

HEALTHIER CHOICES ON THE SHELF

Regulating Retail Sales of Sugar-Sweetened Beverages



ChangeLab Solutions
Law & policy innovation for the common good.



**NATIONAL POLICY & LEGAL ANALYSIS NETWORK
TO PREVENT CHILDHOOD OBESITY**

Check out ChangeLab Solutions resources on the First Amendment, NLEA, and how those laws impact advertising/marketing laws: www.changelabsolutions.org/childhood-obesity/food-beverage-marketing

Policymakers can help consumers make informed, thoughtful choices about beverage purchases by taking steps to address the environment people face when they're in a store deciding what to buy. Two potential strategies aimed at supporting healthier choices have garnered strong interest among the public health community: restrictions on product placement within a store, and regulations requiring shelf signage with a health message. This fact sheet provides an overview of the legal issues to consider in pursuing these strategies.

Regulating In-Store Product Placement

The Research Basis

Where a particular item is placed in a grocery store matters. Items at end-of-aisle displays—which are visible from three directions—sell between two and five times more than items located elsewhere, accounting for 30 percent to 40 percent of all supermarket sales.¹ Freestanding product display racks rank second in their ability to attract attention.² As for the impulse-buy items placed at the checkout counter (magazines, candy, gum, soda), checkout sales represent 46 percent of all supermarket sales of these products.³

The consequences are substantial, as far as efforts to change food and beverage purchasing habits are concerned. A store environment that preferentially presents healthy over unhealthy food choices could make a considerable contribution to improving Americans' diets. That's why the public health community has expressed growing interest in regulations restricting where sugar-sweetened beverages (SSBs) and other high-calorie, low-nutrient products are located in supermarkets.

It is important to be aware that such regulations are likely to draw a constitutional challenge that will chart new legal territory. A community pursuing this approach would be well advised to work hand-in-hand with attorneys who are versed in the subtleties of this area of the law.

The First Amendment and Product Regulations

It may not be immediately obvious that the location of products in food retail stores has anything to do with the First Amendment, but the Supreme Court has interpreted the free speech clause to protect not only individuals' right to expression but also advertising—in legal terms, "commercial speech."⁴ Recent Supreme Court cases reveal that the right of corporations to advertise their products generally outweighs the government's right to regulate commercial speech in order to promote public health.⁵

Because commercial speech has become so highly protected, businesses are trying to fend off government regulation by characterizing as many of their activities as possible as commercial speech. Courts have been receptive to this line of argument. For example, in a recent case, a federal appeals court found that commercial speech includes the distribution of free tobacco samples and the exchange of free gifts for proof-of-purchase of tobacco products.⁶ So manufacturers and grocers will almost certainly raise a free speech challenge to a government restriction on where sugary drinks and other non-nutritious items are located in supermarkets, arguing that where and how their products are displayed implicates protected speech.

In the closest case on point, *Lorillard Tobacco Co. v. Reilly*,⁷ the Supreme Court upheld a ban on the self-service display of tobacco products.⁸ Critical to the Court was that the government's interest was *not* related to speech. Instead, the government wanted tobacco products behind the counter in order to prevent youth from shoplifting cigarettes and becoming addicted. In other words, the Court found that even if tobacco packaging contains protected commercial speech, the government was not targeting that *speech* but instead was targeting youths' *access* to the products themselves.

Applying *Lorillard*

It is hard to anticipate how *Lorillard* would apply to a regulation banning products like sugary beverages from checkout aisles, end-of-aisle displays, and freestanding racks. *Lorillard* implies that a supermarket product placement regulation would have a better chance of surviving if the regulation is carefully framed to focus on limiting access to the unhealthy products rather than targeting anything communicative about the display or packaging.

It is unlikely, however, that restricting adult access to lawful products would resonate with a court to the same degree as restricting youths' access to addictive products that are illegal for them to purchase. Moreover, parsing out concerns about access from concerns about messaging may be difficult to do. If the government interest is to assist adults in resisting "impulse buys"—i.e., purchases that they would not, on reflection, have wanted to make—it is uncertain whether a court would accept that impulse buys are a problem of too-easy access rather than a problem associated with the receipt of subtle messages from the display or packaging of the alluring products.

Shelf Signage

It's not uncommon to have signage at the point of sale alerting consumers to the health effects of a product: this tactic has been used for several types of products, such as gasoline. Many public health advocates are interested in using this strategy to post signs on shelves where sugary beverages are sold, to advise consumers about the health impacts of the drinks.

While there are many different types of messages that may be effective, it is critical to note that the legal feasibility of this strategy is uncertain. An SSB signage law is likely to raise two types of legal claims (beyond any claims regarding a specific locality's authority to enact the regulation): one based on the First Amendment and the other based on the federal Nutrition Labeling and Education Act (NLEA). A comprehensive analysis of these legal regimes can provide some insight about what type of SSB signage ordinance would have the best chance of surviving a lawsuit. But ultimately, the legal precedent is too sparse to allow for a prediction on how a court would rule, and it is important to work with legal counsel to craft language that has the best chance to survive legal challenge.

Crafting a Legally Defensible Signage Requirement

Contact us at www.changelabsolutions.org for more information about how the First Amendment and NLEA apply to shelf signage requirements, and to learn the seven features of a legally defensible signage requirement.

Legal Authority

The strategies covered in this fact sheet stem from the government's "police power," which is essentially the government's authority to enact laws to protect public health, safety, and welfare. State governments have very broad police powers; local authority is delegated from the state. Most states follow some form of a "home rule" system, under which the state grants local government bodies the authority to enact these kinds of laws at the local level.

Although both of the strategies addressed here stem from the police power, regulating *sales* of a product is generally much more legally defensible than regulating the advertising or promotion. Both of the strategies discussed in this fact sheet would be subject to a heightened level of judicial review under both the First Amendment and NLEA.

The National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN) is a project of ChangeLab Solutions. ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

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¹ D.A. Cohen and S.H. Babey. 2012. "Contextual Influences on Eating Behaviours." *Obesity Reviews* at 7; H. Sorensen. 2008. "Long Tail Media in the Store." *Journal of Advertising Research* 48: 329–338; H. Sorensen. 2003. "The Science of Shopping." *Marketing Research* 15: 30–35.

² D.A. Cohen and S.H. Babey. 2012. "Contextual Influences on Eating Behaviours." *Obesity Reviews* at 7; H. Sorensen. 2008. "Long Tail Media in the Store." *Journal of Advertising Research* 48: 329–338.

³ D.A. Cohen and S.H. Babey. 2012. "Contextual Influences on Eating Behaviours." *Obesity Reviews* at 7; M.J. Miranda. 2008. "Determinants of Shoppers' Checkout Behavior at Supermarkets." *Journal of Targeting Measurement and Analysis for Marketing* 16: 312–321.

⁴ *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

⁵ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

⁶ *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

⁷ 533 U.S. 525 (2001).

⁸ *Id.*