

restrict the industry from communicating the benefits of alcohol consumption through labels and advertisements. (April 26, 2000; Washington, DC, pages 133–141). Many other commenters defended the constitutionality of a complete ban on the use of health-related statements in the labeling and advertising of alcohol beverages.

Some of the comments that (or commentators who) addressed the First Amendment issue suggested that while ATF would have authority to restrict the use of misleading health claims, a complete ban on the use of health-related statements would be unconstitutional. For example, the Washington Legal Foundation concluded that an outright ban on the use of truthful health claims would be unconstitutional, but stated that the proposed regulations, “if properly implemented, strike the appropriate balance in ensuring the First Amendment rights of industry and consumers, and the dissemination of important information regarding the health benefits proven to flow from moderate consumption of alcohol beverages.” (Comment 390). A comment submitted on behalf of the Oregon Winegrower’s Association also stated that a ban on the use of health claims on labels or in advertisements would be unconstitutional; however, the comment stated that the agency should instead “adhere to a policy of allowing labeling and advertising claims about such health-related benefits to be fairly and objectively evaluated for substantiation, balance and qualification.” (Comment 380).

A comment from Mr. Erik Bierbauer (Comment 395) attached a copy of a note that he wrote for the New York University Law Review as a third-year law student, entitled “Liquid Honesty: The First Amendment Right to Market the Health Benefits of Moderate Alcohol Consumption,” 74 N.Y.U.L. Rev. 1057 (1999). The note concludes that alcohol producers have a First Amendment right to market the health benefits of moderate drinking, as long as they do so accurately and include certain limited disclaimers. Mr. Bierbauer suggested that while such limited disclaimers would be constitutionally authorized, “the sort of disclosure described in ATF’s Industry Circular 93–8 probably would be too burdensome to comply with the First Amendment.” However, Mr. Bierbauer’s comment suggested that “[t]he Constitution would permit the government to require health-related alcohol advertisements and labels to mention lesser-known risks that are present at moderate levels of drinking.

For example, the government might legitimately require a disclaimer warning consumers of the possible link between moderate drinking and breast cancer, and also a statement warning certain vulnerable consumers not to drink at all.” Mr. Bierbauer concluded that “[a]ds and labels that merely direct the consumer to other sources of information, such as the wine labels approved by ATF in February 1999, clearly would enjoy First Amendment protection.”

#### B. Decision

As set forth in this final rule, TTB is not imposing a complete ban on the use of health claims or other health-related statements in the labeling and advertising of alcohol beverages. Accordingly, it is not necessary to consider whether such a ban would be constitutional. Instead, the final rule requires TTB to evaluate health claims on a case-by-case basis to determine if such claims would tend to mislead the consumer.

The final rule codifies ATF’s longstanding position that any substantive health benefit claim is considered misleading unless it is truthful and adequately substantiated by scientific or medical evidence; sufficiently detailed and qualified with respect to the categories of individuals to whom the claim applies; adequately discloses the health risks associated with alcohol consumption; and outlines the categories of individuals for whom any levels of alcohol consumption may cause health risks. The final rule clarifies that the identified health risks must include those associated with both moderate and higher levels of consumption. Thus, the rule would require any such claim to include appropriate qualifications and disclaimers about the health risks associated with alcohol consumption. In addition, health-related directional statements that are not substantive health claims must nonetheless include a disclaimer to clarify that the statement does not advocate the consumption of alcohol beverages for health reasons, or some other appropriate disclaimer to avoid misleading consumers. The rule’s requirements for appropriate disclaimers and qualifications in order to avoid consumer deception about a health issue comport completely with the safeguards articulated by the Supreme Court to protect non-misleading commercial speech.

Commercial speech is defined as speech that proposes a commercial transaction. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

Information on alcohol beverage labels is considered commercial speech. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995). Commercial speech is generally protected by the First Amendment; however, it enjoys a more limited measure of protection. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). Nonetheless, the Government bears the burden of justifying a restriction on commercial speech. *See Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 183 (1999).

In order to regulate commercial speech, the Government must satisfy a 4-prong test. *Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 563–566 (1980). First, the expression is protected by the First Amendment only if it concerns lawful activity and is not misleading. Second, the Government must establish a substantial interest. Third, the regulation must directly advance the governmental interest asserted. Finally, the regulation must be no more extensive than necessary to serve the interest asserted.

In two recent cases involving alcohol beverages, the Supreme Court has struck down bans on truthful and non-misleading commercial speech. In *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995), the Supreme Court applied the *Central Hudson* analysis in striking down the FAA Act’s prohibition against statements of alcohol content on malt beverage labels unless required by State law. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the Supreme Court struck down Rhode Island’s ban on advertising the price of alcohol beverages on First Amendment grounds. More recently, in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), the Supreme Court struck down certain restrictions imposed by the State of Massachusetts on the advertisement of tobacco products on First Amendment grounds. However, none of these decisions restricts the Government’s authority to regulate misleading or potentially misleading commercial speech.

If commercial speech is actually misleading, then it is not protected by the First Amendment. If commercial speech is potentially misleading, the Government may regulate such commercial messages if the restrictions are “no broader than reasonably necessary to prevent the deception.” *In re R.M.J.*, 455 U.S. 191, 203 (1982). Potentially misleading speech cannot be banned “if the information also may be presented in a way that is not deceptive” through the use of “disclaimers or explanation.” *Id.* Requirements for disclaimers have been