

## THE IMPACT OF THE FDA TOBACCO LEGISLATION ON STATE TOBACCO CONTROL EFFORTS

The FDA tobacco legislation signed into law preserves the rights of states to raise tobacco tax rates, implement and enforce comprehensive smoke-free laws, adequately fund strong state tobacco prevention programs, enhance access to smoking cessation, and take any actions to restrict the sale and distribution of tobacco products. It also expands what states can do to prohibit or restrict tobacco product marketing.

Consistent with the way the FDA regulates other products under its jurisdiction, the passage of the legislation will block states from taking action specifically to regulate the structure of any tobacco product that is subject to FDA regulation – except that states are left free to pass any fire-safe cigarette laws.

The FDA tobacco legislation, once fully implemented, will establish a range of new marketing restrictions and other measures that will apply nationwide to complement state tobacco prevention efforts and will provide assistance to states to implement their laws restricting sales to youth.

***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 for the first time, *to the extent permitted under the First Amendment*, take action to do such things as:

- Supplement the new FDA requirement that all retail ads for cigarettes and smokeless consist only of black text on white background by applying the same restrictions to cigar and other tobacco product ads;
- Restrict or eliminate “power walls” of cigarettes being offered for sale at retail outlets (which will be the only remaining presentation of cigarette brand logos, labels and colors in retail outlets after the FDA black-text-on-white-background restriction goes into effect);
- Limit the number or size of tobacco product ads at retail outlets; or
- Require that all tobacco products or tobacco product ads be kept away from cash registers in order to reduce impulse purchases by smokers trying to quit.

As noted above, the states will still have to comply with First Amendment protections for commercial speech. This requires creating a strong legislative history and a substantial evidentiary record that shows that the restrictions address a form of marketing that is of legitimate government concern and that the regulation will directly advance the substantial government interest of preventing youth tobacco use, reducing adult tobacco use or otherwise protecting and promoting public health. It is also necessary to show that the regulations will leave tobacco companies still reasonably able to communicate truthful information to their legal adult customers; and are reasonably related to the government interests they seek to address.\*

---

\* For more information on First Amendment constraints and how they can be overcome, see the Campaign factsheet, *Permissible State Restrictions on Tobacco Product Marketing*, available at <http://tobaccofreekids.org/research/factsheets/pdf/0280.pdf>. That factsheet has not yet been updated to reflect the FDA legislation’s sharp reduction to the scope of FCLA preemption, but its information relating to the First Amendment is up to date. That factsheet will be updated soon, and additional materials will soon be available regarding how states can most effectively use the new authority they now have to regulate and restrict cigarette advertising and promotions.

***No Impact on the Forms of State Tobacco Control Activity that States have Traditionally Exercised.*** With the passage of the FDA tobacco legislation, state and local governments remain free to pursue those key policies – such as smoke-free laws, restrictions on sales to youth and other sales restrictions, tobacco tax increases, increased tobacco prevention program funding, and enhanced access to tobacco cessation services – that states have used to prevent and reduce tobacco use. More broadly, the FDA legislation also does nothing to restrict states from adopting and enforcing measures to restrict youth or adult access to tobacco products or to do anything else to regulate or restrict the sale, distribution, and possession of tobacco products. The legislation leaves the states free to prohibit the sale of cigarettes or any other tobacco products, either totally, to persons of any age, to change the age of sale or to restrict sales to just at certain specified locations (e.g., by prohibiting sales at pharmacies or other health facilities, or at college campuses or any other locations frequented by youth).

***Limits on State Regulation of the Tobacco Products Themselves.*** As with the laws giving FDA authority to regulate other products, the passage of the FDA tobacco legislation will provide 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. These provisions remove state authority in these areas for products for which FDA jurisdiction has been asserted under the Act – in order to provide for consistent national standards. But the bill does expressly allow states to continue to pass and enforce state “fire-safe” cigarette laws; and the states are left free to impose additional reporting requirements (including ingredient disclosures) on tobacco product manufacturers if there is any information FDA was not getting or not sharing that the states consider useful to have.

The authority of the FDA to regulate the product itself is one of the most important provisions of the bill because it gives the agency the authority 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 regulated the content of tobacco products (beyond “fire-safe” cigarette laws and bans on flavored cigarettes).