



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

# Memorandum

Subject: Request for Opinion on the Meaning of the  
term "Outdoor Advertising Sign"

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In Reply HEPR-1

From: Robert J. Black  
Senior Attorney Advisor  
HCC-30

To: Virgil Pridemore  
Director of Realty Services  
Federal Highway Administration

The Georgia Department of Transportation asked in a July 21, 2016 letter the Federal Highway Administration (FHWA) "clarify its intention" as to whether signs placed inside a building, but aimed towards passing motorists, were "outdoor advertising" signs subject to control by the State under the Highway Beautification Act (HBA). The FHWA believes that the intent of the HBA and the implementing FHWA regulations is clear: such signs are outdoor advertising devices subject to the HBA.

Under the HBA, codified at 23 U.S.C §131, the States are required to provide "effective control ... of outdoor advertising signs, displays, and devices" along certain specified highways. The phrase "outdoor advertising signs, displays, and devices" is used in various sections of the HBA, but not in all. In many sections of the HBA, however, the adjective "outdoor" does not appear before "advertising signs, displays, and devices".<sup>1</sup> The phrase used is simply "advertising signs, displays, and devices." The clear implication is that Congress did not attach special significance to whether the advertising was placed inside a building or outside but intended the HBA to apply to a broad variety of advertising formats that motorists were confronted by.

The HBA itself does not define "outdoor advertising signs, displays, and devices." In its implementing regulations for the HBA, FHWA defines "sign" as an "outdoor advertising sign, light, display, device, figure, painting, drawing, message, placard, poster, billboard, or other thing which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any place on the main-traveled way of the Interstate or Primary Systems, whether the same be permanent or portable installation" (23 CFR 750.703(i)). The adjective "outdoor" modifies "outdoor advertising sign" but interpreting it to mean that every form of advertising subsequently listed must be physically outside constitutes a rather tortured reading of the phrase. In keeping with the intent of the HBA, the definition of sign

<sup>1</sup> See sections 131(c),(d),(e),(f),(j),(k),(l),(m),(n),(o),(p),(r), and (s), where the phrase "signs, displays, and devices" is used without the adjective "outdoor" inserted before it.

in section 750.703(i) is very broad. It encompasses any "thing which is designed, intended or used to advertise or inform, any part of the advertising or informative contents of which is visible" to the motorists on a controlled highway. The FHWA's definition is tied to the intended purpose of the sign, display or device. If an advertising message is directed to the motorists on a controlled highway, whatever tangible form the message takes (e.g., a sign, a banner, or an unconventional display), it constitutes outdoor advertising as envisioned by the HBA. The HBA itself was amended in 1974 to encompass all outdoor advertising signs, displays or devices visible to motorists and "erected with the purpose of their message being read from such main traveled way" outside urban areas. Under the FHWA definition of "sign", a message in any form that is intended for motorists on a controlled route is an outdoor advertising sign for purposes of control of outdoor advertising.

Turning to the situation described in Georgia's letter, the signs appear to be intended solely for advertising off-premise goods and services to passing motorists. They do not appear to be aimed at shoppers in the store or pedestrian passers-by (although this latter point is not clear from GDOT's letter). Presumably the signs do not advertise the goods and services offered on the property for sale; if they did, the signs would be on-premise advertising and therefore exempt from HBA requirements under 23 CFR 750.709. The fact that they are behind glass windows does not exempt them from the HBA. If this were not the case, anyone could put up a sign behind glass in a minimal shed along a busy highway and claim that it was not subject to the HBA because it was "indoors" and therefore not an "outdoor advertising sign."

In the last twenty-five years the Office of Chief Counsel is aware of only one other instance where a sign in a store window aimed at traffic in the nearby city street was claimed to be exempt from the HBA. The FHWA advised the State that it was a sign subject to the HBA; the business failed after a short time, and the sign was removed. A search of State court decisions on State outdoor advertising laws does not disclose any case involving the HBA and "indoor signs." There is, however, a State case that involved illuminated displays behind front windows within a bar that were cited for violating a sign ordinance in New Jersey. The New Jersey Supreme Court in Township of Pennsauken v. Schad, 160 N.J. 156, 733 A. 2d 1159 (1999), held that a township sign ordinance controlled interior store displays which were placed behind front windows. The Court of Appeals had ruled that there was a loophole in the ordinance which exempted indoor signs. The Supreme Court, however, said that if the key term "outside" in the controlling ordinance were limited only "to signs or displays that are placed or located physically outside a building... a proprietor [could] circumvent the ordinance's restrictions and intended effect by placing an otherwise noncomplying sign behind a window inside the premises, while still communicating to passersby... An interpretation of the term 'outside' that focuses on the external visibility better harmonizes the language with the drafters' intent" (733 A. 2d 1168-9).

Similarly, the FHWA believes that not including signs such as the Georgia store window signs within the purview of the HBA would not be what Congress intended when it passed the HBA in 1965. The FHWA regulations implementing the HBA define "sign" very broadly so that any advertising scheme addressed towards the motorists on the highways subject to the HBA would be covered. Therefore, FHWA interprets its HBA regulations as applying to signs placed inside a building but oriented towards motorists.