

Tobacco Product Marketing Restrictions

Federal Regulation of Tobacco: Impact on State and Local Authority
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 would be subject to the constraints of 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 would be determined with respect to the population as a whole, including users and non-users of tobacco.

The FDA has wide-ranging authority to regulate tobacco product marketing. Apart from the agency's power to implement new regulations in the future, the new 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 a product 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 (e.g., at point of purchase), except in adult-only facilities, to black text on white background visuals and spoken words (no music, images or moving images)
- 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 (with no preemption of existing state laws or penalties, and preserving state authority to impose higher minimum-age laws)
- 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 FCLAA, by allowing states to restrict the location, color, size, number and placement of cigarette advertisements
- Blocks tobacco companies from claiming that the FDA has approved or certified any tobacco product

What State and Local Governments Can Do

States and localities will retain the authority to engage in a sweeping array of tobacco control policy actions. FDA regulation will not interfere with, and in some ways will strengthen, state authority to:

- Prohibit or restrict certain forms of tobacco product marketing
- Implement counter-marketing campaigns
- Fund comprehensive state tobacco prevention programs

The Law Expands State and Local Authority to Restrict Cigarette Advertising and Promotion

The Family Smoking Prevention and Tobacco Control Act expands state and local governments' ability to restrict tobacco advertising and marketing by amending the FCLAA, which previously prohibited states from restricting cigarette advertising and promotion specifically based on concerns related to smoking and health. Some health advocates have endeavored, for example,

to ban promotions of tobacco products at retail establishments (e.g., buy one, get one free, and discount coupons), but have been hampered by the language of the FCLAA. Before the new law was enacted, advocates were forced to base new marketing restrictions on goals other than health in order to circumvent the FCLAA preemption, with no assurance that doing so would survive legal challenges.

Some courts had, for example, rejected state and local measures banning free samples. By eliminating the preemption of state and local laws regulating the time, place or manner of cigarette advertising and promotion, the new law eliminates that problem and allows this kind of state and local regulation.

The preemption that applied to regulation of cigarette advertising and promotion did not apply to smokeless tobacco or other tobacco products, and the new law does not change that. Thus, state and local governments remain free to regulate the time, place or manner, but not the content, of advertising and promotion of all non-cigarette tobacco products, subject to possible judicial review relating to the First Amendment's protections of commercial speech.

The new law permits state and local governments to:

- Expand the law's requirement that retail ads for cigarettes and smokeless tobacco products be limited to black-and-white text to cigar and other tobacco product advertisements
- Restrict or eliminate the display of so-called power walls of cigarette packages at retail outlets, which will be the only presentation of cigarette brand logos, labels and colors permitted in retail outlets under the new law ("power walls" are the large displays of cigarettes found near cash registers at such places as convenience stores and gas stations)
- Limit the number and size of tobacco ads at retail outlets
- Require that tobacco products and advertisements be kept a minimum distance from cash registers in order to reduce impulse purchases by smokers trying to quit

The caveat, again, is that the enactment of some of the measures noted above may face legal challenges by tobacco or allied interests. States and localities will be able to engage in all such actions to the extent they are determined by the judicial system to be permissible under the free speech protections of the First Amendment. The possibility of judicial review should not unduly dissuade advocates and policymakers from pursuing such policies, but when doing so, advocates are advised to take steps to strengthen the case that such regulations are valid under the First Amendment. Policymakers must conscientiously develop both a strong legislative history and a substantial evidentiary record demonstrating that such restrictions (e.g., prohibiting power walls) directly advance the legitimate and substantial government interest of preventing youth tobacco use, reducing adult tobacco use or otherwise protecting and promoting public health. The legislative record should also make explicit that the restrictions will not entirely prevent tobacco companies from communicating truthful information to their legal adult customers, and that the restrictions are reasonably related to the government interests they seek to address.

With an eye toward effective use of the powers newly granted by the Family Smoking Prevention and Tobacco Control Act, advocates and policymakers may also consider using age-based criteria to avoid potential First Amendment concerns. For example, while the new law already limits outdoor and point-of-sale tobacco advertising to black-and-white text only, except in adult-only facilities, a state or locality could potentially prohibit outright point-of-sale advertising and require keeping tobacco products and paraphernalia out of sight in venues that admit persons under age 18.



The Law Blocks State Authority to Prescribe Health Warning Labels on Product Packages and Advertisements

The Family Smoking Prevention and Tobacco Control Act prescribes stronger health warning labels and warning label formats on cigarette and smokeless tobacco product packages and advertisements, and authorizes the FDA to establish warning labels on other tobacco products. Preemption on state action in this area remains in effect.

State and local governments can, however, impose warning mandates that do not affect tobacco product packages or ads. For example, the New York City Board of Health has proposed requiring all tobacco retailers to prominently display point-of-sale warnings and cessation messages, possibly including graphic images to depict the adverse health effects of tobacco products.

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

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