generally required either a physical invasion of the property or a denial of all economically beneficial or productive use of the property (other than real property), and have examined the degree to which the governmental action serves the public good, the economic impact of that action, and whether the action has interfered with "reasonable investment-backed expectations." See Lucas v. South Carolina Coastal Council,

, 112 S.Ct. 2886, 2893 (1992); Andrus v. Allard, 444 U.S. 51, 65 (1979) (reduction in value is not necessarily a taking); Golden Pacific Bancorp v. United States, 15 F.3d 1066, 1071-73 (Fed. Cir. 1994) (heavily regulated bank could not have developed a historically rooted expectation of compensation so Federal take-over did not require compensation), cert. denied, 115 S.Ct. 420 (1994); Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667 (3rd Cir. 1991) (denial of license to operate an all-night dance hall did not constitute a taking because it did not deny all economically viable use of the property), cert. denied, 503 U.S. 984 (1992); Elias v. Town of Brookhaven, 783 F.Supp. 758 (E.D.N.Y. 1992) (loss of profit or the right to make the most profitable use does not constitute a taking); Nasser v. City of Homewood, 671 F.2d 432 (11th Cir. 1982) (deprivation of most beneficial use of land or severe decrease in property value does not constitute a taking). Indeed, in Andrus v. Allard, the Supreme Court wrote,

Suffice it to say that government regulation-by definition-involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.

Andrus, 444 U.S. at 65 (emphasis in original; citations omitted).

Here, the proposed rule would not require the government to physically invade or occupy private property, so the first inquiry is whether the proposed rule, if finalized, would deny all economically beneficial or productive use of property. The proposal would prohibit outdoor advertising from being located within 1,000 feet of any elementary or secondary school or playground. However, cases involving advertising restrictions illustrate that restrictions on the size and placement of advertising may be acceptable if they represent a valid exercise of

governmental authority or do not deny all economically viable uses of the property. See Sign Supplies of Texas, Inc. v. McConn, 517 F.Supp. 778, 782 (S.D. Tex. 1980) (city ordinance on sign and billboard size, height, and location did not constitute a taking and was a valid regulation of injurious and unlawful acts). In this instance, the proposed restriction against outdoor advertising represents an exercise of the agency's statutory authority to restrict certain devices and permit labeling and advertising to continue under certain conditions.

Neither would the proposed rule effect a taking of vending machines or self-service displays. Although vending machines would no longer be permitted to be used to sell cigarettes or smokeless tobacco products, they would continue to have economic value if they were modified for other uses. FDA notes that a recent issue of Vending Times stated that cigarette vending sales declined in 1993 and that:

Many traditional machines were modified to sell both full-value and generic/subgeneric styles at two prices, and glass-front machines gained favor as cigarette merchandisers because of their high selectivity, flexible pricing, attractive display, and convertibility to other uses if cigarette vending becomes illegal.

"Vending Cigarettes," Vending Times, Census of the Industry Issue, 1994 at p. 42 (emphasis added).

This statement indicates that compliance with this regulation would not result in a "taking" of vending machines. Similarly, self-service displays, in many instances, could be moved, adapted, or locked to comply with the requirement of direct transfer from retailers to consumers. Thus, like vending machines, self-service displays would retain their utility rather than

losing their value.

Non-tobacco items that bear the brand name, logo, symbols, mottos, selling messages, or any other indicia of a cigarette or smokeless tobacco product are often given away free as promotional items or packaged with tobacco products as incentives to purchase the product. Banning brand identifiable non-tobacco items as a marketing tool and limiting sponsorship of events would not constitute a taking because, like vending machines and self-service displays, they can be modified or adapted to fit other needs. FDA notes that the FTC, in 1991, had to consider whether its proposal to require warning messages on "utilitarian objects" bearing the names, logos, or selling messages of smokeless tobacco product firms or brands constituted a taking. The FTC acknowledged that small

businesses and one advertising association claimed that the FTC's rule would impose economic burdens on them, but felt that such claims were unsubstantiated. The FTC quoted an authority in consumer product regulation as stating that firms that produce these "utilitarian items" must be "adaptable and flexible to meet different needs of changing marketplace demands" and that they are able to transfer resources to other potential customers with only short term sales transaction costs. See 56 FR 11653, at 11661 (Mar. 20, 1991); see also Georgia-Pacific Corp. v. United States, 640 F.2d 328, 360 (Ct. Cl. 1980) ("It is settled that not all losses suffered by the owner are compensable under the fifth amendment. The government must pay only for what it takes, not for opportunities which the owner may have lost.") (citation omitted). FDA also notes that, until a final rule becomes effective, firms could easily adjust their business practices to adapt to the proposed regulations or to phase out utilitarian items and, therefore, not have such items in stock when the rule becomes effective.

Finally, prohibiting the use of nontobacco names on tobacco products and requiring labels, labeling, and advertising to carry the product's established name and a brief statement would represent too slight a "taking" to warrant constitutional concern. With respect to the prohibition against the use of non-tobacco names, the nontobacco product firm would lose its ability to license its name to any tobacco company, but it would be free to exploit its trade name with any other industry. There have been very few instances (such as "Harley- Davidson' cigarettes) of tobacco companies licensing a nontobacco trade name. The agency recognizes that these brands might still be in the marketplace and would apply this provision prospectively only.

Nevertheless, even if the agency's proposed actions could constitute a "taking," FDA finds that the actions are consistent with section 4(d) of the order. The labels, labeling, and advertising for cigarettes and smokeless tobacco products convey images of status, sophistication, maturity, and adventure or excitement that are particularly appealing to young people. Their effectiveness at attracting young people is reflected in studies showing that young people tend to smoke the most heavily advertised brands and that very young children are able to recognize brand logos and imagery. The appeal generated by labels, labeling, and advertising, coupled with easy access, creates the risk that young people will