

Tobacco Product Marketing Restrictions

Federal Regulation of Tobacco: A Summary
July 2009



Background

On June 22, 2009, President Barack Obama signed into law the Family Smoking Prevention and Tobacco Control Act, giving the U.S. Food and Drug Administration (FDA) comprehensive authority to regulate the manufacturing, marketing, and sale of tobacco products. The new law represents the most sweeping action taken to date to reduce what remains the leading preventable cause of death in the United States.

Before enactment of the new law, the advertising and promotion of cigarettes was largely exempt from regulation due to preemptive provisions in the Federal Cigarette Labeling and Advertising Act (FCLAA). Although no similar federal preemption applied to advertising or marketing restrictions on other tobacco products, these types of restrictions were not pursued on a widespread basis.

What the New Law Does

The Family Smoking Prevention and Tobacco Control Act requires a number of restrictions on cigarette and smokeless tobacco product advertising and other marketing, and also grants the FDA authority to impose additional restrictions on the advertising, promotion and other marketing of tobacco products in order to promote overall public health. All such restrictions will be subject to review under the First Amendment, which protects certain commercial speech. The FDA finding as to whether such regulation would be appropriate for the protection of the public health will be determined with respect to the population as a whole, including users and non-users of tobacco.

The new law gives the FDA wide-ranging authority to regulate tobacco product marketing. Apart from the agency's power to implement new regulations in the future, the law mandates certain specific changes, as follows:

- Restricts tobacco advertising and promotion in order to promote overall public health (the judicial system will almost certainly be asked to adjudicate whether any of the legislated advertising restrictions unconstitutionally interferes with free speech under the First Amendment)
- Stops illegal sales of tobacco products to minors
- Prohibits health claims about purported reduced risk products, where such claims are not scientifically proven or would cause net public health harms (for example, by discouraging current tobacco users from quitting or encouraging new users to start)
- Revises and strengthens the content of health warnings on both cigarette and smokeless tobacco products, requiring the warnings to cover 50 percent of the front and back of all packages, including graphic images depicting the harmful effects of tobacco use
- Prohibits terms such as "light," "mild" and "low-tar" on tobacco product packages and advertisements, while authorizing the FDA to restrict additional terms in the future



The Family Smoking Prevention and Tobacco Control Act also mandates restrictions on the marketing and advertising of cigarettes and smokeless tobacco that the FDA itself adopted in 1996 but which the Supreme Court nullified in 2000 on the basis that Congress had not at that time given the FDA the authority to take such action. The new law:

- Bans outdoor advertising within 1,000 feet of schools and playgrounds
- Bans brand sponsorships of sports and entertainment events
- Bans free giveaways of any non-tobacco items with the purchase of products or in exchange for coupons or proof of purchase
- Bans free samples and the sale of cigarettes in packages that contain fewer than 20 cigarettes
- Limits any outdoor and all point-of-sale tobacco advertising, except in adult-only facilities, to black text on white background only
- Limits advertising in publications with significant teen readership to black text on white background only
- Limits audio-visual advertising, except in adult-only facilities, to black text on white background visuals and spoken words (no images, music or sound effects)
- Restricts vending machines and self-service displays to adult-only facilities
- Establishes 18 as a federal nationwide minimum age for legal cigarette and smokeless tobacco sales with strong federal penalties, including the loss of the right to sell tobacco products for chronic, repeat offenders
- Requires retailers to verify age for all over-the-counter sales by checking a photographic ID, and provides for federal enforcement and penalties against retailers who sell to minors

The law includes other significant changes, as well. For example, it:

- Limits the previously existing federal preemption against state regulation of cigarette advertising under the Federal Cigarette Labeling and Advertising Act, by allowing states to restrict the location, color, size, number and placement of cigarette advertisements. (It leaves unchanged local and state government power to regulate smokeless tobacco or other tobacco products.)
- Blocks tobacco companies from claiming that the FDA has approved or certified any tobacco product

To learn more about FDA regulation of tobacco, visit www.tclconline.org.

The Tobacco Control Legal Consortium provides information and technical assistance on issues related to tobacco and public health, but does not provide legal representation or advice. This fact sheet should not be considered legal advice or a substitute for obtaining legal advice from an attorney who can represent you. If you have specific legal questions, we recommend that you consult with an attorney familiar with the laws of your jurisdiction.