



THE IMPACT OF THE NEW FDA TOBACCO LAW ON STATE TOBACCO CONTROL EFFORTS

The new FDA tobacco law does not in any way interfere with the ability of states (or localities) to raise tobacco tax rates, implement and enforce comprehensive smoke-free laws, adequately fund strong state tobacco prevention programs, or take any actions to restrict the sale or distribution of tobacco products. But it greatly expands what states (and localities) can do to prohibit or restrict tobacco product advertising and promotion. Consistent with the way the FDA regulates other products under its jurisdiction, the FDA tobacco law blocks states from taking action specifically to regulate the structure of any tobacco product that FDA is already formally regulating (except that states are still left free to pass and enforce fire-safe cigarette laws). At the same time, the FDA tobacco law, once fully implemented, establishes a range of new marketing restrictions and other measures that apply nationwide to complement state tobacco prevention efforts and make some new state or local action unnecessary.

Expanded State Authority to Restrict Cigarette Advertising and Promotion. For many years, the Federal Cigarette Labeling and Advertising Act (FCLAA) has preempted states from taking any action, for health purposes, to restrict cigarette advertising or promotion. The passage of the FDA bill changes that by newly allowing states to restrict or regulate the time, place and manner (but not the content) of any cigarette advertising or promotions.^{*} Among other things, states may now take such new action as:

- Limit the number or size of tobacco product ads at retail outlets;
- Prohibit the placement of tobacco products and tobacco product ads near cash registers (to reduce impulse purchases by smokers trying to quit); or
- Supplement the new FDA time, place and manner advertising restrictions that apply only to cigarette and smokeless tobacco ads by establishing similar restrictions on cigar and other tobacco product ads.

But any new state or local time, place or manner restrictions on tobacco product advertising will still have to contend with First Amendment protections for commercial speech. Put simply, new state restrictions on tobacco product advertising will likely pass constitutional muster if it is clear that they will directly advance the government's substantial interest in reducing youth and adult tobacco use or otherwise protecting and promoting public health; are not more extensive than necessary to promote those government interests; and will leave tobacco companies and retailers reasonably able to communicate with their legal tobacco product customers.[†]

No Impact on the Most Important Forms of State Tobacco Control Activity. The FDA tobacco law leaves state and local governments free to pursue those key policies – such as smoke-free laws, tobacco tax increases and increased tobacco prevention program funding – that work most effectively to prevent and reduce tobacco use. The FDA law also does nothing to restrict states from adopting and enforcing measures to restrict youth or adult access to tobacco products or to take any other action to regulate or restrict the sale, distribution, and possession of tobacco products.

^{*} There is no FCLAA-like preemption of state or local action to restrict the advertising of tobacco products other than cigarettes. But federal law does directly preempt states and localities from placing any requirements, for health purposes, on the packaging or labeling of smokeless tobacco, as well as cigarettes.

[†] For more on First Amendment constraints and how they can be overcome, see the Campaign factsheet, *Permissible State Restrictions on Tobacco Product Marketing*, <http://tobaccofreekids.org/research/factsheets/pdf/0280.pdf>.

For example, the FDA law does nothing to interfere with a state’s ability to prohibit the sale of cigarettes or any other tobacco products, either totally or just at certain specified locations (e.g., by banning sales at pharmacies, other health facilities, or college campuses). Nor does the law impede state efforts to establish strong minimum price laws for tobacco products; set minimum package sizes or maximum sales amounts; require cessation-assistance warning signs at outlets that sell tobacco products; or restrict the number of such retail outlets.

Limits on State Regulation of the Tobacco Products, Themselves. As with the laws giving FDA authority to regulate other products, the FDA tobacco law provides FDA with exclusive authority in such areas as establishing tobacco product standards, prohibiting adulterated or misbranded tobacco products, establishing labeling requirements, implementing and enforcing manufacturing standards, and regulating modified risk tobacco products. To provide for consistent national standards, once FDA has taken action in one of these areas relating to a specific category of tobacco product, the new FDA law blocks state activity in the same area pertaining to the same category of tobacco product. But the bill does expressly allow states to continue to pass and enforce state “fire-safe” cigarette laws, and to impose additional reporting requirements (including ingredient disclosures) on tobacco product manufacturers to obtain any desired information that FDA is not already getting and sharing with the states.

FDA will use its new authority to regulate the characteristics of tobacco products to do such things as require changes to existing or new products to make them less harmful or less addictive. Because such product regulation is complex and requires considerable oversight and testing expertise and capacity, the states have not done much to regulate cigarettes or other tobacco products directly (beyond “fire-safe” laws). But the FDA tobacco legislation gives FDA both extensive authority and hundreds of millions of dollars in funding to do that work in ways that will protect and promote overall public health.

New FDA Tobacco Control Measures Are Going Into Effect Nationwide. The new FDA tobacco law establishes a range of new restrictions on tobacco products and their marketing that will free states and localities to focus on other complementary strategies to prevent and reduce tobacco use and its harms. The following are just some of the new FDA marketing restrictions that are in effect or soon will be (unless blocked or postponed by legal challenges):

<u>New FDA Marketing Restrictions (apply to cigarettes and smokeless only)</u>	<u>In Effect</u>
<i>Larger, stronger warning labels required on all smokeless tobacco packages and in all smokeless advertisements</i>	6/22/10
<i>FDA Rule: No vending machine sales or self-service displays except in adult-only facilities</i>	6/22/10
<i>FDA Rule: No branded product tie-ins, such as T-shirts, with purchases</i>	6/22/10
<i>FDA Rule: No sales of cigarettes in packages of fewer than 20 cigarettes.</i>	6/22/10
<i>FDA Rule: No free samples of any tobacco products, except free samples of smokeless allowed in adult-only facilities in certain restricted situations</i>	6/22/10
<i>FDA Rule: All ads must be black text on white background only – except in adult-only facilities and in magazines with less than 15% or fewer than 2 million youth readers[‡]</i>	6/22/10
<i>FDA must publish regulations requiring larger, graphic cigarette warning labels that cover top half of front and back of all cigarette packs and for cigarette ads (effective 15 months later)</i>	by 6/22/11
<i>To protect youth, FDA must issue regulations to address the promotion and marketing of tobacco products sold over the Internet, by mail-order or other non-face-to-face sales</i>	by 4/1/12

Campaign for Tobacco-Free Kids, July 21, 2010

[‡] This provision has been struck down by a federal District Court as violating the First Amendment; but FDA is appealing that ruling.