

Pending Ban on Coupons and Other Incentive Items Promoting Restaurant Foods Based on Nutritional Standards in Santa Clara, CA Presents Significant First Amendment Issues

May 5, 2010

On April 27, 2010, the Board of Supervisors for Santa Clara County, California, conducted its "preliminary vote" to institute a new ordinance which prohibits restaurants from "providing" toys, coupons, or other "incentive items linked to the purchase" of any product containing "excessive" calorie, fat, saturated fat, sodium, added sugars, or prohibited levels of trans fat, non-nutritive sweeteners, or caffeine. More information regarding the specified nutritional criteria is available [here](#). The ordinance includes no food labeling requirements and provides that the requirements must be construed in a manner that is consistent with state and federal law.

In order for an ordinance to go into effect in Santa Clara, it must undergo both a "preliminary" and "final" vote before Santa Clara's Board of Supervisors. The "final vote" will be held Tuesday, May 11, 2010. If the ordinance passes again on May 11, enforcement will begin 90 days later (August 11, 2010). If the ordinance does not pass it will be removed from the docket and would have to undergo another "preliminary vote" before it could be presented to the Board of Supervisors for a "final vote" again.

The ordinance would ban the use of incentive items for products based on nutrient and ingredient content, including coupons and other items that constitute commercial speech, presenting significant First Amendment issues. The ordinance would define "incentive item" broadly to include "any toy, game, trading card, admission ticket or other consumer product, whether physical or digital... or any coupon, voucher, ticket, token, code, or password redeemable for or granting digital access to any [of the aforementioned items]."

Restaurants that violate the new ordinance would be subject to administrative and civil penalties, including fines. The county would use fines collected under the ordinance to fund obesity prevention programs conducted by the county public health department. The Board of Supervisors found that "restaurants encourage children and adolescents to choose specific menu items by linking them with free toys and other incentives," citing 2006 data regarding fast food child-directed promotional expenditures published by the Federal Trade Commission.