

MIAMI VALLEY RISK MANAGEMENT
ASSOCIATION
LEGAL ALERT

RE: CONSIDERATIONS SURROUNDING AN INDIVIDUAL'S RIGHT TO
DISTRIBUTE ADVERTISEMENTS, COUPONS, AND FOOD SAMPLES ON
GOVERNMENT PROPERTY

Introduction:

Concerns have recently been raised regarding the government's ability to restrict and otherwise regulate an individual's distribution of advertisements, coupons, and food samples on public and non-public governmental property.¹ While an individual does have the right to distribute advertisements, coupons, and food samples in certain situations, any restrictions and regulations of this practice must be approached with caution due to the rather uncertain nature of the law. However, stated simply, while outright prohibiting an individual from distributing advertisements, coupons, and food samples from a non-public forum is permissible, the same cannot be said for restrictions placed on individuals in open public forums.

The following contains a short description of the First Amendment protections as it relates to the distribution of advertisements, coupons, and food samples, something which is generally referred to as "commercial speech," as well as a brief discussion as to how courts analyze constitutional challenges to these restrictions and regulations. This discussion is then followed by issues that should be considered when restricting and regulating that distribution.

The First Amendment and Commercial Speech:

The First Amendment to the United States Constitution confers upon an individual the right to free speech. However, just like many other freedoms, the freedoms provided by the First Amendment are not absolute. Instead, the freedoms

¹ This Legal Alert does not address any additional concerns regarding restrictions placed on an individual distributing materials regarding social or political issues – often referred to as "political speech" – a type of speech that is given more extensive protections under the First Amendment.

provided by the First Amendment are dependent upon numerous factors including, but not limited to, the type of speech involved, which is generally classified as “commercial speech” and “non-commercial speech,” as well as considerations of whether the speech occurs in a public forum or non-public forum

Although not without some difficulty, it is now widely acknowledged that the act of soliciting clients and distributing advertising materials falls into the category of “commercial speech” that is afforded a limited degree of First Amendment protections. In applying these protections, courts consider: (1) whether the regulated commercial speech concerns a lawful activity and is not misleading; (2) whether the restriction seeks to implement a substantial governmental interest, for example, the health and safety of the public; (3) whether the restriction directly advances that substantial governmental interest; and (4) whether the restriction is no more extensive than is necessary to achieve that interest. These considerations are similar to the time, place, and manner restrictions generally applied by courts when addressing other challenges to First Amendment freedoms. Unfortunately, the restrictions that may be placed on “commercial speech” have been subject to many varying interpretations. Therefore, whether any government restriction or regulation on “commercial speech” would pass constitutional muster is dependent on the facts of each case.

The Distribution of Advertisements, Coupons, and Free Samples is a form of Commercial Speech Subject to Limited First Amendment Protections:

It is generally acknowledged that the distribution of advertisements and coupons constitutes “commercial speech” as it “does no more than propose a commercial transaction” that is “related solely to the economic interests of the speaker and its audience.” *United States v. United Foods, Inc.*, 533 U.S. 405, 409, 121 S.Ct. 2334 (2001); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of New York*, 447 U.S. 557, 561, 100 S.Ct. 2343 (1980). However, a more difficult question remains as to whether the distribution of free product samples also constitutes a form of protected “commercial speech.”

The most recent case addressing whether the distribution of free product samples constitutes a form of protected “commercial speech” was provided by the Sixth Circuit Court of Appeals in *Discount Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509 (6th Cir.2012). In *Discount Tobacco*, the Court was asked to determine whether an act that restricted the tobacco industry’s ability to offer free samples of tobacco products was an unconstitutional restriction on commercial speech. In finding that the restriction on distributing free tobacco products regulated “commercial speech,” the Sixth Circuit determined that the regulation was “an attempt to regulate the ‘communicative impact’ of the activity” that otherwise restricted “commercial expression.” *Id.* at 539. In turn,

while *Discount Tobacco* may serve as an extreme example, it nonetheless stands for the proposition that such distribution constitutes a form of “commercial speech” that is subject to First Amendment protections.

That said, although constituting a form of protected “commercial speech,” the distribution of free product samples can still be restricted, regulated, or even banned under certain circumstances. In fact, as the Court in *Discount Tobacco* found, the outright ban of the distribution of free samples of tobacco products was a permissible restriction on “commercial speech” as the restriction was necessary to limit the access of those products to minors. Unfortunately, just like most issues regarding the boundaries provided by First Amendment protections, the debate over what constitutes a permissible restriction on “commercial speech” remains uncertain. Therefore, before any restriction is put into place, it is imperative to contact the law director or legal counsel for guidance.

The Distribution of Commercial Speech in Public and Non-Public Areas:

The distribution of advertisements, coupons, and free product samples constitutes “commercial speech” that is subject to limited First Amendment protections. However, these protections do not extend to allow an individual unbridled access onto government property. In fact, as the United States Supreme Court has stated, “the First Amendment does not guarantee access to government property simply because it is owned or controlled by the government.” *United States Postal Serv. v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129, 101 S.Ct. 2676 (1981). Instead, what restrictions may be placed on “commercial speech” is governed by considerations of *where* the commercial speech is taking place. These areas are generally referred to as “non-public forum” and the “public forum.”

A non-public forum is government property that is not generally open for public communication. The inside of a government building, used as office space, would fall into this category. *Satawa v. Macomb County Road Comm.*, 689 F.3d 506, 518 (6th Cir.2012). Any restrictions placed on speech in a non-public forum is permissible so long as “the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker’s view.” *United Food & Commercial Workers Union, Local 1099 v. Southwest. Ohio Reg. Transit Auth.*, 163 F.3d 341, 350 (6th Cir. 1998). On the other hand, public forums are those places that have traditionally been open to the public for assembly and debate. Such places include streets, sidewalks, and parks. Restrictions placed on speech in these areas are given more protections than those in a non-public forum. In those areas, any restrictions placed on speech would need to satisfy a heightened standard by demonstrating that such restriction advances a substantial governmental interest and that it is not more

extensive than necessary. However, as the law is not clear as to what constitutes a permissible restriction of commercial speech, any restrictions and regulations of this practice must be approached with caution.

Items to Consider When Implementing Restrictions on Commercial Speech:

As can be seen, the contours of the First Amendment protections create numerous difficult decisions relating to what restrictions and regulations may be placed on “commercial speech.” In an effort to make these decisions more manageable, the following should be considered:

1. Is the restriction content-neutral in that it is not based upon the content of the commercial speech?
 - a. Content-neutral restrictions and regulations, as opposed to those based merely on the content of the message, are generally afforded many more First Amendment protections. For example, although highly unlikely, regulations on advertising of miniature golf courses should not be treated differently than regulations on advertising a jewelry store. In other words, any restrictions and regulation must be consistent regardless of the business being promoted.
2. Is the commercial speech occurring in a public or non-public area?
 - a. As noted above, “commercial speech” activities that are occurring in non-public forum are not afforded the same protections as “commercial speech” activities in a public forum. In turn, an individual can be prohibited from engaging in commercial speech activities within non-public areas, but not those that are considered public areas without a legitimate and compelling governmental interest.
3. Does the restriction still allow for commercial speech in other surrounding areas, *i.e.* is it no more extensive than is necessary?
 - a. Any restriction on speech that occurs in a public area must advance a substantial governmental interest, *e.g.*, health, safety, and general welfare of the public, and must not be more extensive than necessary. In other words, while restrictions on commercial speech in non-public areas are permissible, individuals must not be completely precluded from engaging in the commercial speech activity in other public areas. This compromise

protects both the governmental interests while also allowing for the individual to engage in the protected commercial activity.

Conclusion:

An individual's right to engage in "commercial speech" is ever evolving and must be approached with caution. In turn, while outright prohibiting an individual from distributing advertisements, coupons, and food samples from an otherwise restricted non-public forum is permissible, the same cannot be said for restrictions placed on individuals in open public forums. Instead, in those circumstances, restrictions can limit the place in which such distribution occurs so long as the individual is afforded with the opportunity that would still allow him to reach his intended target of the would be consumer. Unfortunately, the debate over what may constitute a permissible restriction on commercial speech remains uncertain. Therefore, before any restriction is placed on commercial speech, it is imperative to contact the law director or other legal counsel for assistance.