Center for Public Health
and Tobacco Policy

Tobacco Product Display Restrictions

This work provides educational materials and research support for policy initiatives and does not constitute and cannot be relied upon as legal advice.

October 2010. Last updated April 2012 (technical corrections only). All rights reserved. Center for Public Health and Tobacco Policy.

Funded by a grant from the New York State Department of Health.

Authored by:
Micah Berman
Marlo Miura
John Bergstresser

The Center for Public Health and Tobacco Policy
***at* New England Law | Boston**

154 Stuart St.
Boston, MA 02116

Contact:
Phone: 617-368-1465
Fax: 617-368-1368
tobacco@nesl.edu
www.tobaccopolicycenter.org

The Center for Public Health and Tobacco Policy is a resource for the New York and Vermont tobacco control communities. It is funded by the New York State and Vermont Departments of Health and works with the New York State and Vermont Tobacco Control Programs and their contractors and partners to develop and support policy initiatives that will reduce tobacco-related morbidity and mortality in New York and Vermont.

Tobacco Product Display Restrictions

Part 1 – Why Focus on Product Displays?

Nearly 90% of regular smokers start smoking by the age of 18 – very few begin after high school.[1] As Surgeon General Joycelyn Elders stated in 1994, "[I]f adolescents can be kept tobacco-free, most will never start using tobacco."[2] While there are several factors that contribute to adolescent smoking, tobacco advertising and promotion at retail stores where tobacco products are sold (also referred to as the "point-of-sale") is undoubtedly one of the most significant. According to a study published in the *American Journal of Public Health*, "After controlling for other variables, weekly or more frequent exposure to retail tobacco marketing was associated with a 50% increase in the odds of ever smoking – nearly as much as the effect of exposure to a parent or household member who smokes."[3]

• • •

Table of Contents

Part 1 – Why Focus on Product Displays? ***1***

Part 2 – International Examples ***5***

Part 3 – Current Law ***12***

Part 4 – Model Ordinance ***13***

Part 5 – Potential Legal Challenges ***16***

Part 6 – Implementation and Enforcement ***22***

Conclusion ***23***

Citations ***24***

Appendix A: Model Ordinance

Appendix B: Compliance Guidance

• • •

One way in which tobacco companies seek to entice adolescents to use their products is through the use of prominent product displays, sometimes referred to as "power walls." These power walls – typically located behind the cash registers – are highly engineered by tobacco companies to maximize visual intrusiveness and instigate impulse purchases.[4] They function as a subtle kind of advertising, conveying the message that cigarettes are popular and desirable. And they are effective. A recent study concluded that "young people's exposure to tobacco displays at the POS [point-of-sale] is significantly associated with being susceptible to smoking, experimenting with smoking and current smoking."[5]

This report focuses on a powerful legislative response to the tobacco companies' attempts to manipulate youth perceptions and addict a new generation to tobacco use: tobacco

product display restrictions. Display restrictions, which require tobacco products to be kept out of sight, are an appropriate and effective policy intervention that, when combined with other tobacco control efforts, will protect adolescents from predatory tobacco marketing. Tobacco product display restrictions have been successfully implemented around the world, and their use is spreading rapidly.

The Growth of Point-of-Sale Advertising

When the Master Settlement Agreement was signed in 1998, resolving lawsuits brought by 46 states against the tobacco industry, the tobacco companies agreed to stop advertising their products on billboards and to limit other forms of advertising and sponsorship. Rather than reduce their spending on advertising and promotion, however, they shifted much of their spending to the point-of-sale. Annual marketing expenditures by tobacco companies skyrocketed, from $6.9 billion in 1998 to $12.8 billion in 2006. In a given year, the tobacco industry spends close to half a billion dollars in marketing in New York State alone – more than $22 per New Yorker – and close to 90% of that money is spent at the point-of-sale (through a combination of advertising, price buy-downs, and retailer incentives).[6]

> *"The tobacco companies have the displays and they were trying to outbid each other . . . . They are trying to get the space right behind the counter where the racks are . . . . They want the customer to see the cigarettes and the price right behind the cashiers."*
>
> – Convenience store manager (Feighery 2007)

The largest portion of the tobacco companies' point-of-sale promotional budget is spent on price discounting, but a significant amount of that money is spent on "promotional allowances" that compensate retailers for prominently displaying tobacco products in specially designed display racks. In return for receiving these allowances, the tobacco retailers are typically required to sign contracts in which they commit to displaying a company's cigarettes and other tobacco products in a particular location and in a particular manner – usually in a power wall right behind the cash register.[7] In 2008, the most recent year for which data is available, tobacco companies paid retailers nearly $488 million in promotional allowances.[8] The vast amount of money spent on tobacco product displays shows that the tobacco companies clearly believe that prominent power walls increase their sales. Moreover, the fact that they need to pay retailers to display their products (approximately $200 per month, according to a 1999 survey[9]) suggests that the size of the display racks is not driven by customer demand:

> The fact that [the retailers] need to be paid strongly suggests that the size and nature of the displays and signage that the tobacco firms seek to install are more substantial than the retailers' natural inclination. . . . It also suggests that the displays and signage are more than the retailers would normally deploy, given the sales volume and profit margins.[10]

Although cigarettes are a uniquely dangerous product, retailers receive far more in display incentives for cigarettes than they do for any other product. A 1999 study of small retail stores found that 62.4% received compensation for tobacco product placement and in-store displays, compared to only

25.7% for snack foods and soda, and 9.1% for beer and wine.[11]

The Impact of Power Walls

When youth are exposed to extensive tobacco product displays every time they enter a store that sells cigarettes, it distorts their perceptions regarding the availability of cigarettes and increases the likelihood that they will start smoking.

In a 2006 study, researchers found that "[t]he presence of cigarette displays at the point-of-sale, even in the absence of cigarette advertising, has adverse effects on students' perceptions about ease of access to cigarettes and brand recall, both factors that increase the risk of taking up smoking."[12] A more recent research study conducted in New Zealand – a jurisdiction that has banned all point-of-sale advertising other than the displays of the tobacco products themselves – concluded that "[t]he association between exposure to point of sale tobacco displays and susceptibility to smoking uptake or experimenting is comparable to the association between these outcomes and parental smoking, smoking in the home and school SES [socio-economic status]."[13]

The prevalence of power walls in convenience stores is especially troublesome since adolescents are likely to be the ones with the greatest exposure to this advertising. Three-fourths of teenagers visit a convenience store at least once a week, and they stay in these stores for an average of 16 minutes – twice the average time of adults.[14] There is also evidence that tobacco companies may be targeting stores that are popular with youth for the largest displays. A study examining the prevalence of certain brands of tobacco advertising in California found that "stores popular among adolescents displayed more than three times as many cigarette marketing materials outside, and contained twice as much shelf space for Marlboro, Camel, and Newport."[15] Marlboro, Camel, and Newport are the three most popular brands among youth smokers.[16]

In addition, tobacco product displays also have negative effects on those who are trying to smoke less or stop smoking cigarettes. Melanie Wakefield, a leading tobacco researcher and director of Australia's Centre for Behavioural Research in Cancer, has written: "[C]igarette displays stimulate impulse purchases among smokers. Those trying to avoid smoking commonly experience urges to purchase cigarettes when confronted with cigarette displays."[17] Likely for this reason, current smokers have expressed strong support for tobacco product display restrictions when surveyed.[18]

In sum, there is considerable evidence that the ubiquitous presence of large cigarette displays in retail locations increases the likelihood that youth will initiate smoking. Power walls influence the public's perceptions regarding smoking and cause people – especially youth – to overestimate the prevalence of smoking. Once individuals are addicted to cigarettes, these displays trigger urges to purchase cigarettes and increase consumption, which can make quitting more difficult. Furthermore, although anti-smoking advertising and warnings can help reduce youth susceptibility to smoking, they are not sufficient to counteract the effects of point-of-sale advertising.[19] In light of this evidence, the time has come for a restriction on the display of tobacco products in non-adult-only retail stores.

Why Tobacco Product Display Restrictions Are Necessary
Tobacco use is far and away the leading cause of preventable death, killing more than 400,000 Americans and more than 25,000 New Yorkers a year. ***Tobacco is not a normal consumer product – it kills when used as intended.***
Tobacco addiction starts in childhood – nearly 90% of regular smokers started smoking by the age of 18.
Research demonstrates that displays of tobacco products – separate and apart from other tobacco advertising – increase the likelihood that youth will start smoking.
Tobacco product displays create a false impression for youth of the social acceptability (normalcy) and popularity of tobacco use.
Tobacco companies engineer product displays to make them as tempting as possible – and they pay retailers for the right to control and manipulate these displays.
Displays of tobacco products prompt impulse purchases by people trying to quit smoking or people trying to smoke less.
International examples suggest that display restrictions are an effective means of reducing youth smoking.

Part 2 – International Examples

In 2005, the World Health Organization sponsored international negotiations that led to the Framework Convention on Tobacco Control ("FCTC"), a treaty that requires its signatories to initiate a multifaceted approach to tobacco control. The treaty outlines a systematic program designed to reduce the demand for tobacco, including elements such as price increases through taxation, warning labels, public awareness initiatives, promotional restrictions, and cessation programs.[20]

Article 13 of the FCTC requires that "each party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban on all tobacco advertising, promotion and sponsorship."[21] The FCTC considers displays of tobacco products to be a form of advertising:

> Display of products is a key means of promoting tobacco products and tobacco use, including by stimulating impulse purchases of tobacco products, giving the impression that tobacco use is socially acceptable and making it harder for tobacco users to quit. Young people are particularly vulnerable to the promotional effects of product display. . . .
>
> Parties should introduce a total ban on any display and on the visibility of tobacco products at points of sale . . . .[22]

This treaty currently has 168 parties, including the United Kingdom, Canada, Australia, Japan, and China.[23] (Although the United States has signed the FCTC, it is not a party to the agreement because the Senate has not ratified the treaty.) The inclusion of a display ban in the FCTC suggests a broad international commitment to limiting the impact of tobacco product displays.

International Adoption

There are five countries that have fully implemented a restriction on the display of tobacco products: Iceland, Canada (where display restrictions were approved in each province, rather than by the national government), Thailand, Ireland, and Norway. In addition, almost all Australian states and territories have passed legislation restricting tobacco product displays, and those laws have already been implemented in New South Wales (Australia's most populous state), the Australian Capital Territory, and Western Australia. England, Wales, Scotland, Northern Ireland, and Finland have passed laws that restrict tobacco product displays, but those laws have not yet been implemented.

The first time a jurisdiction restricted the display of tobacco products was in 2001, when the Republic of Iceland passed the Tobacco Control Act. This act states, "Tobacco and tobacco trademarks shall be so placed at points of sale that they are not visible to the customer."[24] The next jurisdiction to adopt a display restriction was the Canadian province of Saskatchewan, which implemented a tobacco product display restriction in 2002. Its law states, "No retailer shall permit tobacco or tobacco-related products to be displayed in the retailer's business premises so that the tobacco or tobacco-related products are

Canadian Provinces and Territories: Tobacco Product Display Restrictions

Prov./Ter.	Enactment	Implementation
Saskatchewan	2001	2002, suspended due to legal challenge in October 2003, then reinstated in January 2005
Manitoba	2002	2005
Nunavut	2004	2005
Ontario	2005	2008
Prince Edward Island	2005	2006
Quebec	2005	2008
Alberta	2007	2008
British Columbia	2007	2008
New Brunswick	2007	2009
Nova Scotia	2006	2007
Northwest Territories	2006	2007
Yukon	2009	2009
Newfoundland & Labrador	2009	2009

visible to the public if young persons are permitted access to those premises."[25] Rothmans, Benson & Hedges, a Canadian tobacco company, challenged the law in court, and enforcement was temporarily put on hold until the law was upheld by a unanimous ruling of the Supreme Court of Canada in January 2005.[26] Immediately after the Supreme Court ruling, Manitoba and Nunavut began to enforce their own similar laws, and the other Canadian provinces adopted their own display restriction laws between 2005 and 2009.[27]

On September 24, 2005, Thailand implemented a complete ban on point-of-sale tobacco product displays. However, this ban was met with resistance by Seven-Eleven, the largest chain of tobacco retailers in Thailand. Seven-Eleven refused to eliminate the cigarette displays for almost two months after the ban was implemented, but eventually caved in the face of boycotts and protests.[28]

In 2008, the Australian Capital Territory and the Australian state of New South Wales passed laws prohibiting the display of tobacco products. Both of these laws went into effect in 2010. Western Australia followed by passing a display restriction law that took effect in September 2010, and Victoria, South Australia, Tasmania, and the Northern Territory have all adopted display restrictions that will be enforced starting in 2011 or 2012.[29]

Ireland implemented a comprehensive restriction on tobacco advertising in July 2009.[30] Its legislation prohibits all point-of-sale advertising, including point-of-sale product displays. The most recent country to implement a tobacco product display restriction was Norway; its law went into effect on January 1, 2010.[31]

As the recent adoption of display restriction laws (not yet in effect) by England, Wales, Northern Ireland, Scotland, and Finland shows, these laws are quickly spreading around Europe.[32] Based on the positive experiences of countries with display restrictions, other countries such as New Zealand are now exploring the enactment of similar laws.[33] Although each country has a unique legal system, there is a considerable amount to be learned from the countries that have been the trailblazers in this area.

Tobacco Industry Resistance

One frequent feature of other countries' experiences with display restrictions has been unsuccessful legal challenges by tobacco companies and tobacco retailers. Although several legal challenges are still in progress, to date the tobacco industry has never been successful in having a display restriction law overturned.

As mentioned above, in Saskatchewan, the first Canadian province to implement a tobacco product display restriction, Rothmans, Benson & Hedges challenged the law on the grounds that the province's law conflicted with federal law. Although an appellate court temporarily barred enforcement of the law, a unanimous ruling of the Supreme Court of Canada affirmed the law's legality.[34] The Supreme Court held that the fact that the national government had not yet addressed the issue of tobacco product displays did not mean that the provinces were powerless to do so on their own.[35]

Elsewhere, tobacco companies have filed suit to try to block laws from going into effect, but they have dropped their claims when they were unsuccessful. For example, Ireland's restriction on the display of tobacco products was challenged by P.J. Carroll and Company, John Player and Sons Ltd., Gallaher (Dublin) Ltd., and others. However, the courts refused to delay the law from going into effect, and a week before the trial date the case was withdrawn by the tobacco industry plaintiffs.[36]

More recently, Imperial Tobacco, British American Tobacco and Japan Tobacco have joined together to challenge the United Kingdom's display restriction, arguing that it will "encourage the smuggling of tobacco and have a negative impact on small business."[37] Philip Morris also announced that it would challenge Norway's display restriction law, claiming in part that it would be ineffective. Bjoern-Inge Larsen, who heads up the Norwegian Directorate of Health, responded by pointing out that "if Philip Morris really felt the restriction would not reduce the consumption of tobacco they would not worry about this law."[38]

Convenience stores have occasionally been vocal opponents of the display restrictions, claiming that the cost of modifying their stores to comply with the law could put them out of business and that the prohibition on product displays could drive customers away and encourage customers to purchase smuggled, untaxed cigarettes.[39] In some cases, these retailer groups have been exposed as front groups for the tobacco industry. As reported by Lynn Greaves of the Saskatchewan Coalition for Tobacco Reduction:

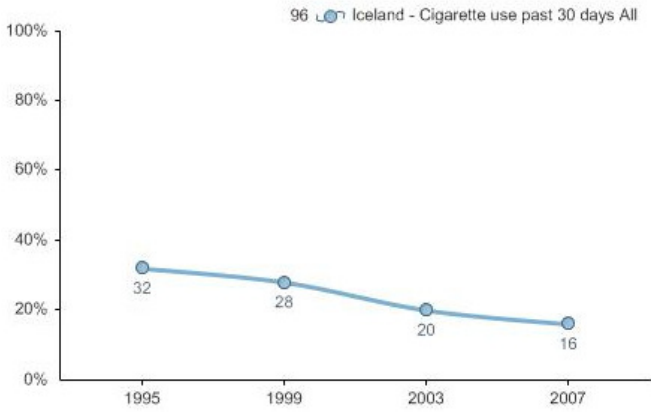
> The *Saskatchewan Committee for Responsible Tobacco Retailing* was formed just prior to the legislation being passed. Although claiming to be "poor" retailers the Committee appeared to be well funded. The Committee mounted a fax campaign to retailers urging them to oppose the legislation by calling their Member of the Legislative Assembly. Retailers were also provided with misinformation predicting dire outcomes if the legislation were passed. Suspicions of links between the retail committee and the tobacco industry were confirmed when a Committee spokesperson admitted it was a sub-committee of the *Canadian Coalition for Responsible Tobacco Retailing*, a tobacco industry coalition with a similar name.[40]

The predicted "dire outcomes," including insurmountable economic hardship and increased crime, did not come to pass.[41] As described in the next section, in jurisdictions that have implemented display restrictions, youth smoking initiation has decreased, and retailers have not experienced the harsh consequences that were foreshadowed by those opposing the laws.[42]

The Impact of the Tobacco Product Display Restrictions

In Iceland, youth smoking rates have declined since the introduction of the display restriction. While it is impossible to disaggregate the effect of the display restriction from other tobacco control measures that were enacted simultaneously, there has been a significant drop in tobacco use among 10th graders since the implementation of the law in 2001. The European School Survey Project on Alcohol and Other Drugs ("ESPAD") surveys 10th grade (16-year-old) students in approximately 35 European Countries. Since the ESPAD has a large sample size (80-90% of 10th grade Iceland students participate), any change larger than a percentage point is statistically significant.[43]

The results of the ESPAD show a striking decrease in smoking prevalence since the implementation of the display restriction in 2001 (from 28% in 1999 to 16% in 2007).[44] This is consistent with the suggestions of academic studies cited above, including the 2004 Henriksen study ("weekly or more frequent exposure to retail tobacco marketing was associated with a 50% increase in the odds of ever smoking"),[45] the 2008 Wakefield study ("[t]he presence of cigarette displays at the point-of-sale, even in the absence of cigarette advertising, has adverse effects on students' perceptions about ease of access to cigarettes and brand recall, both factors that increase the risk of taking up smoking"),[46] and the 2009 Paynter study (finding that the more often a 14-15 year old is exposed to cigarette displays, the more likely he or she is to smoke).[47] Also, it is likely that the display restriction will continue to push down teen smoking rates well into the future, as new generations of children grow up without exposure to power walls and other pro-smoking advertising.



Source: European School Survey Project on Alcohol & Other Drugs, http://www.espad.org/keyresult-generator

Table 8.2: Current smoking prevalence* by province, age 15-19, 1999-2008

Year	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Canada	**27.7**	**25.3**	**22.5**	**22.0**	**18.3**	**18.4**	**18.1**	**14.9**	**15.2**	**14.8**
British Columbia	20.2	18.0	16.8	14.8	13.6	12.8	14.4	12.4	9.0	15.2
Alberta	26.4	24.4	24.1	19.0	18.1	15.7	18.9	15.2	20.1	16.0
Saskatchewan	31.4	24.1	27.1	29.0	28.2	24.7	24.9	20.8	22.0	20.0
Manitoba	29.5	25.4	28.2	23.3	20.3	21.0	20.0	19.7	20.1	17.0
Ontario	24.8	25.1	18.8	19.2	14.5	16.8	16.0	12.5	13.5	12.8
Quebec	35.7	29.6	28.6	32.0	25.5	24.1	22.8	18.3	17.4	16.6
New Brunswick	27.4	29.9	24.6	17.6	21.6	17.7	17.9	15.7	16.8	14.2
Nova Scotia	30.1	25.1	26.8	20.2	18.4	20.3	12.9	14.8	13.4	14.4
PEI	28.3	21.5	20.4	19.3	19.5	16.6	12.9	14.1	13.1	13.7
Nfld. & Labrador	29.9	28.4	22.0	22.2	22.0	21.1	19.0	16.2	16.8	14.7

*Includes daily and non-daily smokers
Data Source: CTUMS, 1999-2008

Source: Canadian Tobacco Use Monitoring Survey
http://www.tobaccoreport.ca/ytu_cs_sp_byprov.html

Canada's experience with the success of the display restriction laws is consistent with Iceland's. The Canadian Tobacco Use Monitoring Survey is conducted yearly and measures the smoking rates of all age groups and provinces in Canada. The trend in the data is apparent – youth smoking rates have gone down in Canada, and the decline is most dramatic in those provinces where the restrictions have been in effect the longest (Saskatchewan and Manitoba).[48] Overall, the smoking rate for 15- to 17-year-olds in Canada has fallen from 13.8% in 2005 to 9.7% in 2008 (a 30% decrease).[49]

Groups opposing the display restrictions predicted that the laws would cause extreme economic hardship to tobacco retailers, especially small convenience stores. This prediction has not been borne out by experience. A recent article in the *Journal of the New Zealand Medical Association* summarized the evidence from Canada:

> In Canada, retailers predicted their profits would be eroded. However, the evidence reveals that any initial financial impacts resulting from tobacco display bans were minor, even for small stores reliant on tobacco sales. Crucially, payments made by tobacco companies to retailers have continued beyond the introduction of display bans….[50]

Even representatives of the Canadian convenience store industry have been quoted suggesting that the display restrictions have not harmed their membership.[51] This result is logical, because although display restrictions have helped to reduce youth smoking rates, most current smokers will continue to purchase cigarettes from the retailers that they currently patronize. As the *Journal of the New Zealand Medical Association* article noted, "changes in smoking experimentation, initiation and addiction will only be evident over several years, during which time retailers will have had many opportunities to diversify their product range."[52] In other words, while smoking rates gradually decline, retailers can consider long-term strategies to reduce their dependence on tobacco-related revenue.

Small tobacco retailers have also opposed the display restrictions on the grounds that modifying their stores to comply with the

restriction will be exceedingly expensive. Similarly, experience has shown that this concern is unfounded. In most cases, retailers have made simple modifications to existing shelving in order to comply with the new laws.

For example, the Association of Convenience Stores commissioned a study to survey Ireland stores about how they modified their premises to comply with the display restriction. The study revealed that 78% modified their existing display units to comply with the restriction, while only 22% installed a new storage unit.[53] Many of these retailers were able to accomplish these modifications at very low cost, using curtains and screens.[54]

Some stores have used this new space for advertising other products, covering the display units with attractive advertisements for store brand food products.[55] In Canada, companies which produce display cases have adapted to the new laws by creating innovative solutions for compliance – offering opaque containers and other compliance solutions at reasonable prices to retailers.[56] In addition, some Canadian retailers report that tobacco companies installed complying display units for them, as an incentive to continue selling their products.[57] While some retailers have nonetheless complained about the extra cost being imposed on retailers, these minimal implementation costs are a small tradeoff when considering the benefits of these policies: sparing children from tobacco-related disease and death.[58]

International Tobacco Product Display Restrictions
What Do These Laws Do?

The following are examples of provisions included in display restriction laws in other jurisdictions. These provisions are intended to be illustrative, not models to be copied. The Center for Public Health and Tobacco Policy's model ordinance is contained in Appendix A.

Part One: General Rule – Prohibiting Tobacco Product Displays

Example: "A person who is the occupier of premises on which tobacco products or non-tobacco smoking products are sold must ensure that members of the public cannot see any of those products, or any smoking accessories, from inside or outside the premises." (New South Wales, Australia)

Example: "Tobacco and tobacco trademarks shall be so placed at points of sale that they are not visible to the customer." (Iceland)

Part Two: Defining the Type of Retailers Covered (or Not Covered) by the Law

Example: "No retailer shall permit tobacco or tobacco-related products to be displayed in the retailer's business premises so that the tobacco or tobacco-related products are visible to the public if young persons are permitted access to those premises." (Saskatchewan, Canada) ("Young person" is defined as a person under the age of 18.)

Example: "A person does not commit an offence . . . if the display . . . is in a specialist tobacconist." (Scotland) ("Specialist tobacconist" is defined as a store that derives more than half of its revenue from the sales of "cigars, snuff, pipe tobacco and smoking accessories" and meets other requirements.)

Part Three: Exceptions to the General Rule – Permitted Displays

Example: "No offence is committed . . . if the display is a requested display to an individual aged 18 or over." (England)

Example: "A tobacco advertisement at one point of sale . . . may advertise a product line of a tobacco product . . . by the display of a single immediate package [i.e., a package containing the product] of the product line in the form in which the package is available for sale at that point of sale . . . ." (Victoria, Australia)

Part Four: How Customers Can Learn of the Available Products

Example: "[Retailers may display a] single price ticket at a point of sale for each product line for sale (or usually available for sale) at the point of sale." (Australian Capital Territory) ("Price tickets" are defined as labels no larger than $15cm^2$ that include only the product's name, price, and bar code.)

Example: "[A] person may in any place or premises in which tobacco is sold or offered for sale at retail . . . display a sign that lists the types of tobacco for sale and their prices, if the sign complies with and is displayed in the manner, place, form and size prescribed by regulation . . . ." (New Brunswick, Canada)

Part Five: Enforcement and Penalties

Example: "Local authority boards of health, under the supervision of [the Environmental Agency] shall monitor places where tobacco is sold, and monitor the observation in their district of the provisions of Section II of this Act, regarding labelling [sic], advertising and sale of tobacco." (Iceland)

Example: "A person who contravenes [the section of the law prohibiting tobacco displays] is guilty of an offence and liable (a) for a first offence, to a fine of not more than $10,000, and (b) for a 2nd or subsequent offence, to a fine of not more than $100,000. (Alberta, Canada)

Part 3 – Current Law

New York state law and federal law both regulate tobacco products. Historically, the federal government has regulated tobacco advertising and promotion and excluded state governments from regulating with respect to those subject matters. However, federal law has recently changed due to the enactment of the Family Smoking Prevention and Tobacco Control Act ("FSPTCA"). This recently enacted law allows for concurrent state and federal regulation of tobacco advertising and promotion.

Federal Law

The federal government began regulating the advertising and promotion of cigarettes in 1965, when Congress passed the Federal Cigarette Labeling and Advertising Act ("FCLAA").[59] As originally enacted, the act required warning labels on cigarette packs and preempted (prevented) state and local governments from requiring different or additional warnings on cigarette packs or advertisements.[60] In 1969, Congress amended the FCLAA to require stronger warning labels.[61] At the same time, the preemption language in the Act was changed and broadly expanded.[62] This expanded preemption provision made the regulation of cigarette advertising and promotion an exclusively federal matter and precluded *any* state or local regulation of cigarette advertising or promotion if the regulation was based on health concerns.

Despite this broad preemption – which left only the federal government in a position to regulate tobacco advertising and promotion – the federal government did very little over the next three decades to limit the advertising and promotion of cigarettes, even as tobacco companies aggressively targeted youth with promotional campaigns such as R.J. Reynolds' infamous "Joe Camel" campaign.[63] Due in part to this federal inaction, the states resorted to lawsuits against the tobacco industry in the 1990s, resulting in the 1998 Master Settlement Agreement in which the major tobacco companies agreed to stop advertising on billboards and directing advertisements towards youth.

Until recently, complete federal preemption of state regulation relating to tobacco advertising and promotion remained the law. Congress reversed course in 2009 by passing the Family Smoking Prevention and Tobacco Control Act ("FSPTCA"), which significantly alters federal tobacco regulation of tobacco products.[64] This law grants the Food and Drug Administration (FDA) limited authority to regulate tobacco products,[65] something the Supreme Court had previously determined that the FDA was unable to do without express congressional authorization.[66] The FSPTCA also provides for stronger warning labels[67] and, perhaps most importantly to local tobacco control advocates, alters the scope of federal preemption relating to the advertisement and promotion of tobacco products.

The FSPTCA modified the preemption provision of the FCLAA, which, as amended, now reads:

> No requirement based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter. . . . Notwithstanding [the preceding], *a State or locality may enact statutes and promulgate regulations, based*

> *on smoking and health . . . imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes*.[68]

This modified preemption provision allows state and local governments to regulate what they were unable to regulate before: where, when and how cigarette companies can advertise their products. Prior to the passage of the FSPTCA, a number of state and local advertising restrictions were invalidated by the courts because they ran afoul of the express preemption provisions of the FCLAA. For example, in 2001 the United States Supreme Court held that a Massachusetts state law that prohibited tobacco advertisements within 1000 feet of "any public playground, playground area in a public park, elementary school or secondary school"[69] was preempted by the FCLAA's express preemption provision.[70] However, now that the FCLAA's preemption scheme has been altered by the FSPTCA, it is unlikely that a similar law would be considered to be preempted. (Yet, as discussed in Part 5 below, a similar law would still be subject to a First Amendment challenge.)

Although state or local display restriction laws would have been preempted under the previous version of the FCLAA, under the revised preemption provision they are not barred. Such laws regulate the "place" and "manner" in which tobacco products can be promoted at the point-of-sale, and as such they are not preempted. (Again, however, they are still subject to First Amendment challenges.)

New York State Law

Even though New York's Public Health Laws contain many provisions regulating the sale of tobacco products, there is only one provision that regulates the *display* of tobacco products. That provision states:

> No person operating a place of business wherein tobacco products or herbal cigarettes are sold or offered for sale shall sell, permit to be sold, offer for sale or display for sale any tobacco product or herbal cigarettes in any manner, unless such products and cigarettes are stored for sale (a) behind a counter in an area accessible only to the personnel of such business, or (b) in a locked container; provided, however, such restriction shall not apply to tobacco businesses [as defined in the Code] and to places to which admission is restricted to persons eighteen years of age or older.[71]

This provision prohibits self-service tobacco displays in retail stores open to minors, but it does not prohibit or limit the visible display of the products themselves. No U.S. jurisdiction has yet passed a tobacco product display restriction law such as those in effect in Iceland, Canada, Thailand, Ireland, Norway, and parts of Australia.

Part 4 – Model Ordinance

The Center for Public Health and Tobacco Policy's model ordinance (contained in Appendix A) is designed for use by local governments around New York. Since no jurisdiction in the U.S. has yet enacted a display restriction ordinance, this model was developed by incorporating some elements of display restriction laws in effect in other countries while also keeping in mind the requirements and limitations of the U.S. and

New York legal systems. It is unknown how U.S. courts will rule on legal challenges to display restriction laws, but this model ordinance has been carefully written to provide jurisdictions with a strong argument that the law does not violate First Amendment protections for commercial speech. This issue is discussed in more detail in the following section.

General Issues

What government entity will be adopting the tobacco product display restriction policy? What government entity will be enforcing the policy?

These are the preliminary questions that must be addressed at the beginning of the drafting process. The model ordinance is written flexibly so that it can be enacted by a county or a municipality (city, town, or village), or it can be incorporated into a county sanitary code by the county health department. If the county government or county health department adopts the policy, then the county health department can assume the enforcement duties. This may be preferable, as county health departments are committed to improving health and are, in most cases, already involved in enforcing the Smoke-Free Air Act and the Adolescent Tobacco Use Prevention Act (ATUPA). If a display restriction ordinance is adopted at the municipal level, then a municipal department (such as the Department of Code Enforcement or the Department of Permit and Inspection Services) will likely be responsible for enforcement, unless the city is able to contract with the county health department for enforcement. Although such municipal departments are experienced at ensuring compliance with local laws, they may not be as committed to the public health purposes underlying the tobacco product display restriction as a health department may be.

Section One: Findings

The first section of the model ordinance contains "findings" that express the reasons for the government's decision to enact such a law. These findings are extremely important, because courts reviewing the law may look to the findings to see if the government had sufficient reasons and justifications for adopting such a measure.[72] The findings should focus on explaining why the display of tobacco products is currently a problem and why the proposed law is needed to address it.

Some courts have expressed a preference for localized findings, including facts about how the proposed law will address the problem at the local level, as opposed to generalized statements about the issue.[73] Some of the figures in the findings have been left blank, so that they can be filled in with local information. It is also advisable to add other findings that are based on local information and may be compelling to the local community. Additional supporting information and exhibits can also be introduced at government hearings where the ordinance is considered. This information can then be referenced in the findings.

Section Two: Definitions

The second section defines the terms that are used in the model ordinance. A few of these terms are worth noting:

- **Age-Verified Customer** and **Legal Age:** Under current New York law, tobacco products cannot be sold to a person under the legal age (eighteen

in most parts of New York, but nineteen in Nassau, Suffolk, and Onondaga Counties), and vendors are required to ask for identification if the person appears to be under the age of twenty-five. The model ordinance uses the same standards for determining when the list of available tobacco products (the "Tobacco Menu") may be provided to a customer. Customers who are of legal age and have had their ID verified if they appear to be under the age of twenty-five are referred to as "Age-Verified Customers."

- **Department:** The "Department" will be the government entity responsible for enforcing the law. This entity should be specified, and discussions with that government agency should occur well before the ordinance is introduced to ensure the enforcing agency's support and cooperation.

- **Tobacco Product:** The ordinance prohibits the display of "Tobacco Products." Tobacco Products are defined to include all types of tobacco products (cigarettes, cigars, smokeless tobacco, etc.) as well as manufactured products containing nicotine. Nicotine products that are approved for use in tobacco cessation by the FDA (Nicorette gum, Nicoderm CQ patches, etc.) are exempted from the definition of "Tobacco Product" and can be displayed. Electronic cigarettes, or e-cigarettes, cannot be displayed unless they are approved as tobacco cessation products by the FDA. The definition of "Tobacco Product" also includes tobacco product packaging. This is done so that retailers cannot thwart the purpose of the display restriction by displaying empty packages.

Section Three: Adult-Only Establishments Exempted

The model ordinance prohibits the display of tobacco products in retail stores, with the exception of adult-only establishments. This is done because the primary purpose of the law is to protect children from tobacco marketing. In addition, limitations on marketing in adult-only settings would be much more vulnerable to a First Amendment challenge. The ordinance, however, does not contain a "tobacco store" exception. Stores that are primarily in the business of selling tobacco can exempt themselves from the provisions of this ordinance by ensuring that their business does not allow people below the legal age for purchasing tobacco (eighteen or nineteen) to enter.

Section Four: Display of Tobacco Products Prohibited

This is the central element of the model ordinance. It prohibits the "display of any Tobacco Product in any matter that permits the customer to view any Tobacco Product prior to purchase." The mechanism for ensuring that tobacco products cannot be viewed is not specified, leaving retailers with flexibility to decide how to comply with the law in a way that best suits their business operation. Retailers may put the tobacco products under the counter, in a back room, in closed, opaque shelving, or in any other location where they cannot be seen by customers.

Sections Five: Use of Tobacco Menu

Because tobacco products cannot be displayed, retailers will be permitted to show customers a "Tobacco Menu" telling them what tobacco products are available and the prices of such products. The Tobacco Menu can only be provided to Age-

Verified Customers at their request, and it must be kept out of sight when not being used. The model ordinance does not limit the type of information that can be put into the Tobacco Menus.

Sections Six and Seven: Enforcement and Penalties

In the model ordinance, penalties for displaying tobacco products range from $500 for a first violation to $2000 for the third and subsequent violations. Violations relating to the use of the Tobacco Menu range from $250 to $1000. Note that under state law, fines allowable under a sanitary code are limited to $500, so if the model ordinance is incorporated into a county sanitary code, the amount of the allowable fines will need to be modified.

The model ordinance also provides for inspections to ensure compliance with the law, and it permits legal actions to be brought by the government or by members of the community (including, but not limited to, other retailers who may be concerned about fair and even enforcement) to ensure compliance with the law. In addition, if a licensing scheme is in place in the locality, violations of the tobacco display ordinance may be grounds for suspending or revoking a license.

Sections Eight and Nine: Severability and Effective Date

The final two sections of the model ordinance are technical provisions included in many laws. The first is a severability provision, which provides that if any piece of the law is struck down in court, the remaining portions of the law remain valid. This is an important provision to include, because without such a provision, a court decision invalidating even one portion of the law could potentially nullify the entire ordinance.

The final section provides that the law will go into effect 180 days (approximately six months) after the ordinance is enacted. This phase-in period allows tobacco retailers plenty of time to ensure that they are able to comply with the requirements of the new law, and it provides the government with sufficient time to plan for inspections and enforcement.

Questions or concerns about the model ordinance can be addressed to the Center for Public Health and Tobacco Policy at tobacco@nesl.edu.

Part 5 – Potential Legal Challenges

Tobacco companies have consistently used legal challenges to resist regulation that is detrimental to their economic interests. Governments that plan to enact a tobacco product display restriction should be aware that tobacco companies could file a legal challenge to the law, asserting that the law is unconstitutional and should be struck down. The primary argument that the plaintiffs will allege is that the law restricts commercial speech in violation of the First Amendment to the United States Constitution. The plaintiffs may also allege that the product display restriction is preempted by the Federal Cigarette Labeling and Advertising Act, although a court is unlikely to accept this argument in light of the narrowed

preemption provisions in the Family Smoking Prevention and Tobacco Control Act (2009).[74]

First Amendment Challenge

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."[75] The same limits that the First Amendment places on Congress also apply to state and local governments.[76] Accordingly, any regulation passed by a state or local government that restricts speech or expression will have to be consistent with the modern jurisprudence interpreting the First Amendment. This jurisprudence has not found all types of speech to be entitled to the same level of protection from regulation. Some speech, representing the "core" of what is protected by the First Amendment (typical examples are religious and political speech), receives a high level of protection.[77] However, other speech receives little or no protection, such as that which incites violence or is obscene.[78] Commercial speech is somewhere between these two poles; it receives First Amendment protection from regulation, but this protection is not absolute.[79]

Commercial speech is the communication of information for economic reasons, including promotions and advertising intended to increase demand for consumer products.[80] Conduct intended to convey a message to consumers can be considered commercial speech.[81] The degree to which such speech is protected by the First Amendment is subject to debate. When deciding whether a certain law violates the First Amendment's commercial speech protections, the most commonly applied test is the four-pronged test developed in a case called *Central Hudson* (the "*Central Hudson* test").[82] The four prongs of the test are as follows:

- First, in order for the speech to be eligible for any protection by the First Amendment, the speech "must concern lawful activity and not be misleading."[83] If the speech promotes unlawful activity or is misleading, the speech receives no First Amendment protection and can be restricted.

- Second, the government "must assert a substantial interest to be achieved by restrictions on commercial speech."[84] Courts are likely to see this as a sliding scale, with the most substantial interests being able to justify greater restrictions on speech: "the regulatory technique must be in proportion to [the government's interest]" and "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interest served by its regulation."[85]

- The third prong requires that the "regulation directly advances the government interest asserted" and provides that "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."[86]

- The last prong requires that the restriction must not be "more extensive than is necessary to serve [the government's interest]."[87] Explaining this prong, the Supreme Court wrote: "The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress

> information when narrower restrictions on expression would serve its interest as well."[88]

This four-pronged *Central Hudson* test was applied to tobacco control laws in *Lorillard v. Reilly*.[89] In *Lorillard,* tobacco companies challenged a number of advertising restrictions put in place by the Massachusetts Attorney General on the grounds that they were preempted by the FCLAA and also violated the First Amendment (the FCLAA applies only to cigarette promotion, so the First Amendment challenges focused on restrictions on cigar and smokeless tobacco advertising).

Applying the *Central Hudson* test, the United States Supreme Court struck down provisions which prohibited outdoor cigar and smokeless tobacco advertising within 1000 feet of schools or playgrounds because the restrictions failed the final prong of the *Central Hudson* test. According to the Court, the regulations were "more extensive than necessary" to serve the interest of protecting children from tobacco advertising because "[i]n some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers."[90] (For example, the plaintiffs claimed that the regulations would prevent any outdoor tobacco advertising, including window signs, in 87% to 91% of Boston.[91]) The Court concluded that "the uniformly broad sweep of the geographical limitation and the range of communications restricted demonstrate a lack of tailoring."[92]

The Supreme Court also struck down a provision which would have prohibited some point-of-sale advertising. The regulation required that tobacco advertising not be "placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any" school or playground.[93] The Court concluded that the provision failed both the third and fourth prongs of the *Central Hudson* test, reasoning: "[T]he State's goal is to prevent minors from using tobacco products and to curb demand for that activity by limiting youth exposure to advertising. The 5 foot rule does not seem to advance that goal. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings."[94]

As suggested in *Lorillard v. Reilly*, courts will carefully scrutinize regulations restricting tobacco advertising and promotion to see whether they can be upheld under the *Central Hudson* test. In particular, cities and states wishing to impose a display restriction law must be ready to come to court prepared to explain how the law directly advances the government's interest and why a "more limited restriction on commercial speech" could not advance the government's interest.[95]

Application of the Central Hudson Test to Display Restriction Law

Assuming that a court decides that the *Central Hudson* test is the appropriate test to apply to a display restriction law, how might that analysis proceed?[96]

> *Prong One: Is the speech that is being restricted eligible for protection under the First Amendment?*

It is well established that not all speech is protected under the First Amendment. For example, speech which incites violence or is defamatory is not protected. In the commercial context, the Supreme Court has

declined to offer First Amendment protection to speech that is false or misleading.[97] Previous cases have assumed that tobacco product promotion is not inherently misleading and does not promote an illegal activity (despite that fact that tobacco sales to minors are illegal).[98] In his concurring opinion in *Lorillard v. Reilly*, Justice Thomas wrote that although tobacco advertising may contain misleading imagery, "[t]obacco advertising would be no more misleading for suggesting pervasive use of tobacco products than are any other advertisements that attempt to expand a market for a product."[99] With regard to the fact that tobacco use may be illegal for minors, he added that "it is difficult to see any stopping point to a rule that would allow a State to prohibit all speech in favor of an activity in which it is illegal for minors to engage."[100]

Despite Justice Thomas's cautionary words, some legal scholars have suggested that states and local governments should not so easily concede that tobacco promotion is not misleading.[101] Indeed, a huge volume of evidence unearthed in tobacco litigation details how tobacco companies used advertising and promotion to mislead the public about the risks of their products and entice youth to begin smoking.[102] As discussed in Part 1, tobacco product displays are used, at least in part, to convey misleading impressions about the pervasiveness and popularity of tobacco products. As such, this type of promotion could be classified as misleading and beyond First Amendment protection. Nonetheless, it is more likely that a judge who upholds a tobacco product display restriction will do so after applying the entire *Central Hudson* test.

Prong Two: Is there a substantial government interest which can justify the restriction on speech?

The second prong of the *Central Hudson* test requires the government to have a substantial interest which is to be advanced by the restriction on commercial speech. State and local governments have a long-recognized and substantial interest in protecting the health and safety of their residents, and therefore this prong of the test is easily met when the interest at stake is reducing tobacco use. In *Lorillard*, "none of the petitioners contest[ed] the importance of the State's interest in preventing the use of tobacco products by minors."[103] Similarly, in a case involving a tobacco product display restriction, the state or local government's substantial interest in reducing youth tobacco use would likely be uncontested.

Prong Three: Does the regulation directly advance the government interest asserted?

In order to satisfy the third prong of the *Central Hudson* test, the regulation must "directly advance the government's asserted interest," and the support provided for the regulation must be more than "tenuous" or "speculative."[104] "The burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[105] Courts have considered studies, reports, anecdotes (local and non-local), historical evidence, and even "common sense" when evaluating this part of the test.[106]

The government's burden of proof can be satisfied by pointing to evidence that shows that the tobacco product display restriction

will be effective in reducing the prevalence of underage tobacco use (such as the studies discussed in Part 1). This will require those defending the law to present strong evidence, and efforts should be made to ensure that the evidence is from impartial sources, such as respected peer-reviewed medical journals and judicial findings in cases like *U.S. v. Philip Morris*.[107] Ample evidence suggests that:

- Tobacco use – the leading cause of preventable death in the U.S. – is a serious public health problem;
- Youth are particularly vulnerable to tobacco product promotion;
- As shown in tobacco company documents, tobacco companies exploit this vulnerability to target youth; and
- Tobacco product displays encourage underage youth to try to buy tobacco products, increase youth tobacco experimentation and initiation, promote impulse purchases, and normalize tobacco use.

Prong Four: Is the regulation no more extensive than necessary to serve the interest asserted?

The final prong of the *Central Hudson* test requires that the restriction on speech is "not more extensive than is necessary" to further the substantial government interest.[108] As seen in the Supreme Court's decision to invalidate the outdoor advertising restrictions at issue in *Lorillard*, laws that are found by the court to restrict more speech than necessary will be struck down, regardless of whether they satisfy the other elements of the *Central Hudson* test.

The burden is on the government to show that there is a "reasonable fit" between government's interest and the means employed to advance that interest, and that the regulations do not sweep too broadly and restrict more speech than necessary.[109] There are several aspects of the product display restriction which can help demonstrate that the law is narrowly tailored. First, there is an exception which allows adult-only stores to display tobacco products. Second, there is no blanket restriction on tobacco advertisements; only one type of promotion that has been shown to have a significant influence on youth – displays of the tobacco products themselves – is prohibited. Third, the restriction on communication between legal adult consumers and tobacco companies is very limited. Not only can tobacco companies communicate with their customers through advertisements, but adult customers can also receive truthful information about tobacco products in the tobacco menu.

The government must also show that a more limited restriction on commercial speech could not achieve the government's objective. Therefore, it is important to emphasize that despite the numerous tobacco control efforts that have been attempted in the past, additional efforts are needed to advance the government's substantial interest in reducing the prevalence of youth smoking.[110] Since tobacco promotion undermines and increases the cost of other tobacco control measures, regulating tobacco promotion is an important complement to other tobacco control activities. Moreover, research suggests that anti-tobacco informational campaigns (which would not implicate First Amendment concerns) are not sufficient on their own to counteract the harmful effects

that exposure to pro-tobacco messages has on youth.[111]

Advocates should utilize legislative hearings and the "findings" section of the law to address both of the challenges raised by this fourth prong of the *Central Hudson* test. They should highlight that (a) display restriction laws do not restrict the ability of tobacco companies to advertise their products in retail stores or elsewhere (beyond prohibiting the displays themselves), and (b) such laws are important and needed complements to other tobacco control measures.

Preemption by the FCLAA

Based on the power granted to it by the Supremacy Clause of the Constitution, Congress can reserve to itself the power to regulate a specific subject and preempt state and local governments from regulating in that area. [112] When the subject that Congress is regulating is one that the states have traditionally regulated (such as public health), the courts will "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," but a clear statement by Congress will be sufficient to establish preemption [113]

As discussed above, the Federal Cigarette Labeling and Advertising Act ("FCLAA") contains an express preemption provision, but that provision was recently amended by the FSPTCA to allow individual states to regulate where, when, and how cigarette companies may advertise and promote their products. (By its terms, the FCLAA only preempts local regulation of cigarettes, not other tobacco products.) In previous cases like *Lorillard v. Reilly,* the courts have struck down state and local laws which regulated the advertising or promotion of cigarettes, finding such regulations to be preempted by the FCLAA. However, *Lorillard* was decided prior to the passage of the FSPTCA, and therefore its preemption analysis is no longer controlling.

While the interpretation of the modified preemption provisions of the FCLAA has not yet been addressed by a court, a legislative desire to allow state and local government greater authority to restrict certain aspects of tobacco advertising and promotion is evident. State and local governments are now able to regulate the time, place, and manner of cigarette promotions. Since a tobacco product display restriction does not regulate the content of cigarette advertisements and merely regulates the place and manner of tobacco advertisements, it is unlikely that a court will find that federal law preempts a tobacco product display restriction enacted by a state or local government.

Part 6 – Implementation and Enforcement

Tobacco control policies often bring tensions between competing interests to a head, and for this reason it is essential that local governments that plan to enact tobacco control laws have a well-defined strategy to implement and enforce these local laws. Throughout the enactment and enforcement process, tobacco control advocates and local government representatives must be receptive to the legitimate concerns of retailers, yet the focus must remain on achieving the public health objectives of the display restriction – reduced tobacco related disease and death.

Enactment of a Tobacco Product Display Restriction

In New York, tobacco product display restriction laws could be enacted at the county level or by a city, village, or town.[114] In addition, local boards of health have the authority to pass regulations "necessary and proper for the preservation of public health."[115] The process for approving a display law will depend on the type of government enacting the measure and the specifics of local government's procedures.

Regardless of the level of government involved, a public hearing must occur before the law is approved. This provides the public with an opportunity to comment on the proposed law. This is also an opportunity for tobacco control advocates to provide research and data (including local data) demonstrating the importance of a display restriction law. While the concerns of retailers should not be dismissed, advocates should try to keep the focus on health and on the law's objective of protecting children from the pervasive marketing of an addictive and deadly product.

Once the public hearings have taken place and the measure has been approved, there should be a period of time (specified in the law) between enactment and enforcement of the law. The Center for Public Health and Tobacco Policy's model ordinance suggests 180 days (approximately six months) between enactment of the law and the beginning of enforcement. This timeframe allows enough time for retailers to be educated about the new law and to modify their displays accordingly, yet the timeframe is short enough to limit opposition by the tobacco industry and attempts to repeal the law before it goes into effect.

Retailer Education and Compliance

If the law is enacted at the county level, the county health department should be in charge of enforcing the display restriction. If the law is enacted by a different local government, the local health agency or other agency which conducts inspections should be responsible for the enforcement of the new law. This agency should begin working on retailer education immediately after the law is enacted. A list of the retailers who will be affected by the display restriction can be compiled from licensing records. A pamphlet describing what is permissible under the new law and what is not permissible should be sent to all the retailers. This pamphlet should also discuss the reasons behind the display restriction in order to put the restriction in the proper health context. Retailers should be invited to contact the enforcement agency for more information on compliance with the law, and the enforcement agency should be prepared to answer questions and to assist retailers with compliance.

Examples of information sent to retailers by governments in other countries can be found at the following websites:

- New South Wales (Australia): http://www.health.nsw.gov.au/resources/publichealth/healthpromotion/tobacco/pdf/display_factsheet_5_final.pdf

- British Columbia (Canada): http://www.hls.gov.bc.ca/tobacco/pdf/RETAIL_Brochure_final_1.04.pdf

- Ontario (Canada): http://www.mhp.gov.on.ca/en/smoke-free/display-ban/DisplayBan-FAQs.pdf *and* http://www.mhp.gov.on.ca/en/smoke-free/display-ban/CheatSheet-EN.pdf

- Ireland: http://www.dohc.ie/publications/tobacco_guidance

Some of these materials are reproduced in Appendix B.

Enforcement

As the enforcement date approaches, the enforcement agency should start planning for the first round of inspections, beginning within two weeks following the enforcement date.

Within two months, all stores within the jurisdiction of the enacting government should be inspected. During inspections, the enforcement officer should fill out an inspection sheet with several points of inspection (such as "are tobacco products visible?," "is the tobacco menu kept behind the counter?"), indicating either "compliant" or "non-compliant" for each point. One copy of this inspection sheet should be provided to the retailer after inspection and one copy should be retained for department records.

The enforcement officer should issue a fine if the retailer receives a "non-compliant" mark in any category. However, the enforcement officer should have the discretion to issue a warning if the retailer clearly made an effort to comply but simply misunderstood the requirements. If a non-compliant mark is issued in any category, the enforcement officer should discuss the requirements imposed by the new law with the retailer and ensure that adequate steps are taken to remedy the non-compliant situation. The enforcement officer should also discuss the penalties for non-compliance, including fines and potentially the loss of the ability to sell tobacco products. A retailer that receives a "non-compliant" mark in any category should be inspected again in two weeks.

Once an initial round of inspections has occurred, the enforcement agency should continue to inspect the locations periodically to ensure continued compliance. To conserve resources and reduce additional costs, these inspections could be combined with ATUPA compliance inspections. As with other tobacco control measures, display restriction laws are likely to become largely "self-enforcing," so long as there is an initial effort made to ensure that all retailers come into compliance with the law.[116]

Conclusion

As tobacco companies place more reliance on power walls and other point-of-sale promotions to recruit new smokers, tobacco control advocates and public officials must respond with a similar focus on the point-of-sale. Fortunately, the 2009 Family Smoking Prevention and Tobacco Control Act gives local governments new legal authority to

regulate tobacco advertising and promotion in retail outlets. Tobacco product display restrictions are one promising way in which local governments can utilize this new authority to protect youth from tobacco addiction. As this report demonstrates, tobacco product display restrictions have been successfully implemented in jurisdictions around the world, and there is a growing evidence base suggesting that such policies can successfully reduce youth tobacco use and help address our nation's leading cause of preventable death.

CITATIONS

[1] Center for Tobacco-Free Kids, *Tobacco Company Marketing to Kids*, July 20, 2010, *available at* http://www.tobaccofreekids.org/research/factsheets/pdf/0008.pdf.

[2] U.S. DEP'T. OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 3 (1994).

[3] Lisa Henriksen et al., *Association of Retail Tobacco Marketing with Adolescent Smoking*, 94 AM. J. PUB. HEALTH 2081, 2082 (2004).

[4] Richard W. Pollay, *More Than Meets the Eye: On the Importance of Retail Cigarette Advertising*, 16 TOBACCO CONTROL 270, 271 (2007) (detailing how these "power walls" are carefully designed for maximum impact, using high tech devices such as eye gaze cameras to plan out the displays).

[5] J. Paynter et al., *Point of Sale Tobacco Displays and Smoking Across 14-15 Year Olds in New Zealand: A Cross Sectional Study,* 18 TOBACCO CONTROL 268, 272 (2009).

[6] Center for Tobacco-Free Kids, *Tobacco Industry Continues to Market to Kids*, March 23, 2010, *available at* http://www.tobaccofreekids.org/research/factsheets/pdf/0156.pdf; Center for Tobacco Free Kids, *The Toll of Tobacco in New York*, *available at* http://www.tobaccofreekids.org/ reports/settlements/toll.php?StateID=NY.

[7] E.C. Feighery, et al., *How Tobacco Companies Ensure Prime Placement of Their Advertising and Products in Stores: Interviews with Retailers about Tobacco Company Incentive Programmes*, 12 TOBACCO CONTROL, 184, 186 (2003) (hereinafter *Interviews*).

[8] FEDERAL TRADE COMMISSION, CIGARETTE REPORT FOR 2007 AND 2008, 4 (2011), *available at* http://www.ftc.gov/os/2011/07/110729cigarettereport.pdf and FEDERAL TRADE COMMISSION, SMOKELESS TOBACCO REPORT FOR 2007 AND 2008, 3 (2011), *available at* http://www.ftc.gov/os/2011/07/110729smokelesstobaccoreport.pdf.

[9] Ellen C. Feighery et al., *Retail Trade Incentives: How Tobacco Industry Practices Compare with Those of Other Industries*, 89 AM. J. PUB. HEALTH 1564, 1566 (1999) (hereinafter *Retail Trade Incentives*).

[10] Pollay, *supra* note 4, at 273.

[11] Feighery, *Retail Trade Incentives*, *supra* note 9, at 1566.

[12] Melanie Wakefield et al., *An Experimental Study of Effects on Schoolchildren of Exposure to Point-of-Sale Cigarette Advertising and Pack Displays*, 21 HEALTH EDUC. RES. 338, 346 (2006).

[13] Paynter, *supra* note 5, at 272. Parental smoking, smoking in the home, and SES are all factors know to be significantly correlated with adolescent smoking.

[14] Lisa Henriksen et al., *Association of Retail Tobacco Marketing with Adolescent Smoking*, 94 AM. J. PUB. HEALTH 2081, 2081 (2004) (*citing* POINT OF PURCHASE ADVERTISING INSTITUTE, THE POINT-OF-PURCHASE ADVERTISING INDUSTRY FACT BOOK (1992)); D. Chanil, *Profile of a Convenience Store Customer*, CONVENIENCE STORE NEWS, Feb. 11, 2002, at 54; E.C. Feighery et al., *Cigarette Advertising and Promotional Strategies in Retail Outlets: Results of a Statewide Survey in California*, 10 TOBACCO CONTROL 84 (2001).

[15] Lisa Henriksen et al., *Reaching Youth at the Point of Sale: Cigarette Marketing is More Prevalent at Stores Where Adolescents Shop Frequently*, 12 TOBACCO CONTROL 315, 317 (2004).

[16] University of Michigan News and Information Services, *Cigarette Brands Smoked by American Teens: One Brand Predominates, Three Account for Nearly All Teen Smoking* (Press Release), Apr. 13, 1999, *available at*

http://www.monitoringthefuture.org/pressreleases/pr99apr14.pdf. In a 2008 study, researchers found that students were more likely to smoke when their schools were located near retailers with a high density of tobacco advertising. Lisa Henriksen et al., *Is Adolescent Smoking Related to the Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?*, 47 PREVENTATIVE MEDICINE 210, 212 (2008).

[17] Melanie Wakefield et al., *The Effect of Retail Cigarette Pack Displays on Impulse Purchase*, 103 ADDICTION 322, 325 (2007).

[18] O.B.J. Carter, et al., *The Effect of Retail Cigarette Pack Displays on Unplanned Purchases: Results from Immediate Post-Purchase Interviews*, 18 TOBACCO CONTROL 218, 219 (2009) (finding that 49% of smokers surveyed in Australia were supportive of a display ban, versus only 12% opposed).

[19] Jie Wu Weiss et al., *Longitudinal Effects of Pro-Tobacco and Anti-Tobacco Messages on Adolescent Smoking Susceptibility*, 8 NICOTINE & TOBACCO RES. 455, 462 (2006).

[20] WORLD HEALTH ORGANIZATION, FRAMEWORK CONVENTION ON TOBACCO CONTROL, at v (2005), *available at* http://whqlibdoc.who.int/publications/2003/9241591013.pdf.

[21] Id. at 11.

[22] WORLD HEALTH ORGANIZATION, GUIDELINES FOR IMPLEMENTATION: ARTICLE 5.3; ARTICLE 8; ARTICLE 11; ARTICLE 13, at 54 (2009), *available at* http://whqlibdoc.who.int/publications/2009/9789241598224_eng.pdf.

[23] World Health Organization, *Parties to the WHO Framework Convention on Tobacco Control*, http://www.who.int/fctc/signatories_parties/en/index.html (last visited Jun. 23, 2010).

[24] Tobacco Control Act (No. 6/2002) (Ice.), *available at* http://eng.heilbrigdisraduneyti.is/media/Reglugerdirenska/Tobacco_Control_Act_revised_2003.pdf.

[25] The Tobacco Control Act, S.S., c. T-14.1, s. 6(3) (2001), *available at* http://www.qp.gov.sk.ca/documents/english/Statutes/Statutes/t14-1.pdf.

[26] Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188 (Can.). Notably, even when enforcement of the law was suspended, approximately 40% of tobacco retailers chose to continue keeping their tobacco products out of view. ASH Scotland, *Point of Sale Tobacco Display Bans – Myths and Realities*, Sept. 2008, *available at* http://www.ashscotland.org.uk/ash/files/ASH%20Scotland%20Briefing%20Paper%20on%20the%20Myths%20and%20Realities%20of%20Tobacco%20Point%20of%20Sale%20Display%20Bans.pdf.

[27] Cancer Society of New Zealand, *Out of Sight – Out of Mind: Canadian Provinces*, *available at* http://protectourchildren.org.nz/index.php?id=378.

[28] *See* Thailand Health Promotion Institute, *Advocacy for Policy of Nil-Display at Tobacco Point of Sales* (2005), *available at* http://www.thpinhf.org/POP.pdf.

[29] The one Australian state that has not enacted a display ban law in Queensland. Legislation has been introduced there to prohibit the display of tobacco products. Queensland Government Ministry, *Ban on Tobacco Displays in Queensland by Mid-2011*, April 29, 2010, *available at* http://www.cabinet.qld.gov.au/mms/StatementDisplaySingle.aspx?id=69544.

[30] Public Health (Tobacco) Act, 2002 (Act No. 6/2002) (Ir.) and Public Health (Tobacco) (Amendment) Act, 2004 (Act No. 6/2004) (Ir.).

[31] Act No. 14 of 9 March 1973 relating to Prevention of the Harmful Effects of Tobacco (Norway), *available at* http://www.regjeringen.no/en/dep/hod/Subjects/Folkehelse/Norways-National-Strategy-for-Tobacco-Co.html?id=451948&epslanguage=EN-GB.

[32] *Finland Bans Tobacco Display in Europe's Toughest Tobacco Control Law*, MEDICAL NEWS TODAY, Aug. 22, 2010, *available at* http://www.medicalnewstoday.com/articles/198494.php.

[33] New Zealand Ministry of Health, *Proposal to Ban Tobacco Retail Displays in New Zealand* (consultation letter requesting comments by May 2010), *available at* http://www.moh.govt.nz/moh.nsf/indexmh/proposal-to-ban-tobacco-retail-displays-in-nz.

[34] David Simpson, *Canada: Point of Sale Win—Again,* 14 TOBACCO CONTROL 78, 78-79 (2005).

[35] Rothman, Benson & Hedges Inc. v. Saskatchewan, [2005] S.C.R. 188 ("There is no inconsistency between s.6 of [Saskatchewan] *The Tobacco Control Act* and s. 30 of the [federal] *Tobacco Act* that would render the former inoperative pursuant to the doctrine of federal legislative paramountcy.").

[36] Ireland Office of Tobacco Control, *Office of Tobacco Control Welcomes Discontinuation of Legal Challenge Against Tobacco Legislation* (Press Release), Jan. 31, 2007, *available at* http://www.otc.ie/article.asp?article=353.

[37] Dominic Walsh, *Cigarette Makers Seek Review of Display Ban,* THE TIMES (U.K.), Apr. 27, 2010, *available at* http://business.timesonline.co.uk/tol/business/industry_sectors/ consumer_goods/ article7108934.ece.

[38] *Marlboro Man Philip Morris Sues Norway Over Cigarette Ban*, TELEGRAPH.CO.UK, Mar. 19, 2010, *available at* http://www.telegraph.co.uk/news/worldnews/europe/norway/ 7405522/Marlboro-man-Philip-Morris-sues-Norway-over-cigarette-ban.html.
[39] THE CENTRE FOR TOBACCO CONTROL RESEARCH, UNIVERSITY OF STERLING, POINT OF SALE DISPLAY OF TOBACCO PRODUCTS 31-36 (Aug 2008).
[40] Letter from Saskatchewan Coalition for Tobacco Reduction to Scottish Government, Apr. 6, 2009, *available at* http://www.scottish.parliament.uk/s3/committees/hs/inquiries/TGPBill/documents/TGP25SaskatchewanCoalitionforTobaccoReduction.pdf. More recently, it was discovered that Philip Morris had been secretly funding an Australian group calling itself the Alliance of Australian Retailers, which had been formed to oppose a proposed rule that would require plain packaging of tobacco products. Anne Davies, *Big Tobacco Hired Public Relations Firm to Lobby Government*, SYDNEY MORNING HERALD, Sept. 11, 2010.
[41] Action on Smoking and Health (ASH) Scotland, *Point of Sale Tobacco Display Bans: Myths and Realities*, at 2 (2008), *available at* http://www.ashscotland.org.uk/ash/6545.1359.html (follow "Briefing on myths and realities of tobacco point of sale display bans" hyperlink).
[42] See *infra* notes 43-58 and accompanying text.
[43] Letter from Stefan Hrafn Jonsson, Research and Development Division Director, Public Health Institute of Iceland, to Katherine Graham, Tobacco Retailers Alliance, *available at* http://www.scottish.parliament.uk/s3/committees/hs/inquiries/TGPBill/documents/2009.06.02ASHScotland.pdf (found in appendix D).
[44] Tobacco control advocates should also be aware of the Public Health Institute of Iceland's ("PHII") survey regarding smoking rates in Iceland, as this data is frequently cited by those opposing the display ban and seems to support the position that the ban has little or no effect (the rate of youth smoking appears to rise and fall, without any downward trend). However, there are some fatal weaknesses when using the PHII survey to measure youth smoking. This survey was designed to measure the overall smoking rate in Iceland, not the youth smoking rate. The sample size is much smaller when only the youth data is viewed, leading to a confidence interval of +/- 4%. Accordingly, even a change from 15% in one year to 23% in the next is not statistically significant. In the letter cited in the previous note, the Research and Development Director from PHII states that they prefer to use the ESPAD data when measuring youth smoking as opposed to their own survey, because the ESPAD data has narrow confidence intervals and any change greater than a percentage point is statistically significant.
[45] Lisa Henriksen et al., *Association of Retail Tobacco Marketing with Adolescent Smoking*, 94 AM. J. PUB. HEALTH 2081, 2082 (2004).
[46] Melanie Wakefield et al., *An Experimental Study of Effects on Schoolchildren of Exposure to Point-of-Sale Cigarette Advertising and Pack Displays*, 21 HEALTH EDUC. RES. 338, 346 (2006).
[47] J. Paynter et al., *supra* note 5, at 272 (2009).
[48] While the data as a whole is strong, when it is broken down by province and by age the sample size in each category becomes smaller and more susceptible to random error. This random error is the cause of the variance between individual years. Letter from Sheila Duffy, ASH Scotland, to Scotland Health and Sport Committee (June 2, 2009), *available at* http://www.scottish.parliament.uk/s3/committees/hs/inquiries/TGPBill/documents/2009.06.02ASHScotland.pdf (found in appendix C). Approximate sampling variability tables for the Canadian Tobacco Use Monitoring Survey are available at http://www.statcan.gc.ca/dli-ild/data-donnees/ftp/survey-tobacco-enquete-tabac-eng.htm.
[49] Propel Centre for Population Health Impact, *Youth: Smoking Prevalence*, *available at* http://www.tobaccoreport.ca/ytu_cs_sp_byage.html (data from the Canadian Tobacco Use Monitoring Survey).
[50] George Thompson et al., *Evidence and Arguments on Tobacco Retail Displays: Marketing an Addictive Drug to Children?*, 121:1276 J. NEW ZEALAND MED. ASS'N 87, 90 (2008). Discussing the fact that retailer incentive payments have continued subsequent to the implementation of display bans (although the amount of the payments has decreased), Thomson et al., write: "These figures imply that tobacco companies are now paying retailers to *handle and sell* their products, rather than to display them. From a marketing point of view, this explanation is logical, since tobacco companies will want retailers to maintain the same range of brands and brand variants as they did prior to the display ban." Id. (emphasis in original).
[51] ASH Scotland, *supra* note 26 (citing quotes given to *Your Convenience Manager*, a publication of the Canadian convenience store industry).
[52] Thompson, *supra* note 50, at 20.

[53] *Dealing with Display Bans: Solutions and Support*, GLOBAL CONVENIENCE STORE FOCUS, Dec. 2009, *available at* http://www.globalcstorefocus.com/0912/4.html.
[54] Id.
[55] Id.
[56] See 4 Solutions Display Corp., *Restricted Tobacco Overview*, http://www.4solutionsdisplay.com/restricted_tobacco_overview (last visited Oct. 8, 2010).
[57] Kate Lunau, *Butts on the Line*, MACLEANS.CA, July 23, 2008, *available at* http://www.macleans.ca/business/economy/article.jsp?content=20080723_24986_24986&page=1.
[58] Indeed, any minimal costs imposed on businesses are likely vastly outweighed by the economic and health benefits that result from reduced smoking rates. Moreover, businesses that are strongly reliant on tobacco sales have another option – closing their premises to youth. Some retailers in Canada chose this option following the implementation of display ban laws. See Health Canada, *A Proposal to Regulate the Display and Promotion of Tobacco and Tobacco-Related Products at Retail*, *available at* http://www.hc-sc.gc.ca/hc-ps/consult/_2006/tob-ret/index-eng.php (Section 3.4).
[59] Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1341).
[60] Id. at § 5 ("(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package. (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.").
[61] Federal Cigarette Labeling and Advertising Act, Pub. L. No. 91-222, §4, 84 Stat. 87, 88 (1970) ("Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health.").
[62] Id. at § 5, 88 ("(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.")
[63] Joseph R. DiFranza et al., *RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children,* 266 J. AM. MED. ASS'N 3149 (1991).
[64] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).
[65] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1786 (2009) (codified at 21 U.S.C.A. § 387a(a)).
[66] Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 121 (2000) ("[I]t is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction.")
[67] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1842 (2009) (to be codified at 15 U.S.C.A. § 1333(a)(1)) ("WARNING: Smoking can kill you." "WARNING: Cigarettes cause fatal lung disease." "WARNING: Cigarettes are addictive.").
[68] 15 U.S.C. § 1334 (2010) (emphasis added). The FSPTCA also contains another preemption provision, 21 U.S.C. § 387p. This provision prohibits state and local governments from regulating "tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products," but provides that state and local governments may impose more stringent restrictions than the federal government with regard to "requirements relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products."
[69] 940 MASS. CODE REGS. 21.04(5)(a).
[70] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 551(2001) ("Congress pre-empted state cigarette advertising regulations like the Attorney General's because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health. Accordingly, we hold that the Attorney General's outdoor and point-of-sale advertising regulation targeting cigarettes are pre-empted by the FCLAA.").
[71] N.Y. PUB. HEALTH LAW § 1399-cc(7) (2010).
[72] Edenfield v. Fane, 507 U.S. 761, 770-71 (1993) ("It is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.") (internal quotation marks and citations omitted).

[73] See, e.g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 563 (2001) ("[A] case specific analysis makes sense, for although a State or locality may have common interests and concerns about underage smoking and the effects of tobacco advertisements, the impact of a restriction on speech will undoubtedly vary from place to place.").
[74] See Part 3, *supra*.
[75] U.S. CONST., AMEND. I.
[76] Schneider v. New Jersey, 308 U.S. 147, 160 (1939) ("The freedom of speech and of the press secured by the First Amendment . . . against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state.")
[77] Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972) ("[O]ur people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'")
[78] See Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571-572 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.")
[79] See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) ("In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible.")
[80] See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience").
[81] See, e.g., Bailey v. Morales, 190 F. 3d 320 (1999) (hiring others to solicit customers constitutes commercial speech protected by the First Amendment).
[82] Central Hudson, 447 U.S. at 564. If however, the court finds that the law at issue is directed solely at *conduct* and is "unrelated to the suppression of free expression," it may apply the less stringent test developed in *O'Brien v. United States* (the "*O'Brien* test"). O'Brien v. United States, 391 U.S. 367, 377 (1968). Under this test, the government regulation is more likely to be upheld. In *Lorillard v. Reilly*, 533. U.S. 525, 569 (2001), the Supreme Court applied the *O'Brien* test and found that a law requiring tobacco products to be kept behind the counter did not violate the First Amendment.
[83] Central Hudson, 447 U.S. at 566.
[84] Id. at 565.
[85] Id. at 563.
[86] Id. at 564, 566.
[87] Id. at 566.
[88] Id. at 565 (internal reference omitted).
[89] 533 U.S. 525 (2001).
[90] Id. at 562.
[91] Id.
[92] Id. at 528.
[93] 940 CODE OF MASS. REGS. §§ 21.04(5)(b), 22.06(5)(b) (2000).
[94] Lorillard, 533 U.S. at 566.
[95] Central Hudson, 447 U.S. at 564.
[96] Justice Thomas has suggested abandoning the *Central Hudson* test and providing commercial speech with the same amount protection from regulation as non-commercial speech. Thus far, other justices have not been willing to endorse that position. See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996) (Thomas, J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech' is of 'lower value' than 'noncommercial' speech.").
[97] Central Hudson, 477 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising . . . Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it . . . or commercial speech related to illegal activity.")

[98] However, specific ads or specific types of tobacco promotions that are demonstrably false will not be protected by the First Amendment. See, e.g., United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1123-26 (D.C. Cir. 2009) (finding that the tobacco companies' marketing of "light" cigarettes as less harmful than regular cigarettes constituted fraud, and that "the First Amendment does not protect fraud").
[99] Lorillard, 533 U.S. at 579 (Thomas, J., concurring).
[100] Id. at 580 (Thomas, J., concurring).
[101] See, e.g., David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOY. L.A. L. REV. 507, 558 (2006) (suggesting that "[i]n *Lorillard*, the government . . . irredeemably sandbagged its own case by its unwise waiver of the first part of the *Central Hudson* inquiry").
[102] See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1467-1551 (1999).
[103] Lorillard*,* 533 U.S. at 555.
[104] Central Hudson*,* 447 U.S. at 569.
[105] Edenfield v. Fane, 507 U.S. 761, 770-771 (1993).
[106] Florida Bar v. Went for It, Inc., 515 U.S. 618, 628 (1995).
[107] U.S. v. Philip Morris USA, Inc., 449 F. Supp 2d 1 (D.D.C. 2006).
[108] Central Hudson*,* 447 U.S. at 566.
[109] Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 183 (1999) ("In a number of cases involving restrictions on speech that is 'commercial' in nature, we have employed *Central Hudson's* four-part test to resolve First Amendment challenges . . . [i]n this analysis, the Government bears the burden of identifying a substantial interest and justifying the challenged restriction").
[110] See Centers for Disease Control and Prevention, *Cigarette Use Among High School Students --- United States, 1991-2009*, 56 MORBIDITY & MORTALITY WEEKLY REP'T 797 (2010) (demonstrating the rate of decline in youth smoking rate has significantly decreased since 2003 and suggesting that additional tobacco control measures are needed).
[111] *See* Weiss*, supra* note 19, at 462.
[112] U.S. CONST. Art VI, cl. 2 (proving that the laws of the United States "shall be the Supreme Law of the Land").
[113] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
[114] N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(12) ("Every local government . . . shall have power to adopt and amend local laws . . . relating to . . . [t]he government, protection, order conduct, safety, health and well-being of persons therein. This provision shall include but not be limited to the power to adopt local laws providing for the regulation or licensing of occupations or businesses . . . .").
[115] N.Y. PUB. HEALTH LAW § 308.
[116] In other words, expensive enforcement measures will become unnecessary because compliance with the law will become the societal norm and violations will be reported by the public.

This page intentionally left blank.

Appendix A: Model Ordinance

MODEL NEW YORK ORDINANCE PROHIBITING THE DISPLAY OF TOBACCO PRODUCTS IN FACILITIES OPEN TO MINORS

Section 1: Findings

The **[Common Council]** of **[City]** hereby finds and declares that:

Tobacco use is the foremost preventable cause of premature death in the United States, causing over 400,000 deaths in the United States each year;

More than XXX high school age youth and XXX adults in **[City]** currently smoke and smoking kills approximately XXX adults in **[City]** each year;

Tobacco companies sell products that are addictive and inherently dangerous, causing cancer, heart disease, and other serious illnesses;

[City] has a substantial interest in reducing the number of individuals of all ages who use cigarettes and other tobacco products, and a particular interest in protecting adolescents from tobacco dependence and the illnesses and premature death associated with tobacco use;

An overwhelming majority of Americans who use tobacco products begin using such products while they are adolescents and become addicted to those products before reaching the age of 18;

Tobacco product displays lead minors to develop favorable beliefs about tobacco use, overestimate the prevalence of tobacco use, and engage in illegal purchases of tobacco products;

The display of tobacco products plays a crucial role in the decision of individuals, and adolescents in particular, to begin using tobacco products;

The World Health Organization has endorsed a ban on retail tobacco product displays as an effective method of reducing tobacco use;

Research suggests that preventing the display of tobacco products will lead to a significant decrease in the number of adolescents becoming addicted to those tobacco products and will assist individuals in their efforts to quit smoking;

Tobacco companies recognize the importance of tobacco product displays in increasing product sales and therefore pay tobacco retailers for prominent display locations;

Consider Who Will Adopt the Law: *In addition to cities, counties and county boards of health may possess the legal authority to prohibit the display of tobacco products.*

County boards of health can adopt such a rule by adding it to the county's sanitary code. However, this model would have to be adapted somewhat for that purpose. Please contact the Center for Public Health and Tobacco Policy to discuss this option further.

Add Localized Findings: *Communities can add more localized facts into the findings and can add other findings compelling to the community. It is also important to introduce supporting materials into the record during common council hearings. Those materials can be referenced in the findings.*

Prior efforts by the city and state to limit tobacco use, while effective, have not precluded the need for further efforts to reduce tobacco use by adolescents;

The Centers for Disease Control recognizes that a comprehensive, multi-faceted approach is necessary to adequately address the issue of youth tobacco use;

Due to federal preemption, **[City]** lacked the legal authority to limit the display of tobacco products prior to the enactment of the Family Smoking Prevention and Tobacco Control Act in 2009;

Preventing the display of tobacco products will reduce the number of adolescents who use tobacco products, while still affording tobacco companies numerous ways to communicate product information and provide other advertising to their legal adult customers;

[Common Council] desires to reduce adolescent smoking and the public health consequences of smoking without prohibiting the sale of tobacco products to adult consumers;

The purpose of this legislation is to further the strong governmental interest in protecting the health of its citizens, and particularly its children, by restricting the display of tobacco products in retail environments that are open to children; and

This measure does not restrict expressive conduct any more than necessary and will leave tobacco companies with reasonable and adequate ways to communicate non-misleading commercial information to their legal adult customers.

Central Hudson/ Commercial Speech Test: *Keep in mind the* Central Hudson *factors when developing findings. Use findings that demonstrate that (a) the government has a substantial interest in prohibiting the display of tobacco products, and (b) the law directly advances the government's interest.*

Section 2: Definitions

As used in this Chapter, the following terms shall have the meanings indicated:

(A) ADULT-ONLY ESTABLISHMENT means a facility where the operator ensures or has a reasonable basis to believe (such as by checking the identification of any person appearing to be under the age of 25) that no person under the Legal Age is permitted entrance.

(B) AGE-VERIFIED CUSTOMER means any individual who has presented a driver's license or other photographic identification card issued by a government entity or educational institution indicating that the individual is of Legal Age. Such identification need not be required of any individual who reasonably appears to be at least twenty-five years of age, provided, however, that such appearance shall not constitute a defense in any proceeding alleging a violation of this Chapter. It shall be an affirmative defense to a violation of this Chapter that the Tobacco Retailer

Adult-Only Establishments: *This model ordinance exempts adult-only establishments (see Section 3). Note that there is no separate exception for tobacco stores. Tobacco stores must prohibit access to minors in order to continue displaying tobacco products.*

successfully performed a Transaction Scan of an individual's identification as defined by New York Public Health Law 1399-cc and that a Tobacco Menu or Tobacco Product was provided to such individual in reasonable reliance upon such identification and transaction scan.

(C) LEGAL AGE means the minimum age at which individuals are permitted to legally purchase tobacco products.

(D) DEPARTMENT means the **[Department of XXX]**.

(E) PERSON means any natural person, company, corporation, firm, partnership, business, organization, or other legal entity.

(F) TOBACCO MENU means a booklet, pamphlet, or list that contains a listing of tobacco products offered for sale by the Tobacco Retailer and the price of such products. The Tobacco Menu may contain pictures of and advertisements for Tobacco Products.

(G) TOBACCO PRODUCT means any manufactured product containing tobacco or nicotine, including but not limited to cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, snus, dissolvable tobacco products, and electronic cigarette cartridges, whether packaged or not; any packaging that indicates it might contain any substance containing tobacco or nicotine; or any objects utilized for the purpose of smoking or inhaling tobacco or nicotine products, including but not limited to pipes, hookahs, cigarette or cigar wrapping papers, and electronic cigarettes. However, "Tobacco Product" does not include any product that has been approved by the U.S. Food and Drug Administration, pursuant to its authority over drugs and devices, for sale as a tobacco use cessation product or for other medical purposes and is being marketed and sold solely for that approved purpose.

(H) TOBACCO RETAILER means any Person who sells or offers for sale any Tobacco Product, or any employee of such a person.

Section 3: Adult-Only Establishments Exempted

Sections 4 through 7 of this Chapter shall not apply to Adult-Only Establishments.

Section 4: Display of Tobacco Products Prohibited

(A) No Tobacco Retailer shall display or permit the display of any Tobacco Product in a manner that permits a consumer to view any Tobacco Product prior to purchase. Except as provided for in Subsection 4(B), this Section is not violated if:

(1) at the direct request of an Age-Verified Customer, such a customer handles a Tobacco Product to inspect the product for quality and freshness prior to purchase; or

Exceptions: *There are limited exceptions that allow for tobacco products to be briefly handled during the course of business. However, retailers cannot permit the display of tobacco products for any longer than necessary.*

(2) Tobacco Products are temporarily visible during restocking, the sale of the Tobacco Products, or the carriage of the Tobacco Products into or out of the premises.

(B) No Tobacco Retailer shall display or permit the display of any Tobacco Product for any longer than necessary to complete the purposes identified in Subsection 4(A)(1) or Subsection 4(A)(2).

Section 5: Use of Tobacco Menu

(A) No Tobacco Retailer shall store any Tobacco Menu in a location where it is visible to customers or accessible to customers without the assistance of a Tobacco Retailer.

(B) No Tobacco Retailer shall provide any Tobacco Menu to any individual other than an Age-Verified Customer.

(C) After a customer has completed viewing a Tobacco Menu, the Tobacco Retailer shall immediately return the Tobacco Menu to its storage location.

(D) Any tobacco advertisements or promotions included in the Tobacco Menu shall include any warning labels required by federal law or regulation.

Section 6: Enforcement

(A) The Department or its authorized designee(s) shall enforce the provisions of this Chapter. The Department may conduct periodic inspections to ensure compliance with this Chapter.

(B) Any citizen who desires to register a complaint under this Article may do so with the Department.

(C) In addition to the remedies provided by the provisions of this Chapter, the Department or any other person aggrieved by the failure of a Tobacco Retailer to comply with the provisions of this Chapter, including but not limited to any other Tobacco Retailer located in **[City]**, may seek injunctive relief against the violator to enforce the provisions of this Chapter and prevent future violations.

(D) In any action brought pursuant to Section 6(C), the Department or other person who initiates such an action shall, if the prevailing party, be entitled to recover reasonable attorneys' fees and costs involved in bringing the action, plus interest.

Tobacco Menu:
Retailers are free to determine the content of the Tobacco Menu (so long as warnings required by federal law are provided). The menu can only be provided to customers who are old enough to purchase tobacco products.

Enforcement:
Enforcement of this Chapter is through both city and public inspection.

The Department can: (1) issue monetary fines and (2) seek injunctive relief. The fines are described in Section 8. Injunctive relief means that the city can go to court and ask the judge to order someone to stop doing something—here, it would be violating the law and conducting illegal activities.

Someone in the community can: (1) alert the Department about the illegal activity, and/or (2) seek injunctive relief. The person who goes to court can seek, as part of the case, reimbursement for the cost of bringing the case to court.

Section 7: Penalties

(A) Any Tobacco Retailer found to be in violation of Section 4 of this Chapter shall be liable for civil penalty of not more than $500 for the first violation, not more than $1000 for the second violation within a two-year period, and not more than $2000 for the third and each subsequent violation within a two-year period. Each day on which a violation occurs shall be considered a separate and distinct violation.

(B) Any Tobacco Retailer found to be in violation of Section 5 of this Chapter shall be liable for civil penalty of not more than $250 for the first violation, not more than $500 for the second violation within a two-year period, and not more than $1000 for the third and each subsequent violation within a two-year period. Each day on which a violation occurs shall be considered a separate and distinct violation.

(C) In addition to the fines established by this Section, violation of this Chapter by a Tobacco Retailer may result in the suspension or revocation of any permit or license issued to the Tobacco Retailer.

(D) All civil penalties and fines recovered by under this Chapter shall be provided to the Department for use in enforcing this Chapter and other city laws relating to Tobacco Products.

Penalties: *Penalties could be tailored to reflect other similar local laws. The penalties section would have to be modified before inclusion in a county sanitary code. (Fines allowable under a county sanitary code cannot exceed $500.)*

Section 8: Severability

The provisions of this Chapter are declared to be severable, and if any section of this Chapter is held to be invalid, such invalidity shall not affect the other provisions of this Chapter that can be given effect without the invalidated provision.

Section 9: Effective Date

The effective date of this ordinance shall be one hundred and eighty (180) days from the date of its enactment.

Effective Date: *The effective date should be set at a time that gives the Department and retailers enough time to prepare for the new law. The time period between enactment of the law and the effective date should, however, be no longer than necessary.*

The Center for Public Health & Tobacco Policy
***at* New England Law | Boston**
http://www.tobaccopolicycenter.org/

NEW ENGLAND LAW BOSTON
154 Stuart St.
Boston, MA 02116

Contact:
Phone: 617-368-1465
Fax: 617-368-1368
tobacco@nesl.edu

The Center for Public Health and Tobacco Policy is a new resource for the New York tobacco control community. It is funded by the New York State Department of Health and will be working with the New York State Tobacco Control Program and its contractors to develop and support policy initiatives that will reduce tobacco-related morbidity and mortality in New York.

This work provides educational materials and research support for policy initiatives and does not constitute and cannot be relied upon as legal advice.

Appendix B: Compliance Guidance

New South Wales (Australia), British Columbia (Canada), Ontario (Canada)

THE FACTS

RETAILER FACTSHEET 5

Ban on display of tobacco and smoking products in retail outlets

Section 9 of the *Public Health (Tobacco) Act 2008* prohibits the display of tobacco products, non-tobacco smoking products and smoking accessories.

Large retailers (more than 50 employees) must now comply.
Small retailers (50 or fewer employees) must comply by 1 July 2010.

Why is the law changing to ban the display of tobacco products?

Research suggests that tobacco displays can influence children's perceptions about the availability and accessibility of cigarettes in their community and can also make it harder for intending quitters to quit.

In 2008, a NSW Government public consultation process found that over half of the submissions received indicated support for a proposal to place tobacco out of sight in retail outlets.

What does a display ban mean?

In NSW the display of tobacco products, non tobacco smoking products and smoking accessories will be phased out in shops and retail outlets, including specialist tobacconists, and tobacco vending machines.

Tobacco retailers will need to ensure that tobacco products, non-tobacco smoking products and smoking accessories **cannot be seen by the public from inside or outside the premises.**

The exceptions are where:

- ✓ a member of the public displays their own tobacco or smoking products; or
- ✓ a tobacco or smoking product or products is displayed to a customer at his or her direct request, including during the actual transaction/sale.

It is also acknowledged that retailers may need to periodically restock their tobacco storage units and that there may be some unavoidable display of tobacco products, non-tobacco smoking products or smoking accessories in this process. (See page 5 of the FAQs).

What types of smoking accessories are covered by the display ban?

The types of smoking accessories covered by the display ban are defined in the Act and include cigarette papers, pipes, cigarette holders, hookahs, water pipes or any other smoking implements. Matches and lighters are not covered by the display ban and therefore may continue to be displayed.

How will the changes affect my business?

Removing tobacco products from sight in premises may require some retailers to make changes to their premises. Therefore, the Act allows for a staged phase-in providing existing retailers with time to plan and make any relevant changes. *See over*

Tobacco retailers that employed 50 employees or less as at 25 September 2008 (the date of the introduction of the *Public Health (Tobacco) Bill 2008)* will need to comply with the display ban by 1 July 2010. Retailers that employed more than 50 employees as at 25 September 2008 must now comply with the display ban. New tobacco retailing businesses need to comply with the display ban from 1 July 2009 and therefore do not receive any additional implementation time.

How can retailers be sure they comply with the display ban requirements?

All tobacco retailers need to ensure they are aware of their obligations introduced by the display ban under the *Public Health (Tobacco) Act 2008*.

There is a variety of ways in which premises retailing tobacco and smoking products may be configured. The key performance measure underpinning the display ban is that **tobacco and smoking products cannot be seen by members of the public from inside or outside the premises.**

Tobacco retailers need to therefore determine how best to meet the display ban performance measure in their specific premises and operating environment to ensure compliance with the legislation. Tobacco retailers are encouraged to apply the following test when undertaking compliance self-assessment: **Can members of the public see any tobacco or smoking products from inside or outside my premises?**

Is general information about implementing the display ban available?

Different types of retail outlets may require different storage configurations for storing their tobacco products. Some retailers may need to amend their tobacco storage units in order to ensure that products are kept out of sight. In general, any option that could allow for the exposure of tobacco or smoking products during business operating hours, including incidental exposure, is not allowed. (Refer to the exceptions on page 1. See the FAQ attachment with further descriptions. Photos will be available in the near future).

Some general tips for tobacco retailers are provided below:

- ✓ Arrangements should minimise exposure of tobacco products during a retail transaction, the use of a large public-facing tobacco storage device with a single opening is unlikely to comply;
- ✓ Tobacco storage devices should not be left open for a period of time allowing tobacco products to be displayed to members of the public (see the FAQ attachment regarding customer transactions);
- ✓ Tobacco products should not be shown to a customer to help in product selection, except when requested by the customer;
- ✓ Retailers need to ensure that members of the public are not exposed to tobacco or smoking products when multi-facing storage devices are used in retail premises (Refer to the exceptions on page 1. See the FAQ attachment which provides additional context);
- ✓ Retailers need to ensure that members of the public are not exposed to tobacco or smoking products when accepting inventory (Refer to the exceptions on page 1. See the FAQ attachment which provides additional context); and
- ✓ Retailers should not allow any broken storage devices, which allow the display of tobacco products to members of the public, to remain unrepaired.

How will customers know what brands and types of tobacco are available in a retail outlet?

Tobacco retailers may choose only one method to display basic information about tobacco products, such as prices and names, through the use of:

- ✓ price tickets; or
- ✓ a single price board.

Retailers may use one or the other of the above methods but NOT both. Therefore the same method of displaying prices and product names must be used for all product lines carried by your business.

The use of tobacco and smoking product catalogues is not allowed. Information about how prices of tobacco products may be displayed is contained in the *Public Health (Tobacco) Regulation 2009*.

Requirements for price tickets

If tobacco retailers choose to use price tickets, they must ensure that they:

- ✓ only use two colours - one for the ticket and one for the price;
- ✓ are not coloured in fluorescent colours or in a more distinctive manner than price tickets used for other merchandise in the retail outlet;
- ✓ are not highlighted by any lighting;
- ✓ are no larger than 35 square centimetres in area;
- ✓ contain lettering not more than two centimetres in height and not more than 1.5 centimetres in width;
- ✓ do not contain information other than the name of the product line, a bar code or other identifying codes, the price and a symbol indicating the country of origin;
- ✓ display the price and product name only once for each product line carried by the retailer;
- ✓ have no other article or thing attached to them; and
- ✓ are not arranged with other price tickets so as to create an image or visual effect from the arrangement that would be incomplete if any one ticket were removed.

Requirements for a price board

If tobacco retailers choose to use a price board, they must ensure that they only use one and it must:

- ✓ not contain information other than the names of the product lines and prices;
- ✓ be no larger than 2,000 square centimetres in area;
- ✓ have a black background with white lettering or a white background with black lettering (but not both);
- ✓ contain lettering that is not more than two centimetres in height and not more than 1.5 centimetres in width;
- ✓ display the price and product name only once for each product line carried by the retailer;
- ✓ have no other article or thing attached to it; and
- ✓ not be highlighted by any lighting.

THE FACTS

RETAILER FACTSHEET 5

Ban on display of tobacco and smoking products in retail outlets

Further information

For further information about the tobacco control reforms, please access the NSW Health website: **www.health.nsw.gov.au** or call the Tobacco Information Line on 1800 357 412.

The Tobacco Information Line can be accessed by non-English speaking persons via the Translating and Interpreting Service (TIS) on 13 14 50.

NSW GOVERNMENT

NSW HEALTH

Last updated March 2010.

ISBN 978-1-74187-535-5 (CHA) 100065

Enforcing the Law

Enforcement officials, employed by the provincial health authorities, are responsible for the day-to-day enforcement of the *Tobacco Control Act* and Regulation.

Provincial enforcement officers can use one of two penalty options for owner/operators. They could receive 1) a violation ticket or 2) a penalty under the Administrative Penalty Process. Penalties for first convictions could result in a fine of up to $1,000 and/or a sales prohibition up to 30 days. These penalties can increase up to $3,000 and/or a 180-day tobacco sales prohibition.

Key Facts

- If minors are allowed in a store, then tobacco products and promotional items cannot be displayed.
- If minors are not allowed in a store, then tobacco can be displayed provided it cannot be clearly seen from outside.
- When minors can enter a store, tobacco displays must be hidden from view between every sales transaction.
- Retail signage is restricted to two types: point-of-sale signs produced by the Ministry of Health and product-price signs.
- Tobacco products cannot be sold in public sector sites such as health, hospital, government, recreational or post secondary facilities.

For further information, contact your local health authority:

Vancouver Island Health Authority
250 360-1450

Vancouver Coastal Health Authority
604 675-3800

Fraser Health Authority
604 476-7000

Interior Health Authority
250 851-7300

Northern Health Authority
1 877 617-6777

Or visit the Tobacco Control website at:
www.health.gov.bc.ca/tobacco

Information in this brochure is intended to provide general information on B.C.'s Tobacco Control Act and Regulation. It should not be used as a substitute for legal or other expert advice.

BRITISH COLUMBIA
The Best Place on Earth

Promoting Better Health for All British Columbians

Tobacco Retail Display and Promotion Restrictions

What you need to know about B.C.'s tobacco laws effective March 31, 2008.

BRITISH COLUMBIA
The Best Place on Earth

Ministry of Health

Appendix B

Almost all provinces ban the retail display and promotion of tobacco products.

This includes products made from tobacco such as cigarettes, cigars, smokeless tobacco as well as signs, lighters, videos and clothing promoting tobacco products. Since most people start smoking before the age of 19, limiting youth access to tobacco advertising is an important step in promoting healthier choices for British Columbians.

The Rules

As of March 31, 2008, under the provincial *Tobacco Control Act* and Regulation, a retailer in B.C. cannot:

- Display or promote tobacco products if they can be seen or accessed by a minor inside the establishment;
- Display or promote tobacco products in a way that is clearly visible to a person outside the retail establishment.

All tobacco retailers must prevent minors from seeing and accessing their tobacco products and promotional items. There are no exemptions.

Sales Bans

After March 31, 2008, tobacco products cannot be sold in hospitals, health authority or government buildings, public recreation centres, or public post secondary institutions.

Displaying Tobacco for Sale

If minors have access to the store, tobacco products and promotional items must be hidden from view between each sales transaction. To do this, it is up to retailers to determine which method would work best for their store. It could be as simple as using a curtain that remains closed between sales, or stocking tobacco products behind doors or in drawers that are closed after every sale.

Tobacco and tobacco products can be displayed provided that:

- No one under the age of 19 can enter the store.
- Tobacco products and promotions cannot be clearly visible to a person from outside the store.
- The part of the store with the tobacco display is restricted to persons 19 years of age or older and products and promotions cannot be seen or accessed from outside the restricted area.

What about cigarette papers, tubes and filters?

Under provincial regulation, these kinds of products cannot be displayed as they promote tobacco use.

What Kind of Tobacco Signs Can I Post at My Store?

There are only two types of tobacco signs allowed by regulation in a store: point-of-sale signs and product-price signs.

Point-of-sale signs

These signs are produced by the Ministry of Health and must be posted as described in the regulation. They include 1) two decals for the cash register or drawer - one facing the customer and other facing the clerk, and 2) a warning sign to be displayed so the customer can clearly see it when they purchase their tobacco product. These signs can be obtained from your local health authority.

Product-price signs

A maximum of three signs per store are allowed to describe the tobacco products available and their price. These signs are restricted in their content, dimensions, colour and print size, and can be produced by the retailer. They may be viewed from inside or outside of the store. See section 4.32 of the Tobacco Control Regulation on the Tobacco Control web site for more details. www.health.gov.bc.ca/tobacco

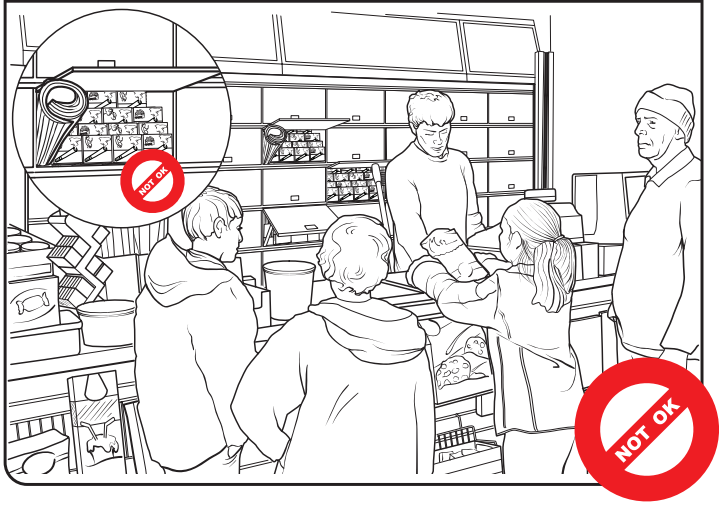
Appendix B

SMOKE FREE ONTARIO

SMOKE-FREE ONTARIO ACT
TOBACCO DISPLAY BAN
FEBRUARY 2008

TOBACCO DISPLAY BAN
EXAMPLES FOR TOBACCO VENDORS

You CAN'T leave doors open that allow tobacco to be shown.



You CAN'T show the tobacco to help someone choose.

OK Let them see a list or binder to choose which product they want.

You CAN'T get tobacco for more than one customer at the same time.

You CAN'T have broken doors that allow tobacco to be shown.

For Further Information

Contact Your Local Public Health Unit

Ministry of Health Promotion
Smoke-Free Ontario Legislation
www.ontario.ca/smokefree

The Smoke-Free Ontario Act and Regulation are available online at: www.e-laws.gov.on.ca.

Ontario

Center for Public Health and Tobacco Policy
154 Stuart Street
Boston, MA 02116
T 617-368-1465
F 617-368-1368
tobacco@nesl.edu
www.tobaccopolicycenter.org

1908 NEW ENGLAND LAW BOSTON