



# COMPTROLLER OF PUBLIC ACCOUNTS

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AUSTIN, TX 78711-3528

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OPINION COMMITTEE

RQ-0533-JC

April 10, 2002

The Honorable John Cornyn  
Attorney General, State of Texas  
Post Office Box 12548  
Austin, Texas 78711-2548

FILE # ML-42504-02  
I.D. # 42504

Dear General Cornyn:

We request your formal opinion on the ability of the Comptroller of Public Accounts to enforce the provisions of Texas Government Code, Section 161.122, which prohibits a sign that contains an advertisement for cigarettes or tobacco products from being located closer than one thousand feet from a church or school. Under Section 161.121(4) of the Code, the term "sign" is defined as an outdoor medium - including a structure, display, light device, figure, painting, drawing, message, plaque, poster, or billboard - that is used to advertise or inform, and is visible from the main-traveled way of a street or highway.

Last year, the United States Supreme Court rendered a decision in *Lorillard v. Reilly*, 533 U.S. 525 (2001). In *Lorillard*, the Supreme Court struck down Massachusetts' restrictions on cigarette and tobacco advertising. Those restrictions had held that a tobacco product manufacturer's, distributor's, or retailer's placement of outdoor advertising at a location that was within a one thousand-foot radius of any public playground, elementary school, or secondary school was an unfair or deceptive act. Mass. Regs. Code tit. 940 § 21.04(5)(a) (2000).

With regard to the Massachusetts regulations that restricted cigarette advertising, the Supreme Court found that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempted the state guidelines. The FCLAA prohibits any requirement or prohibition that is based on smoking and health and is imposed under state law with respect to the advertising or promotion of cigarettes. While some similarity exists between the administrative regulations that were at issue in *Lorillard* and the provisions of Section 161.122 of the Texas Government Code, the Massachusetts regulations appear to be broader in nature. For example, the Massachusetts regulations also prohibit oral advertising and advertising that is located within an establishment but is visible from the outside, which the Texas statute does not prohibit.

Because the FCLAA only applies to cigarette advertising, the Court considered the constitutionality of the Massachusetts restrictions on the advertising of cigars and tobacco products by application of the four-part test for analysis of regulations of commercial speech that

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the Court developed in *Central Hudson Gas & Elec. Corp. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). The Court ruled that Massachusetts failed to show that the regulation was no more extensive than necessary to serve the asserted governmental interest.

Our question to you concerns the applicability of the *Lorillard* decision to the current Texas statutory provisions that restrict the advertising of cigarettes and tobacco products. Specifically, does the Supreme Court's ruling in *Lorillard* prohibit the Comptroller's Office from enforcement - to any extent - of the restrictions on the advertising of cigarettes and tobacco products that are provided under Texas Government Code, Section 161.122?

We thank you in advance for your consideration of this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Munisteri". The signature is stylized and cursive, with a large initial "R" and "M".

Richard A. Munisteri  
General Counsel