



Restricting Tobacco Advertising

The Tobacco Control Legal Consortium has created a series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures.¹ For more details about these policy considerations, please contact the Consortium.

Ways to Restrict Tobacco Advertising

The 2009 Family Smoking Prevention and Tobacco Control Act (“Tobacco Control Act”) expands the ability of state and local governments to regulate tobacco product advertising.²

Because of this broadened authority, many communities are considering ways to restrict tobacco advertising. Often their goals, driven by public health concerns, are to prevent and reduce tobacco use – particularly by the young. Governments approach restricting tobacco advertising in three ways: (1) by restricting all advertising without regard to its content, which is called a “content-neutral restriction” and affects all types of advertising, including tobacco advertisements; (2) by restricting the time, place or manner of tobacco advertisements; or (3) by restricting the content, messages or imagery within some tobacco advertisements. The first option is the least controversial means of regulating advertising, and is one pursued by many state and local governments.³ The second and third options, which place restrictions only on tobacco advertisements, face more complex legal hurdles. This publication will provide insights for governments interested in learning more about the second option – restrictions on the time, place or manner – and will focus on the benefits, elements and challenges of such a policy.



Policy Benefits

Most tobacco advertising is prohibited in television, radio, billboard, and transit ads pursuant to Federal Trade Commission regulations and provisions of the Master Settlement Agreement. However, tobacco advertisements are still prevalent in many areas, including certain outdoor locations such as store windows, store parking lots, and similar spaces. Tobacco advertisements are particularly concentrated inside retail stores, and are often targeted at children and adolescents, a particularly susceptible audience. Studies have shown that even brief exposure to

tobacco advertising can influence the attitudes and perceptions of youth about smoking and the use of tobacco products.⁴ By placing restrictions on tobacco advertising, communities can limit the amount of tobacco product advertising to which minors are exposed, which may decrease youth initiation and ongoing use of these products.

Policy Elements

A law that seeks to limit tobacco advertisements should be drafted carefully to strengthen the case for its adoption and limit legal exposure. Below are a few policy elements often found in restrictive advertising policies.

Findings. Effective advertising policies generally include brief statements of fact or statistics that outline the issue being addressed, support the need for the policy, help clarify the policy goal, and are designed to help the law withstand legal challenges. Findings might include the following:

- **Evidence.** Provide well-supported evidence about how prevalent tobacco advertising is, the significant dollars spent on it, and the direct connection between youth exposure to certain quantities of tobacco ads with youth initiation.
- **Local Studies.** Evidence based on your actual community, locality or even state can be more persuasive than a broader national or international evidence base. For example, consider undertaking a study of the number of tobacco signs youth are exposed to in a community, and a survey of the impact such advertising has on youth.
- **Rationale for Approach Taken:**
 - **Narrowly Tailored.** Restrict the least amount of speech possible. For example, consider restricting tobacco advertisements only within facilities that allow entry to minors. Explain how the law will accomplish the goal of reducing youth initiation.
 - **Least Restrictive Means.** Consider including evidence, such as study results, showing how other regulatory and statutory efforts were unsuccessful in accomplishing the goal of reducing youth initiation.

Time, Place and Manner Restrictions. Under the Federal Cigarette Labeling and Advertising Act (“FCLAA”), state or local governments can impose “specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.”⁵ Because this authority is relatively new and courts have not yet had the opportunity to interpret it, it is unclear precisely what these terms mean, but some concepts and viable options might include:

- **Time:** The time of day or days of the week that certain activity can take place. Example: allow tobacco advertisements in retail stores to be viewable only during hours when children are in school or under night-time curfews.
- **Place:** Where advertisements may be placed. Example: prohibiting ads within 10 feet from the point-of-sale.
- **Manner:** What types of tobacco marketing may be used. Example: prohibiting sandwich board advertisements.

- **But not content:** Although a state, county, or city may impose some restrictions on where, when, or how ads are placed, it cannot restrict the specific words or imagery in the ads.

Tiered Approach. The law could be structured so that if one aspect is found unconstitutional, it could be severed, and the other provisions of the law might survive. For example, a state or local government might want to consider a spectrum of advertising restrictions, such as:

- Restrict all tobacco ads within 100 feet of a retail establishment.
- Restrict all inward-facing tobacco ads on retail store windows.
- Restrict all tobacco ads within 10 feet of a cashier station.
- Restrict all tobacco ads within 20 feet of products youth generally purchase.
- Restrict the size, type, or number of tobacco ads.
 - **Size:** Restrict the size of all tobacco ads that appear outside businesses, on windows, or other areas. Many localities choose to limit advertisements to a certain percentage of the total window area or frontage of the business.
 - **Type:** Limit the types of tobacco advertisements that appear. Some cities have determined that electronic, scrolling or otherwise “dynamic” display advertisements detract from the aesthetic quality of the community, and prohibit them if they meet certain specifications. Most localities specify the types of materials that can be used; some limit colors and typefaces, while others specify the minimum quality of construction required.
 - **Number:** Limit the number of outdoor tobacco advertisements that each business can post. Communities often impose this type of restriction in conjunction with size limitations, so, for instance, businesses can choose between a smaller number of large advertisements or a greater number of small advertisements.

Policy Challenges

Prior to June 2009, FCLAA preempted state or local government efforts to regulate *cigarette* advertising.⁶ The Tobacco Control Act amended FCLAA so that it now authorizes local governments to regulate the time, place and manner, but not the content, of cigarette advertisements.⁷ This expanded authority presents new opportunities for state and local governments to limit tobacco advertisements, but it does not come without restrictions. Any state or local regulations of cigarette advertising must still comply with limitations remaining under FCLAA (for instance, states and localities cannot regulate the packaging of cigarettes), and must be consistent with the First Amendment.

Communities need to be aware of potential legal challenges by those who argue that tobacco advertising restrictions violate the First Amendment and state constitutional law, as well as FCLAA.⁸ Attempts to regulate tobacco advertisements should always be approached with caution and involve discussions with legal counsel.

Policy Hurdle #1: Federal Cigarette Labeling and Advertising Act. Any law that places restrictions on the content of cigarette advertising would almost surely face challenges arguing that such a law is preempted by FCLAA. Note, however, that because FCLAA only regulates

the promotion and advertising of cigarettes, laws that regulate the promotion and advertising of other tobacco products (“OTPs”) should be safer from FCLAA challenges.

Policy Hurdle #2: The First Amendment. To determine whether a law violates the First Amendment, courts look to previous Supreme Court decisions for guidance. The Supreme Court has developed a series of tests to determine whether the First Amendment’s speech protections are being violated. Different tests are applied depending on what type of speech is being regulated. Tobacco advertising is a form of commercial speech, which the courts afford less protection than other kinds of speech, such as individual political expression. The First Amendment’s Free Speech tests usually consist of several components—often called “prongs.” The law must meet each prong’s requirement to be held constitutional. If the law fails to meet any one of these prongs, it violates the First Amendment and is unconstitutional.

Policy Hurdle #3: State Law. Some local regulations that restrict certain tobacco product advertising may be preempted, or restricted, by state law. In addition, it is possible that a state court might interpret a state constitution’s free speech clause more broadly than the Supreme Court has construed the First Amendment.

The following table contains drafting tips on how to anticipate legal challenges arising from restricted tobacco advertising regulations.⁹

| Type of Speech Regulated | Test Applied by Courts | Drafting Tips |
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| <p>Restrictions on Speech</p> <p>Example: Prohibit all in-store tobacco ads</p> <p>Burden: High hurdle</p> | <p><i>Central Hudson Gas v. Public Services Commission</i></p> <p>Four Prongs:</p> <ol style="list-style-type: none"> 1. Is the restricted speech false, deceptive, or promoting illegal activities? 2. Is the law justified by a substantial governmental interest? 3. Does the law directly and materially advance the governmental interest? 4. Is there a reasonable fit between the goal and the means chosen to accomplish the goal? <p>OR</p> <ol style="list-style-type: none"> 4. Does the law restrict the least possible amount of speech necessary to achieve its goal? | <ul style="list-style-type: none"> • Fully document extent of the problem the law was drafted to solve, and include a careful, thorough analysis of how the law would impact commercial speech in the law’s findings. • Clearly state the government’s goal in enacting the law, because doing so helps to show the law satisfies prong two and prong three. • The law must clearly advance the objective the government enacted the law to achieve. • The findings should also indicate why the law’s approach must be taken and why other approaches to solving the problem that have a lesser impact on commercial speech would not work. • Be sure the new law restricts the least amount of speech as possible while still achieving the law’s goal. |

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| <p>Compelled Speech (factual)</p> <p>Example: Law requiring point-of-purchase ad stating, “Smoking causes lung cancer”</p> <p>Burden: Moderate hurdle</p> | <p><i>Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio</i></p> <p>Three prongs:</p> <ol style="list-style-type: none"> 1. Is the statement strictly factual? 2. Is the factual disclosure requirement not controversial (accurate)? 3. Is the factual disclosure reasonably related to a legitimate governmental interest (particularly if the interest is in preventing consumer deception)? | <ul style="list-style-type: none"> • Any required disclosure should contain only indisputable facts. • Findings must show that those facts are backed up by strong research. • Many factual findings should be included to support that the intent of the warning or disclosure is to protect citizens’ health. • Findings should also show that consumers are likely to be deceived or otherwise harmed without receiving the factual warning or disclosure. |
| <p>Compelled Speech (opinion)</p> <p>Example: Law requiring counter ad at point-of-purchase stating “Smoking isn’t cool”</p> <p>Burden: High or very high hurdle depending on test</p> | <p><i>Central Hudson Gas v. Public Services Commission</i> (See prongs above)</p> <p>OR:</p> <p>Strict Scrutiny analysis</p> <ol style="list-style-type: none"> 1. Is the requirement justified by a compelling governmental interest? 2. Is the requirement the least restrictive means for achieving that interest? | <p>For either test:</p> <ul style="list-style-type: none"> • The findings must clearly identify the government’s goal in enacting the law and explain in detail why the government has such a strong interest in that goal. • If possible, studies documenting the problem should be included in the findings. • The findings must also include a careful, thorough analysis of how the law would impact speech and should explore other, less restrictive means for achieving the goals the government seeks and explain why those would not work or, if they have been tried before, explain why they have not worked in the past. • The law must be designed to require the least amount of speech possible, while still achieving its goal. |

Other Helpful Resources

The Consortium’s parent organization, the [Public Health Law Center](#), features on its website resources on several topics related to the regulation of tobacco marketing and advertising, such as a series on the regulation of [tobacco advertising and “commercial speech” issues](#), as well as resources on [content-neutral advertising](#), [placement of tobacco products](#), and [tobacco advertising and Commerce Clause](#) issues. The Consortium’s federal regulation of tobacco [web page](#) features

a series of publications that explain how the federal legislation impacts the tobacco control authority of state and local governments, including the regulation of tobacco advertising.

Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at (651) 290-7509 or publichealthlaw@wmitchell.edu with any questions about the information included in this guide or to discuss local concerns you may have about implementing policies restricting tobacco advertising.

¹ The information contained in this document is not intended to constitute or replace legal advice.

² Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (codified, in relevant part, at 15 U.S.C.A. §§ 1333-34 and 21 U.S.C.A. § 301 *et seq.* (2010)).

³ For a discussion and examples of content-neutral policies restricting retail advertising, see the Tobacco Control Legal Consortium’s publication, “[Content-Neutral Advertising Laws](#).” Properly drafted content-neutral restrictions can avoid complicated legal issues, such as those associated with commercial speech rights guaranteed by the First Amendment of the U.S. Constitution. *See, e.g.,* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 565-66, 569 (2001) (where the Court assumed, but did not rule, that the tobacco industry has “a cognizable speech interest in a particular means of displaying their products”). Several Tobacco Control Legal Consortium publications on the [Public Health Law Center](#)’s website explain First Amendment issues related to tobacco advertising.

⁴ Douglas A. Luke et al., *Family Smoking Prevention and Tobacco Control Act: Banning Outdoor Tobacco Advertising Near Schools and Playgrounds*, 40 AM. J. PREV. MED. 295 (2011).

⁵ 15 U.S.C. § 1334(c).

⁶ Note that FCLAA has never explicitly placed any restrictions on the regulation of non-cigarette tobacco products (“OTPs”).

⁷ 15 U.S.C.A. §§ 1333-34 and 21 U.S.C.A. § 301 (2010)).

⁸ 15 U.S.C.A. § 1331 (2010). This material is adapted from Elisa P. Laird-Metke, Tobacco Control Legal Consortium, *Regulating Tobacco Marketing: A “Commercial Speech” Factsheet for State and Local Governments* (2010), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-speech-2010.pdf>.

⁹ The information contained in this table does not address government speech or expressive conduct. For more information on these topics, please see the Consortium’s [guidelines](#), [factsheet](#) and [flowchart](#) on regulating tobacco marketing and commercial speech issues.

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