent of the advertising space "in a conspicuous and prominent format and location at the top of each [advertisement]" for print and poster advertisements.[304] The new warnings called for in the amended FCCLA are:

WARNING: Cigarettes are addictive.

WARNING: Tobacco smoke can harm your children.

WARNING: Cigarettes cause fatal lung disease.

WARNING: Cigarettes cause cancer.

WARNING: Cigarettes cause strokes and heart disease.

WARNING: Smoking can kill you.

WARNING: Tobacco smoke causes fatal lung disease.

WARNING: Quitting smoking now greatly reduces serious risks to your health.[305]

Under the amended FCCLA, cigarette advertisements in press and poster advertising will have to meet the following requirements:

> The word "WARNING" shall appear in capital letters, and each label statement shall appear in conspicuous and legible type. The text of the label statement shall be black if the background is white and white if the background is black, under the plan submitted [to the FDA]. The label statements shall be enclosed by a rectangular border that is the same color as the letters of the statements and that is

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[303] Memorandum to Potential Cigarette Manufacturers or Importers (FTC Mar. 21, 2011), *available at* http://www.ftc.gov/bcp/policystmt/cigarettememo.shtm.

[304] FSPTC Act, Pub. L. No. 111-21, Div. A, § 201, 123 Stat. at 1842-46 (June 22, 2009) (amending 15 U.S.C. § 1333).

[305] *Id.* The amended FCCLA does not include separate warnings for billboards.

> the width of the first downstroke of the capital "W" of the word "WARNING" in the label statements. The text of such label statements shall be in a typeface pro rata to the following requirements: 45-point type for a whole-page broadsheet newspaper advertisement; 39-point type for a half-page broadsheet newspaper advertisement; 39-point type for a whole-page tabloid newspaper advertisement; 27-point type for a half-page tabloid newspaper advertisement; 31.5-point type for a double page spread magazine or whole-page magazine advertisement; 22.5-point type for a 28 centimeter by 3 column advertisement; and 15-point type for a 20 centimeter by 2 column advertisement. The label statement must be in English . . . . [306]

In addition, under the FSPTC Act, the new warnings in cigarette advertisements are supposed to include "color graphics depicting the negative health consequences of smoking" that the FDA was required to design.[307]

On June 22, 2011, the FDA enacted a final cigarette warning rule adopting nine highly controversial color graphic images to be included in warning boxes along with the nine new warning statements for cigarette advertisements (and packages) beginning Sept. 22, 2012, all of which also include a reference to a smoking cessation resource for consumers ("1-800-QUITNOW").[308] The new cigarette warnings with color graphics can be downloaded from the FDA website.[309] In addition, the FDA has issued a guide to help

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[306] *Id.* If the advertisement is published in a non-English language print vehicle like a magazine, newspaper or periodical, then the warning must be published in the main language of the publication. *Id.* (to be codified at 15 U.S.C. § 1333(b)(2)).

[307] *Id.* at 1845.

[308] Required Warnings for Cigarette Packages and Advertisements, 78 Fed. Reg. 36628, 36674-90 (FDA June 22, 2011) (codified at 21 C.F.R. pt. 1141).

[309] The set of final cigarette health warnings are available online for download at the FDA's website. 21. C.F.R. § 1141.21 (referring to http://www.fda.gov/cigarettewarningfiles). These color graphics are required also for the warning boxes required for cigarette package labeling. *Id.*

answer compliance questions regarding the new cigarette advertising and packaging warnings.[310]

However, in February, 2012a federal district court in Washington, D.C., ruled that the new cigarette warnings required in the FSPTC Act and the FDA's final cigarette warning rule are unconstitutional and enjoined the FDA from enforcing any of the new cigarette warning requirements..[311] The case is widely expected to take years to resolve if fully litigated, with probable appeals to the U.S. Court of Appeals for the D.C. Circuit and, ultimately, the U.S. Supreme Court. In other words, this is an evolving regulatory and constitutional matter.

Smokeless tobacco advertisements: Federal warnings. The Comprehensive Smokeless Tobacco Health Education Act (CTSHEA – often referred to as the "Smokeless Tobacco Act"), as amended by the FSPTC Act in 2009, has warning requirements for smokeless tobacco advertising.[312] Significantly here, unlike the new cigarette warning requirements, the new smokeless tobacco warning requirements do *not* require color graphics and went into effect June 22, 2010. Advertisements for smokeless tobacco currently must include one of four warnings in rotation in accordance with a plan submitted by the advertiser and approved by the FDA.[313] The warnings are:

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[310] Guidance for Industry: Required Warnings for Cigarette Packages and Advertisements (FDA Oct. 2011), *available at* http://www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM276631.pdf.

[311] R.J. Reynolds v. FDA,2012 WL 653828 (D.D.C. Feb. 29, 2012).

[312] 15 U.S.C. § 4402.

[313] The specifics of the rotation requirements are included in the statute. *Id.* at (b)(3). The FDA published a guidance to industry for submitting rotation plans under the amended Smokeless Tobacco Act. Guidance to Industry: Enforcement Policy Concerning Rotational Warning Plans for Smokeless Tobacco Products

WARNING: This product may cause mouth cancer.

WARNING: This product can cause gum disease and tooth loss.

WARNING: This product is not a safe alternative to cigarettes.

WARNING: Smokeless tobacco is addictive.[314]

In press and poster advertisements for smokeless tobacco, the warnings must be published in black text on a white background, or *vice versa*, in rotation according to the advertiser's approved rotation plan; and must comprise the top 20 percent of the advertisement.[315] The warning must be boxed and outlined with a line that is the same color as the letters in the warning and the same width as the "first downstroke in the capital 'W'" in the text of the warning statement.[316] The warning must use "conspicuous and legible type,"[317] and there are specific font size requirements for the text of the warning statement in print media advertising. The text must be in

> …45-point type for a whole-page broadsheet newspaper advertisement; 39-point type for a half-page broadsheet newspaper advertisement; 39-point type for a whole-page tabloid newspaper advertisement; 27-point type for a half-page tabloid newspaper advertisement; 31.5-point type for a double page spread magazine or whole-page magazine advertisement; 22.5-point type for a 28 centimeter by 3 column advertisement; and 15-point type for a 20 centimeter by 2 column advertisement.[318]

(FDA June 2010), *available at* http://www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM214430.pdf.

[314] 15 U.S.C. § 4402(a)(1), (b)(1).

[315] *Id.* at (b)(2)(B), (b)(2)(D).

[316] *Id.* at (b)(2)(E).

[317] *Id.* at (b)(2)(C).

[318] *Id.* at (b)(2)(F).

The required warning statements in smokeless tobacco advertising must be published in English unless the advertisement appears in a non-English language publication, in which case the warning must be in the publication's "predominant language."[319] As mentioned, these warning requirements for smokeless tobacco advertising are now in effect.

Cigar advertisements: Federal warnings. The 2009, the FSCTP Act did not specifically include cigars or cigar advertising although the FDA has jurisdiction to enact rules regarding cigars and their advertising. As of June 2012, the FDA had not done so. However, under a consent agreement between the FTC and the seven largest U.S. cigar manufacturers in 2000,[320] most cigar advertising in the United States must display one of the following warnings clearly and conspicuously:

SURGEON GENERAL'S WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL'S WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL'S WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL'S WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL'S WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.[321]

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[319] *Id.* at (b)(2)(G)(i). Otherwise, if the advertisement is not in English, the warning statement must be in the same language as the advertisement. *Id.* at (b)(2)(G)(ii).

[320] *See* Proposed Consent Agreements, 65 Fed. Reg. 41998 (FTC July 7, 2000). The FTC entered a decision and order on the proposed consent agreement in August 2000. *In re* Swisher Int'l, Decision and Order (FTC Aug. 18, 2000), *available* at http://www.ftc.gov/os/2000/08/swisherdo.htm.

[321] *See* Proposed Consent Agreements, 65 Fed. Reg. at 41999.

These warnings also must be rotated in accordance with a plan submitted by the advertiser and approved by the FTC,[322] and the warnings must comply with specific display requirements for print, billboard and broadcast advertising formats.[323] As mentioned above, federal statutes do not specifically prohibit cigar advertising on FCC-regulated electronic media.

Other advertising restrictions in the FSPTC Act and FDA rules. In addition to the warning requirements mentioned above, the 2009 FSPTC Act includes other important advertising restrictions for cigarettes and smokeless tobacco. Also, the FDA enacted a final tobacco rule in 2010 to implement advertising restrictions called for in the FSPTC Act. The most important advertising restrictions are discussed here although a federal appeals court found some of these provisions unconstitutional in 2012.

The FDA regulations approve cigarette and smokeless tobacco advertisements in print media like newspapers and magazines; outdoor media like billboards; direct mail; and promotional materials at retail locations ("point-of-sale" advertisements) like posters, signs and audio or video presentations.[324] Use of non-approved media, including the Internet, requires advance notice to the FDA with a description of the extent to which the medium reaches minors.[325] Also, under the regulations, cigarette and smokeless tobacco brands may not be used to promote "any athletic, musical, artistic, or social or cultural"

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[322] *See id.* at 42000.

[323] *See id.* at 41999.

[324] 21 C.F.R. § 1140.30(a)(1).

[325] 21 C.F.R. § 1140.30(a)(2).

event (referred to here as the "promotions ban").[326] As mentioned, neither the FSPTC Act nor the corresponding FDA rules affect the longstanding ban on cigarette and smokeless tobacco ads on electronic media regulated by the FCC.

The FDA's ill-fated 1996 tobacco regulations – a previous attempt by the agency to regulate tobacco advertising that never became effective[327] – sought to ban cigarette and smokeless tobacco advertisements in outdoor media like billboards and retail signs located within 1,000 feet of public playgrounds, playground areas in public parks, and elementary and secondary schools.[328] In the 2009 FSPTC Act, Congress instructed the FDA to include the agency's 1996 1,000-foot ban in its new regulations with any needed "modifications" in light of a ruling by the U.S. Supreme Court in 2001 that struck down on First Amendment grounds a similar *state* regulation in Massachusetts.[329] As of June 2012, the FDA had not yet enacted either the original or a modified version of its 1,000-foot rule and was still engaged in the rulemaking process regarding billboard advertising for cigarettes and smokeless tobacco.[330]

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[326] 21 C.F.R. § 1140.34(c).

[327] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (rejecting the FDA's attempt at that time to regulate tobacco products and their advertising for lack of statutory authority at the time).

[328] 21 C.F.R. § 897.30(b) (1996).

[329] Pub. L. No. 111-31, Div. A, § 201, 123 Stat. 1776, 1831 (June 22, 2009) (citing Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)).

[330] Request for Comment on Implementation of the Family Smoking Prevention and Tobacco Control Act, 75 Fed. Reg. 13241 (FDA Mar. 19, 2010) ("to obtain information related to the regulation of outdoor advertising of cigarettes and smokeless tobacco"); Request for Comment on Implementation of the Family Smoking Prevention and Tobacco Control Act – Extension of Comment Period, 75 Fed. Reg. 27672 (FDA May 18, 2010) (extending the original public comment period from May 18 to July 19, 2010).

In addition to regulating the media to be used for tobacco advertising, the FDA's 2010 final tobacco rule affects the content of cigarette and smokeless tobacco advertisements. Generally, the regulations limit print advertising for these products in magazines and newspapers, billboards, and printed point-of-sale materials to black text on a white background – effectively banning the use of color and imagery.[331] There are two exemptions to the color and imagery ban. The first is for print advertisements in an "adult publication," which means a publication whose underage readership is no more than 15 percent of its total readership *and* whose underage readership does not otherwise exceed 2 million readers.[332] The second exemption is for advertising in retail establishments where minors are not allowed as long as the advertisements are fixed to the wall or some other structure and not visible from outside.[333]

The 2009 FSPTC Act also prohibits claims in advertisements that a tobacco product is safer than similar products on the market unless the FDA approves the product in advance as a "modified risk tobacco product[]"[334] The ban includes making any comparison claim that a tobacco product "presents a lower risk of disease or is less harmful" than other similar products on the market.[335] The modified risk provisions

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[331] 21 C.F.R. § 1140.32(a). Point-of-sale video advertisements are limited to static black text on a white background with no music or sound effects, and point-of-sale audio advertisements are limited to spoken words with no music or sound effects. 21 C.F.R. § 1140.32(b).

[332] 21 C.F.R. § 1140.32(a)(2)(i)-(ii).

[333] 21 C.F.R. §§ 1140.16(c)(2)(ii), 1140.32(a)(1).

[334] FSPTC Act, Pub. L. No. 111-21, Div. A, § 911, 123 Stat. 1776, 1812-19 (June 22, 2009) (codified at 21 U.S.C. § 387k).

[335] 21 U.S.C. § 387k.

prohibit terms such as "light," "mild" or "low" to advertise a tobacco product unless the FDA has approved the product in advance as a modified risk tobacco product.[336] In addition to the modified risk provisions, the FSPTC Act also prohibits any implied or express claims in tobacco product advertising that misleads – or would be likely to mislead – consumers into thinking that the advertised product has been approved, found safe or endorsed for consumer use by the FDA; or that the product is "safe or less harmful" because it is regulated by the FDA or complies with FDA regulations.[337]

In 2009, almost immediately after Congress passed the FSPTC Act, tobacco companies filed a lawsuit in federal district court in Kentucky challenging the advertising restrictions on First Amendment and other grounds. The district court ruled in 2010,[338] and on appeal, in *Discount Tobacco City & Lottery, Inc. v. United States* in 2012,[339] the U.S. Court of Appeals for the Sixth Circuit issued a ruling finding some of the advertising restrictions unconstitutional but upholding others.

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[336] *Id.* For more information on the FDA's approval process, *see generally* Guidance for Industry: Modified Risk Tobacco Product Applications (Draft Guidance) (FDA Mar. 2012), *available at* http://www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM297751.pdf. In addition, the FDA has issued a guidance on the use of terms "light," mild" and "low" in tobacco product advertising. Guidance for Industry and FDA Staff: Use of "Light," "Mild," "Low," or Similar Descriptors in the Label, Labeling, or Advertising of Tobacco Products (FDA June 2010), *available at* http://www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM214599.pdf.

[337] FSPTC Act, Pub. L. No. 111-21, Div. A., § 103, 123 Stat. 1776, 1833-35 (June 22, 2009) (codified at 21 U.S.C. § 331(tt)).

[338] Commonwealth Brands, Inc. v. United States, 678 F.Supp.2d 512 (W.D. Ky. 2010).

[339] Discount City & Lottery, Inc. v. United States, 674 F.3d 509 (6th Cir. 2012).

The appeals court upheld the promotions ban,[340] the modified risk provisions[341] and the part of the FDA claim ban that had been challenged.[342] However, the court struck down the color and imagery ban for tobacco advertising under the First Amendment.[343] The appeals court did *not* address the constitutionality of the FDA's potential 1,000-foot rule for outdoor advertising like billboards.[344]

In addition, the *Discount City* court upheld the FSPTC Act's warning requirements, including the call for color graphics, for cigarette and smokeless tobacco advertising as constitutional on their face, but did not address the constitutionality of the FDA's 2011 final cigarette warning rule – which, as mentioned above, includes the specified color graphics for the new cigarette warnings.[345]

When is it lawful to advertise "wholesale" pricing or a "closing-out sale"?

State statutes limit the use of the term "wholesale" in advertising and allow for media liability for knowingly publishing unlawful wholesale advertising. No one may advertise

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[340] *Id.* at 543-44.

[341] *Id.* at 536-37.

[342] *Id.* at 549-51 (focusing on 21 U.S.C. § 331(tt)) (addressing only the part of the ban dealing with implied or express statements that mislead or would be likely to mislead consumers into thinking that an advertised tobacco product is "safe or less harmful" because it is regulated or inspected by the FDA, or because the product complied with FDA regulations).

[343] *Id.* at 548.

[344] The district court below concluded that this issue was not ripe for review because the FDA had yet to act and enact any rule that could be considered at the time. *Commonwealth Brands*, 678 F.Supp.2d at 535-36.

[345] *Discount City Tobacco & Lottery*, 674 F.3d at 524-31, 551-69 (Stranch, C.J., wrote a separate opinion for the majority upholding the warning requirements in which Clay, C.J., who wrote the majority opinion in the case dissented).

the sale of merchandise at "wholesale" prices unless that term is lawfully used as part of the advertiser's "company or firm name;" the advertised sale is for resellers that have a license issued and recorded by the state; or the advertised prices are "established by an independent agency not engaged in the manufacture, distribution or sale of [the advertised] merchandise."[346] Using the term "wholesale" in violation of these requirements is an "unfair trade practice" under the state Unfair and Deceptive Trade Practices Act (UDPTA) discussed earlier in this chapter.[347] However, print and broadcast media that publish and disseminate advertising cannot be held liable for a violation of these provisions unless they knowingly publish an unlawful wholesale advertisement or have a financial interest in the wholesale being advertised.[348]

State statutes also require that anyone advertising a "closing-out sale" or a "distress sale" must have obtained a license to conduct the sale from the clerk of the town or city where the sale is being conducted.[349] Under the statutes, a "closing-out sale" means any sale that is advertised with descriptors such "going out of business," "selling out," "liquidation," "lost our lease," "must vacate," "forced out" or "removal."[350] Similarly, a

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[346] N.C. GEN. STAT. § 75-29(a). In addition, the statutes limit the use of the term "wholesale" in company and firm names to bona fide wholesalers that meet statutorily-defined criteria. *Id.* at (a).

[347] *Id.* at (b) (referring to N.C. GEN. STAT. § 75-1.1, which prohibits unfair methods of competition and unfair and deceptive practices and acts).

[348] N.C. GEN. STAT. § 75-1.1(c).

[349] N.C. GEN. STAT. § 66-77. If the sale is being held in an unincorporated area, then the license must be obtained from an appointee designated by the board of county commissioners that has jurisdiction over the unincorporated location where the sale is being held. *Id.* The licensing requirements apply to "person," which includes "individuals, partnerships, voluntary associations and corporations." N.C. GEN. STAT. § 66-77.

[350] N.C. GEN. STAT. § 66-76.

"distress sale" generally includes sales "in which it is represented or implied that going out of business is possible or anticipated, in which closing out is referred to any way, or in which it is implied that business conditions are so difficult that the seller is forced to conduct the sale."[351] The licensing requirement also applies to any sale that advertises reduced prices for items that have been damaged by fire, smoke or water.[352] Advertising these types of sales in violation of the statutes is a Class 1 misdemeanor,[353] although media outlets are exempt from liability for publishing a false advertisement for these sales unless the media outlet refuses to identify the advertiser when requested to do so, in writing, to a North Carolina state agency including law enforcement.[354] In addition, the requirements for conducting and advertising closing-out and similar sales do not apply to sales ordered by a federal court or a state court in North Carolina.[355]

Conclusion

N.C. General Statutes include myriad provisions that regulate advertising in the state, some of which are not covered by this chapter.. In addition, federal statutes and rules regulate advertising in a variety of ways beyond those included in this chapter. T Publishers and advertising managers need to keep abreast of changes and developments

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[351] *Id.*

[352] N.C. GEN. STAT. § 66-77(a).

[353] N.C. GEN. STAT. § 66-81.

[354] N.C. GEN. STAT. § 66-82. The exemption also applies broadly to any "other agency or medium for the dissemination of advertising." *Id.*

[355] N.C. GEN. STAT. § 66-82.

in the laws that regulate advertising in North Carolina as they occur frequently and regularly.