



COMMERCIAL SPEECH

What is "commercial speech?" (according to the USSC)
• "expression related solely to the economic interests of the speaker and its audience" – Central Hudson 447 U.S. 557

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COMMERCIAL SPEECH

What is the test for determining whether government prohibition or regulation is unwarranted?

- Part 1
 - Does the speech concern lawful conduct or is it misleading?
- Part 2
 - Does the restriction serve a legitimate government interest?
- Part 3
 - Does the restriction directly advance the government's stated interest?
- Part 4
 - Is the regulation or restriction no broader than necessary to serve the government's stated interest?

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POSADAS

Court willing to accept arguments of the state without requirement for evidence.

The power to prohibit gambling includes the lesser included power to allow gambling but limit speech about the activity.

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EDGE

Reaffirms the notion that deference is given to the state regarding a legitimate government interest and whether that interest is advanced by the speech limitation.

Whether the state's policy is actually advanced by the limitation on speech is viewed on the whole and not as it applies to a particular litigant.

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COMMERCIAL SPEECH

Postal lottery prohibitions were expanded by the 1934 Communications Act
18 U.S.C. §1304 Broadcasting lottery information
Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined under this title or imprisoned not more than one year, or both.
Each day's broadcasting shall constitute a separate offense.

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FCC Regulations
47 CFR §73.1211 Broadcast of lottery information.
(a) No licensee of an AM, FM, television, or Class A television broadcast station, except as in paragraph (c) of this section, shall broadcast any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise or scheme, whether said list contains any part or all of such prizes...

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COMMERCIAL SPEECH

FCC Interpretations – The Exceptions

- State run lotteries
 - Broadcast within the state
 - Broadcast in an adjacent stat that also had a legal lottery
 - Any other state with a legal lottery
- Non-profit games
- Horse Racing
- Poker Tournaments (based on skill)
- Native American Casinos as part of IGRA

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COMMERCIAL SPEECH

44 Liquormart

- 3 justices held that truthful non-misleading speech is entitled to greater protection
- 3 justices suggested that no deference be given to the governments asserted interest and that strong evidentiary support must be present for the ban to be constitutional
- The court holds the power to prohibit an activity does not include the lesser power to permit the activity but limit speech about the activity (specifically stating Posadas was wrong)

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COMMERCIAL SPEECH

Greater New Orleans

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COMMERCIAL SPEECH

Greater New Orleans

The Facts - The Timeline

- On February 24, 1994 the Greater New Orleans Broadcasting Association, a trade association of New Orleans-based radio and television stations, challenged the constitutionality of a federal law banning radio and television advertisements of casino gaming.
- On November 29, 1995, the 5th U.S. Circuit Court of Appeals affirmed the federal district court decision, ruling that the federal ban on broadcast advertisements of casino gaming does not violate the First Amendment.
- On April 29, 1996 Greater New Orleans filed an appeal to the U.S. Supreme Court.
- On October 7, 1996 the U.S. Supreme Court vacated the 5th Circuit's decision. It ordered the 5th Circuit to apply the principles articulated by the high court in 44 Liquormart v. Rhode Island.
- On July 30, 1998 the 5th U.S. Circuit Court of Appeals ruled again that the federal ban on casino gaming advertisements does not violate the First Amendment.
- On September 7, 1998 Greater New Orleans Broadcasting Association, Inc. filed a petition for writ of certiorari to the U.S. Supreme Court, asking the high court to review the 5th Circuit's decision.
- On January 15, 1999, the U.S. Supreme Court agreed to hear the case.
- On April 27, 1999, the U.S. Supreme Court heard oral arguments in the case.

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COMMERCIAL SPEECH

Greater New Orleans

The Facts

- Plaintiff is an association of broadcasters in Louisiana that operate under FCC licenses
- Exemptions exist for advertising for many types of gambling
 - Indian Gaming
 - State Lotteries
 - Horse Racing... etc.
- Plaintiff wants to take ads for Louisiana and Mississippi private casinos
- Some signals may travel to Texas and Arkansas that have no legal private casino gaming

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COMMERCIAL SPEECH

Greater New Orleans

The Facts

- "Petitioners brought this action against the United States and the FCC in the District Court for the Eastern District of Louisiana, praying for a declaration that § 1304 and the FCC's regulation violate the First Amendment as applied to them, and for an injunction preventing enforcement of the statute and the rule against them."

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COMMERCIAL SPEECH

Greater New Orleans

- Does the Court use Central Hudson?
 - "In this case, there is no need to break new ground. Central Hudson, as applied in our more recent commercial speech cases, provides an adequate basis for decision."

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COMMERCIAL SPEECH

Greater New Orleans

- Part 1 – Legal Subject Matter
 - "Their content is not misleading and concerns lawful activities"

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COMMERCIAL SPEECH

Greater New Orleans

- Part 2 – Whether the asserted governmental interest served by the restriction is substantial
 - (1) reducing the social costs associated with "gambling" or "casino gambling," and (2) assisting States that "restrict gambling" or "prohibit casino gambling" within their own borders.

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COMMERCIAL SPEECH

Greater New Orleans

- Part 2 – Whether the asserted governmental interest served by the restriction is substantial
 - “We can accept the characterization of these two interests as “substantial,” but that conclusion is by no means self-evident.”
 - “the judgment of both the Congress and many state legislatures, the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations, primarily in the form of economic benefits”
 - “we cannot ignore Congress’ unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General.”

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COMMERCIAL SPEECH

Greater New Orleans

- Part 3 – whether the speech restriction directly and materially advances the asserted governmental interest
 - “This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”

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Greater New Orleans

- Part 4 – Whether the speech restriction is not more extensive than necessary to serve the interests that support
 - “The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—“a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.”

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COMMERCIAL SPEECH

- Greater New Orleans
 - So what happens....

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COMMERCIAL SPEECH

- Greater New Orleans
 - As applied to petitioners' case, § 1304 cannot satisfy these standards.
 - State Interest # 1 - reducing the social costs associated with "gambling" or "casino gambling."
 - "any measure of the effectiveness of the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling"
 - "The operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."

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COMMERCIAL SPEECH

- Greater New Orleans
 - "Accordingly, respondents cannot overcome the presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and non-misleading information about lawful conduct."

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SUMMARY

DOJ Response

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SUMMARY

DOJ Response

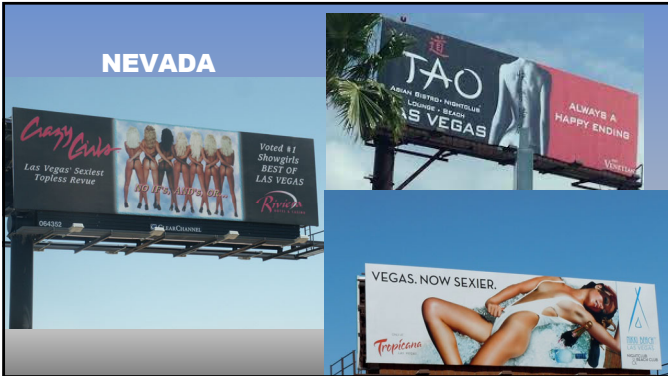
ENFORCEABILITY OF 18 U.S.C. § 1302
Application of 18 U.S.C. § 1302 to prohibit the mailing of truthful advertising concerning lawful gambling operations (except as to state-operated lotteries in some circumstances) would violate the First Amendment. Accordingly, the Department of Justice will refrain from enforcing the statute with respect to such mailings.

LETTER TO THE SPEAKER OF THE HOUSE OF REPRESENTATIVES September 25, 2000

This is to inform you of the Department of Justice's determination that, in light of governing Supreme Court precedent, the Department cannot constitutionally continue to apply 18 U.S.C. § 1302 to prohibit the mailing of truthful information or advertisements concerning certain lawful gambling operations.

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NEVADA



NEVADA

5.011 Grounds for disciplinary action. The board and the commission deem any activity on the part of any licensee, his agents or employees, that is inimical to the public health, safety, morals, good order and general welfare of the people of the State of Nevada, or that would reflect or tend to reflect discredit upon the State of Nevada or the gaming industry, to be an unsuitable method of operation and shall be grounds for disciplinary action by the board and the commission in accordance with the Nevada Gaming Control Act and the regulations of the board and the commission. Without limiting the generality of the foregoing, the following acts or omissions may be determined to be unsuitable methods of operation:

- ...4. Failure to conduct advertising and public relations activities in accordance with decency, dignity, good taste, honesty and inoffensiveness, including, but not limited to, advertising that is false or materially misleading.

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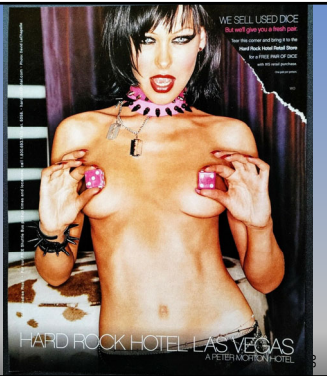
NEVADA

The Hard Rock Story

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NEVADA

The Hard Rock Story





NEVADA

The Hard Rock Story

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NGC REGULATION 5.011

Grounds for disciplinary action under 5.011 include:

5.011(1)
 Failure to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the State of Nevada and act as a detriment to the development of the industry.

5.011(4)
 Failure to conduct advertising and public relations activities in accordance with decency, dignity, good taste, honesty and inoffensiveness, including, but not limited to, advertising that is false or materially misleading.

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In 2004, the Gaming Control Board tested that power when it filed a complaint against the Hard Rock Hotel.

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Las Vegas Sun
 NEWS BUSINESS SPORTS POLITICS OPINION ENTERTAINMENT
 Home Sign Up News Alerts Sports Subscriptions About Awards: Gaming, Ve
 Facebook X Email Plus
Casino hit with complaint
 Thursday, Jan. 22, 2004 | 11:08 a.m.
 The Hard Rock hotel-casino, dogged by complaints from public agencies about patrons having sex in public places and racy advertising campaigns, could face a fine of as much as \$300,000 after the state Gaming Control Board filed a three-count complaint against the Las Vegas resort over its advertising on Wednesday.
 A spokesman for the Hard Rock said Wednesday that a hearing would be requested to determine whether the property's ads had violated any state statutes.
 Known as a hang-out for a hip crowd of young gamblers, the Hard Rock could be fined or have its gaming license restricted, suspended or revoked by the Nevada Gaming Commission, which could hear the complaint within 60 to 90 days.

15% OFF PREMIUM COLARS AND MORE
 CLICK HERE FOR SAVINGS

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Commissioners will be asked to determine if the Hard Rock, located off the Strip at Paradise Road and Harmon Avenue, has violated gaming regulations relating to the suitability of its advertising.

State laws give the Gaming Commission authority to punish gaming license holders for "failure to conduct advertising and public relations activities in accordance with decency, dignity, good taste, honesty and inoffensiveness ..."

The eight-page complaint cites three advertisements the Control Board found inappropriate:

A second billboard advertisement, displayed last summer, showed a naked woman holding a pair of dice over her nipples. The caption said, "We sell used dice."

Jeff Silver, an attorney representing the Hard Rock, said he was surprised by the filing and said he would welcome a dialogue about advertising.

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"Typically, the issue of ad strategy is something left to the discretion of the licensees," Silver said after reviewing the complaint. "Based on what they're saying, the board would have to make judgments on any ad campaign. In a city where this type of advertising is the norm and not the exception, maybe it's time to look at the entire issue."

Silver said the clientele that patronizes the property is not the type "that would be attracted by ads for a great buffet at the Hard Rock. They're attracted by something a little edgier."

Silver said the Hard Rock toned down its risque advertising in November after Gaming Control Board member Bobby Silver scolded the resort for its ads at a Nov. 5 meeting at which regulators recommended the licensing of Kevin Kelley, president and chief operating officer of the resort.

Clark County officials asked the Hard Rock to remove its billboard showing the woman with the dice in January 2003, declaring it "obscene." In July 2002, the Hard Rock was ordered to pay a \$100,000 fine to settle Gaming Board complaints over public sex acts taking place in one of its nightclubs.

Advertising content in Las Vegas has stretched the bounds of taste and appropriateness for years.

The Riviera hotel-casino raised a stir when it began advertising its long-running "Crazy Girls" production show with a promotion promising "no ifs, ands or..." and showing cast members in thong costumes from the rear. That advertisement continues to be displayed, even on the tops of taxi cabs where it is in clear view of

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At the Hard Rock Hotel, we believe in your Monday Night Rights: Large quantities of prescription stimulants. Having wives in two states. The Big Score Football on Monday nights. . . . Tell your wives you are going; if they are hot, bring them along.

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THE COMPLAINT: COUNT 1



Ad in Las Vegas Weekly:
 "There's always a temptation to cheat"

Board:
 "This ad conveys that cheating at gaming, and lounging on piles of gaming cards and chips is acceptable behavior at the Hard Rock's gaming tables" in violation of NGC Reg. 5.011(1) and (4)

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THE COMPLAINT: COUNT 2

Las Vegas Weekly magazine ad:

"At the Hard Rock Hotel, we believe in your Monday Night Rights: Large quantities of prescription stimulants. Having wives in two states. The Big Score Football on Monday nights. . . . Tell your wives you are going; if they are hot, bring them along."

The Board:

This ad conveys that possession of large quantities of prescription stimulants and having more wives than is legal is acceptable activity among Hard Rock's patrons in violation of NGC Reg. 5.011(1) and 5.011(4).

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HARD ROCK

Arguments for the casino

HARD ROCK

The Hard Rock argued that this regulation was in violation of its 1st Amendment rights...

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THE HARD ROCK'S RESPONSE...

"Regulation 5.011(4) is vague, ambiguous and overbroad, therefore unenforceable in the context for which enforcement is sought"
"The advertisements described in the Complaint are forms of commercial speech protected by the First Amendment"
The "Compliance Overview" cited by the Board did not address the type of advertising at issue here (it was meant to help employees deal with potentially objectionable 'contests and promotions') and was "not equivalent to a regulatory requirement."

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HARD ROCK

Arguments for the regulator

THE COMPLAINT: COUNT 3

Board:
Following a 2002 disciplinary action, the Hard Rock represented it would take certain remedial actions...including review by its Compliance Officer and Committee of any "questionable elements" in its advertising. The ads described herein were not submitted to either. This failure demonstrates that the Hard Rock has "persistently failed to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the State of Nevada and act as a detriment to the development of the industry in violation of NGC Reg. 5.011(1).



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THE HARD ROCK'S COMMENTARY



FROM YOUR FRIENDS AT THE HARD ROCK HOTEL & CASINO A PETER MAROTTA HOTEL

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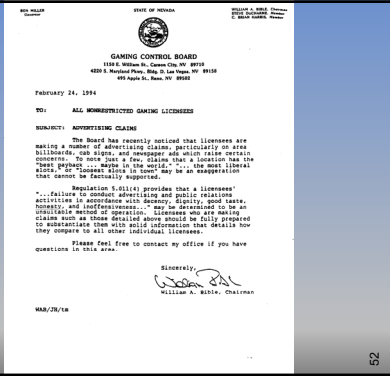
THE HARD ROCK'S RESPONSE

The matter was settled with a \$300,000 fine and changes to the compliance plan and procedures for approving advertising.

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NEVADA

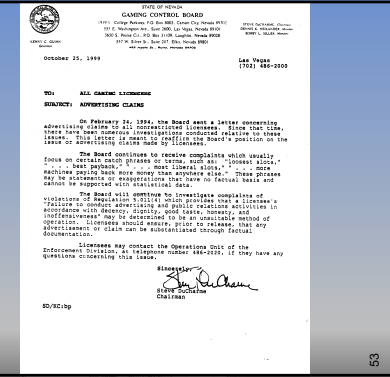
Letters



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NEVADA

Letters



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OTHER JURISDICTIONS

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OTHER JURISDICTIONS

THERE'S A PLACE FOR FUN AND GAMES

paddypower.com
poker · casino · betting · games

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OTHER JURISDICTIONS

facebook

Paddy Power

225mil

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OTHER JURISDICTIONS

CORAL

MONEY BACK
IF YOUR
HORSE FALLS
IN ANY
UK JUMPS RACE

ONCE IS LUCKY
TWICE IS TALENT
THE PROFESSOR

Ladbrokes

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OTHER JURISDICTIONS

BOYLESPORTS GAMING

NAILED ON BONUS

OPT-IN

T&CV Apply

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OTHER JURISDICTIONS

Let's make things more interesting. PaddyPower.com.au

HILLARY'S BIGGEST DOWNFALL

EVENS

2/1

Let's make things more interesting. PaddyPower.com.au

HILLARY'S BIGGEST DOWNFALL

Let's make things more interesting. PaddyPower.com.au

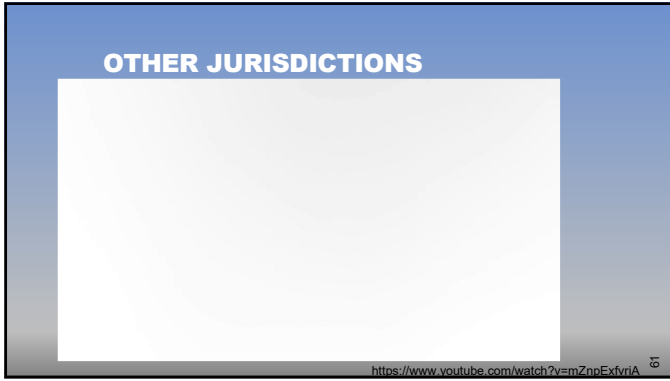
HILLARY'S BIGGEST DOWNFALL

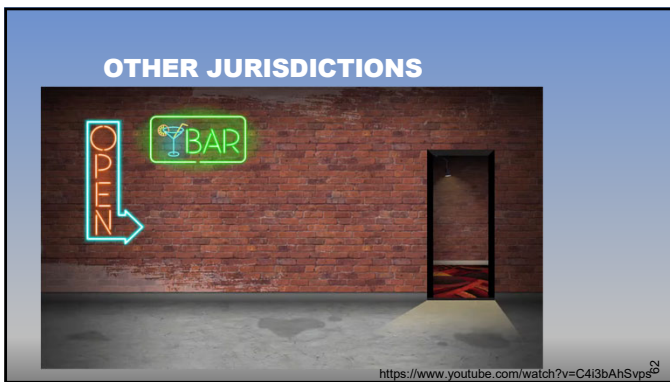
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OTHER JURISDICTIONS

<https://www.adelaidenow.com.au/news/sportsbet-2019-ad/video/6ff5ac61199a9c84f2fcb3ced4eb71c>

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US SPORTS BETTING ADVERTISING

113th CONGRESS
1st Session

H. R. 967

To prohibit the advertising of sportsbooks on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES
February 9, 2015

Enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

A BILL

To prohibit the advertising of sportsbooks on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission, and for other purposes.

Enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Betting on Our Future Act".

SEC. 2. PROHIBITION ON ADVERTISING OF SPORTSBOOKS ON CERTAIN MEDIA OF ELECTRONIC COMMUNICATION.

(a) Prohibition.—It shall be unlawful to advertise a sportsbook on any medium of electronic communication subject to the jurisdiction of the Commission.

(b) Enforcement. Act. Enforcement.—The Commission shall implement and enforce this section in a part of the Communications Act of 1934 (47 U.S.C. 301 et seq.) in relation to this section, or regulations promulgated under this section, shall be considered to be a violation of the Communications Act of 1934, or a regulation promulgated under such Act, respectively.

(c) Characteristics.—In this section:

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US SPORTS BETTING ADVERTISING

- Any issues with the BETTING ON OUR FUTURE ACT?

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US SPORTS BETTING ADVERTISING

- Any issues with the BETTING ON OUR FUTURE ACT?
 - Part 1
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US SPORTS BETTING - AGA

- American Gaming Association - Responsible Marketing Code for Sports Wagering
 - Respecting the Legal Age for Sports Wagering
 - Supporting Responsible Gaming
 - Controlling Digital Media and Websites
 - Monitoring Code Compliance
 - Compliance Process

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US SPORTS BETTING - AGA

- Responsible Marketing Code for Sports Wagering
 - Respecting the Legal Age for Sports Wagering
 - No sports betting message should be designed to appeal primarily to those below the legal age for sports wagering by depicting cartoon characters or by featuring entertainers or music that appeal primarily to audiences below the legal age within the jurisdiction. Nor should any message suggest or imply that underage persons engage in sports wagering.
 - Sports wagering advertisements should not be placed in media outlets (including social media) that appeal primarily to those below the legal age for sports wagering, nor should they be displayed at an event venue where most of the audience at many of the events at the venue is reasonably expected to be below the legal age for sports wagering.
 - No sports wagering messages—including logos, trademarks, or brand names—should be used or licensed for use on clothing, toys, games, or game equipment intended primarily for persons below the legal age for sports wagering. To the extent that promotional products carry sports wagering messages or brand information, AGA members and their employees will use commercially reasonable efforts to distribute them only to those who have reached the legal age for sports wagering.
 - Sports wagering should not be promoted or advertised in college or university-owned news assets (e.g., school newspapers, radio or television broadcasts, etc.) or advertised on college or university campuses.

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US SPORTS BETTING - AGA

- American Gaming Association - Responsible Marketing Code for Sports Wagering
 - Respecting the Legal Age for Sports Wagering
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US SPORTS BETTING - AGA

- American Gaming Association - Responsible Marketing Code for Sports Wagering
- Supporting Responsible Gaming
 - Messages will not promote irresponsible or excessive participation in sports wagering.
 - Each message will contain a responsible gaming message, along with a toll-free help line number where practical.
 - No message should suggest that social, financial or personal success is guaranteed by engaging in sports wagering. Nor should any message imply or suggest any illegal activity of any kind.
 - Messages should adhere to contemporary standards of good taste that apply to all commercial messaging, as suits the medium or context of the message.

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US SPORTS BETTING - AGA

- American Gaming Association - Responsible Marketing Code for Sports Wagering
- Controlling Digital Media and Websites
 - Messages placed in digital media—including third party internet and mobile sites, commercial marketing emails or text messages, social media sites, and downloadable content—shall comply with all applicable provisions of this Code concerning the content of such messages.
 - Each website that includes advertising or marketing materials should include a responsible gaming message and a link to a site that provides information about responsible gaming and responsible gaming services.
 - Owned websites or profiles that include sports betting content, including social media pages and sites, shall include a reminder of the legal age for sports wagering. Age affirmation mechanisms, utilizing month, day, and year of birth, will apply before a user can gain access to any page where individuals can engage in gambling.

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US SPORTS BETTING - AGA

- American Gaming Association - Responsible Marketing Code for Sports Wagering
- Controlling Digital Media and Websites
 - Owned websites will include geolocation mechanisms on those pages where individuals can engage in gambling, in order to screen any individuals who reside in jurisdictions that have not legalized sports wagering.
 - User-generated content on an owned site or web page will be monitored and moderated on a regular basis for compliance with the provisions of this code.
 - Digital marketing communications will respect user privacy and comply with all applicable legal privacy requirements including those governing consent. All such messages targeting an individual recipient will be clearly identified as originating from the sports betting operator or otherwise attributable to the operator. In addition, each such message sent via email or text message will provide the option therein of opting out or unsubscribing.
 - Owned websites shall disclose to users—in their terms of use or other policy statements—any practices of the website that involve sharing user information with third parties unrelated to the operator sponsoring the site.

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US SPORTS BETTING - AGA

- American Gaming Association - Responsible Marketing Code for Sports Wagering
 - Respecting the Legal Age for Sports Wagering
 - Supporting Responsible Gaming
 - Controlling Digital Media and Websites
 - Monitoring Code Compliance
 - Compliance Process

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US SPORTS BETTING - AGA

- American Gaming Association - Responsible Marketing Code for Sports Wagering
 - Monitoring Code Compliance
 - The AGA will offer biannual training opportunities for members and employees of members involved in the advertising or marketing of sports wagering services.
 - AGA members will provide training on the provisions of this code, including periodic refreshers and updates, to all individuals involved in the advertising or marketing of sports wagering services.
 - AGA members will deliver a copy of this code to advertising agencies, media buyers, and other third parties involved in the member's advertising or marketing.
 - AGA members shall adopt an internal review process to evaluate whether promotional and marketing messages comply with this code, and will conduct periodic reviews of promotional and marketing messages to evaluate compliance with this code.
 - The commitments in this code apply to persons or entities operating in partnership with or as agents of AGA members in conducting advertising and marketing activity related to sports betting.

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US SPORTS BETTING - AGA

- American Gaming Association - [Compliance Review Board](#)
 - Upon request for further review by the Complainant, the AGA CCRB Liaison will send all materials to the CCRB members for their review.
 - The CCRB will meet, in person or virtually, to evaluate if the sports betting marketing or advertising activity at issue is in violation of the code.
 - The CCRB will endeavor to provide written notice of its decision to the Complainant and the Reported-Company within seven business days of receiving the appeal of the complaint. In order to find that a Reporting Company is in violation of the Code, there must be an affirmative vote from at least one Chair and a majority of the Member Delegates at the meeting.
 - At least one of the Chairs and three Member Delegates must be present for the CCRB to meet and decide on violations of the code. If a Member Delegate's company is the subject of a complaint or is the Complainant, such member shall be recused from the discussion and decision.
 - The CCRB's written decision will include if a violation of the code has occurred and if so, that the Reported Company is expected to promptly withdraw or revise the advertising and promotional material and/or placement at issue.
 - The CCRB decision, and initial complaint, will be summarized in a publicly available forum on the AGA website. The Complainant is provided the option to remain anonymous in such public reports; in such cases, only the substance of the complaint will be made public.

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LEAGUES



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QUESTIONS

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