Service Commission, 447 U.S. 557, 563 (1980); Ohralik, 436 U.S. at 455–56. Therefore, although commercial speech is protected, the government has latitude to regulate commercial speech in ways it could not regulate other forms of expression. *Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979) ("When dealing with restrictions on commercial speech we frame our decisions narrowly, "allowing modes of regulation [of commercial speech] that might otherwise be impermissible in the realm of noncommercial expression." (citation omitted).

In Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, the Supreme Court established a four-prong test to determine whether restrictions on commercial speech are unconstitutional. The first prong states that for commercial speech to come within the protection of the First Amendment the speech must concern lawful activity. The other prongs relevant to an analysis of restrictions on commercial speech are:

(2) The government interest that is asserted to justify the proposed limitation must be substantial;

(3) The proposed limitation must directly advance the government's interest; and

(4) The proposed limitation should be no more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. 557, 566 (1980).

Since *Central Hudson*, the Supreme Court has taken a permissive view of the government's regulation of commercial speech and has upheld several restrictions on commercial speech. FDA believes that the proposed restrictions on the labeling and advertising of cigarettes and smokeless tobacco products, and the requirement that manufacturers fund and disseminate a media-based educational campaign, also would withstand any First Amendment challenge.

The *Central Hudson* analysis begins with the second prong. The proposed rule meets the requirements of the second prong because it serves the substantial government interest of protecting the public health. The Supreme Court has held that the government's "interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest." Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 341 (1986) (Court upheld restrictions on advertising of casino gambling to residents of Puerto Rico). Accord, Fox,

492 U.S. 469 (1989); Metromedia Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981). National Council for Improved Health v. Shalala, Memorandum Decision and Order, Civil No. 94-C-5090 (June 30, 1995) (U.S. District Court for the district of Utah rejected claim that FDA's regulation of dietary supplements violated First Amendment protection.) In this instance, the proposed rule's labeling and advertising restrictions and mandated educational campaign would reduce the use of cigarettes and smokeless tobacco products by those young individuals who are the most vulnerable to addiction and, perhaps, the least capable of deciding whether to use the products. Decreased use of these products will reduce the risk of tobaccorelated illnesses and deaths. The proposed rule, therefore, reflects a substantial government interest in public health.

The proposed rule also meets the third prong of the Central Hudson test by directly advancing the government's substantial interest. The Supreme Court has stated that, when determining whether an action advances the governmental interest, it is willing to defer to the "common-sense judgments" of the regulatory agency as long as they are not unreasonable. Metromedia, 453 U.S. at 509 ("We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety.")

The agency's proposed restrictions on advertising and labeling are based on its review of the evidence that shows that advertising plays an important role in young people's decisions to use tobacco products. Such evidence, consisting of numerous published studies, reports, and recommendations by the industry, health professionals, consumer groups, and public health organizations, demonstrates how advertising and labeling may make young people more receptive to using cigarettes and smokeless tobacco products and how the regulatory approach proposed by FDA may reduce the potential harm to young people. See Florida Bar v. Went for It, 63 U.S.L.W. 4644 (1995) (anecdotal record sufficient to meet third prong of Central Hudson). The Supreme Court has specifically deferred to the government's conclusion that advertising increases consumption of a product. In *Edge*, the Court stated:

Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments. Here, as in *Posadas de Puerto Rico*, the Government obviously legislated on the premise that the advertising of gambling serves to increase the demand for the advertised product. Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling, even if the North Carolina audience is not wholly unaware of the lottery's existence. Congress has, for example, altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes.

Edge, 113 S.Ct. at 2707 (citations omitted). Accord, *Posadas,* 478 U.S. at 341–42 (Puerto Rican legislature's belief that advertising of casino gambling aimed at Puerto Rican residents would increase demand for it was a reasonable one); *Dunagin* v. *City of Oxford, Miss.,* 718 F.2d 738, 748 n.8 (5th Cir. 1983) ("whether there is a correlation between advertising and consumption is a legislative and not an adjudicative fact question"), *cert. denied,* 467 U.S. 1259 (1984).

The proposed rule's requirement that the manufacturers provide funds for a media-based educational campaign is similarly supported by ample evidence that such educational campaigns have been very effective in reducing initiation and prevalence of tobacco use by young people. The proposed rule directly addresses the serious public health problem caused by tobacco use by young people in a manner that "will in fact alleviate [the harm] to a material degree." *Edenfield*, 113 S.Ct. at 1800.

Unlike the advertising restrictions (text-only format, ban on promotional items, and restrictions on sponsorship), which would help reduce the appeal of future advertising to young people, the proposed education campaign is necessary to address the widespread misconceptions about tobacco use among young people that have in part been created by the ubiquitous advertising and promotional practices of the tobacco industry. For example, the industry currently spends nearly \$2 billion creating appealing imagery and sponsoring and advertising events that associate their products with lifestyles that are attractive and popular with young people.

The amount of advertising, the variety of its format (e.g. advertisements, on hats, at concerts, on televised sponsored events), and the appeal of its messages compete effectively with the health messages of the government and health authorities. One consequence is that many young people believe that tobacco products are an important part of growing up and being "cool." Another consequence is that young people remain ignorant of the strength of the

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