



## Federal Regulation of Tobacco and its Impact on the Retail Environment

On June 22, 2009, President Barack Obama signed into law the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act),<sup>1</sup> giving the U.S. Food and Drug Administration (FDA) comprehensive authority to regulate the manufacturing, marketing, and sale of tobacco products. The new law represents the most sweeping action taken to date to reduce what remains the leading preventable cause of death in the United States. For more information on the Tobacco Control Act, please see the Consortium's publications in its [Federal Regulation of Tobacco Collection](#).

The Tobacco Control Act contains several provisions related to the retail environment. Perhaps most notably, the law mandated restrictions on the sales, marketing, and advertising of cigarettes and smokeless tobacco that the FDA itself adopted in 1996 but which the Supreme Court nullified in 2000 on the basis that Congress had not at that time given the FDA the authority to take such action.<sup>2</sup>



This fact sheet highlights federal tobacco restrictions that impact the retail environment, focusing on provisions in the Tobacco Control Act and related regulations. It will highlight policy options that states and many local governments can consider to further restrict tobacco in retail settings. We encourage you to consult with local legal counsel before attempting to implement these measures.<sup>3</sup> For more details about these policy considerations, please contact the Tobacco Control Legal Consortium.

### Sales to Minors

The Tobacco Control Act and related regulations prohibit the sale of cigarettes and smokeless tobacco to any person younger than eighteen.<sup>4</sup> Retailers are required to check a photo ID of anybody appearing to be under the age of twenty-seven.<sup>5</sup> The effectiveness of laws restricting minors' access to tobacco products can scarcely be questioned.<sup>6</sup>

State and local governments can adopt youth access regulations that go beyond the requirements of federal law,<sup>7</sup> making it less likely that children and young adults become tobacco users. One way states can go beyond the requirements of federal law is by expanding the range of products covered. At present, no federal law prohibits the sale of

products such as cigars, pipes, or electronic cigarettes to minors. Further, many state youth access laws limit the definition of “tobacco products” to products that can be smoked or chewed,<sup>8</sup> potentially excluding novel tobacco products such as dissolvable tobacco products and electronic cigarettes. States can expand their youth access laws to cover a wider range of products,<sup>9</sup> while excluding products that have been approved as cessation aids.<sup>10</sup>

Another way states can go beyond the requirements of federal law is by raising the minimum age to purchase tobacco products to above age eighteen. At least four states and three counties have already done this.<sup>11</sup> For more information on the topic of raising the minimum age to purchase tobacco, please see the Consortium’s publication, *Raising the Minimum Legal Sale Age for Tobacco and Related Products*.

### **Self-Service and Vending Machines**

Federal regulations prohibit retailers from allowing self-service access to cigarettes and smokeless tobacco and from selling these products in vending machines. Exceptions include vending machines in facilities that cannot be entered by minors and certain mail-order sales.<sup>12</sup> Again, state and local governments can go beyond the requirements of federal law, making it less likely that children will have access to tobacco. Governments can prohibit self-service or vending machine sales of all tobacco and unapproved nicotine products, and can eliminate the exemption for adult-only facilities. Some states already do this,<sup>13</sup> and evidence suggests that it is an effective strategy to reduce minors’ access to tobacco.<sup>14</sup>

### **Free Samples**

Federal regulations prohibit the distribution of free samples of cigarettes and smokeless tobacco including in retail settings,<sup>15</sup> with one notable exception for certain non-retail settings.<sup>16</sup> Free samples of the lesser of 0.53 ounces or eight individual portions of smokeless tobacco (if it is a product that is served in individual portions) can be distributed in a “qualified adult-only facility.” There are many requirements to what constitutes a “qualified adult-only facility,” but the term seems to encompass tobacco company sampling tents often present at rodeos, concerts, and other events that may attract youth.

State and local governments can enact laws that go beyond the requirements of the federal regulation.<sup>17</sup> They can prohibit the distribution of free samples of all tobacco and unapproved nicotine products, and they can eliminate the exemption for qualified adult-only facilities. This approach has been recommended by the U.S. Surgeon General.<sup>18</sup> State and local governments can also restrict coupon redemption, a tobacco industry practice that often undercuts restrictions on free samples. For more information on this topic, please see the Consortium’s [publication on coupon restrictions](#).

## Minimum Pack Size

Federal regulations prohibit cigarettes from being sold in packages containing fewer than 20 cigarettes.<sup>19</sup> Further, no retailer may break open a pack of cigarettes and sell them in a quantity below twenty cigarettes, or break open any package of smokeless tobacco and sell it in a quantity that is smaller than the smallest package distributed by the manufacturer.<sup>20</sup> This is consistent with studies showing that single cigarette sales appeal to minors because of their low price.<sup>21</sup>

The federal regulations for cigarettes seem less likely to be abused than the regulations for non-cigarette tobacco products. For example, if a manufacturer were to package and sell a pouch of snus individually, a retailer could sell it and not violate the federal regulation. Consequently, state and local governments could consider creating larger minimum pack size requirements for non-cigarette tobacco products. For more information regarding minimum pack size, please see the Consortium's publication, *Regulating Tobacco Products Based on Pack Size*.

## Non-Tobacco Gifts

Federal regulations prohibit retailers from offering any gift or item – other than cigarettes or smokeless tobacco – in exchange for any purchase of cigarettes or smokeless tobacco, or in exchange for any credits, proofs-of-purchase, or coupons.<sup>22</sup> Since this prohibition does not apply to the purchase of other tobacco products – such as cigars, pipe tobacco, or electronic cigarettes – state and local governments can consider expanding it to include those products.

## Flavored Cigarettes

Under the Tobacco Control Act, neither a cigarette nor its component parts (such as the tobacco, filter, or paper) may contain a characterizing flavor, such as fruit, candy, or alcohol, with the exception of tobacco and menthol flavors.<sup>23</sup> Marketing and public health research shows that flavors such as fruit, candy, and alcohol hold an intense appeal to minors and young adults.<sup>24</sup> Consequently, flavored cigarettes are not allowed to be sold in retail settings. This provision does not apply to any tobacco product besides cigarettes and the component parts of cigarettes, so smokeless tobacco, cigars, pipes, and electronic cigarettes are still sold with flavors in many communities. This includes products that are virtually indistinguishable from cigarette but are branded as “little cigars.”

Several local jurisdictions – including New York City; Providence, Rhode Island; and Santa Clara County, California – have passed laws restricting the sale of flavored non-cigarette tobacco products. The legality of New York City's ordinance was upheld by a federal court, although the decision is under appeal.<sup>25</sup> See the Consortium's publication, [Regulating Flavored Tobacco Products](#), for more information on this topic.

### **“Light,” “Low Tar,” and other Health Descriptors**

The Tobacco Control Act prohibits tobacco products from being marketed with health descriptors such as “light,” “mild,” or “low,” unless the FDA has specifically approved the marketing.<sup>26</sup> Congress has given the FDA power to regulate cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco.<sup>27</sup> The Secretary may, in his or her discretion, deem other tobacco products to be within the FDA’s power to regulate.<sup>28</sup> As of yet, the Secretary has not deemed products like so-called “little cigars” to be within the FDA’s regulatory purview. As a result, products like little cigars – which are often indistinguishable from cigarettes – are still sold using these descriptors. There may be a litigation risk if a state or local government were to regulate in this field due to federal preemption.<sup>29</sup> However, it may withstand legal scrutiny if it is a sales restriction similar to New York City’s ordinance restricting the sale of flavored non-cigarette tobacco products.

### **Warnings on Advertisements**

The Tobacco Control Act created new requirements for warnings for cigarettes and smokeless tobacco, both on the products themselves and on any advertising for the product – including advertisements in retail stores. Cigarette packages and cigarette advertising must contain specific textual warnings.<sup>30</sup> The law also required the FDA to create warnings that graphically depict the dangers of cigarette smoking.<sup>31</sup> The agency did this, but the graphic warnings have not yet been implemented because of ongoing litigation.<sup>32</sup> The Tobacco Control Act also created new text warnings for smokeless tobacco packages and advertising.<sup>33</sup> These warnings have taken effect. Therefore, smokeless tobacco advertisements in retail stores should have these warnings, which are required to cover at least 20 percent of the area of the advertisement.<sup>34</sup>

State and local units of government are preempted, or prohibited, from creating new requirements for the labeling of tobacco products.<sup>35</sup> However, New York City adopted an ordinance requiring that retailers post health warnings graphically depicting the harmful effects of smoking wherever tobacco products are sold. This ordinance was struck down by a federal judge on preemption grounds, although the litigation is ongoing.<sup>36</sup>

### **“Tombstone” Advertising**

Federal regulations require that cigarette advertising, including advertising in retail stores, be limited to “black text on a white background,” a style known as “tombstone” advertising.<sup>37</sup> This regulation was struck down by a federal judge on First Amendment grounds, although the litigation is ongoing.<sup>38</sup> State and local government regulations concerning advertisements must be consistent with the First Amendment. Any such regulation concerning cigarette advertisements can relate only to the time, place and manner, but not content, of the advertising.<sup>39</sup>

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<sup>1</sup> Family Smoking Prevention and Tobacco Control Act, 21 U.S.C.A. §§ 387–387u (West 2009) [hereinafter Tobacco Control Act]; Pub. L. No. 111-31, 123 Stat. 1776 (2009); 21 C.F.R. §§ 1140.30, 1140.32 (2010).

<sup>2</sup> See Tobacco Control Act, *supra* note 1, at Pub. L. No. 111-31, tit. 1, Sec. 102; 21 C.F.R. § 1140.1 *et seq.*; *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120 (2000).

<sup>3</sup> The information contained in this document is not intended to constitute or replace legal advice.

<sup>4</sup> See, e.g., Tobacco Control Act, at § 387f(d)(4)(A)(i); 21 C.F.R. § 1140.14(a).

<sup>5</sup> 21 C.F.R. § 1140.14(b).

<sup>6</sup> See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CTRS. FOR DISEASE CONTROL AND PREVENTION PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL 8 (1994) [hereinafter CDC: PREVENTING TOBACCO USE].

<sup>7</sup> 21 U.S.C.A. § 387p(a)(1).

<sup>8</sup> See, e.g., FLA. STAT. § 569.002(6) (2010).

<sup>9</sup> See, e.g., MINN. STAT. § 297F.01, subd. 19 (2011)

<sup>10</sup> See, e.g., *id.* at § 609.6855(c) (2011).

<sup>11</sup> ALA. CODE § 28-11-13 (2011); ALASKA STAT. §§ 11.76.100, 105 (2011); N.J. STAT. ANN. § 2A:170-51.4 (2011); UTAH CODE ANN. §§ 76-10-104 *et seq.* (2011); NASSAU CNTY. N.Y. LOCAL LAW NO. 5-2006 (2006); Suffolk County, N.Y., Regulatory Local Laws ch. 792 (2006); Alania Potrikus, *FYI: Starting Today, You Must Be 19 to Buy Cigarettes in Onondaga County*, THE POST-STANDARD, Mar. 2, 2009, available at [http://www.syracuse.com/news/index.ssf/2009/03/fyi\\_legal\\_age\\_to\\_buy\\_cigarette.html](http://www.syracuse.com/news/index.ssf/2009/03/fyi_legal_age_to_buy_cigarette.html).

<sup>12</sup> 21 C.F.R. §§ 1140.14(c), 1140.16(c).

<sup>13</sup> See, e.g., [http://www.syracuse.com/news/index.ssf/2009/03/fyi\\_legal\\_age\\_to\\_buy\\_cigarette.html](http://www.syracuse.com/news/index.ssf/2009/03/fyi_legal_age_to_buy_cigarette.html).

<sup>14</sup> See, e.g., CDC: PREVENTING TOBACCO USE, *supra* note 6, at 249 (“[R]esults were more significant ... when vending machines were entirely banned.”)

<sup>15</sup> Although the regulation refers to “cigarettes, smokeless tobacco, or other tobacco products,” the FDA has not yet enforced this restriction in the case “other tobacco products.” See 21 C.F.R. § 1140.16(d)(1); UNITED STATES FOOD & DRUG ADMINISTRATION, *Draft Guidance for Industry: Compliance with Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents [Revision to Draft Guidance]* (Mar. 2011), available at

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<http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm252758.htm>.

<sup>16</sup> 21 C.F.R. § 1140.16(d).

<sup>17</sup> 21 U.S.C.A. § 387p(a)(1); 21 C.F.R. § 1140.16(d)(2)(ii).

<sup>18</sup> CDC; PREVENTING TOBACCO USE, *supra* note 6, at 186, 256.

<sup>19</sup> 21 C.F.R. § 1140.16(b).

<sup>20</sup> 21 C.F.R. § 1140.14(d).

<sup>21</sup> *See, e.g.*, H. Landrine et al., *Minors' Access to Single Cigarettes in California*, 4 PREVENTATIVE MED. 503, 503 (1998), available at <http://www.ncbi.nlm.nih.gov/pubmed/9672942>. *See also* CDC; PREVENTING TOBACCO USE, *supra* note 6, at 256.

<sup>22</sup> 21 C.F.R. § 1140.34(b).

<sup>23</sup> 21 U.S.C.A. § 387g(a)(1)(A).

<sup>24</sup> *See, e.g.*, Carrie M. Carpenter, et al., *New Cigarette Brands with Flavors that Appeal to Youth: Tobacco Marketing Strategies*, 24 HEALTH AFFAIRS 1601, 1608 (2005); Paula Frank, *Kids' Drinks*, FOOD PRODUCT DESIGN, Jan. 1, 2000, available at <http://www.foodproductdesign.com/articles/2000/01/kids-drinks.aspx>.

<sup>25</sup> *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 2011 WL 5569431 (S.D.N.Y. Nov. 15, 2011); 21 U.S.C. § 387p(a)(1).

<sup>26</sup> *See* 21 U.S.C.A. § 387k.

<sup>27</sup> 21 U.S.C.A. § 387a(b).

<sup>28</sup> *Id.*

<sup>29</sup> *See* 21 U.S.C.A. § 387p(a)(2)(A); *see also U.S. Smokeless Tobacco Mfg. Co.*, 2011 WL 5569431.

<sup>30</sup> Tobacco Control Act, *supra* note 1, at Pub. L. No. 111-31, tit. II, § 201.

<sup>31</sup> *Id.* at § 201(d).

<sup>32</sup> *R.J. Reynolds Tobacco Co. v. FDA*, --- F.Supp.2d ----, 2011 WL 5307391 (D.D.C. Nov. 7, 2011).

<sup>33</sup> Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C.A. § 4402 (2010), amended by Tobacco Control Act, *supra* note 1, at Pub. L. No. 111-31, tit. II, § 204.

<sup>34</sup> *Id.* at § 4402(b)(2)(B).

<sup>35</sup> 21 U.S.C.A. § 387p(a)(2)(A).

<sup>36</sup> 23-34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health, 757 F.Supp.2d 407 (S.D.N.Y 2010).

<sup>37</sup> 21 C.F.R. § 1140.32(a).

<sup>38</sup> *Commonwealth Brands, Inc. v. U.S.*, 678 F.Supp.2d 512, 525-6 (W.D.Ky. 2010).

<sup>39</sup> 21 U.S.C.A. § 387p(a)(2)(B); Federal Cigarette Labeling and Advertising Act, 15 U.S.C.A. § 1334(c) (2010).