PUBLIC HEALTH LAW CENTER
Tobacco Control Legal Consortium

FDA TOBACCO PROJECT

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REGULATING TOBACCO IN A POST-DEEMING WORLD

State and local options

The Family Smoking Prevention and Tobacco Control Act of 2009 granted the U.S. Food and Drug Administration (FDA) the authority to regulate all tobacco products. However, the Act only gave the FDA immediate authority over cigarettes, cigarette tobacco, smokeless tobacco, and roll-your-own tobacco.

To regulate all other tobacco products, the agency was required to issue a rule that "deemed" those products to be within FDA authority. On May 10, 2016, nearly seven years after the Tobacco Control Act became law, the FDA published the final deeming regulation. This regulation is a necessary first step for there to be comprehensive federal regulation of cigars, e-cigarettes, hookah, pipe tobacco, dissolvable tobacco products, and any other product containing tobacco, or nicotine derived from tobacco.

While the deeming regulation is an important step to protect the public from the harms of tobacco products, the final rule leaves a lot to be done at all levels of government. This factsheet identifies the gaps left by the deeming regulation that can be filled at the state and local levels. For a more

comprehensive discussion of the contents of the deeming regulation and other actions that the FDA should take to reduce the huge toll of illness and death caused by tobacco use, see our fact-sheet *The Deeming Regulation: FDA Authority Over E-Cigarettes, Cigars, and Other Tobacco Products*.

Federal preemption in tobacco control

The Tobacco Control Act explicitly preserved most state authority (and, to the extent allowed under state law, local authority) to regulate

tobacco products. Only a few specific types of policies are preempted by federal law. The Act provides that state and local governments retain the authority to restrict or prohibit the "sale, distribution, possession, exposure to, access to, advertising, and promotion of, or use of tobacco products by individuals of any age." It also allows policies related to "fire safety standards for tobacco products," and permits states to require "information reporting to the State."

The Tobacco Control Act prohibits state and local governments from adopting policies that are "different from, or in addition to" FDA standards related to "tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products."

State and local governments retain full authority to tax products, enact smoke-free laws, and adopt retail restrictions, such as limiting or prohibiting the sales of tobacco products, licensing retailers, and raising the minimum legal sales age above eighteen.

Post-deeming regulation gaps

While the deeming regulation is an important development, simply asserting jurisdiction does not adequately protect public health from the dangers related to e-cigarettes, cigars, and other products.

Given some limits on FDA authority as well as the slow pace of the federal regulatory process, state and local governments retain their critical role of implementing strong, evidence-based tobacco control policies to protect health in their communities.

Key policy options to protect health in your state or community include:

Raising taxes on tobacco products, including e-cigarettes

Prohibiting smoking and tobacco use in public spaces

Establishing minimum pack sizes and minimum prices for tobacco products

Raising the minimum legal sales age for tobacco products to 21

Prohibiting the sale of tobacco products by certain retailers, such as:
- Prohibiting the sale of tobacco products in pharmacies
- Limiting the sale of tobacco products to adult-only, tobacco-only retail stores

Reducing the number of tobacco retailers in a community, as part of a comprehensive tobacco retailer licensing program

Restricting the location of tobacco retailers within the community, so that they are not near other tobacco retailers or near schools

Prohibiting the sale of classes of tobacco products, such as:
- All combustible tobacco products
- All flavored tobacco products, including menthol

Final deeming regulation provisions

	Cigarettes	Smokeless tobacco	Cigars	E-cigarettes and others
Minimum sales age of 18 and age verification under 27	✔	✔	✔	✔
Prohibition on vending machine sales	Allowed in adults-only facilities	Allowed in adults-only facilities	Allowed in adults-only facilities	Allowed in adults-only facilities
Prohibition on self-service displays	Allowed in adults-only facilities	Allowed in adults-only facilities		
Minimum package size requirements	✔			
Prohibition on breaking packages by retailers (e.g., sales of loosies)	✔	✔		
Prohibition on free samples	✔	Allowed in qualified adults-only facilities	✔	✔
Prohibition on characterizing flavors	Menthol and tobacco allowed			
Mandatory warning labels on packages and advertisements	Nine rotating warnings	Four rotating warnings	Six rotating warnings*	One static warning
Prohibition on brand names on non-tobacco products and brand name sponsorship of sporting and cultural events	✔	✔		
Required notice of advertising in any non-traditional medium	✔	✔		

Other resources

For more information on the FDA's regulation of tobacco products, visit our FDA Tobacco Action Center.

This publication was prepared by the Public Health Law Center at Mitchell Hamline School of Law, St. Paul, Minnesota.

Endnotes

* In the proposed deeming rule, FDA proposed to require four of the five warnings already included on most cigar packages and in most cigar advertisements as a result of settlement agreements between the Federal Trade Commission (FTC) and the seven largest U.S. cigar manufacturers. The final deeming regulation requires a fifth warning regarding reproductive health effects and cigar use specifically, which reads "WARNING: Cigar use while pregnant can harm you and your baby." The FDA notes in the final rule materials that this requirement is supported by existing scientific evidence and is appropriate for the protection of the public health. However, because the general statement "Tobacco smoke increases the risk of infertility, stillbirth and low birth weight" is also a true statement, and because scientific evidence demonstrates that cigar smoke is similar in content and effects to cigarette smoke, the FDA will allow the use of the reproductive health warning required by the FTC settlement agreement as an optional alternative to the fifth FDA warning. In addition, cigarette tobacco, roll-your-own tobacco, and the newly covered tobacco products will have a required warning label regarding addictiveness.