

**Model Legislation:
Rice University's Baker Institute and
the South Texas College of Law
Drug Policy Collaboration 2013**

Part 3 of 8: Labeling and Advertising Statutes

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The following is one of several collections of model statutes produced by the legislation class at South Texas College of Law (STCL) during the spring 2013 semester. The class was offered in collaboration with Rice University's Baker Institute. Students attended lectures on drug policy, legislation, and statutory interpretation conducted by Dru Stevenson, J.D., STCL professor and Baker Institute Scholar; Nathan Jones, Ph.D., Alfred C. Glassell III Postdoctoral Fellow in Drug Policy; and William Martin, Ph.D., Harry and Hazel Chavanne Senior Fellow in Religion and Public Policy and director of the Baker Institute's Drug Policy Program. Each student completed a project addressing one aspect of marijuana legalization or postlegalization regulation through a model statute or ordinance. Links to each of the model statutes can be found at bakerinstitute.org/model-legislation-2013. Neither the Baker Institute nor the South Texas College of Law endorse any particular policy. The model legislation has not undergone editorial review by the Baker Institute.

Introduction to This Collection

By Dru Stevenson, J.D., Helen and Harry Hutchins Research Professor, South Texas College of Law, and Baker Institute Scholar

Marijuana shares common features with both alcohol and tobacco – in the former case, as an intoxicant, and in the latter, in that smoking the substance is the most common means of consumption. Both alcohol and tobacco have labeling requirements and certain advertising restrictions – some legal, some unofficial but longstanding. In the wake of marijuana legalization, whether for medicinal or recreational usage, both labeling and advertising regulation is likely to emerge in forms analogous to the regimes governing alcohol and tobacco. The following proposed statutes focus on labeling and advertising. Each will present some proposed statutory provisions followed by legal (“official” if adopted) commentary.

The American legal system regulates advertising and labeling through statutes, administrative regulations, and tort liability. Statutes and regulations can be general or specific – requiring country-of-origin stamps on all products being an example of the former and specific warning labels, nutritional information, or ingredient lists being examples of the latter. The legislature may mandate certain labeling information by statute (with law enforcement agencies responsible for enforcing the requirements), or regulatory agencies may promulgate specific regulations that the agencies then monitor and enforce; agency regulations have the force of law in our country. Labeling and advertising requirements or restrictions can come from either federal or state governments; federal rules can create complex preemption issues for states. In addition, manufacturers and sellers can face tort liability for deceptive advertising and labeling, or for failure to warn of potential dangers of a product. In such cases, courts could theoretically order companies to alter their labels or advertising, but more often the award of monetary damages to the plaintiff induces potential defendants to adapt their labeling or advertisements to avoid such liability prospectively. It is also worth noting that zoning regulations also govern what types of advertisements can appear in various locations. Labeling and advertising laws frequently face First Amendment (free speech) challenges, but such challenges are usually unsuccessful; courts have consistently held that the government can regulate the time, place, and manner of speech, and that modest labeling requirements or advertising restrictions are constitutionally valid.

We anticipate a number of labeling and advertising issues related to legalized marijuana. The most significant would be for potency of the various intoxicant compounds found in a given batch, as well as additives (flavorings, supplemental intoxicants, preservatives, and so on). Source or origin is also likely to become an issue, as are warnings against misuse or use while operating vehicles or machinery. Advertising directed at children is likely to face regulatory limitations.

STATUTE 1

§1. Definitions¹

As used in this subchapter:

1. “Business consumer” means an individual, partnership, or corporation who seeks or acquires cannabis or cannabis supplies for public retail purposes or to sell or distribute to consumers individually.
2. “Cannabis” means any part of the cannabis plant that is grown, produced, packaged, sold, or distributed for personal use or personal consumption.
 - a. This term includes the stems, seeds, and leaves of a flowering female cannabis plant, whether or not that plant is fertilized.
 - b. This term is, from time to time, referred to as the “product.”
3. “Cannabis supplies” means any object or tool used to grind, roll, smoke, or otherwise process or consume cannabis for personal use.
4. “CBD” means Cannabidiol; a non-psychoactive chemical contained in the cannabis plant.
5. “Consumer” means an individual, partnership, or corporation who seeks or acquires cannabis or cannabis supplies for personal use or personal consumption.
6. “Manufacturer” means a person:
 - a. Engaged in the packaging or delivery of cannabis or cannabis supplies to a retailer or other person which is intended for sale or distribution to consumers, whether or not they are also involved in the growth, cultivation, or dehydration process of the same; and
 - b. That holds the necessary licenses for the county and state in which they are in operation, as required by the State Marijuana Board or other applicable agency.
7. “Person” means an individual, partnership, corporation, or any other business or legal entity.
8. “Producer” means a person:
 - a. Engaged in the growth, cultivation, or dehydration process of cannabis intended for the personal use or personal consumption of consumers; and
 - b. That holds the necessary licenses for the county and state in which they are in operation, as required by the State Marijuana Board or other applicable agency.
9. “Retailer” means a person:
 - a. That accepts cannabis or cannabis supplies from a manufacturer, producer, or other person that is intended for sale or distribution to consumers; and
 - b. That holds the necessary licenses for the county and state in which they are in operation, as required by the State Marijuana Board or other applicable agency.
10. “Sale or distribution” includes sampling or any other distribution not for sale to consumers.
11. “THC” means Delta-9-tetrahydrocannabinol; the main psychoactive chemical contained in the cannabis plant, which is responsible for the euphoric, “high” feeling often experienced by users of marijuana.

¹ Regulation referenced for style and content: 15 U.S.C.A. § 1332

Not all definitions are used in the regulations drafted for this assignment, but I thought they might be helpful to future completed drafts, so I included them.

§2. Packaging and Labeling Requirements²

A. Failure to meet the requirements in this section in connection with the packaging and labeling of cannabis for sale or distribution to consumers is hereby declared unlawful. Knowingly providing false information on the label affixed to or included with cannabis for sale or distribution to consumers is hereby declared unlawful. The consumer has standing to bring a case under this section where any of the following constitute a producing cause of economic damages or damages for mental anguish in any [enacting state]³ court where venue can be found.

B. Labeling Requirements

1. It shall be unlawful for any person to manufacture, package, sell, offer to sell, or distribute within [enacting state] any cannabis the package of which fails to bear, in accordance with the requirements of this section, a label depicting the following information:
 - a. Minimum percentages required by law of THC and CBD in each package of cannabis sold to the public;
 - b. Percentage of THC contained in the packaged cannabis;
 - c. Percentage of CBD contained in the packaged cannabis;
 - d. Strain or type of cannabis, listed by scientific terms, if available, and generic or “slang” names;
 - e. Warnings of any side effects, whether physical, mental, or otherwise, associated with the particular strain of cannabis;
 - f. Growth method (whether dirt growth, hydroponic, or otherwise) and an indication whether or not the cannabis was grown using all-organic materials;
 - g. Weight of the cannabis contained in the package;
 - h. State and county of origin of the cannabis;
 - i. Any verification that is required by the state and county of origin to grow, manufacture, sell, or distribute cannabis, such as a seal, stamp, or proof of license, including the necessary licenses for the county and state in which they are in operation, as required by the State Marijuana Board or other applicable agency; and
 - j. Suggested or advised ingestion amount based on percentages of THC and CBD contained in the cannabis and consumer weight.
2. The label information required by this subsection may be printed: directly on the package of cannabis; on a label which is then affixed to the package of cannabis; or in a pamphlet or other form which is included with each package of cannabis. Information not printed on the package or affixed thereto in plain view of the consumer shall be available to the consumer before the purchase of the cannabis.
3. Any label or printed information affixed to or included in or with a package of cannabis shall not include promises or descriptions of any expected benefits or effects of the particular strain of cannabis, whether medical or otherwise.

² Regulations referenced for style and content: V.T.C.A., Bus. & C. § 17.50, 15 U.S.C.A. § 1333

³ This field and others like it throughout this model regulation would be populated with the name of the state which is enacting the regulation.

C. Packaging Requirements

1. Manufacturers and other persons involved in the sale or distribution of cannabis to consumers shall package the product per the following guidelines:
 - a. All packaging shall be clear, so that prospective consumers may view the product;
 - b. Labels, marketing or promotional material, stickers, warnings, or any other mark that is affixed, printed, or otherwise placed on or inside the packaging, including the label information required by this section, shall not be so large as to unreasonably interfere with the ability of the consumer to view the product; and
 - c. Packaging shall include a tamper-proof seal to alert consumers if the product has been previously opened or otherwise tampered with.

D. A retailer of cannabis shall not be in violation of this section for packaging that:

1. Contains a label that includes all the information required by this section;
2. Conforms to the packaging requirements of this section;
3. Is supplied to the retailer by a license- or permit-holding cannabis manufacturer or producer, as required by the State Marijuana Board; and
4. Is not altered by the retailer in a way that is material to the requirements of this subsection.

Commentary

Purpose

The purpose of these regulations is to protect consumers against false advertising and to allow consumers to purchase cannabis that is pure and untainted, among other concerns. The labeling requirements in §2(B) should aid consumers in purchasing the type or strain of cannabis they are seeking as well as protect individual consumers from being taken advantage of by giving them a remedy if the label information printed on, affixed to, or included with the cannabis package is missing or known to be incorrect by the manufacturer, producer, or other person who associated it with the cannabis. The packaging requirements in §2(C) aim to protect consumers from the ingestion of cannabis that has been tainted with other substances after it has left the manufacturer who packaged the cannabis. The packaging requirements also aid consumers in choosing the product they seek, thereby improving consumer satisfaction.

Additionally, these provisions are drafted to minimize disputes between manufacturers, producers, retailers, other persons involved in the sale or distribution of cannabis to consumers, and consumers themselves when the consumer claims the product they received was not what was desired. The numerous safety features built in to the regulations and the provisions to allow the consumer to adequately view and read descriptions of the product before purchase should allow the consumer access to information necessary to locate the precise product they desire. However, should a consumer be unsatisfied with the product, the provisions of this regulation give the consumer a cause of action if damages have resulted due to a breach of these sections. Additionally, these provisions are intended to speed the resolution of disputes that do arise by providing standards by which to judge the actions or inactions of manufacturers, producers, retailers, or other persons involved in the sale or distribution of cannabis to consumers.

Finally, in order to protect consumers, these provisions aim to provide consumers with a portion of the information necessary to make an informed, educated decision about the purchase

and use of cannabis. Information such as the THC and CBD content as well as the suggested ingestion amount should help to minimize disputes by aiding consumers in their choice and use of the product. The side-effect warnings required on the label should also protect manufacturers, producers, retailers, and other persons involved in the sale or distribution of cannabis to consumers from claims that consumers were not aware of the possible effects resulting from ingestion of cannabis. By utilizing all the information gathered for them by these regulations, the consumer should be able to form an opinion about whether they wish to partake in the ingestion of cannabis and, if so, which cannabis to purchase.

Interpretation of Initiative Measures

If any part of this regulation becomes law through ballot initiative, these comments are to be considered legislative history in all respects.

§2(A)

Section 2 is intended to grant consumers a legal remedy for damages resulting from the failure to follow the requirements of this section by a manufacturer, producer, retailer, or other person involved in the sale or distribution of cannabis to consumers. Actions leading to possible legal ramifications may include, but are not limited to, the sale or distribution to consumers of cannabis that was not properly packaged or which did not bear the proper label requirements, by which the consumer suffered either economic damages or damages for mental anguish.

§2(B)(1)(a), (b), and (c)

Recommended minimum required percentage of THC in all cannabis sold to consumers is a percentage not less than 5%.⁴ This recommended percentage is suggested in order to further encourage consumers to purchase legal cannabis and likewise cripple black market sales by guaranteeing a THC percentage not less than what can reasonably be expected to be found in cannabis sold on the black market.

There is no recommended minimum required percentage of CBD in cannabis sold to consumers. The interaction between CBD and THC is a main factor that influences the overall experience of users of cannabis. The ingestion of cannabis containing higher levels of CBD is more likely to produce a clear-headed, less “high” feeling without psychoactive effects, such as may be desired for some medical uses. Additionally, ingestion of cannabis containing increased levels of CBD may provide additional benefits to medical use consumers suffering with certain illnesses, such as cancer.⁵ For such use or desired results, the recommended minimum required percentage of CBD is a percentage not less than 4% by weight for cannabis flowers.⁶ However, it

⁴ This recommendation is based on information from the following websites and studies, which indicate that the percentage of THC in cannabis over at least the last decade has averaged between 4.5% and 5%. <http://home.olemiss.edu/~suman/potancy%20paper%202010.pdf>; <http://www.briancbennett.com/charts/fed-data/thc-content.htm>.

⁵ <http://www.cancer.gov/cancertopics/pdq/cam/cannabis/healthprofessional/page4>

⁶ <http://pureanalytics.net/blog/2012/02/19/how-thc-and-cbd-work-together/>

is suggested that the general required percentages of CBD vary by strain, depending on the consumer's desired effect of the drug.⁷

§2(B)(1)(d)

The strain or type of cannabis is required in order to facilitate more effective and rapid treatment of specific medical conditions, as well as to improve overall consumer satisfaction with their chosen product. Utilizing information about strain and type, consumers may thereby choose the cannabis that is best suited to treat their specific issue or ailment, and choose the specific strain they are seeking.

§2(B)(1)(e)

Alerting consumers to possible side effects is meant to protect manufacturers, producers, retailers, and other persons involved in the sale or distribution of cannabis to consumers from the possible legal ramifications resulting from a consumer's distaste for those effects. This section is specifically designed to place the risk on the individual consumer of any negative results to the consumer, whether temporary or permanent, resulting from side effects of the ingestion of cannabis that are specifically referenced as part of the label information.

§2(B)(1)(f)

Growth method is required so that consumers who are concerned with the use of chemicals in the growth of their products may make an informed choice regarding their purchase.⁸

§2(B)(1)(h) and (i)

In order to protect consumers, state and county of origin is a necessary inclusion until cannabis use is legalized in a majority of the country to ensure that consumers are purchasing cannabis that was produced and packaged legally. Including proof of any required licenses on cannabis packaging will assure consumers that the persons manufacturing or producing the cannabis they are receiving are approved by and registered with the governing board of the applicable overseeing agency. Additionally, including this information may help to foster local production and sales of cannabis.⁹

⁷ <http://www.themarijuanaeffect.com/chemicalsinmarijuana.html>

⁸ Growth method is generally a matter of preference, although a fairly heated debate seems to be waging regarding the medical benefits and effects of marijuana grown hydroponically when compared with traditional dirt growths, whether or not organic. <https://buymarijuanaseeds.com/blog/how-to/organic-vs-chemical-growing-the-ongoing-quandary>.

⁹ I would include elsewhere in the regulations that manufacturers, producers, or retailers must have a license issued either by the state or county where the cannabis is produced, packaged, or sold. If an "opt-out" provision allows individual counties to opt out of the legalization of the production or sale of cannabis, perhaps licenses granted by

§2(B)(1)(j)

The minimum amount of THC required to have a perceptible psychoactive effect is about 10 micrograms per kilogram of body weight.¹⁰ This would need to be converted to pounds and ounces. This requirement will help minimize disputes between producers, manufacturers, and retailers versus consumers, especially in regards to claims by consumers that the product was not as potent as the consumer expected. Additionally, should a dispute arise, a suggested ingestion amount will provide a baseline for beginning discussions and resolution of issues between the parties.

§2(B)(2)

This section is included in order to give manufacturers, producers, and other persons involved in the sale or distribution of cannabis to consumers the freedom to produce the label information required by subsection 2(B) in a format which conforms to a marketing scheme, is aesthetically pleasing, or is believed will result in higher sales. Additionally, ensuring the consumer has access to the label information before the purchase of the cannabis, whether or not the information is affixed to or printed on the cannabis packaging or printed elsewhere and included with the packaging, helps secure the cause of action guaranteed by this section as well as protect the consumer.

§2(B)(3)

The prohibition on listing benefits or effects of cannabis is intended to protect producers, manufacturers, retailers, and other persons involved in the sale or distribution of cannabis to consumers from liability, both under this regulation and federal pharmaceutical guidelines.

§2(C)(1)(a) and (b)

The requirements that cannabis is packaged in a clear container and the label information not unreasonably restricts the consumer's view of the product are meant to aid consumers in procuring the particular product they intend to buy. If the consumer has easy access not only to the information provided on the label, but also can view the cannabis itself, the consumer will be able to make a more informed choice, which may improve consumer satisfaction and minimize disputes.

each individual county would make sense. Otherwise, I would think a state-wide license would work. Either way, I would require that some sort of standardized mark associated with the license be displayed at growth sites, in manufacturing and packaging plants, inside retail establishments, and on packages of cannabis sold to help ensure that consumers were receiving a product that was legally grown, packaged, and sold.

¹⁰ <http://www.sheriff.douglas.ga.us/marijuana.html>

§2(C)(1)(c)

The requirement of a tamper-proof seal is meant to protect consumers from the receipt of contaminated cannabis, and to quickly and easily alert retailers and consumers to such contamination or attempts to tamper with the product. As such, this requirement is also intended to place the risk of loss of such product on the manufacturer or other persons involved in the sale or distribution of cannabis to consumers. Although this subsection is not meant to exclude re-sealable plastic “ziplock”-type bags as an acceptable package for cannabis intended for sale to consumers, should the manufacturer or person choose to package the product in such a way, whether or not the package directly violates the requirements of this subsection, the risk of loss of the product remains with the manufacturer or person until delivery to the retailer, as defined and described more fully in §3.¹¹

§2(D)

This subsection offers some protection to retailers who receive cannabis which conforms to the labeling and packaging requirements of this section, so long as the package and label are not altered after receipt. Allowing retailers this defense to liability is likely to encourage retailers to refuse cannabis in packaging that does not meet the requirements §2(B) and §2(C), thereby fulfilling the purpose of shifting the risk back to the manufacturer, producer, or other person involved in the sale or distribution of cannabis to consumers who failed to properly label or package the cannabis.

¹¹ §3 was not drafted for this project. However, some provisions I believe would be helpful to include in such a provision are included in this footnote. To further protect the public, I would include the prohibition on the sale of any product bearing evidence that indicated the package had been opened or otherwise tampered with, whether or not such evidence was based on the state of the tamper-proof seal required in §2(C)(1)(c). In order to further urge manufacturers to make their packages tamper-proof, I would also indicate that the manufacturer would remain responsible for products that were shipped to retailers until arrival, so that if the packages arrived at the retailer and the seals indicated the packages had been opened, not only could they not be sold by the retailer, the manufacturer also would not be able to charge the retailer for those packages.

STATUTE 2

Protecting the Public from Improper Marijuana Advertisement and Solicitation Act

I. General Rule

(a) No person shall advertise marijuana merchandise, products, or usage in this State that is in violation of any section of this Act that specifies a prohibition.

(b) No person shall advertise marijuana merchandise, products, or usage in this State except in accordance with any rules promulgated by Texas Department of Licensing and Regulation Commission.

II. Application to Texas only

(c) This section applies only in Texas.

III. License Commission's Regulatory Authority

(d) The Texas Department of Licensing and Regulation Commission shall have the authority to enforce this statute by adopting regulations, rules, and prohibitions to:

- 1) Regulate marijuana advertisements on billboards;
- 2) Regulate advertising of marijuana along any road, street, or highway;
- 3) Regulate advertising of marijuana by licensees in newspapers, leaflets, or other commercially printed materials;
- 4) Regulate advertising of products of marijuana through radio, television, and other media;
- 5) Regulate advertising of marijuana through any Internet server that is Texas based;
- 6) Regulate advertising of marijuana on automobiles or commercial vehicles;
- 7) Regulate the size, quantity, and appearance of advertisements of marijuana on the commercial property of a licensee;
- 8) Regulate the display and advertisement of rates and prices of marijuana on a licensee's commercial property;

- 9) Regulate advertising of marijuana through any mail, delivery, or postal system;

IV. Advertising On or Near School or Playground Premises is Prohibited

(e) No person, business, establishment, or other organization shall advertise or solicit any marijuana merchandise, products, or usage within 300 feet of any public or private school or playground.

- 1) This section shall not apply to any undergraduate or post-graduate institutions;
- 2) This section shall not apply to any advertising that negatively advertises the use of marijuana or illustrates any of its ill effects.

V. Advertising on Daytime Television is Prohibited

(f) No person, business, establishment or other organization shall advertise any marijuana merchandise, products, or usage during the hours of 6:00 A.M. until 10:00 P.M. Monday through Sunday.

- 1) This section shall apply to all channels, networks, and stations that may air in this state.
- 2) This section shall not apply to any advertising that negatively advertises the use of marijuana or illustrates any of its ill effects.

VI. False or Misleading Advertising Prohibited

(g) This subsection is to regulate any advertisement that is untrue, misleading, deceptive, or false in any material respect.

- 1) To “advertise falsely” is to knowingly or purposely create a false or misleading statement to the general public in connection with the promotion or sale of marijuana;
- 2) A marijuana licensee may not advertise falsely in the conduct of any scope of business;
- 3) The Board of License Commissioners shall enforce this subsection.

VII. Advertising that Promotes Illegal Activity is Prohibited

(h) In this subsection, “promotes illegal activity,” means any advertisement that may reasonably be believed to be an act that promotes an activity that is against the laws of this State.

VIII. Fines and Penalties

(i) A person who violates any section of this statute is guilty of a Class A misdemeanor and may be fined no more than \$5,000.

Commentary

The “Protecting the Public from Improper Marijuana Advertising and Solicitation Act” (“PIMAS”) has been ratified due to the recent pieces of legislation that allows the legal distribution and purchase of marijuana. Distributors and retailers will be eager to advertise their marijuana products that can now be sold legally. However, these distributors and retailers must follow PIMAS’ procedures that have been set forth to prevent improper advertising and solicitation. Advertising, through various methods, is a very effective way to give the public awareness over a number of different issues and merchandises. The effectiveness of advertising is obvious, as businesses spend over \$200 billion to advertising every year in the United States. Neil Gormley, *Greening the Law of Advertising: Prospects and Problems*, 42 Tex. Envtl. L.J. 27, 35 (2011). Moreover, researchers estimate that children in the United States see between 20,000 and 40,000 television commercials each year. *Id.* Due to this this strong influence advertising has on society, it is thus prone to being abused in a number of different ways. PIMAS is designed to prevent this abuse that might occur due to the legalized retail and use of marijuana.

Although marijuana has been legalized, there are several reasons why restrictions should still be placed on it just as any other controlled substance. Studies of marijuana conclude that there is a direct link to hallucinations, drowsiness and sleep, impaired short-term memory, impaired cognition and motor coordination, as well as potential for addiction. Roger A. Nicoll & Bradley E. Alger, *The Brain's Own Marijuana*, *Sci. Am.*, Dec. 2004, at 70-71. Most of these side effects are the same reason why tobacco and alcohol advertising has been scrutinized as well. Marijuana regulations can build from and improve on those currently in place for alcohol and tobacco.

PIMAS is solely a Texas law but requires any outside retailers seeking to do business in Texas to comply with the law. PIMAS is two-fold in that it creates absolute prohibitions that are mandatory but also gives the Texas Department of Licensing and Regulation Commission the ability to create regulations to further this statute. The following is a commentary that discusses the constitutionality of the law, the specific interests the state has in enacting the legislation, and a further discussion of the law and its impact.

II. The First Amendment

PIMAS was enacted to prevent inappropriate advertising without breaching the boundaries of the rights offered through the Federal and State Constitutions. The well-known text of the First Amendment provides that “Congress shall make no law...abridging the freedom of speech, or of the press.” The clause, known as the Free Speech clause, has been used to prevent the government from enacting laws that may burden a variety of different types of speech. The court has interpreted the First Amendment to give certain procedural protections based on the topic of the speech and where it is said. The First Amendment has been incorporated to all the states through the 14th Amendment’s due process clause.

Article I, section 8 of the Texas Constitution provides Texas’ version of the Free Speech clause. There are obvious textual differences between Texas’ Free Speech clause and its Federal counterpart. Texas’ Free Speech clause holds, “Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press...”

In *Davenport v. Garcia*, the court held that, in general, Article I, Section 8 affords greater and broader rights than the First Amendment protections. The *Davenport* court based this conclusion off the text, history, and precedent of various Free Speech issues. With this in mind, PIMAS has been designed to ensure that the Free Speech rights of retailers will not be infringed. As will be discussed in the subsections below, PIMAS does not violate either the First Amendment or the Texas Free Speech clause.

III. Commercial Speech Protections and Regulations

“Commercial Speech”, according to the court, is speech where the purpose and content of the message taken as a whole are strictly for business. In other words, it is speech designed to propose a commercial transaction. Due to this interpretation, advertising has been regulated under the Commercial Speech doctrine to determine whether Free Speech protections have been impinged.

At one time, Commercial Speech was not protected at all by the First Amendment. This was mainly because it was once thought that such speech did not contribute to the doctrine of the “Marketplace of Ideas.” As a result, all layers of government could restrict commercial speech to almost any extent necessary as long as it was not unreasonable. However, the case of *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council* overruled a law that disallowed pharmacists to publish drug prices and established that Commercial Speech should at least receive some heightened protection. Therefore, the court held any regulations on Commercial Speech would invoke an “intermediate scrutiny” test. The court noted that Commercial Speech should be protected for several reasons: 1) just because a speaker has economic motives does not mean he or she should be penalized, 2) many consumers such as the sick and poor want this free flow of commercial information that might be cheap, and 3) the ability to communicate on commercial issues is consistent with the free market society of the United States. Although the majority said Commercial Speech would be tested under an intermediate scrutiny test, it did not create the test to determine if a violation had occurred.

Finally, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the court created the 4-part “*Central Hudson Test*” to determine whether the right to engage in Commercial Speech had been unconstitutionally impacted. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 573 (1980). The first part of the test asks whether the Commercial Speech at issue is either “misleading or related to unlawful activity”. *Id.* at 558. If it is either, then it will not receive First Amendment protection and the government can regulate it or even prohibit it entirely. If, however, the commercial speech is not misleading or related to unlawful activity, then the government may only regulate it if it satisfies the next three factors. The second part says, “the government interest in doing so must be substantial.” *Id.* More generally, laws that are designed to protect the health, safety, and welfare of society will easily meet the standard. The third part says the regulation must “directly advance the interest”. There is no precise measure for this prong, however it will not be upheld if it is “remote or ineffective” in sustaining the government interest. The fourth and final part of the test requires the law to be narrowly tailored. The court has interpreted this to mean that there must not be “equally effective but less restrictive alternative” regulations. *Id.* at 564. This 4-part test will be discussed much more thoroughly in the commentary below in regards to its application to PIMAS.

As noted previously, however, a state constitution is allowed to provide more Free Speech rights if it so desires. Based on Texas Free Speech jurisprudence, it appears in general as if Texas does have a wider scope than the Federal First Amendment. However, the Texas courts have decided to stay “lock-step” with the Federal cases in regards to Commercial Speech interpretations. In other words, Texas has basically cited and used the *Central Hudson Test* in any Commercial Speech cases the state courts may have. This “lockstep” of Commercial Speech rights appeared in several Texas cases including *Pruett v. Harris County Bail Bond Bd.*, 249 S.W.3d 447 (Tex. 2008) and in *Anderson Courier Service v. State*, 104 S.W.3d 121 (Tex. App. Austin 2003). The cases cite the *Central Hudson* as the sole test to determine whether a right to Free Speech has been violated for Commercial Speech cases.

Therefore, the legislature has created PIMAS to satisfy both the Article I, section 8 of the Texas Constitution and in particular the *Central Hudson Test*. Although Texas Commercial Speech law is the most binding authority, Texas’ following of the Federal interpretation of *Central Hudson* allows the following commentary to see Federal authoritative jurisprudence as very persuasive.

III. A History of Tobacco and Alcohol Advertising Regulations

To help set up the guidelines of PIMAS and how it satisfies *Central Hudson*, a look back at the history of Tobacco and Alcohol advertising regulations would be helpful. This is because the restrictions put in place by PIMAS have been modeled off legislation regarding alcohol and tobacco advertising that were subsequently reviewed by the court. Moreover, the interests for restricting advertising for substances such as tobacco and alcohol are very much the same as the interests for restricting advertising of marijuana.

There are several cases that discuss both tobacco and alcohol regulations. Some regulations have been upheld. Other regulations have been shot down as unconstitutional against Free Speech rights. Several have been partially upheld and partially struck. This latter situation

has often occurred because of the way the *Central Hudson* test is created. Although part of a law may pass the test, another part may fail another prong of the test. This is why it is very important that PIMAS was drafted not only to further the State's interest but also did so in manner that directly furthered that interest and did not restrict any more speech than necessary. To do otherwise would be enacting a law that covers more ground and violate more privacy than is needed or required to achieve the state's interest.

A complete statutory ban of advertising for a legal product is simply impermissible. Although there was previously a complete ban on marijuana advertising, this was so because marijuana was illegal and thus did not fall under First Amendment or Free speech protections. Either way, a complete statutory ban of marijuana advertising is something PIMAS does not attempt to do. A similar issue arose in the case of *44 Liquormart, Inc. v. Rhode Island*. In *44 Liquormart*, Rhode Island's legislature passed a complete ban on any price advertising that did not occur on the premises of a store where liquor could be legally sold. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 487 (1996). The plaintiffs filed the suit claiming this violated their First Amendment right to Free Speech. *Id.* at 486. The court did agree that the State had several substantial interests to promote truthful and accurate commercial messages and to prevent increase consumptions of alcohol by individuals. However, the court nevertheless found this to be a First Amendment violation. The court noted the legislation failed the "must directly advance the interest" prong of the test. *Id.* at 492. In reply to the State's argument that it enacted the statutory ban to protect consumers from untruthfulness and inaccurate "commercial harms," Justice Stevens held that governmental regulations to stimulate truthful and accurate commercial messages rarely protect consumers. *Id.* Moreover, Justice Stevens said that the State failed to prove that the statutory ban would prevent an increase in consumption of alcohol after taking into consideration the number of abusive drinkers who would not be affected but who needed the assistance the most. *Id.* at 491.

Another case that is extremely helpful to see the legal parameters of advertising regulations is the *Lorillard Tobacco Co. v. Reilly* case. In *Lorillard Tobacco*, the court struck down several regulations issued by the Attorney General of Massachusetts but also upheld several parts of it that fully satisfied the *Central Hudson* Test. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 527 (2001). The regulations restricted the type of advertising that could be placed on cigarettes, cigars, and or any other tobacco use. *Id.* at 527. The court first held that the "governmental interest in preventing underage tobacco use is substantial, and even compelling." *Id.* at 528. One of the regulations prohibited outdoor advertising of tobacco and cigars that were within 1,000 feet of a school or playground. *Id.* The court said that this not only conveyed the state interests to prevent underage use but also that it directly advanced those interests in compliance with the third prong of the test. *Id.* at 528-529. Nevertheless, the court still said it failed *Central Hudson* in the end because it was not narrowly tailored. *Id.* at 529. The court explained that creating a near absolute ban in some metropolitan areas would excessively restrict the sellers' opportunity to offer legal transactions with adults. *Id.* at 528. In other words, the regulation was more extensive that was necessary to serve the interest of protecting underage use. This was because a much shorter ban could have achieved the same interests in preventing underage use of cigarettes and tobacco. However, the court did hold that the Attorney General's regulation that required retailers to place the cigarettes and tobacco merchandise behind the counters and requiring customers to talk to a salesperson before they are able to hold or inspect such products did not violate the First Amendment. The court again noted the state had a

substantial interest to prevent minors from accessing tobacco or becoming acquainted with its brands. It then stated that such regulation not only advanced this interest but was narrowly tailored. It held that such a regulation did not impede adult access to tobacco products and that retailers still had was of exercising their speech interests to present their products since adults simply had to talk to a sales clerk beforehand.

These cases help indicate the type of problems this legislature sought to avoid when enacting PIMAS. Based on this case law and many others, it appears that preventing use of certain substances from minors is a substantial interest that is likely to always satisfy the second prong of *Central Hudson*. The biggest issue that PIMAS was designed to satisfy is that it directly advances that interest and does not restrict any more speech than necessary. With this jurisprudence in mind, it will help go forward to explain each 4-part analysis of the *Central Hudson* Test and how PIMAS is able to satisfy each factor.

IV. Regulating Speech that is False, Misleading, or Promotes Illegal Activity

The first prong of the *Central Hudson* Test is not something the state has to prove but rather is more of an initial step to determine whether the test needs to be used in the first place. In other words, it must be determined if the expression is protected by the First Amendment. For speech to fall within this protection, it must not be false, misleading, or promote illegal activity.

The State will thus have the ability to ban any type of speech that may fall under one of these categories. This is an absolute rule, so therefore if the speech does fall under one of these categories they are automatically in violation of this law and can be fined immediately.

The scope of this factor appears to be wide. Certainly, the state could argue that any advertising can promote illegal activity because certainly even the most remote areas can have citizens under the age of 24, which is the age requirement to purchase marijuana. If this is the case then this could be considered to “promote” illegal activity because eventually an underage citizen would see the advertisement and be persuaded by it. This would be an illegal activity that the advertising promoted and thus in violation of PIMAS section VII(h). With this in mind the state could theoretically ban all advertising because at some point it could logically be linked to some type of illegal activity.

However, the drafters of PIMAS were careful to not rely on this. The courts have never interpreted advertising of alcohol or tobacco to promote illegal activity simply because they know eventually underage citizens would see the advertising. The legislature does not believe the court would think any different with it being marijuana even though it has been historically scrutinized very highly. Rather, an example of a type of advertising that can violate this part of PIMAS would be an advertisement on a billboard that shows someone smoking marijuana while driving. Texas clearly states that a driver may not smoke marijuana while driving. This is no surprise as marijuana has been shown to cause impairment in every area that can be reasonably connected with safe driving of a vehicle such as motor coordination, visual functions, and particularly complex tasks that require multi-tasking. David Malleis, *The High Price of Parenting High: Medical Marijuana and Its Effects on Child Custody Matters*, 33 U. La Verne L. Rev. 357, 374 (2012). Therefore, because the law states driving while smoking marijuana is illegal, the advertising to do such a thing will violate PIMAS without even receiving any Free

Speech protections. However, in exception to clear cases such as this, the legislature believes the court will continue to view this factor narrowly. With this in mind, a discussion of how the legislature satisfies the next three prongs of *Central Hudson* will have to be looked at.

V. The State's Interests are Substantial

The second step the state must look at is to prove that their interests are considered “substantial.” This is basically the intermediate scrutiny standard. More generally, laws that are designed to protect the health, safety, and welfare of society that are narrowly tailored will meet this standard. The goal of PIMAS is indeed to protect the wellbeing of the community and its adolescents.

As with the first prong, the court is typically liberal in its application, often declaring many of the state's interests to be considered to meet the intermediate scrutiny requirement. To date the Federal Court has only found two proclaimed state interests as unsatisfactory under the second *Central Hudson* prong. These two deficient interests were protecting recipients from mail they might find “offensive” and maintaining state authority over alcohol transactions and promotions. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995). Other than this, however, many interests claimed by the state are typically seen as substantial.

This legislature has found several interests for regulating the advertising of marijuana that is similar to the interests to regulate tobacco and alcohol. These interests include protecting the privacy of consumers, ensuring marijuana will be used in legal and proper manners, and helping prevent immoral corruption in the community. However, the biggest interest the State has is to protect underage citizens, in particular adolescent children, from being exposed to the uses and dangers of marijuana. This interest derives first because use from those under the 24-age limit to purchase and consume marijuana would be illegal. More importantly, however, the state's interest is to prevent children from being exposed to the strong hallucinogenic effects marijuana causes. Though not definitive, many studies suggest a causal relationship between marijuana use and the onset of permanent psychosis. David M. Fergusson et al., *Cannabis and Psychosis*, 332 *Brit. Med. J.* 172, 173 (2006). Psychosis is a “generic description of severe mental illness characterized by the presence of delusions, hallucinations, and other associated cognitive and behavioral impairments that interfere with the ability to meet the ordinary demands of life.” *Id.*

Moreover, marijuana has been linked to causes of addiction. While matured adults are likely to be able to overcome and handle these two symptoms, children are not near as likely to be able to. Studies have also shown that children who are exposed to marijuana lead them to a “gateway” to more drugs. The Partnership for a Drug-Free America takes the position that marijuana use does indeed lead to the use of other drugs. Abbie Crites-Leoni, *Medicinal Use of Marijuana: Is the Debate A Smoke Screen for Movement Toward Legalization?*, 19 *J. Legal Med.* 273, 282 (1998). Additionally, a study by Columbia University's Center on Addiction and Substance Abuse found that a child who experiments with marijuana is 85 times more likely to use cocaine than a child who does not use marijuana. *Id.* at 283.

Underage citizens are also more likely to be in some type of educational school or institution. The use of marijuana and its effects would likely impact the ability of the student to achieve his or her potential at the school. These are the interests the state has from censoring children to any over-exposure of marijuana. These interests are indeed substantial and help protect the health and safety of society as a whole. Therefore we conclude that the state has interests that meet the standard of being “substantial.” PIMAS will help protect a large number of adolescents as well as the health and safety of the community.

VI. PIMAS Directly Advances the State’s Government Interests

The third step in the Commercial Speech Test is that the regulation of the speech must directly advance the State’s interests they have put forth. In other words, this step looks at whether suppressing the speech will indeed satisfy the concerns of the state. This factor is where many Commercial Speech regulations get struck down on. This is because although the court often says the State does put forth an interest, the regulation is really just illusory in helping that interest.

For example, *Rubin v. Coors Brewing Co.* concerned a law that did not allow beer manufacturers to put on their beer labels any alcohol content percentage information. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995). The State argued that the regulation was necessary to prevent beer manufacturers from promoting their beverages based on the strength of the alcohol, which the State indicated would lead to higher rates of alcoholism. *Id.* The court agreed that there was indeed a substantial interest but held the regulation did not directly advance the interest. *Id.* 487-88. The court reasoned that the State still allowed wine manufacturers to indicate the alcohol percentage content on the labels and more importantly the State did not put on any evidence that indicated such a competition of “who has the strongest alcohol content” would even occur. *Id.*

The jurisprudence of the “directly advance” prong illustrates the need to have some evidence as to how restricting the speech will promote the state’s interests. PIMAS directly advances its interest. The two parts of the law that might come to question is the 300 foot prohibition of advertising near schools and playgrounds and also the advertising restriction on television during daytime hours. It should be noted that the 300 foot restriction will pass the directly advance prong because the area surrounding the school is always filled with children both during the school year and in the summers. Even if their parents pick them up, many children will still see any advertising when on their drive home. Moreover, the 300 foot prohibition is not nearly as far as 1000 feet prohibition that was found in the *Lorillard v. Reilly* case discussed previously. Although the law was struck down because it restricted more speech than necessary, the court still held that the 1000 feet prohibition directly advanced the interest of protecting minors. Here, a restriction much closer to the school will impliedly advance the same interest of protecting minors and preventing them from experimenting with the use of marijuana.

Moreover, the ban on marijuana advertising between the hours of 6:00 A.M. until 10:00 P.M. directly advances the state’s interests of protecting minors. These hours are the times specifically found by the FCC to be the times minors most watch television. Marie A. Ryan, *To V or Not to V-That Is the Regulatory Question: The Role of the V-Chip in Government Regulation of Broadcast and Cable Indecency*, 4 Cardozo Women's L.J. 137, 139 (1997). Additionally, by the time the average child reaches the age of eighteen, he or she has spent some 10,000-15,000 hours watching television and has been exposed to 200,000 commercials. Alison

L. Thorburn, *Regulating Television for the Sake of Children*, 67 U. Det. L. Rev. 413 (1990). Due to the amount of television-advertising minors are exposed to, the need to regulate marijuana advertising during daytime hours is crucial. To do so would certainly advance the interests of protecting minors from the usage of marijuana.

VII. PIMAS' Regulations are not Any More Extensive than Necessary

The final prong of the *Central Hudson* test looks at if the law is “narrowly tailored” in achieving the interests put forth by the state. In other words, the state’s suppression on speech must not be more than what is necessary to achieve the goals they have in mind. PIMAS was drafted carefully to ensure this would not be done. In considering whether a regulation is narrowly tailored to serve the state's interest under a mid-scrutiny frame work like *Central Hudson*, the Supreme Court has held that the fit between the regulation and the state's interest does not have to be perfect, but only be reasonable. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 478 (1989). The prohibition against advertising near schools or playgrounds and the prohibition against advertising during daytime hours are minor restrictions compared to similar legislation that were held to go too far.

In regards to the advertising near schools or playgrounds, the prohibition is against any advertising within 300 feet of the school. In the *Lorillard*, the statute had a near identical provision as PIMAS’ but the limitation was within 1000 feet. Although it passed the first three factors of the *Central Hudson* test, it failed to be narrowly tailored. *Lorillard Tobacco Co.* at 528. The court said that such a prohibition went too far and restricted more speech than was necessary. *Id.* The court reasoned that such a restriction interfered with the alcohol industry’s ability to communicate affectively to adults. *Id.* 528-529. In the opinion, the majority wrote the regulation “would constitute nearly a complete ban on the communication of truthful information about the products in question.” *Id.* at 529.

The difference between PIMAS and the *Lorillard* is that our regulation does not make it to where there is virtually no advertising space available to licensees. The legislature believes a 300-foot prohibition is enough to prevent children from being exposed to marijuana while also respecting the Free Speech rights of commercial retailers.

PIMAS is also narrowly tailored in respect to the 10:00 P.M. to 6:00 A.M. “safe harbor” hours created for the advertising of marijuana. Although this rule will prevent many children from being solicited by marijuana advertisements, it respects the right of commercial advertising to adults whom are of legal age. The hours of 10:00 P.M. until 6:00 A.M. gives adults the chance to look at prices and different products of marijuana so they may search the market as they please. A complete ban on marijuana television advertising would likely not be able to pass this aspect of the *Central Hudson* test, similar to *Lorillard*. A similar provision was found in *Action for Children's Television v. FCC* where the FCC prohibited offensive programming to later hours of the day when children would not be watching. *Action for Children's Tel. v. FCC*, 852 F.2d 1332, 1342 (D.C. Cir. 1988). The court reaffirmed the need for safe harbor hours when broadcasters may program offensive material but also struck down a complete ban on offensive

and indecent material. Therefore, PIMAS creation of “safe harbor” hours satisfies both the needs of the State as well as the desires of both the producer and the consumer.

VIII. License Commission’s Regulatory Authority

Under PIMAS, the Texas Department of Licensing and Regulation Commission (TDLR) has been given the authority to promulgate bans and regulations that is specified in the statute. The advertising market constantly fluctuates. Due to this, the legislature has given the TDLR the authority to fully ensure the state’s interest will be protected. PIMAS has been set up to satisfy the *Central Hudson* Test and maintains that the TDLR must also stay within these parameters.

To illustrate, PIMAS allows the TDLR to regulate advertising of marijuana “to enforce this statute.” What this means is that the TDLR has the ability to ban or regulate marijuana advertising on billboards that promote illegal use, is misleading, or is 300 feet within a school or playground. The list goes on to include several other methods the TDLR can regulate such as on roads, newspapers, automobiles, and through the mail. As anticipated, many of these advertisements can easily violate a provision of PIMAS, such as an automobile that might come near a school. A proper regulation by the TDLR would be the ability to limit the size of the ad on the automobile and to completely ban this car from coming within the 300-foot perimeter of the school.

The legislature believes this delegation of authority is both proper and a necessity. This delegation does not give the TDLR the outright authority to just create whatever ban or restriction they may wish. This would likely be considered an improper delegation because only the legislature is supposed to have lawmaking ability. However, many administrative agencies have been created to take this workload off the legislature. We give this delegation of authority to TDLR but with proper guidelines as to what authority they may assert. As noted, the TDLR may only create law that further reinforces PIMAS. It cannot create law that is wholly unrelated to PIMAS and its restrictions.

TDLR is a public entity so there shall be no possibility of conflicting interests, which might have been the case if the delegation was to a private entity. Many other states have enacted similar language giving an Administrative Commission the ability to enforce their advertising laws regarding alcohol and tobacco. These states include North Carolina’s statute 18B-105, Indiana’s statute 7.1-2-3-16, West Virginia’s statute 60-2-15, Massachusetts general law 138 statute 24, and our own Texas statute 108.52. PIMAS’ delegation of authority to a commission has worked for other states, including Texas, when it comes to administrating alcohol and tobacco. We feel the help of the TDLR will be even more critical when it comes to marijuana advertising to protect the state’s interests.

IX. Fines and Penalties

The fine and penalty of violating PIMAS is one of substantial magnitude. A person who violates PIMAS is guilty of a Class A misdemeanor. The fine that may be assessed shall be no more than \$5,000. Many other foreign jurisdictions that have advertisement restrictions on alcohol and tobacco only seek a penalty of a Class B or C misdemeanor and with a lower fine.

However, there are several reasons why we place punishment at a somewhat higher rate than these other statutes. First, marijuana's legal use has barely been authorized. There were several justifying reasons as to why marijuana use was illegal for so long. Due to this reason the courts should not only read PIMAS broadly but also access this penalty to the fullest extent necessary. This is why the punishment bar was set high in the first place. Secondly, the high penalty is supposed to act as a deterrent to creating such improper advertising. Without any consequences then PIMAS would be seen as a toothless piece of legislation that many would simply violate and get away with just minor penalizations.

At the same time, however, the legislature does not seek to create a felony for a violation of PIMAS. The reason this is so is because the large majority of jurisdictions do not make these advertising restrictions a felony offense and also because the Free Speech acts as a scintilla of protection here as well. Although we want to deter retailers from improper advertising, the legislature by no means wants to suppress speech that may be helpful to the producer, consumer, or society as a whole. The United States thrives off a free market enterprise and the ability to advertise through Free Speech obviously encourages this. The legislature seeks only to suppress that speech which may be harmful. This can be done through the fine and penalty that is currently in place.

X. Conclusion

PIMAS is a statute that will help protect society from unneeded exposure to the advertising and solicitation of a now legal controlled substance. At the same time, PIMAS respects the desires by retailers and consumers to sell and obtain a substance just as they would other products. Both the United States Constitution and Texas Constitution offer protection to these retailers and we do not seek to suppress these rights. PIMAS does not breach these protections but does ensure that this right will not be abused against the betterment of the state of Texas.