

Marketing Controls: Regulating Tobacco and Junk Food/Beverage Ads

Marice Ashe, JD, MPH
Public Health Law & Policy

www.phlpnet.org

American Public Health Association

November 5, 2007



Tobacco Control Advocacy

- Focus on changing social norms through policy and education/behavioral change
- Goal: Create a social and legal climate in which tobacco is
 - Less accessible
 - Less acceptable
 - Less desirable

Impact of Tobacco Ads

Studies show that tobacco ads:

- Stimulate demand for cigarettes by youth
- Influence youth decisions to smoke more than peer pressure

(See, e.g. John Pierce articles in *JAMA*, Nicola Evans in *Journal of National Cancer Institute*)

Impact of Food & Beverage Ads

- Food and beverage marketing practices put children's long-term health at risk.
 - **Institute of Medicine, “Food Marketing to Children and Youth: Threat or Opportunity?” (2005)**

Controlling Reach of Ads

- Two Options:
 - Controlling advertising (i.e., speech)
 - Controlling products (i.e., conduct)

Advertisements Are Speech

- Advertisements are “commercial speech”
- First Amendment test: *Central Hudson*
 - Ads may not be misleading

Regulations must:

- Promote a legitimate government interest
- Be narrowly tailored
- Be no more extensive than necessary to achieve the legitimate government interest

Central Hudson Test is Challenging

- Failed tobacco control regulations:
 - Prohibition on billboards near schools:
 - Struck down by Supreme Court
 - Prohibition on ads below four feet in retail stores:
 - Struck down by Supreme Court
- Legally, it is much easier to restrict *products* than advertising
 - Restricting products first can give legal support to later advertising controls

Direct Advertising Controls

- Ban food/beverage ads on public **school K-12 campuses**
 - All ads
 - All food and beverage ads, or
 - All food and beverage ads not allowed to be sold on campus
- Ban food ads on TV/internet during children's programming *may* be possible IF regs are:
 - Narrowly tailored to predominantly reach just children
 - No more extensive than necessary to create improvement to health

Indirect Advertising Controls

- States and local governments have the authority to promote the health and general welfare of the people
 - Called the “police power”

“Police Power” Controls Products

- Limit the number of retail outlets selling a product
 - Alcohol
- Require product to be behind counter
 - Tobacco, spray paint
- Ban sale of product entirely
 - Alcohol, spray paint

Examples from Tobacco Control

- Require tobacco outlets be located away from areas frequented by children
- Limit discount retailers to industrial zones
- Limit total number of tobacco outlets in a community
- Limit proximity of tobacco outlets to each other

Examples for Foods & Beverages

- Product bans
 - No foods sold below x% nutritional value
 - No trans fats
- Product standards
 - Meal deals must not exceed x% of daily intake of certain components (fats, etc.)
- Retailing restrictions
 - No toys with unhealthy meals (no “happy meals”)
 - Menu labeling

More Ideas . . .

- Require fast food outlets to locate a minimum distance from youth-oriented facilities
- Limit the total number or per capita number of fast food outlets
- Charge a fee to retailers to mitigate the impact of poor nutritional content
- Prohibit drive-through service
- License retailers and restaurants and require minimally nutritious options
- Prohibit access to junk foods by children in a retail environment

Summary

- Regulations aimed at advertising controls may be legitimate if focused only on children
 - Will be tested in courts against *Central Hudson* test
 - Need to create a child protection test
- Regulations aimed at *products* rather than speech pass easier legal tests
 - Lots of examples of what might be done

For More Information

Go to:

Public Health Law & Policy

www.phlpnet.org

