



Federal Regulation of Tobacco and the Retail Environment

This summary highlights federal tobacco restrictions that impact the retail environment, focusing on provisions in the 2009 Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act)¹ and related regulations. It includes options that state and local governments could consider.² For more information and to discuss considerations relating to these measures, please contact the [Public Health Law Center](mailto:publichealthlaw@wmitchell.edu) at publichealthlaw@wmitchell.edu.

Sales to Minors

- Sale of cigarettes and smokeless tobacco to persons younger than eighteen is prohibited.³
- State and local governments can adopt youth access regulations that are more stringent than the federal law, such as increasing the minimum legal sale age.⁴

Self-Service and Vending Machines

- Retailers cannot provide self-service access to cigarettes and smokeless tobacco or sell these products in vending machines, unless the retailer is an adults-only establishment.⁵
- State and local governments can prohibit self-service displays and vending machines of any tobacco product or by any type of retailer.⁶

Free Samples

- Distribution of free samples of cigarettes and smokeless tobacco is prohibited,⁷ with an exception for a “qualified adult-only facility.”⁸
- State and local governments can enact laws that are more stringent than the federal law.⁹

Minimum Pack Size

- Cigarettes cannot be sold in packages containing fewer than 20 cigarettes; no retailer may break open a pack of cigarettes and sell fewer than twenty cigarettes per package, or break open a package of smokeless tobacco and sell it in a quantity smaller than the smallest package distributed by the manufacturer.¹⁰
- Local governments may consider options that establish minimum pack sizes for non-cigarette tobacco products such as smokeless tobacco, cigars, cigarillos, and little cigars.

Non-Tobacco Gifts

- Retailers cannot offer any tobacco-branded gift or item, other than cigarettes, smokeless tobacco, or matchbooks, in exchange for any purchase of cigarettes or smokeless tobacco, or in exchange for any credits, proofs-of-purchase, or coupons.¹¹

Flavored Cigarettes

- Cigarettes and their component parts (such as tobacco, filter, or paper) cannot be flavored (such as fruit, candy, or alcohol) with anything other than tobacco or menthol.¹²
- State or local governments may consider restricting sales of flavored non-cigarette tobacco products. A federal court upheld New York City's restriction; this decision is under appeal.¹³

Health-Related Warnings

- New federal warning requirements apply to cigarettes and smokeless tobacco, both on the products themselves and on any advertising – including advertisements in retail stores. One court found the specific graphic warning labels chosen by the FDA for cigarette packages and advertisements violate the First Amendment rights of tobacco companies.¹⁴ Another court found that the general requirement of graphic warning labels is legally valid.¹⁵ Appeals are expected in both cases.
- State and local units of government cannot impose product labeling requirements.¹⁶ They may, however, consider requiring health warning signs at the point of sale. New York City required retailers to post warning signs graphically depicting smoking's harmful effects. This specific requirement was overturned by a federal appellate court, although the court left open the possibility that a legally valid warning requirement could be established.¹⁷ An appeal is possible.

Tombstone Advertisements

- Cigarette advertising, even in retail stores, must be limited to “black text on a white background,” a style known as “tombstone” advertising.¹⁸ A federal court ruled this provision violates the First Amendment.¹⁹ An appeal is expected.
- State and local governments can consider restricting the time, place and manner of tobacco advertising, but cannot regulate the content of the ads.²⁰

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

² The information contained in this document is not intended to constitute or replace legal advice and we encourage you to consult with local legal counsel before attempting to implement these measures.

³ 21 U.S.C.A. § 387f(d)(4)(A)(i); and 21 C.F.R. § 1140.14(a).

⁴ 21 U.S.C.A. § 387p(a)(1).

⁵ 21 C.F.R. §§ 1140.14(c), 1140.16(c)(2)(ii).

⁶ 21 U.S.C.A. § 387p(a)(1).

⁷ Although the regulation refers to “cigarettes, smokeless tobacco, or other tobacco products,” the FDA has not yet enforced this restriction with respect to “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 <http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm252758.htm>.

⁸ 21 C.F.R. § 1140.16(d)(iii).

⁹ 21 U.S.C.A. § 387p(a)(1); 21 C.F.R. § 1140.16(d)(2)(ii).

¹⁰ 21 C.F.R. § 1140.16(b); and 21 C.F.R. § 1140.14(d).

¹¹ 21 C.F.R. § 1140.34(b).

¹² 21 U.S.C.A. § 387g(a)(1)(A).

¹³ *U.S. Smokeless Tobacco Mfg. Co. v. New York City*, 2011 WL 5569431 (S.D.N.Y. Nov. 15, 2011). 21 U.S.C. § 387p(a)(1).

¹⁴ *R.J. Reynolds Tobacco Co., et al. v. FDA*, ___ F.3d ___ (D.C. Cir. 2012) (2012 WL 3632003).

¹⁵ *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509 (6th Cir. 2012).

¹⁶ 21 U.S.C.A. § 387p(a)(2)(A).

¹⁷ *23-34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health*, 685 F.3d 174 (2d Cir. 2012).

¹⁸ 21 C.F.R. § 1140.32(a).

¹⁹ *Discount Tobacco City & Lottery*, 674 F.3d 509, *supra* note 14.

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