

CAMPAIGN For TOBACCO-FREE Kids®

THE SUPREME COURT FDA RULING: THAT CONGRESS HAS NOT YET PROVIDED FDA WITH AUTHORITY OVER TOBACCO PRODUCTS

In response to cigarette company legal challenges, on March 21, 2000 the U.S. Supreme Court ruled 5-4 that Congress had not yet given the U.S. Food and Drug Administration (FDA) adequate jurisdiction to regulate tobacco products or related marketing practices. Because of the Supreme Court's ruling, the pending FDA Tobacco Rule was eliminated – including previously active provisions that set 18 as the nationwide minimum legal age for purchasing tobacco and required that retailers check photo identification before selling cigarettes to persons who appear younger than 27 years of age. But the Court did not invalidate any of the specific provisions of the FDA Tobacco Rule. It only stated that FDA did not yet have the necessary statutory authority to issue any rules pertaining to tobacco products.

Although the Supreme Court found that “tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States,” it also ruled that “Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.” Because of this ruling, neither FDA or any other federal entity may oversee tobacco products or their marketing to minimize harms to the public health or to restrict tobacco marketing to kids until Congress passes new legislation that expressly provides the authority to do so.

History of the FDA Rule and FDA's Assertion of Jurisdiction Over Tobacco

On August 28, 1996, President Clinton approved the U.S. Food and Drug Administration's assertion of jurisdiction over tobacco products and its related Tobacco Rule, which the FDA developed to reduce teenage tobacco consumption through a comprehensive range of initiatives. The major tobacco companies immediately filed lawsuits in a North Carolina U.S. District Court to challenge FDA's statutory authority to issue the Rule and to charge that the Rule's specific advertising and promotional restrictions both exceeded the FDA's statutory authority and violated the tobacco companies' Constitutional right to free speech.

On April 25, 1997, District Court Judge William Osteen upheld the FDA's legal authority to regulate cigarettes and smokeless tobacco products as "drugs" and "devices" under the Food, Drug, and Cosmetic Act, as well as its specific authority to issue the FDA Rule's youth access provisions. But the Judge also ruled that the FDA did not have statutory authority to issue the Rule's advertising and promotional restrictions. Because he found that the FDA did not have statutory authority to issue the Rule's advertising restrictions, Judge Osteen did not decide whether those provisions violated the tobacco companies' First Amendment free speech rights.

The tobacco companies appealed Judge Osteen's ruling that FDA has statutory authority over tobacco products to the U.S. Fourth Circuit Court of Appeals. The U.S. Justice Department, on behalf of the FDA, appealed the Judge's finding that FDA did not have authority to issue the Rule's advertising restrictions. On August 14, 1998, a Fourth Circuit panel voted 2 to 1 that the FDA has no statutory authority to regulate tobacco products, thereby overruling the District Court decision. The Justice Department asked the full Fourth Circuit to reconsider the panel's ruling, but the Circuit Court declined to do so on November 10, 1998.

On January 19, 1999, the Justice Department filed a petition for writ of certiorari with the U.S. Supreme Court, which requests that the Court review the Fourth Circuit panel's ruling and find

that the FDA has full statutory authority both to regulate tobacco products and to issue all the provisions of the FDA Tobacco Rule. The Supreme Court accepted the case and heard oral arguments on December 1, 1999.

On March 21, 2000 the Supreme Court ruled 5-4 that Congress had not given FDA adequate jurisdiction to regulate tobacco products or related marketing practices or to issue the FDA Tobacco Rule. The ruling was based, in part, on a finding that if FDA had authority over tobacco under existing FDA authorization language it would have to ban tobacco products, and Congress clearly had not intended to give FDA that authority. But the ruling also made it very clear that Congress could provide FDA with extensive authority over tobacco products and their marketing without necessarily providing FDA with the authority to ban any tobacco products.

Provisions of the FDA Rule (Eliminated By the Supreme Court Ruling)

Nationwide Minimum Age and Photo Identification Requirement. The FDA Rule established 18 as the nationwide minimum age for purchasing tobacco products, and required retailers to check photo identification of anyone buying tobacco products who appears younger than 27. These provisions had been in effect since February 1997. Because of the tobacco companies' court challenges, none of the other FDA Rule provisions had been implemented.

Reducing Easy Access by Children. To make it more difficult for kids to obtain tobacco products illegally, the FDA Rule also included the following:

- Banned vending machine sales and self-service displays, except in places where minors are not allowed, such as certain bars and nightclubs.
- Prohibited the sale of single cigarettes and required packages to contain at least 20.
- Prohibited free giveaways of cigarettes or smokeless (spit) tobacco products.

Restricting Tobacco Company Marketing to Children. To reduce tobacco company marketing practices that reach large numbers of kids, the FDA rule also includes the following:

- Banned all outdoor advertising within 1,000 feet of schools and playgrounds.
- Limited all remaining outdoor and point-of-sale tobacco advertising to black-and-white text only, except inside facilities that minors are not allowed to enter.
- Limited advertising in publications with significant youth readership (those with either 15 percent or 2 million readers under 18 years of age) to black and white print only.
- Prohibited tobacco company sales or giveaways of non-tobacco merchandise or products -- such as caps, jackets, or gym bags -- that carry cigarette or smokeless tobacco brand names or logos.
- Prohibited the tobacco companies from giving away non-tobacco items -- such as key chains, lighters, or music CDs -- in exchange for the purchase of cigarettes or smokeless tobacco.
- Prohibited tobacco company brand-name sponsorships of sporting or entertainment events, or of individual teams or entries (while still permitting sponsorships in the companies' corporate names).

Additional Information. The website of the Campaign for Tobacco-Free Kids (www.tobaccofreekids.org) provides additional information on the FDA Rule and why it is needed, as well as links to the full text of the FDA Rule, major legal briefs and court rulings, and other FDA-related website pages.