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PROHIBIT BILLBOARD TOBACCO ADVERTISING

House Bill 4343 (Substitute H-2) First Analysis (9-17-98)

Sponsor: Rep. Tom Alley
Committee: Transportation

THE APPARENT PROBLEM:

The illegal use of tobacco by school children in the United States is increasing, according to an annual survey funded by the U.S. Department of Health and Human Services. The nationwide survey of approximately 50,000 eighth-, 10th- and 12th-grade students in 1996 indicated that cigarette smoking is on the rise. Survey results show that of the students who participated, 21 percent of the eighth graders, 30 percent of the 10th grade students, and 34 percent of the high school seniors smoked cigarettes. Furthermore, the American Medical Association estimates that 3,000 young people a day take up smoking, resulting in more than one million new smokers each year.

Some people contend that the tobacco industry is purposely marketing its products to youths in Michigan and across the country. One sales approach used in this effort is billboard advertising. In billboard ads, one persuasive marketing technique is that which features cartoon characters or attractive individuals who serve as seductive role models and who depict cigarette smoking as a positive activity.

To limit the exposure of Michigan's youngsters to messages that encourage smoking, some have argued that the advertising of cigarettes on outdoor billboards should be banned.

THE CONTENT OF THE BILL:

House Bill 4343 would amend the Highway Advertising Act to prohibit a sign from advertising the purchase or consumption of tobacco products. The prohibition would begin January 1, 2000. The bill specifies that notwithstanding any other provision of the act, a person who violated this section would be responsible for a civil fine of not less than \$5,000 or more than \$10,000 for each day of violation.

Under the bill, "billboard" would mean a sign separate from a premises created for the purpose of advertising a product, event, person or subject not related to the premises on which the sign is located. Off-premises directional signs would not be considered billboards for the purpose of the bill. The bill also would define "tobacco product" as any tobacco product sold to the general public; the term would include, but not be limited to, cigarettes, cigars, tobacco, snuff, and chewing tobacco.

The bill contains a severability section that specifies that if any part of the bill was found by a court to be invalid or unconstitutional, the remaining parts of the bill would not be affected but would remain in full force and effect.

Currently, the law says that the legislature finds it appropriate to regulate and control outdoor advertising adjacent to the interstate highway, freeway, and primary highway systems within the state. The bill would extend the regulatory purview to include the secondary highway, major street, and local road systems within the state. The bill also would state that the legislature finds it "appropriate to regulate and control outdoor advertising and the content of outdoor advertising as it pertains to tobacco."

MCL 252.303 et al.

BACKGROUND INFORMATION:

This bill is similar to Senate Bill 341, also on the House calendar. Senate Bill 341 would ban tobacco billboards after January 1, 2000, and also would ban billboard advertisements containing sexually explicit material. In order to forestall an almost certain constitutional challenge based on a violation of commercial free speech were Senate Bill 341 to be

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enacted into law, proponents of House Bill 4343 propose a bill that only would ban tobacco advertising on billboards.

FISCAL IMPLICATIONS:

The House Fiscal Agency notes that the bill would result in reduced state fee revenues, as some current advertisers would be prohibited from using signs (for which they pay a \$5 permit fee). In addition, the bill would likely increase the Department of Transportation's enforcement costs. (9-16-98)

ARGUMENTS:

For:

According to the American Medical Association, 90 percent of new smokers are children and teens who replace other cigarette smokers who died prematurely from tobacco-related diseases. Furthermore, cigarette smoking among underage students reportedly is at a 17-year high. Cigarette advertising appears to increase young people's risk of smoking, according to a 1994 U.S. Surgeon General's report. In addition, a 1991 study published in the *Journal of the American Medical Association* noted that "Old Joe", the cartoon camel used to advertise Camel cigarettes, is as familiar to six-year-olds as the silhouette of Mickey Mouse. The study also found that 91 percent of six-year-old children not only recognized the camel image, but were able to link it with cigarettes. The tobacco industry reportedly doubled its advertising and promotion budget from \$3.3 billion in 1988 to \$6 billion in 1993, with an increasing amount of the marketing dollars paying for promotional activities that appeal to young people. Clearly, the tobacco industry designs billboards and other promotional activities to encourage young people to smoke. Consequently, the state has a compelling interest in protecting its youths from the harmful health risks associated with cigarettes and other tobacco products. Many Michigan residents apparently agree that tobacco billboards should be banned in the state as a means of limiting the exposure of young people to the lure of cigarette smoking. A recent poll by EPIC/MRA indicates that 64 percent of the state's residents support a ban on cigarette billboard advertising, while 31 percent oppose a ban, according to an article in the *Lansing State Journal* (5-8-97).

Response:

In their zeal to reduce youth smoking and to improve health, proponents of tobacco industry regulation have predicted policy results that often are bloated by over-

promise, based on statistics and figures that are unproven. For example, after the \$368.5 billion settlement proposal between tobacco producers and state officials was reached last year, the American Cancer Society said a 60 percent decrease in youth smoking in coming years could reduce early death from diseases like lung cancer by a million. As reported in the *New York Times*, that figure appears to have come from policy projections and targets; it is an unfounded claim cloaked in the reason of science.

Scientists at the American Cancer Society have acknowledged that their claim was based on an "if-then" projection, rather than an analysis of whether the proposal's programs would accomplish that goal. Proponents of the tobacco settlement plan are not alone in their cavalier and imprecise use of numbers to support claims. Opponents of the settlement plan that seems now to be on hold also have used figures in opportunistic ways. For example, those in the tobacco industry seem happy to play both sides of the statistical fence. Last year, they estimated that the price increase in the June plan (62 cents per pack over a decade, versus \$1.10 or more now being considered by Congress) would cause sales to drop by nearly 43 percent among all smokers over a decade. But now that Congress is considering raising prices by twice that much, producers have turned around and said that higher prices would undermine, rather than help, efforts to reduce youth smoking. Now they say that high cigarette prices will encourage those in the black market to target teenagers.

Everyone in the tobacco debate agrees that reducing youth smoking would have major benefits because nearly all long-term smokers start as teenagers. But few studies have analyzed how steps like price increases and advertising bans affect youth smoking. And the few studies that do exist have often produced contradictory results. The fact is, experts are at odds over whether advertising bans and sales restrictions would produce the projected drop in youth smoking. In California, for example, youth smoking began to decline in the early 1990s, soon after the state began one of the most aggressive anti-smoking campaigns in the country. But it has begun to rise again in recent years. Again, as reported in the *New York Times*, experts do agree that unless significant changes are made in areas like price and advertising, youth smoking rates will not decline. But they are unwilling to make wild predictions. Instead, they say that the passage of tobacco legislation would guarantee only one thing: the start of a vast social experiment whose outcome is by no means clear. What is clear is that it

is extremely unwise for policy makers and politicians to claim that a number intended to be a future goal is already a tested and proven outcome. To conflate the two distinct ideas is an irresponsible sleight of hand; policy magic.

Against:

Content-based speech regulation is prohibited under the First Amendment of the United States Constitution. Under the bill, billboards advertising tobacco products would be banned. Since tobacco is a legal product it is unreasonable to prohibit the tobacco industry from advertising it. Banning billboards that carry these messages would set a dangerous precedent of content-based censorship. If government is allowed to prohibit billboards based on the content of their messages, it could lead to a ban of billboards that advertise other unpopular yet lawful products, behavior, or ideas. In addition, the U.S. Supreme Court recently established constitutional protections for truthful commercial speech on billboards by invalidating a Rhode Island statute that would have banned liquor price advertising. To survive a constitutional challenge, a limitation on commercial speech should be narrowly drawn and not more extensive than necessary. This bill, however, would ban *all* outdoor advertising of tobacco products throughout the entire state.

Response:

Commercial speech about tobacco can be and already is regulated. For example, tobacco cannot be advertised on television and radio. While the U.S. Supreme Court ruling on the Rhode Island statute has been cited by the billboard industry as establishing constitutional protections, the ruling is not as broad as the billboard industry claims. In fact, the ruling dealt with the governmental restrictions on the dissemination of truthful information about the price of a lawful product.

On the other hand, the court has upheld other laws that restrict or ban outdoor advertising of liquor or tobacco products. The court recently declined to hear a First Amendment challenge to a 1994 Baltimore ordinance that bans tobacco and alcohol billboards in order to promote the welfare and temperance of minors. The ruling sends a clear message that the court will permit commercial speech restrictions that are aimed at reducing tobacco use among children. Furthermore, although tobacco itself may be a legal product, Michigan's Youth Tobacco Act makes it a crime to sell or give tobacco in any form to a person under 18.

For:

If Michigan were to ban tobacco billboards, it would join the federal government and a number of other states that also are seeking to do the same. In June 1997, the nation's largest tobacco companies agreed to submit to strict federal control over the way they make and market cigarettes and to pay \$368.5 billion over the next 25 years to compensate states and individuals for tobacco-related health costs. Although that settlement plan recently collapsed when the tobacco industry withdrew from negotiating the U.S. Senate's proposed \$516 billion tobacco bill during April 1998, the tentative settlement banned billboard and other advertising of tobacco products, the use of human and cartoon characters in ads, Internet advertising, the placement of these products in movies and television, brand-name sponsorship of sporting events, and brand-name promotional merchandise. President Bill Clinton and members of Congress have continued to promise tobacco legislation that will reduce youth smoking.

Restrictions on advertising will undoubtedly figure prominently in any future statutory regulatory scheme, because ad restrictions already are provided by case law. For example, the largest tobacco companies recently settled a lawsuit with the State of Florida and agreed to pay \$11.3 billion over the next 25 years and to take steps aimed at reducing underage smoking. Under the agreement, the tobacco industry must reduce advertising and promotion of tobacco products in return for protection from some lawsuits. In addition, tobacco companies will have to remove their billboard ads within 1,000 feet of schools and replace those ads with anti-tobacco advertising funded by the settlement. Other billboards promoting tobacco products will be removed over the next few months. In another recent settlement of a 1991 lawsuit in California, filed by an individual citizen opposing Camel ads and joined by 13 city and county attorneys, the Joe Camel image will be banished from advertising in that state. Under that settlement, R.J. Reynolds Tobacco Company, which produces Camel cigarettes, will have to pull from the state all Joe Camel advertisements on billboards, posters, and magazines by the end of the year.

POSITIONS:

The American Cancer Society supports the bill. (9-16-98)

The Tobacco Free Michigan Action Coalition supports the bill. (9-16-98)

The Michigan Chamber of Commerce strongly opposes the bill. (9-16-98)

The American Civil Liberties Union opposes the bill. (9-16-98)

Analyst: J. Hunault

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.