NO VAPES IN CYBERSPACE: HOW TO STOP INTERNET SALES OF COMMERCIAL TOBACCO
EFFECTIVE PUBLIC HEALTH POLICY IS CREATED IN CONSIDERATION OF EQUITY

Image credit: Sam Bradd https://drawingchange.com/gathering-wisdom-visuals-for-a-healthy-future/
LEGAL TECHNICAL ASSISTANCE

- Legal Research
- Policy Development, Implementation, Defense
- Publications
- Trainings
- Direct Representation
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TODAY’S PRESENTATION
Today’s Speaker
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Moderator
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INTRODUCTION

Young, underaged persons can and do acquire tobacco products including e-cigarettes online.
AGENDA

Current Landscape of Internet & Delivery-Based Commercial Tobacco Product Sales

What measures can Local, State, and Federal governments take to address online sales of tobacco products?

• Local Action
• State Action
• Federal Action

Conclusion
CURRENT LANDSCAPE OF INTERNET & DELIVERY-BASED COMMERCIAL TOBACCO PRODUCT SALES

• Growing prevalence of on-demand internet-app-based retailers and delivery services popular with young people.
  – GoPuff:

A representative example
  – Saucey

www.GoPuff.com

https://www.saucey.com/tobacco
CURRENT LANDSCAPE OF INTERNET & DELIVERY-BASED COMMERCIAL TOBACCO PRODUCT SALES

- Major online commercial and e-cigarette retailers like Juul also present regulatory challenges.
CURRENT LANDSCAPE OF INTERNET & DELIVERY-BASED COMMERCIAL TOBACCO PRODUCT SALES

• Flawed and ineffective age verification processes.

CURRENT LANDSCAPE OF INTERNET & DELIVERY-BASED COMMERCIAL TOBACCO PRODUCT SALES

• Limited but significant illicit online tobacco trade.
WHAT CAN LOCAL COMMUNITIES DO?

LITIGATION

• Cities and counties can pursue litigation against online tobacco retailers to enforce their minimum legal sales age laws.

• Examples of jurisdictions that have employed this measure:
  • New York City
  • Chicago
WHAT CAN LOCAL COMMUNITIES DO?

REGULATION

• Some regulatory measures include:
  • Completely prohibit direct-to-consumer sales and shipments of tobacco products, include e-cigarettes.
  • Require local licensure for all tobacco product sales.
  • Define tobacco retailer to include only fixed location retailers that serve walk-in customers.
  • Example of a local jurisdiction that has pursued legislation:
    • San Francisco

https://www.cigaraficionado.com/article/colorado-looks-to-raise-cigar-taxes
WHAT CAN STATES DO?

• **Litigation**
  • Like local jurisdictions, states can also pursue litigation against online tobacco retailers to enforce their tobacco laws and to protect public health.
    • Recently, several states, including California, Minnesota, New York, and Arizona have filed suits against Juul.

• **Regulation**
  • Potential Legal Issues & Challenges
    • U.S. Constitution – No barrier.
    • Federal Statutes – may limit state authority, especially with respect to regulating common carriers.
WHAT CAN STATES DO?

Other state action:

• Litigation against common carriers – New York State
• Taxing out-of-state sellers, including online tobacco retailers – South Dakota v. Wayfair (2018).

States retain significant authority to regulate and even entirely prohibit direct-to-consumer shipments of tobacco products, including e-cigarettes.

• At least twelve (12) states have laws that prohibit direct-to-consumer shipments of some tobacco products.
• At least six (6) states have even more comprehensive laws that extend these prohibitions to e-cigarettes.

https://sustainability.ups.com/sustainability-strategy/environmental-responsibility
FEDERAL ACTION & AUTHORITY

Two key federal laws applicable to internet sales of tobacco products:

• The Prevent All Cigarette Trafficking Act of 2009 (PACT Act)
  • Significant step in regulating internet sales of tobacco products, but critical limitations or loopholes remain.

• Tobacco Control Act of 2009
  • FDA's authority to regulate internet sales under the Act has yet to be exercised.

THE PACT ACT: SOME KEY PROVISIONS

• Prohibits online sale of cigarettes and smokeless tobacco to anyone under the legal sales age in their state.

• Requires that an internet-based retailer who ships tobacco:
  – Label packages as containing tobacco
  – Verify age and identity at purchase
  – Use a method of mailing or shipping that checks ID and obtains a customer signature at delivery; and
  – Pay state taxes and comply with state laws as if the sale occurred within the state

• Prohibits the shipment and transport of cigarettes & smokeless tobacco through the U.S. mail;

• Preserves the authority of states to prohibit internet-based retailers from shipping cigarettes & smokeless tobacco products to consumers & residential addresses within their states.
THE PACT ACT: SOME LIMITATIONS

• Applies to cigarettes and smokeless tobacco; does not apply to e-cigarettes, cigars, and other tobacco products.

• Significantly limits state ability to regulate common carriers such as UPS & FedEx.
  – E.g., states cannot require common carriers to check IDs or obtain signatures at delivery.
  – BUT, internet-based-on-demand retailers, such as GoPuff, are likely not common carriers and so remain subject to state regulation.
  – And states can likely still regulate common carriers where other tobacco products (besides cigarettes and smokeless tobacco) are involved.

• Note: the Act does not limit state authority to entirely prohibit direct-to-consumer sales and shipments of all tobacco products.
TOBACCO CONTROL ACT

• Gives the FDA clear authority and instruction to adopt a regulation to control internet sales of tobacco products to youth.

• Established a deadline for this regulation: October 1, 2011.

• To date, however (more than 8 years later), the FDA has failed to propose a regulation consistent with this duty.
CONCLUSION

• States and local governments can close many of the existing loopholes.

• States and local jurisdictions (where not preempted by state law) have the authority to regulate and even entirely prohibit internet-based retailers from selling and shipping tobacco products to customers within their borders.

• Complete prohibition on direct-to-consumer shipments of tobacco products is likely the most effective way to prevent youth access to online tobacco products including e-cigarettes.

RESOURCES

Online Sales of E-Cigarettes & Other Tobacco Products (2019)


States and Tribes Stepping in to Protect Communities from the Dangers of E-Cigarettes: Actions and Options (2020)
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QUESTIONS??