

# OUTDOOR

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## Legal Corner: Individual States Have Authority to Regulate Digital Billboards in Accordance with Their Federal/State Agreements

**D**igital billboards is the most widely discussed topic today in the outdoor advertising industry. Recent advances in technology have made outdoor advertising via digital technology a reality. Although the cost of digital billboards, including LED (light emitting diodes) signs, is still somewhat costly, the ability to display and change messages electronically is appealing to advertisers and outdoor advertising companies as well as law enforcement. All outdoor advertising signs located adjacent to certain controlled highways are regulated by the Highway Beautification Act (HBA; 23 USC 131 et seq.). The HBA requires states to maintain effective control of outdoor advertising located adjacent to these highways.

States have authority to regulate highway advertising signs, but are required to obtain approval from the Federal Highway Administration (FHWA) of any changes to their laws, regulations and procedures implementing the requirements of the HBA. Outdoor advertising signs whose size, lighting and spacing are consistent with the customary use as determined by agreements between the several states and the Federal Government (FSA Agreements) may be erected and maintained. (23 USC § 131(d).) Most of the FSA Agreements were entered into in the late 60s and early 70s.

The FHWA issued a Memorandum to Regional Administrators on July 17, 1996 (1996 Memorandum), to provide guidance for off-premise changeable message signs. The 1996 Memorandum noted that since the FSA Agreements were entered into, "there have been technological changes in science, including changes that were unforeseen at the time the agreements were executed. While most of the agreements have not changed, the changes in technology require the state and FHWA to interpret the agreements with those changes in mind." Although the 1996 Memorandum addressed the leading technology at that time, three-message display signs, it was generally based on the premise any changeable messages that are fixed for a certain period of time do not constitute "flashing," "intermittent" or "moving" lights, which are prohibited under 23 CFR § 750.108(c).

On September 25, 2007, the FHWA issued a Memorandum to Division Administrators (2007 Memorandum) confirming the 1996 guidance for off-premise changeable message signs and applied that guidance to digital billboards. The 2007 Memorandum applies to conforming signs, and reiterates the FHWA's position that changeable messages fixed for a period of time do not constitute "flashing," "intermittent" or "moving" lights, as those terms are defined in the HBA or the FSA Agreements. The 2007 Memorandum expressly states, in pertinent part:

Proposed laws, regulations,

and procedures that would allow permitting CEVMS [Changeable Electronic Variable Message Signs] subject to acceptable criteria (as described below) do not violate a prohibition against 'intermittent' or 'flashing' or 'moving' lights as those terms are used in the various FSAs that have been entered into during the 1960s and 1970s.

Changeable message signs, including digital/LED display CEVMS, are acceptable for conforming off premise signs, if found to be consistent with the FSA and acceptable and approved State regulations, policies and procedures.

This guidance does not prohibit States from adopting more restrictive requirements for permitting CEVMS to the extent those requirements are not inconsistent with the HBA, Federal regulations, and existing FSAs.

Therefore, whether or not a digital billboard is allowed in a specific jurisdiction depends on the language of the FSA Agreement, and the relevant state and local laws and regulations. As long as the laws, regulations and procedures permitting digital billboards meet acceptable requirements, they will not violate the HBA. In some circumstances, FSA Agreements may need to be revised. States may amend FSA Agreements under the following process:

1. A state must first submit its pro-



posed change along with the reasons for the change and the effects of such change to the FHWA Division Office.

2. The Division and FHWA Headquarters offices review and comment on the proposal.

3. If the concept is approved by the FHWA, the state must hold state-wide public hearings on the proposed change in order to receive comments from the public.

4. If the state then wishes to amend the agreement, it must submit to the FHWA:

- a. the justification for the change;
- b. the record of hearings; and
- c. an assessment of the impact.

5. Then, these are summarized and published in the Federal Register for comments.

6. Comments on the proposed amendment agreement will then be evaluated by the FHWA.

7. The FHWA will then decide if the agreement should be amended as proposed and will publish its decision in the Federal Register.

If a state's FSA Agreement permits digital billboards, the analysis turns to whether the duration of the message, the transition time, brightness, spacing and location are consistent with the FSA Agreement and within the FHWA's range of acceptability. The 2007 Memorandum provides the following general standards:

- **Duration of message:** State regulations generally vary between four and ten seconds. The FHWA recommends eight seconds.

- **Transition time:** The transition time between messages allowed under State regulations is generally between one and four seconds. The FHWA recommends a one to two second transition.

- **Brightness:** Digital billboards should adjust brightness in response

to changes in light levels.

- **Spacing:** Spacing of digital billboards should be not less than the minimum spacing requirements for signs under the FSA Agreements.

- **Locations:** Digital signs should be allowed in areas permitted under the FSA Agreements, except where such locations are determined inappropriate to ensure the safety of the motoring public.

The main focus of the FHWA standards referenced above is traffic safety. Recent traffic safety studies have been conducted by the Virginia Tech Transportation Institute (VTTI), the South Carolina Department of Transportation (SCDOT) and the Foundation for Outdoor Advertising Research and Education (FOARE), which commissioned Tantara Associates to perform the study. The SCDOT conducted a six-month study after installing three digital billboards in 2006 to determine whether or not the signs posed a greater risk to motorists. "The study based on the period of review does not highlight a problem with the digital billboards," said Deputy State Highway Engineer Dipak M. Patel.

The study conducted by Tantara Associates involved a temporal and special analysis of the traffic and accident data near seven digital billboards on interstate routes in Cuyahoga County, Ohio, for the periods 18 months before and 18 months after the billboards were converted to digital billboards. The Tantara Associates' study found the digital billboards have no statistical relationships with the occurrence of accidents. The SCDOT and Tantara Associates research was consistent with the study previously conducted by the VTTI, which found that digital billboards were safety neutral in design and operations from a human factor's perspective. The VTTI study

concluded the duration of a driver's mean glance in the direction of a digital billboard is less than one-second.

Traffic safety is not only an important issue when analyzing whether state regulations are consistent with FSA Agreements or the FHWA's ranges of acceptability, but may also be relevant to a First Amendment challenge on local or state laws and regulations of digital billboards. Two recent decisions, one by the Supreme Court of New Hampshire in *Carson's Chrysler v. City of Concord*, 938 A.2d. 69 (2007) and another by the First Circuit in *Nasser Jewelers, Inc. v. City of Concord*, 208 US App. Lexus 1052 (January 18, 2008), where faced with the question of whether Concord, New Hampshire's, ordinance prohibiting electronic message signs was constitutional.

Although both the *Carson's Chrysler* and *Nasser Jeweler's* cases involved on premise signs, the decisions are instructive. The New Hampshire Supreme Court and the First Circuit cited language from the Supreme Court's decision in *Metro Media v. San Diego*, 453 U.S. 490 (1981), which provided, in part, that the Supreme Court hesitates to disagree with the so-called common sense judgment of local lawmakers and reviewing courts that "billboards are real and substantial hazards to traffic safety." (*Id.* at 509.) The Supreme Court in *Metro Media*, however, further stated that the record before it was inadequate to show any connection between billboards and traffic safety, suggesting the reason the Supreme Court was hesitant to disagree with the notion that billboards are a traffic safety hazard.

Similar to the Supreme Court in *Metro Media*, the New Hampshire Supreme Court and the First Circuit likewise had an inadequate record regarding the issue of traffic safety.



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Working together is success.*  
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Neither court had any evidence before it to disagree with the premise that billboards are a traffic hazard. The recent traffic safety studies performed by the VTTI, SCDOT and Tantala Associates suggest that the purported "common sense judgments" billboards are a traffic safety hazard, may be inaccurate. In fact, digital billboards may provide a much needed health, safety and general welfare function to the community.

For example, digital billboard messages may be set up to display Amber Alerts for missing children, wanted notices for criminals or fugitives, and other important public service, health, safety and disaster assistance notices. This was the case in 2007 when digital billboards were used to direct drivers and others during the interstate bridge disaster in Minneapolis.

Given the latest traffic safety studies, states should strongly consider whether digital billboards will enhance the safety and general welfare of its citizens, rather than distract their motorists. Thirty-eight states currently allow billboards with changeable messages or digital technology. North Dakota, New Hampshire and Wyoming do not allow changeable message signs. The regulations governing the duration of the message, transition time, brightness, spacing and locations vary between jurisdictions. Further information about particular state requirements may be obtained from the Outdoor Advertising Association of America by visiting [www.oaaa.org](http://www.oaaa.org) or by inquiring with the state. 

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