Regulating Tobacco Marketing: "Commercial Speech" Guidelines for State and Local Governments

Tobacco Control Legal Consortium





Law. Health. Justice.

Suggested citation:
Elisa P. Laird-Metke, Tobacco Control Legal Consortium, *Regulating Tobacco Marketing: "Commercial Speech" Guidelines for State and Local Governments* (2010)

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This publication was made possible by the financial support of the American Cancer Society and the Robert Wood Johnson Foundation.

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On June 22, 2009, President Barack Obama signed into law the Family Smoking Prevention and Tobacco Control Act, giving the U.S. Food and Drug Administration (FDA) comprehensive authority to regulate the manufacturing, marketing, and sale of tobacco products. The new law represents the most sweeping action taken to date to reduce what remains the leading preventable cause of death in the United States.

To help you understand the potential ways in which state and local regulation of tobacco product marketing and promotion might be limited by the provisions of the Federal Cigarette Labeling and Advertising Act or the First Amendment to the U.S. Constitution, the Tobacco Control Legal Consortium, a collaborative network of legal centers, has prepared this summary of key considerations and drafting tips.

Introduction

The Family Smoking Prevention and Tobacco Control Act[1] (the "2009 FDA law") created a sea change in the tobacco control world, greatly increasing state and local governments' ability to regulate the marketing of tobacco products. But it did not leave the gates wide open to pass *any* kind of tobacco marketing restriction: the Federal Cigarette Labeling and Advertising Act (FCLAA)[2] and the First Amendment still put some limits on the ability to pass state and local laws that restrict tobacco advertising and promotions.[3] Where such laws are enacted, tobacco manufacturers or retailers might file a lawsuit challenging the legality of any such law, using the FCLAA or First Amendment as a basis for the challenge.

The filing of a lawsuit, however, does not mean a new law will be overturned. There are ways to draft laws affecting tobacco marketing so that they will be in the best possible position to withstand a lawsuit. This publication explains how to avoid potential legal pitfalls by analyzing how courts would likely view the various types of restrictions that might be placed on tobacco marketing, offering guidelines for drafting new laws. It discusses two potential legal barriers to state or local laws regulating tobacco advertising: FCLAA preemption and the First Amendment. This publication will focus on five types of regulations:

- Restrictions on commercial speech, such as a ban on in-store tobacco ads;
- Compelled (required) statements of fact, such as a law requiring point-of-purchase advertisements stating "Smoking causes lung cancer";
- Compelled statements of opinion, such as a law requiring point-of-purchase advertisements stating "Smoking isn't cool";
- Compelled speech that indicates the speech is from the government, such as the Surgeon General's warning on tobacco packages; and
- Compelled or restricted *conduct*, such as banning self-service tobacco displays or requiring tobacco packages to be shelved so the tax stamp is visible.

By understanding how courts may treat a new law, state and local governments can draft the law accordingly to give it the best chance of surviving a lawsuit.

Evaluating the Legality of a Potential New Law

The First Hurdle: The FCLAA

Prior to the passage of the 2009 FDA law, the FCLAA prevented states and localities from enacting certain restrictions on cigarette advertising and labeling. The 2009 FDA law did not repeal any part of the FCLAA, but added language to it that alters the FCLAA's restraints on what laws state and local government might enact.

The FCLAA expressly states that it preempts any state or local law regulating cigarette labels.[4] This means that no state or local law may be passed regarding labels on cigarette packages, such as requiring the health warnings to be in a language other than English or requiring additional health warnings beyond those mandated by the federal government. This part of the FCLAA is unchanged by the 2009 FDA law and remains in effect. Because the FCLAA does not apply to tobacco products other than cigarettes, however, a law requiring warnings on non-cigarette tobacco products could be enacted by a state or locality without worrying about FCLAA preemption.

Additionally, the FCLAA prohibits any "[1] requirement or prohibition [2] based on smoking and health . . . [3] with respect to the advertising or promotion of any cigarettes."[5] In the landmark *Lorillard* case[6] discussed further below, the Supreme Court interpreted the FCLAA to completely prohibit state and local regulation of cigarette advertising, leaving such regulation entirely to the federal government. The language of these FCLAA provisions also remains unchanged by the 2009 FDA law.

The FCLAA limits on cigarette advertising restrictions were modified by the 2009 FDA law, however. The 2009 FDA law added a section to the FCLAA expressly allowing state or local governments to impose "specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes."[7] Because the FCLAA only regulates cigarette promotions, restrictions on ads or promotions for other kinds of tobacco, such as smokeless tobacco or cigars, are not affected by that law.

So what does regulating the "time, place, and manner, but not content" of cigarette advertisements mean?[8]

- *Time:* The time of day or days of the week that certain activity can take place. Example: prohibiting tobacco advertising a certain number of days before an event, or requiring tobacco advertisements to be covered during after-school hours on weekdays.
- *Place:* Where advertisements may be placed. Example: prohibiting storefront tobacco ads from taking up more than a certain percentage of the window area of a store, or prohibiting ads within ten feet of the point of sale.
- *Manner:* What types of tobacco marketing may be used. Example: banning freestanding tobacco displays, or banning "powerwalls" (large displays of tobacco packages grouped together).

The phrase "but not content" in the FCLAA means that although a state, county, or city may create some restrictions on where, when, or how ads are placed, it probably cannot prohibit tobacco ads from containing, for example, smiling people (or people at all), because that would be restricting the content of the ads.

In sum, if a proposed law regulates only the time, place, or manner of cigarette marketing but not the content of the advertisement, or if the law applies to the advertising and promotion of tobacco products other than cigarettes, then the FCLAA is probably not a barrier to having the law upheld. However, any law that changes existing warning labels on cigarette packages, requires additional warnings on cigarette packages, or places restrictions on the content of cigarette advertising would be preempted by the FCLAA and should not be pursued.

Even if the proposed law seems to avoid preemption by the FCLAA, it may still face another legal hurdle: the First Amendment to the U.S. Constitution.

The Second Hurdle: The First Amendment

Although the 2009 FDA law allows states and localities to place new restrictions on tobacco marketing, the First Amendment still protects speech by tobacco companies. So how can state and local governments determine whether the restrictions they want to enact against tobacco marketing are constitutional? This section will first offer background on the First Amendment, then review the possible types of restrictions on commercial expression, and finally discuss each type of restriction, examining how a court would probably analyze whether that type of law is constitutional under the First Amendment. Understanding how a court might analyze the law informs how the law can be drafted to increase the chances that it will survive First Amendment review if it is challenged in court.

Background

Even though the First Amendment to the U.S. Constitution protects free speech, the Constitution does not go into detail about what kinds of speech

should be protected, or to what extent. The details of free speech protections have been developed by the U.S. Supreme Court in a series of cases over the past century, and those protections have evolved over time. These cases have defined *speech* to include a broad range of spoken and written communication, and have extended First Amendment protection even to conduct that has a communicative component.[9]

When laws restricting free speech are challenged in court, how the law is treated depends on the kind of speech at issue. For example, courts have ruled that people have a fundamental right to speak on certain topics such as politics and religion; this "core" type of speech receives the highest level of First Amendment protection, and many laws restricting it have been found unconstitutional.[10] On the other hand, courts have found no constitutional protection for certain types of speech such as obscenity[11] or threats against another person,[12] and have upheld laws restricting this sort of speech.

Commercial Speech

Between these two poles of fully protected "core" speech (like political speech) and wholly unprotected speech (like obscenity), the Supreme Court has established over the past thirty years a level of "intermediate" protection that extends to what the Court calls *commercial speech.*[13] Commercial speech is essentially speech related to the economic interests of the speaker.[14] It can take the form of advertising, branding, logos, banners, and so on.[15] First Amendment protection also can extend to expressive conduct, such as how products are displayed in a store.[16] (Not all speech made by a business is commercial speech, however. For example, a business' statement supporting a particular political candidate is political speech, even though it is made by a business. Political speech would get full First Amendment protection.)

In general, courts will protect commercial speech but to a lesser degree than "core" speech, and they will allow more restrictions on commercial speech.[17] For example, courts have upheld restrictions that prevent kids from getting information about products that are illegal for kids to buy,[18] but the courts' willingness to allow restrictions on commercial speech has its limits. For instance, courts typically will not uphold laws restricting speech that prevent adults from receiving truthful information about products that are sold legally.[19] Speech used by tobacco companies to advertise their products has been deemed by the Supreme Court to be commercial speech.[20] Because it is unlikely that laws restricting tobacco marketing will include restrictions on non-commercial speech, this publication focuses on commercial speech.[21]

Types of speech that governments might regulate

There are several different ways in which states and localities might pass laws affecting commercial speech. A government might enact a law prohibiting businesses from advertising in certain locations; or a new law might require businesses to make certain statements, such as to warn consumers of potential harm resulting from their product. The law might not involve *speaking* at all—it might require or ban certain *conduct* which in itself impacts communication from that company. Determining which of the following categories a proposed law affecting commercial speech falls into is the first step to ensure that the law is drafted in the most defensible way.

1. *Restriction on commercial speech*: A government could create a law restricting the kinds of commercial speech businesses may express. If

a new local law said that businesses that sell rat poison cannot place rat poison ads in the newspaper because those ads might lead people to think that using rat poison carries no risk to humans, that law would be a *restriction on commercial speech*.

2. *Compelled factual speech*: If the government requires a company to make certain speech in the form of a statement of fact, it is referred to as *compelled factual speech*. For example, a new law might be passed requiring makers of rat poison to post a large warning on the package saying, "Rat poison is dangerous if consumed by humans."

3. *Compelled opinion speech*: Compelled speech could also be in the form of an opinion statement. If the government required a company to issue a warning such as "Rat poison is not a useful product," that would be *compelled opinion speech*.

4. *Government speech*: If the government requires a company to deliver a message that clearly comes from the government itself, the compelled speech is not considered commercial speech at all—it is referred to as *government speech*. An example would be a new law requiring the following warning on packages of rat poison: "The State Health Board has determined that rat poison is not a useful product." To be considered government speech, it must be clear that the warning is speech coming from the government—in this case the State Health Board—and not from the business.

5. *Expressive commercial conduct*: A final type of expression is not truly speech at all but instead is conduct that has the effect of conveying a message. This is referred to as *expressive conduct*. Conduct by a business is not usually considered expression protected by the First Amendment, but there are exceptions. A law may restrict expressive commercial conduct, or it might compel businesses to engage in expressive conduct. Sometimes a law is created to restrict or compel speech; other times the impact on speech is merely a side effect of the law. (Whether the impact on speech is the intent of the law or an incidental side effect determines how the court would evaluate the law, as discussed later.) An example of a restriction on expressive conduct with an incidental impact on speech might be a ban on self-service displays of rat poison (requiring rat poison to be kept behind the counter or in locked cases so that kids cannot get it). The incidental effect on speech would be that consumers would have a harder time viewing the product's label and logo, which constitutes a restriction on commercial speech, even though the goal of the law is to protect children.

In contrast to the above five types of restrictions on commercial speech, a restriction on the sale of products (*what* product can be sold or *when* it can be sold—such as a ban on selling rat poison, a particular kind of rat poison, or rat poison at certain times of day) is *not* a restriction on expressive speech or conduct. This is a separate category—*nonexpressive conduct*—and as long as it is not communicative, it is not protected by the First Amendment's free speech protections. For example, one court held that selling tobacco products in pharmacies is nonexpressive conduct without a communicative component and, as such, is not protected by the First Amendment.[22] Therefore, a ban on the sale of tobacco products in pharmacies was upheld.[23] However, if a court concludes that a restriction on sales is actually a restriction on some kind of commercial speech, it will apply First Amendment protections.

Determining whether a proposed law is constitutional

When the courts evaluate whether a law violates the First Amendment, they look to previous cases, especially Supreme Court cases, for guidance. Over the years, the U.S. Supreme Court has established tests to help determine whether the First Amendment's speech protections are being violated by federal, state, or local laws. (The tests are generally, but not always, named for the case in which they were first established.) Different tests are applied depending on what kind of speech the court determines is at issue. Sometimes it can be difficult to determine what kind of commercial speech is being restricted. If the law's legality is challenged, the court that will make that determination.

First Amendment free speech tests usually consist of several components, often called *prongs*—the law must pass the first prong before moving on to the second, and so on. If the law that is being challenged meets each prong's requirement, then it is "constitutional."

If the law fails to meet the requirement of any of the prongs, it is "unconstitutional" and therefore invalid.

This publication examines each of the types of speech listed above and explains what test courts would likely apply to each, explaining each of the prongs included in those tests. It will also offer some tips for drafting a law of each type, so that the law will be as strong as possible if it is ever challenged in court. Of course, there is no guarantee that the drafting tips will help to create a law that withstands judicial scrutiny, but following them should help make this outcome more likely.

1. Restriction on commercial speech

When a law that limits or bans commercial speech is challenged in court, the court usually applies the *Central Hudson* test (so named because the test was first developed in the case *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*).[24] The court considers the following questions:

First: Is the restricted speech false, deceptive, or concerning illegal activities?[25]

Before considering the rest of the prongs, the court must first establish that the challenged speech accurately informs the public about a legal activity. If it does not, there is no First Amendment issue because the First Amendment doesn't protect speech that is false or deceptive or that promotes illegal activities. This prong is nearly always met in cases concerning restrictions on tobacco marketing. Even if kids are not legally able to buy cigarettes, the Supreme Court has held that tobacco is a legal product for adults.[26]

Because cigarettes are legal for adults to purchase, advertisements for them would not be considered illegal merely because kids, along with adults, are able to view them. Additionally, advertisements that depict healthy people smoking would probably not be considered "deceptive" by the courts, in spite of evidence showing that smoking has negative effects on health.[27]

Second: Is the law justified by a substantial governmental interest?[28]

The court will examine why the law was passed to make sure that the problem the law is meant to address justifies restricting commercial speech. The problem the government seeks to tackle must be important. The government's interest in protecting its citizens' health is traditionally recognized as a substantial interest, so restrictions on tobacco marketing intended to curb smoking rates should satisfy this prong of the test.

Third: Does the law directly advance the governmental interest?[29]

The court will next look at how the law addresses the problem to make sure that the law directly and materially furthers the government's interest. Often, the government must show that it relied on factual evidence proving that the law would successfully address the problem.[30] Though there have been cases in which the Supreme Court has relied on "anecdotal evidence" rather than empirical studies, most recent cases have looked for reliable studies establishing that the law would work.[31]

Fourth: Is there a reasonable fit between the goal and the means chosen to accomplish the goal?
-OR- Does the law restrict the least possible amount of speech necessary to achieve its goal?[32]

This prong is the one most in flux—there are two ways a court might approach this prong. Courts may interpret this prong fairly leniently or quite stringently. In one decision, the Supreme Court used the "reasonable fit" standard.[33] The decision in this case has not been overturned, but after that decision was issued the Court has since applied a tougher standard—"least restrictive means"—in another case.[34] As a result, it is not entirely clear which of these two standards a court would apply. A state or community enacting a law should be prepared for

the toughest interpretation, under which a court will evaluate whether the law could have been drawn more narrowly to restrict less speech. The court will ask whether there is another way to achieve the same goal without impacting any speech or, if a restriction on speech is necessary, whether the law restricts the least possible amount of speech necessary to achieve its goal. This determination is specific to the context of the case and the community where the law was passed, so a court applying the more stringent standard would examine whether the government tried any other approach first that did not work or whether other approaches that do not impact speech might work instead. A court applying a more lenient interpretation would simply ask if there is a "reasonable fit" between the law's goals and the means used to achieve them, *not* whether the law restricts the smallest amount of speech possible.

If the court determines that the law restricts commercial speech and the restriction passes all four prongs of the *Central Hudson* test, the law will be declared constitutional under the First Amendment.[35]

Example: The Supreme Court's most relevant recent commercial speech decision—one that sets out the current understanding of the *Central Hudson* test and applies it to a restriction on tobacco marketing—is *Lorillard v. Reilly*.[36] Massachusetts regulations restricted several kinds of tobacco advertising. Among other things, the regulations required that tobacco billboards be located at least 1,000 feet away from schools and playgrounds and that tobacco ads posted in stores be higher than five feet off the ground to prevent kids from easily seeing them. In *Lorillard*, the Court used the four prongs of *Central Hudson* to analyze both of those provisions and ultimately struck down these provisions because they violated the First Amendment.

Prong 1: The Court held that tobacco is a legal product for adults, and the advertising for it was not false or deceptive.[37]

Prong 2: There was no dispute in the case that this prong was satisfied because the government's interest in protecting children's health is strong.[38]

Prong 3: The Court held that the restriction on billboards within 1,000 feet of schools and playgrounds passed this prong because there was satisfactory evidence that the law advanced the government's goal of reducing underage use of tobacco.[39] However, the Court held that the requirement that in-store advertising be posted more than five feet off the floor failed this prong, reasoning that because not all children are under five feet tall and those who are can look up, the restriction didn't advance the goals of preventing minors from using tobacco products and limiting youth exposure to tobacco advertising.[40]

Prong 4: The Court held that the restriction on tobacco billboards failed this prong because the ban, despite being designed to prevent tobacco billboard ads from reaching children, restricted too much speech intended to reach adults.[41] In the major metropolitan areas of the state, the combination of existing zoning restrictions with the additional tobacco-specific prohibitions meant that essentially all billboards in those areas would be banned.[42] The Court similarly held that requiring in-store advertising to be posted more than five feet off the floor also failed prong four because the restriction included advertising aimed at not only children but also adults.[43]

Drafting tips: A law restricting commercial speech should restrict the least amount of speech possible, while still achieving the law's goal. Even though the first and second prongs of the *Central Hudson* test are usually easily met, it is important to fully document the extent of the problem the law was drafted to solve. This documentation may be included in the law's *findings* (sometimes included as "whereas" clauses preceding the text of the law). The findings should also indicate why the law's approach must be taken and either why other approaches to solving the problem that have a lesser impact on commercial speech would not work or why they did not work in the past. This may help show that the prongs above are met.

2. *Compelled factual speech*

Compelled speech may be divided into two principal types: compelled factual disclosures and compelled opinion statements. Courts treat them differently from one another. This publication will discuss them in turn.

If a court is analyzing a challenged law that compels, or requires, the placement of warnings or disclosures (for instance, on packages or at the point of sale), the test applied by the court will be more lenient than a

law that restricts speech, because requiring warnings has less negative impact on advertisers' free speech rights than prohibiting advertisers from saying certain things.[44] When presented with a challenge to a law that compels warnings or disclosures, a court would apply the *Zauderer* test (from *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*): if the compelled speech is (1) strictly factual, and the factual disclosure requirement is (2) not controversial[45] and (3) reasonably related to a legitimate governmental interest (particularly if the interest is in preventing consumer deception[46]), a court would probably hold that the law does not violate the First Amendment.[47] The warning must contain "accurate, factual information," and there must be "a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose."[48] This test is relatively easy for a law to pass. If these prongs are met, the court will likely find that the law is constitutional.

Example: An example of a noncontroversial, factual disclosure statement would be a sign required at the point of sale stating, "Smoking causes lung cancer."

Drafting tips: Making sure that any required disclosure contains only indisputable facts, and including findings showing that those facts are backed up by strong research, will help a court conclude that the required warning or disclosure is constitutional under the First Amendment. Further, any law compelling speech should include many factual findings supporting the need for the warning or disclosure it is requiring, so that the court can see that the intent of the law was to protect citizens' health. Findings also should be included to show that consumers are likely to be deceived or otherwise harmed without receiving such a factual warning or disclosure, which should help demonstrate the government's legitimate interest in having the warning posted.

3. *Compelled opinion speech*

Sometimes a law requires speech that goes beyond a mere factual statement to the point where it constitutes an opinion statement. A compelled opinion statement could be a statement with which the speaker (usually a company or store) disagrees—for example, a required sign at the point of sale that reads "Smoking isn't cool." When presented with such a law, the courts choose one of two tests—the *Central Hudson* test described earlier or the "strict scrutiny" test. Which test the court would apply is uncertain because this issue has never come before the U.S. Supreme Court. The issue has come before the California Supreme Court, which suggested that the *Central Hudson* test should be applied.[49] However, federal courts and courts in other states are not obligated to follow decisions of the California Supreme Court, and the U.S. Supreme Court has been getting incrementally tougher on commercial speech restrictions, so there is a chance that if the issue works its way up to the Supreme Court, it could apply the tougher test known as "strict scrutiny."[50]

The strict scrutiny test is the hardest test for any law restricting speech to pass. If the court did apply strict scrutiny, the two prongs are:[51]

First: Is the requirement justified by a compelling government interest?

A compelling government interest is a more urgent government interest than the substantial government interest required by the *Central Hudson* test. The law must be about something that the government really *needs* to regulate.

Second: Is the requirement the *least* restrictive means for achieving that interest?

The strict scrutiny test is the hardest test to meet because this requirement goes well beyond merely having a "reasonable fit" between the ends and means (though it may sound very similar to the more stringent reading of the *Central Hudson* fourth prong standard). Essentially, if there is *any* other law that could achieve the desired result without impacting speech, or by restricting less speech, then the court will likely find the challenged law to be unconstitutional.

Example: There is no case in which strict scrutiny has been applied to a law compelling opinion speech. But because the strict scrutiny test has a notoriously high bar for laws to overcome—a former Supreme Court Justice called it "strict in theory, but fatal in fact"[52]—it is unlikely that a compelled opinion statement in a commercial context (such as "Smoking isn't cool") would survive a First Amendment challenge if the strict scrutiny test is applied. It is for this reason that tobacco control advocates hope that the *Central Hudson* test, with its less exacting standard, would be the test applied by the courts as it was in California.

Drafting tips: Regardless of which test may be applied by a court, the text and findings of a law compelling an opinion statement must be carefully drafted. The law must be designed to compel the least amount of speech possible, while still achieving its goal. 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 at all 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, explaining why those would not work or, if they have been tried before, why they have not worked in the past.

4. *Government Speech*

Government speech occurs when a law requires a private business to make a statement that is clearly identified so that people who read the statement understand that the government is doing the talking, not the company.[53] An example of government speech is the warning label requirement for cigarettes sold in the United States, such as "SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide." Although the government requires each manufacturer to print the warnings on cigarette packages, the public can tell that the warning is from the Surgeon General, not the tobacco companies.

It is worth noting that even opinion statements such as "Smoking isn't cool" can be compelled if the government—and not the retailer or manufacturer—is speaking.[54] This is quite different from the compelled speech discussed earlier, where the determination about whether a compelled statement is opinion or fact significantly impacted how the court would treat the compelled speech. Also, the law may require private businesses to pay for the mechanism used to convey the compelled message of the government.[55] For example, a law may not only require that signs containing the message "SURGEON GENERAL'S WARNING: Cigarettes Kill" be posted at the point of sale of every tobacco retailer, but the law can also require the tobacco retailer to bear the cost of printing the signs.

Example: Government speech typically does not trigger First Amendment scrutiny, which means there is no test that would be applied by the court.[56] If a required health warning at the point of sale (for example: "The Health Board has determined that smoking causes lung cancer") is challenged by a retailer arguing it is being forced to say something it does not want to say, the court would have to determine whether the members of the public who read the sign would attribute the speech to the tobacco retailer or manufacturer who has to post the sign or to the Health Board (the government).[57] If the government can show that people who read the warning attribute the speech to the government, First Amendment scrutiny should not apply. However, if the court finds the warning is perceived by its readers to be speech by the retailer or manufacturer, not the government, then it would apply one of the tests described above.[58] Whether the court would then apply the reasonable basis test for factual compelled speech, or the *Central Hudson* or the strict scrutiny tests for opinion speech, depends on the particular facts of the case. It is important to note that the government cannot create so much of its own speech that it "drowns out" all other speech. For example, the government could not require a health warning about tobacco use to occupy the entire storefront windows of tobacco retailer stores so that no other signs could be posted there.

Drafting tips: Because none of the First Amendment tests apply to government speech, drafting any warning about tobacco so that it is clear the speech is being made by the government is a very good way to set up a law to win a challenge in court. State or local governments that want to enact a law requiring certain speech—for example, requiring additional warnings about the dangers of tobacco at the point of sale—should also consider requiring the warnings

to state that they come from the government. As discussed above, it does not matter if the law requires the manufacturer or retailer to pay for the ad.[59] The warning must clearly come from the government, as the court will look to see whether the average person attributes the speech to the government or the private entity. For example, a warning that says "WARNING FROM THE COUNTY OF JEFFERSON: Smoking cigarettes is harmful to your lungs" is more likely to be viewed by a court as speech by the government than a warning that merely says "Smoking cigarettes is harmful to your lungs." In order to show that the speech is coming from the government, the findings should cite the studies and other information the government used to come to its conclusions about the health effects of using tobacco.

5. *Expressive conduct—compelled or restricted*

In addition to speech, the First Amendment protects some *conduct*, but only conduct that is inherently expressive.[60] For example, burning a draft card to express contempt for a war is conduct that is meant to be expressive.[61] If the purpose of the law is to regulate conduct rather than to directly restrict speech, but the law incidentally restricts speech as well, the First Amendment provides a certain amount of protection. In contrast, if the government enacted the law restricting or compelling conduct for the purpose of limiting expression, the restriction is fully protected by the First Amendment.

Perhaps the clearest and most relevant example of a law that incidentally restricts expressive conduct is the regulation challenged in the *Lorillard* case that banned self-service displays of cigarettes.[62] The regulation was issued for the purpose of preventing kids from shoplifting tobacco packages, but it had the incidental effect of making the logos on the packaging harder for customers to see.[63] The Supreme Court concluded that, although the self-service display ban incidentally impacted speech, it was constitutional because its purpose was to prevent shoplifting.

An example of a law that *compels* (rather than prohibits) certain commercial conduct might be a requirement that tobacco packages be displayed so that the tax stamp—usually located on the top or the bottom of the package—is visible without having to pick up each package, allowing a tax inspector to efficiently check whether the proper tax was paid. Though intended for the purpose of making the tax inspectors' jobs easier—which has nothing to do with expression—the law likely would have the incidental effect of making the side(s) of the package with the product's logo not visible to customers, which does affect expression.

Why the law was enacted is the key to determining whether the conduct is protected by the First Amendment. The court would first examine the context to see whether the inadvertently restricted or compelled activity contains enough elements of communication to be entitled to First Amendment protections.[64] Then the court would examine whether the law is directly regulating speech.[65] Where a court determines that (1) the law is not directly restricting speech but only incidentally regulating it, and (2) the conduct being restricted by the law is expressive, the *O'Brien* test (developed in *United States v. O'Brien*) likely would be applied regardless of whether the law restricts expressive conduct or compels it.[66] The *O'Brien* test is as follows:[67]

First: Does the government have the authority to pass the law?

Generally, laws aiming to protect public health will be considered a proper use of a government's powers.

Second: Does the restriction further a substantial government interest?

The law must use the best method available to promote the government interest, and that interest must be significant. Public health goals are usually sufficient to qualify as a substantial governmental interest, but the law must actually further the interest. Merely furthering the government's interest is a much lower threshold than the third prong of the *Central Hudson* test, which requires that the law "directly and materially" advance the government interest.[68] For that reason, the *O'Brien* test may be easier for a law to satisfy than the *Central Hudson* test.

Third: Is the restriction unrelated to the suppression of free expression?

The goal of the legislation must clearly be related to public health; the goal cannot be to suppress speech.

Fourth: Is the incidental restriction on First Amendment freedoms no broader than necessary to achieve the government's interest, even if there is a less speech-restrictive alternative?

Alternative channels must be left open for communicating information to potential customers. This prong is less restrictive than the prong of the strict scrutiny test requiring that the law be the *least* restrictive means possible to achieve the government's goal. Under the *O'Brien* test, the court would likely uphold the law—even if it concludes there is another approach that would have a lesser impact on speech—if the inadvertent effect on expression is not too broad.

Example: As described earlier, the Supreme Court applied the *O'Brien* test to a restriction on tobacco in *Lorillard*, analyzing the requirement that tobacco be kept behind the counter or in a locked case.[69] It concluded that the restriction on speech was constitutional under *O'Brien* because:

> **Prong 1:** There was governmental authority to pass the law;[70]
>
> **Prong 2:** There was a substantial government interest in keeping tobacco away from minors;[71]
>
> **Prong 3:** The restriction on expression—that the packages became harder for customers to see—was incidental to the goal of protecting children by putting packages behind the counter so that minors who were not permitted to purchase cigarettes were not able to shoplift them to begin a smoking habit;[72] and
>
> **Prong 4:** Ample alternate methods of communicating to customers were available, such as having empty sample packs available at the counter for customers to inspect.[73]

However, if the law had been passed with the intent to regulate expression, such as banning "powerwalls" so that people would not be exposed to tobacco logos and images, the court would have applied the *Central Hudson* test and maybe would have found the restriction unconstitutional.

Drafting tips: The first question that advocates and lawmakers should ask themselves when crafting a new law is: "Why are we creating this law?" For the easier *O'Brien* test to be applied, the law's purpose must not be to limit communication; any effect on speech must be a side effect of a conduct regulation. (On the other hand, if the law's goal is to restrict commercial speech, the harder-to-pass *Central Hudson* test would be applied.) Additionally, drafters should show that the law's goal is being met without a wider-than-necessary impact on expressive conduct. The findings must clearly state the reason for the law and include as much research as possible showing the need for the law. For example, if a law is drafted to require that tobacco be shelved so the tax stamps on the top must be visible to facilitate a tax inspection, the law should include findings that show that there is a real need for the government to do this inspection; findings might include a study showing there is an extensive tax evasion problem due to a "black market" for tobacco. Make sure the findings do not suggest that the law's real purpose is to suppress speech; do not, for example, include findings showing that adult ex-smokers who see cigarette logos on the fronts of the packages are more likely to begin a smoking habit again. Findings based on suppressing speech will undermine the argument that any impact on commercial speech is incidental and not the purpose of the law.

Conclusion

The legal barriers to regulating tobacco marketing—FCLAA preemption and the First Amendment—can be avoided by careful drafting. To avoid FCLAA preemption, a law should either regulate only tobacco products other than cigarettes, or, if regulating cigarette marketing, regulate only the time, place, or manner but not the content of the marketing. The FCLAA prevents any law from regulating cigarette labels, though other kinds of tobacco labels are not affected by the FCLAA.

When evaluating whether the law may violate the First Amendment, the critical determination for any law affecting tobacco marketing is this: What is the law regulating? Is the law regulating speech, expressive conduct, or non-expressive conduct? By determining what is being regulated and how, drafters can better understand which test the court would apply if the law is ever challenged, and can draft the law accordingly. Using the drafting tips outlined here and including strong findings supporting the legislation should help a law stand up to a lawsuit filed against it.

Accompanying this publication is a flowchart that may be useful to help analyze any proposed ordinance. It offers guidance to assess which of the tests would be applied if the new law was challenged in court, and it can be used to help draft the strongest ordinance possible.

Endnotes

1 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. (West 2010)). The Act has been challenged in court (Commonwealth Brands v. United States, No. 1:09-CV-117-M, 2010 WL 65013 (W.D.Ky. Jan. 5, 2010)), but this publication assumes that all provisions of the Act are being enforced.

2 15 U.S.C.A. § 1331 *et seq.* (West 2010).

3 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 565–66 (2001).

4 15 U.S.C.A. § 1334(a).

5 15 U.S.C.A. § 1334(b).

6 *Lorillard,* 533 U.S. 525.

7 15 U.S.C.A. § 1334(c).

8 It is important to remember that the long line of First Amendment cases defining and interpreting the "time, place, and manner" test for protected speech may not have any bearing on the FCLAA's "time, place, and manner" language, which is used to determine whether a law is preempted by the FCLAA.

9 *See* Texas v. Johnson, 491 U.S. 397, 414–16 (1989) (noting that First Amendment protection extends to conduct intended to express an idea).

10 *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

11 Roth v. United States, 354 U.S. 476 (1957).

12 Virginia v. Black, 538 U.S. 343 (2003).

13 Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980).

14 *Id.* at 561 (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience"); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (finding pamphlets entitled to commercial speech protection under the First Amendment partly because the manufacturer had an economic motivation for mailing them).

15 Commonwealth Brands v. United States, No. 1:09-CV-117-M, 2010 WL 65013 (W.D.Ky. Jan. 5, 2010) (tobacco marketing and advertising); Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999) (casino gambling advertisements broadcast on radio or television stations); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (advertisement of liquor prices); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (beer labels); Bd. of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469 (1989) (commercial solicitation on a college campus); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (billboards); Ry. Express Agency v. New York, 336 U.S. 106 (1949) (truck advertising).

16 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 569 (2001) (The Court assumed, but did not rule, that there was "a cognizable speech interest in a particular means of displaying their products"); *cf.* Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 412 (1993) (invalidating a law that prohibited news racks with certain magazines).

17 *Bolger,* 463 U.S. at 64–65 ("[T]he Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.").

18 United States v. Williams, 553 U.S. 285, ___, 128 S.Ct. 1830, 1842 (2008) ("Offers to provide or requests to obtain unlawful material, whether as part of a commercial exchange or not, are . . . undeserving of First Amendment protection.").

19 Reno v. Am. Civil Liberties Union, 521 U.S. 844, 875 (1997) ("[T]he governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.").

20 *Lorillard,* 533 U.S. 525.

21 However, if the speech is found by the court to be private, non-commercial speech that merits greater protections than commercial speech, a test commonly called *strict scrutiny* would be applied. Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 798 (1988); Boos v. Barry, 485 U.S. 312, 334 (1988). To pass the strict scrutiny test, the government would have to prove that the law advances a compelling state interest and also show that the means chosen to accomplish that interest restricts the least amount of speech possible while achieving that interest.

22 Philip Morris USA, Inc. v. San Francisco, No. 08-17649, 2009 WL 2873765 (9th Cir. Sept. 9, 2009).

23 *Id.*

24 447 U.S. 557 (1980).

25 *Id.* at 564.

26 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 528–29 (2001).

27 *See id.* at 578–79 (Thomas, J., concurring) (arguing that tobacco advertisements that mislead people into believing that tobacco is more pervasive than it actually is does not mislead people any more than any other advertisement trying to expand its market, which is a reasonable advertising tactic that does not constitute deception); see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 ("They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.").

28 *Central Hudson,* 447 U.S. at 564.

29 *Id.*

30 Edenfield v. Fane, 507 U.S. 761, 770–71 (1993) (noting that the government has the burden of justifying a restriction on commercial speech, which requires more than "mere speculation or conjecture").

31 *Lorillard,* 533 U.S. at 555.

32 *Central Hudson,* 447 U.S. at 565–66.

33 Bd. of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 480 (1989).

34 Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002).

35 There could still be other reasons why the law is unconstitutional, but this publication focuses just on FCLAA preemption and First Amendment analyses.

36 533 U.S. 525.

37 *Id.* at 578–79.

38 *Id.* at 570.

39 *Id.* at 561.

40 *Id.* at 566.

41 *Id.* at 562.

42 *Id.*

43 *Id.* at 567. Because the ban on posting in-store advertising above the height of five feet had already failed prong three, there was no need to analyze prong four—a law is unconstitutional if it fails any of the four prongs of the test. However, courts sometimes go on to analyze additional prongs, even if the law already failed an earlier prong, to help support and explain their decisions.

44 Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985) (quoting *In re R.M.J.,* 455 U.S. 191, 201 (1982)) ("[B]ecause disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception.'").

45 *Zauderer,* 471 U.S. at 651. In this context, "not controversial" means the truth of the statement is undisputed.

46 *Zauderer* was about a challenge to a law aimed at eliminating consumer deception. The First Circuit, in Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310 (1st Cir. 2005), and the Second Circuit, in Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001), have since held that *Zauderer* is not limited to laws trying to prevent deception, although the issue is not fully resolved. *Zauderer* did not indicate what, if any, other governmental interests besides deception might justify a law requiring a factual disclosure.

47 *Zauderer,* 471 U.S. at 651.

48 *Sorrell,* 272 F.3d at 114–15.

49 Gerawan Farming, Inc. v. Kawamura, 33 Cal.4th 1 (2004).

50 Strict scrutiny, the hardest test for a law restricting speech to pass, is the test usually applied to non-commercial, private speech, such as political or religious speech. Commercial speech is usually given less protection by the courts.

51 Sable Commc'n of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989).

52 Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment).

53 *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995) (holding that if symbolic private speech and symbolic government speech are in close physical proximity, the private message does not become government speech if the government has not "fostered or encouraged" any mistake in the source of the message); *see also* Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 841 (1995) (holding that a program designed to facilitate private speech through a school newspaper did not constitute government speech because the University did not "foster or encourage" any mistaken impression that the student newspaper speaks for the University, and the University took great pains to disassociate itself from the private speech).

54 *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 559, 561 (2005) (holding that it is government speech when the Secretary of Agriculture provides the overarching message); *see also* Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.").

55 *See Johanns* 544 U.S. at 562–63 (noting that the government can subsidize a private entity to produce a government message).

56 Pleasant Grove City v. Summum, ___ U.S. ___, 129 S.Ct. 1125, 1131 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

57 *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 99 (1980) ("The selection of material for publication . . . [and] similar speech interests are affected when listeners are likely to identify opinions expressed . . . as the views of the owner.").

58 *Id.* at 100.

59 *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562–63 (2005) (holding that individuals cannot bring actions against the government as a taxpayer because they lack standing when bringing a generalized grievance that is common to all taxpayers).

60 Rumsfeld v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47, 66 (2006).

61 United States v. O'Brien, 391 U.S. 367, 376 (1968).

62 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

63 *Id.* at 568–70.

64 Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 158 (3d Cir. 2002).

65 The *Central Hudson* test would be applied if the law was directly regulating speech. See above for details.

66 *O'Brien,* 391 U.S. 367. There has been no case regarding a law compelling expressive conduct, but because expressive conduct is involved, as opposed to speech, the *O'Brien test* would probably be applied.

67 *Id.* at 382.

68 Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 564 (1980).

69 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

70 *Id.* at 533.

71 *Id.* at 569.

72 *Id.* at 569–70.

73 *Id.*

About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.

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