



THE NEW FDA TOBACCO LAW AND STATE/LOCAL PREEMPTION

Now that the FDA tobacco legislation has been passed into law, federal preemption of state and local tobacco control measures is more strict regarding state and local government efforts to directly regulate tobacco products. But federal preemption is now much less stringent relating to state and local actions to restrict tobacco product advertising and promotion – and the states and localities remain free to ban the sale of any or all types of tobacco products.

To be preempted by the new FDA tobacco law, a state or local government law, regulation or rule must:

- 1) Pertain to cigarettes or smokeless tobacco products (or to other products once FDA formally asserts jurisdiction over them, as well);
- 2) Regulate the tobacco product, itself, or its manufacturing, packaging or labeling; and
- 3) Not be a requirement or restriction regarding any of the following:
 - the sale or distribution of tobacco products
 - the possession or use of tobacco products
 - access to tobacco products
 - exposure to tobacco products (e.g., smoke-free laws)
 - the advertising or promotion of tobacco products
 - “fire-safe” cigarettes
 - information reporting to the state or local government
 - the taxation of tobacco products.¹

To be preempted by the Federal Cigarette Labeling & Advertising Act (FCLAA), as amended by the FDA tobacco legislation, a state or local government law, regulation or rule must:

- 1) Pertain to cigarettes;
- 2) Be established for smoking and health purposes;
- 3) Regulate or restrict cigarette advertising and promotion; and
- 4) Regulate or restrict the content of cigarette ads or promotions.*

Regulating or restricting either the sales or distribution of cigarettes, or the time, place or manner of cigarette ads is not preempted by FCLAA (or any other federal law).²

Advertising restrictions that are not preempted by FCLAA might still be blocked by the First Amendment, if found to be an unconstitutional restriction on commercial speech. But state and local governments may still structure and implement many effective tobacco product advertising restrictions that would readily survive First Amendment scrutiny. In addition, there are many other effective state and local measures to prevent and reduce tobacco use and its harms that could be implemented free of any First Amendment or federal preemption constraints.³

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* FCLAA also preempts any state or local laws or rules requiring a statement pertaining to smoking and health on cigarette labels or packaging.

¹ The key provisions in the new FDA tobacco statute pertaining to preemption follows:

SEC. 916. PRESERVATION OF STATE AND LOCAL AUTHORITY.

(a) IN GENERAL.—

(1) Preservation—Except as provided in paragraph (2)(A), nothing in this chapter, or rules promulgated under this chapter, shall be construed to limit the authority of a Federal agency (including the Armed Forces), a State or political subdivision of a State, or the government of an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this chapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products. No provision of this chapter shall limit or otherwise affect any State, tribal, or local taxation of tobacco products.

(2) PREEMPTION OF CERTAIN STATE AND LOCAL REQUIREMENTS.—

(A) In General—No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this chapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.

(B) Exception—Subparagraph (A) does not apply 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. Information disclosed to a State under subparagraph (A) that is exempt from disclosure under section 552(b)(4) of title 5, United States Code, shall be treated as a trade secret and confidential information by the State.

(b) RULE OF CONSTRUCTION REGARDING PRODUCT LIABILITY.—No provision of this chapter relating to a tobacco product shall be construed to modify or otherwise affect any action or the liability of any person under the product liability law of any State.

² No FCLAA-type preemption applies to any state or local laws, regulations or rules that pertain to tobacco products other than cigarettes. The text of the FCLAA preemption provisions, which apply only to cigarettes, follow:

15 U.S.C. Section 1334. Preemption

(a) Additional statements- Except to the extent the Secretary requires additional or different statements on any cigarette package by a regulation, by an order, by a standard, by an authorization to market a product, or by a condition of marketing a product, pursuant to the Family Smoking Prevention and Tobacco Control Act (and the amendments made by that Act), or as required under section 903(a)(2) or section 920(a) of the Federal Food, Drug, and Cosmetic Act, no statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) State regulations- 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 chapter.

(c) Exception- Notwithstanding subsection (b), a State or locality may enact statutes and promulgate regulations, based on smoking and health, that take effect after the effective date of the Family Smoking Prevention and Tobacco Control Act, imposing specific bans or restrictions on the time, place, and manner, but not content, of the advertising or promotion of any cigarettes.

³ For more guidance on how state and local governments can avoid preemption and First Amendment constraints, see the Campaign for Tobacco-Free Kids factsheet, *Permissible State Restrictions on Tobacco Product Marketing - What Can States Still Do Given Federal Preemption and the 1st Amendment?*, <http://tobaccofreekids.org/research/factsheets/pdf/0280.pdf>.