

# Regulating Tobacco Marketing: A “Commercial Speech” Factsheet for State and Local Governments



Tobacco Control  
Legal Consortium



*Law. Health. Justice.*

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# Regulating Tobacco Marketing: A “Commercial Speech” Factsheet for State and Local Governments

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 give you a brief overview of 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 fact sheet discussing the key considerations and listing some drafting tips.

## What can state and local governments do to curb tobacco marketing?

While the Family Smoking Prevention and Tobacco Control Act of 2009<sup>1</sup> (the “FDA law”) makes it easier for state and local governments to restrict tobacco marketing, the law does not leave the gates wide open to pass *any* kind of tobacco marketing restriction. The Federal Cigarette Labeling and Advertising Act (FCLAA)<sup>2</sup> and the First Amendment to the U.S. Constitution still place limits on local and state communities’ ability to pass such laws.<sup>3</sup> Where new laws restricting the advertising and promotion of tobacco products are adopted, tobacco manufacturers or retailers might file a lawsuit challenging the legality of any such law, on the basis that the law violates the FCLAA or the First Amendment.

A lawsuit does not necessarily mean a new law will be overturned, however. There are ways to draft laws affecting tobacco marketing so that they will be in the best possible position to withstand a legal challenge. This fact sheet briefly describes how courts analyze different kinds of laws restricting marketing and offers guidelines for tailoring new laws to meet the requirements of both the FCLAA and the First Amendment. For more detailed information, see *Regulating Tobacco Marketing: “Commercial Speech” Guidelines for State and Local Governments*.

### The First Hurdle: The FCLAA

The FCLAA is the federal law requiring the Surgeon General’s warning on cigarette products and

advertising.<sup>4</sup> Before it was amended by the FDA law in 2009, the FCLAA also preempted state or local laws relating to cigarette advertising if such laws were based on health-related concerns.<sup>5</sup> As amended by the new FDA law, the FCLAA now allows 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.”<sup>6</sup> What do these terms mean?

- *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.
- *Place*: Where advertisements may be placed. Example: 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 “powerwalls” (large displays of tobacco packages grouped together).
- *But not content*: Although a state, county, or city may create some restrictions on where, when, or how ads are placed, it cannot tell tobacco companies what may be contained within the ads.

Note that the FCLAA only regulates cigarette promotions, so restrictions on ads or promotions

for other kinds of tobacco, such as smokeless tobacco or cigars, are not affected by the law.

If a proposed state or local law regulates only the time, place, or manner of cigarette promotions but not the content, or if the law applies to forms of tobacco other than cigarettes, then the FCLAA probably is not a barrier. However, any law that changes or requires additional warnings on cigarette packages, or places restrictions on what cigarette advertising may contain, would be preempted by the FCLAA and should not be pursued.

### The Second Hurdle: The First Amendment

Even if a proposed law seems safe from FCLAA preemption, it may still face another legal hurdle: the First Amendment. How can state and local governments determine whether the restrictions on tobacco promotions they want to pass are constitutional? This fact sheet assumes that the speech being restricted by a state or local government is *commercial speech*,<sup>7</sup> which is by definition related to the speaker's economic interests and can take the form of advertising, branding, logos, banners, and so on.<sup>8</sup>

#### How would a court determine whether the law is constitutional?

When courts evaluate whether a law violates the U.S. Constitution, they look to previous cases for guidance. Over the years the Supreme Court has established tests to help determine whether the First Amendment's speech protections are being violated; different tests are applied depending on what kind of speech the court determines is being regulated. The 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 being challenged meets each prong's requirement, then it is "constitutional." If the law fails to meet any prong's requirement, it is "unconstitutional" because it violates the First Amendment and is therefore invalid.

There are several ways in which state or local governments might pass laws affecting commercial speech. Some types of laws are difficult to defend, while others are more easily defended. Determining which of the following categories a proposed law falls into will inform which test should be applied to a law

and will help to ensure that the law is drafted to best withstand First Amendment scrutiny.

#### 1. Restrictions on commercial speech, such as a ban on in-store tobacco ads

When faced with a challenge to a law limiting or banning commercial speech, the court usually applies the *Central Hudson* test,<sup>9</sup> and asks the following questions:

**First:** Is the speech false, deceptive, or promoting illegal activities?

**Second:** Is the law justified by a substantial governmental interest?

**Third:** Does the law directly and materially advance the governmental interest?

**Fourth:** Is there a reasonable fit between the goal and the means chosen to accomplish the goal?<sup>10</sup>

The *Central Hudson* test is a difficult one for a law to pass. Courts primarily focus on the third and fourth prongs of this test. In most cases, the Supreme Court has found that the restriction did not meet one or both of those prongs.<sup>11</sup> Only governments with the resources to defend their laws in court should enact a law restricting commercial speech. Please see the chart on page 0 for some tips on how to craft a law to best meet the Central Hudson test.

#### 2. Compelled factual statements, such as a law requiring a point-of-purchase ad stating "Smoking causes lung cancer"

If a law requires that a factual statement (such as a health warning) be posted—for example, at a retail outlet—the court would apply a test based on a case called *Zauderer*,<sup>12</sup> and would ask:

**First:** Is the statement strictly factual?

**Second:** Is the factual disclosure requirement not controversial (accurate)?<sup>13</sup>

**Third:** Is the factual disclosure reasonably related to a legitimate governmental interest (particularly if the interest is in preventing consumer deception)?<sup>14</sup>

If these three prongs are met, then a court would probably hold that the law is consistent with the First Amendment.<sup>15</sup>

3. *Compelled opinion statements, such as a law requiring a point-of-purchase ad stating “Smoking isn’t cool”*

A new law might require speech that, instead of being a mere factual statement as described above, constitutes an opinion statement with which the speaker (usually a manufacturer or a retailer) disagrees. This is an example of *compelled opinion speech*. If the court determines that the required speech constitutes an opinion statement, it can choose to apply one of two tests: the *Central Hudson* test described above, or a tougher test known as “strict scrutiny.”<sup>16</sup> (Which test the court would apply is uncertain because this issue has never come before the U.S. Supreme Court.)

The strict scrutiny test is the hardest test for any law restricting speech to pass. It asks:

**First:** Is the requirement justified by a compelling governmental interest?

**Second:** Is the requirement the least restrictive means for achieving that interest?<sup>17</sup>

It is unlikely that a compelled opinion statement such as “Smoking isn’t cool” would survive a First Amendment challenge if the strict scrutiny test is applied, because compelling an opinion statement would probably not be considered the least speech-restrictive means to reduce tobacco use.

4. *Compelled speech identified as being from the government, such as the Surgeon General’s warning on tobacco packages*

Government speech is speech that a law requires a private business to make, and clearly indicates that the government is doing the talking, not the company.<sup>18</sup> Although the government requires that cigarette manufacturers print the statement “SURGEON GENERAL’S WARNING: Cigarette Smoke Contains Carbon Monoxide” 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 required if it is clear that the government is speaking.<sup>19</sup>

Government speech typically does not trigger First Amendment review, which means that there is no test that would be applied and the court is more likely to uphold the law.<sup>20</sup> It is important to note that the government cannot create so much of its own speech

that it “drowns out” all other speech.<sup>21</sup> For example, the government could not require a health warning about tobacco use to occupy the entire storefront windows of tobacco retailers so that no other signs could be posted there.

5. *Compelled or restricted conduct (vs. speech), such as a ban on self-service tobacco displays or a requirement that tobacco packages to be shelved so the tax stamp is visible*

If the purpose of the law is to regulate some conduct other than speech but the law incidentally restricts speech, the First Amendment provides a certain amount of protection. For the law to be most defensible in court, the restriction on speech must not be the goal of the law. *Why* the law was enacted is the key to determining whether the conduct is protected by the First Amendment. If a court determines that the law is not aiming to restrict speech but only incidentally regulates it, and that the conduct being restricted by the law is expressive, it applies the *O’Brien* test<sup>22</sup> and asks:

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

**Second:** Does the restriction further a substantial governmental interest?

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

**Fourth:** Is the incidental restriction on First Amendment freedoms not broader than necessary to achieve the government’s interest, even if there is a less speech-restrictive alternative?

The *O’Brien* test is easier to pass than the *Central Hudson* and strict scrutiny tests. If there is sufficient evidence to meet the last two prongs of the test, then a law is likely to be upheld.

The following chart may be useful when drafting state or local laws that restrict the advertising or promotion of tobacco products and that are likely to pass the FCLAA hurdle. It offers guidance on which test would be applied to a new law challenged in court, and it can be used to help draft the strongest law possible. For more information on the legal analyses summarized in this fact sheet, see *Regulating Tobacco Marketing: “Commercial Speech” Guidelines for State and Local Governments*.

# Types Of Laws Affecting Commercial Speech And The Tests Applied

Type of speech and example	Test applied by courts	Drafting tips
<p><b>1. Restriction on Speech</b>  <b>Example:</b> Ban on in-store tobacco ads  <b>Burden:</b> high hurdle</p>	<p><i>Central Hudson Gas v. Public Services Commission</i>, 447 U.S. 557 (1980).            4 prongs:            1) Is the restricted speech false, deceptive, or advertising illegal activities?            2) Is the law justified by a substantial governmental interest?            3) Does the law directly advance the governmental interest?            4) Is there a reasonable fit between the goal (the government's interest) and the means chosen to accomplish the goal?  <b>OR</b>            4) Does the law restrict the least possible amount of speech necessary to achieve its goal?</p>	<ul style="list-style-type: none"> <li>Fully document the 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" (sometimes included as "whereas" clauses preceding the text of the law that document, through statistical data or other means, the problem the law was drafted to solve and how the law would solve it).</li> <li>Clearly state the government's goal in enacting the law, because doing so helps to show the law satisfies prong two: that the government has a substantial interest in solving the problem, and prong three: that the law as written will achieve the goal it seeks.</li> <li>The law must clearly advance the objective the government enacted the law to achieve.</li> <li>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 or, if they were tried before, have not worked in the past.</li> <li>Be sure that the new law restricts the least amount of speech possible, while still achieving the law's goal.</li> </ul>
<p><b>2. Compelled speech (factual)</b>  <b>Example:</b> Law requiring point-of-purchase ad stating "Smoking causes lung cancer"  <b>Burden:</b> moderate hurdle</p>	<p><i>Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio</i>, 471 U.S. 626 (1985).            Reasonable relationship test:            Are the required factual disclosures reasonably related to the State's interest in preventing consumer deception?</p>	<ul style="list-style-type: none"> <li>Any required disclosure should contain only indisputable facts.</li> <li>Findings must show that those facts are backed up by strong research.</li> <li>Many factual findings should be included to support that the intent of the warning or disclosure is to protect citizens' health.</li> <li>Findings should also show that consumers are likely to be deceived or otherwise harmed without receiving the factual warning or disclosure.</li> </ul>
<p><b>3. Compelled speech (opinion)</b>  <b>Example:</b> Law requiring counter ad at point of purchase stating "Smoking isn't cool"  <b>Burden:</b> high hurdle or very high hurdle, depending on test</p>	<p><i>Central Hudson Gas v. Public Services Commission</i>, 447 U.S. 557 (1980).            (see above for prongs)  <b>OR</b> strict scrutiny:            (1) Is the requirement, justified by a compelling (vs. just "substantial") governmental interest?            (2) Is it the least restrictive means for achieving that interest (vs. a "reasonable fit")?</p>	<p><b>For either test:</b></p> <ul style="list-style-type: none"> <li>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.</li> <li>If possible, studies documenting the problem should be included in the findings.</li> <li>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.</li> <li>The law must be designed to require the least amount of speech possible, while still achieving its goal.</li> </ul>

Type of speech and example	Test applied by courts	Drafting tips
<p><b>4. Government speech</b>  <b>Example:</b> Law requiring point-of-purchase counter ad stating "The State of Jefferson has determined that smoking causes lung cancer"  <i>Burden: low hurdle</i></p>	<p>No First Amendment concern</p>	<ul style="list-style-type: none"> <li>• It must be clear that the warning is coming from the government.</li> <li>• The findings should cite the studies and other information the government used to come to its conclusions about the health effects of using tobacco.</li> <li>• It does not matter if the law requires the manufacturer or retailer to pay for the ad.</li> </ul>
<p><b>5. Expressive conduct, compelled or restricted</b>  <b>Example of compelled expressive conduct:</b>  Law requiring tobacco packages be displayed so that the tax stamp is visible without having to pick up each package  <b>Example of restriction on expressive conduct:</b>  Ban on self-service tobacco displays  <i>Burden: moderate hurdle</i></p>	<p><i>United States v. O'Brien</i>, 391 U.S. 367 (1968).  4 prongs:  1) Does the government have the authority to pass the law?  2) Does the restriction further a substantial governmental interest?  3) Is the restriction unrelated to the suppression of free expression?  4) Is the incidental restriction on First Amendment freedoms no greater than is essential to achieve the government's interest?</p>	<ul style="list-style-type: none"> <li>• The findings must clearly state the reason for the law and include as much research as possible showing the need for the law.</li> <li>• The law's purpose must not be to limit communication-any effect on speech must be a side-effect of a conduct regulation.</li> <li>• Drafters should show that the law's goal is being met without a wider than necessary impact on expressive conduct.</li> <li>• The findings must not suggest that the law's real purpose is to suppress speech, because that will undermine the argument that any impact on commercial speech is incidental and not the purpose of the law.</li> </ul>

## 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 15 U.S.C.A. § 1334(c).
- 7 Not all speech made by a business is commercial speech, however. For example, a business’s statement supporting a particular political candidate is speech, but is considered political speech rather than commercial speech, even though it is made by a business. Political speech would get full First Amendment protection.
- 8 *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 561 (1980) (defining commercial speech as “expression related solely to the economic interests of the speaker and its audience”).
- 9 *Id.*
- 10 The court might instead ask “Does the law restrict the least possible amount of speech necessary to achieve its goal?” In one case, the Supreme Court used the “reasonable fit” standard. *Bd. of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989). In a later case, the Court applied this tougher “least restrictive means” standard. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002). As a result, it is not entirely clear which of the two standards a court would apply.
- 11 *E.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561–67 (2001).
- 12 *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).
- 13 *Id.* at 651.
- 14 *Id.* *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.
- 15 *Zauderer*, 471 U.S. at 651.
- 16 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.
- 17 *Sable Commc’n of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).
- 18 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).
- 19 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.”).
- 20 *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.”).
- 21 See *Columbia Broad. Sys., Inc. v. Democratic Nat. Comm.*, 412 U.S. 94, 151, 156 (1973) (“The sturdy people who fashioned the First Amendment would be shocked at that intrusion of government into a field which in this Nation has been reserved for individuals.” “The First Amendment is written in terms that are absolute. Its command is that ‘Congress shall make no law . . . abridging the freedom of speech . . . .’”).
- 22 *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 158 (3d Cir. 2002). The *Central Hudson* test would be applied if the law was directly regulating speech. See above for details.

## **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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