



Using Retailer AVCs as a Tool in Tobacco Control

The tobacco industry spends over \$9 billion annually advertising and promoting its products.¹ Of that amount, more than 90 percent is targeted at advertising price promotions and discounts, payments for prominent tobacco product displays, and other marketing tactics at the retail level.² Studies have shown the effectiveness of tobacco marketing in increasing youth initiation and in making it harder for tobacco users to quit.³ As a result, restricting tobacco advertising has long been a key tobacco control strategy.

The tobacco industry is already limited to a certain extent in the way it can advertise many of its products. Under the 1998 Master Settlement Agreement and Minnesota tobacco settlement – negotiated between the tobacco companies and state attorneys general to settle lawsuits against the tobacco industry – the major tobacco companies agreed to several advertising restrictions.⁴ Although the settlement agreements apply to certain marketing practices (such as cartoon ads, brand name merchandise, and billboards and other outdoor advertising), the agreements still allow many other forms of tobacco marketing and are only a partial response to the public health risk it poses.⁵



Another group of tobacco advertising restrictions, known as “Assurances of Voluntary Compliance” (or AVCs), are also based on legal agreements with state attorneys general. These agreements resolved investigations by state attorneys general into alleged violations of state consumer protection laws by either tobacco companies or national retail chains. This factsheet provides a brief overview of AVCs and addresses common questions related to their use in regulating tobacco advertising in the retail environment.⁶

Q: How many tobacco retail stores operate in the U.S.?

A: Approximately 375,000 retail stores sell tobacco products in the U.S.⁷ This number is equivalent to 28 tobacco retailers for every Starbucks and 27 tobacco retailers for every McDonalds.⁸ Retail locations range from convenience stores, supermarkets, and liquor stores to pharmacies and tobacco shops. The prevalence of tobacco retailers, along with the tobacco industry’s significant investment of marketing at the retail level, has a clear impact on tobacco product sales and use, particularly by youth.⁹

Q: What authority do state and local governments have to regulate tobacco advertising?

A: In 2009, the Family Smoking Prevention and Tobacco Control Act gave the U.S. Food and Drug Administration new regulatory authority to restrict certain aspects of tobacco advertising, marketing and promotion.¹⁰ The Act also expanded the authority of state and local governments to regulate tobacco advertising, including at the point of sale and in the general retail environment.¹¹ The “point of sale” refers to any location where tobacco products are advertised, displayed, or purchased, including the final point of purchase (i.e., the register), as well as advertising on the inside and outside of retail establishments.¹²

Q: What are tobacco-related AVCs?

A: As mentioned earlier, an AVC is a formal agreement between a state attorney general and a party (individual or business) that the attorney general believes either violated or may in the future violate consumer protection law.¹³ For example, attorneys general have used AVCs to work with the wireless, cable, and telemarketing industries to curb anti-consumer practices. Tobacco-related AVCs are typically drawn up as part of the ongoing multi-state tobacco enforcement effort among state attorneys general. They are legally binding agreements between attorneys general and large national retailer chains that (among other things) limit the type and location of tobacco advertising permitted in retail stores, and in many cases they can be used as prima facie evidence in a lawsuit if the terms of the agreements are violated.

Multi-state tobacco-related AVCs cover convenience stores operated by such industry giants as 7-Eleven, Conoco (Philips 66 or 76), BP North America, Exxon, Mobil, Shell and Valero. Other AVCs cover retail chains such as Kroger, Walgreens, Rite-Aid and Wal-Mart. AVCs incorporate “best practices” that attorneys general developed in consultation with public health researchers and state and federal tobacco control officials.

Q: How do the tobacco settlement agreements compare with AVCs in terms of tobacco advertising restrictions?

A: Tobacco settlement agreements and assurances of voluntary compliance are similar in certain respects. For example, both types of agreements are legally enforceable. If there is sufficient evidence of a violation, the state attorney general that signed the settlement agreement or AVC could file an action in court to enforce these agreements. The violating company could be held in contempt of court and ordered to pay for any monetary restitution, attorney fees, and penalties related to violating the agreements.

In addition, both settlement agreements and AVCs include restrictions on how tobacco products can be advertised and sold by tobacco companies and retailer chains. For instance, the settlement agreements prohibit certain types of outdoor tobacco advertising, prevent tobacco companies from using certain images or words in their ads, and restrict where tobacco advertising can be placed, and AVCs typically include related advertising restrictions.

There is, however, a significant difference between the two types of agreements. The tobacco settlement provisions apply only to the *participating tobacco manufacturers* who agreed to the

settlements – not to tobacco retailers.¹⁴ Thus, unless a settling manufacturer is in some way involved (for example, by acquiescing in the use of its trademarks, logos or brands or by contributing to the costs of an advertisement), the settlement provisions do not prohibit retailers from advertising or marketing their tobacco products in ways forbidden to tobacco manufacturers.¹⁵ On the other hand, with tobacco-related AVCs, tobacco retailers are bound as to all manufacturers, not just participating tobacco manufacturers.

Q: What are some common AVC provisions?

A: The terms of tobacco-related AVCs vary, depending upon negotiations between parties. Some of the most common provisions include:

- **Advertising.** Companies agree to refrain from using advertising that targets youth.
- **Candy Cigarettes and Other Tobacco Look-Alike Products.** Companies agree to refrain from selling candy cigarettes and other tobacco product look-alikes.
- **Equipment.** Companies agree to install and use cash registers that require store clerks to enter the customer’s birth date before completing the sale.
- **Franchises.** Companies agree to provide franchisees with opportunities to participate in monitoring and enforcement programs, and other tobacco retailing programs. Also, companies agree to include in their franchise agreements that violations of youth access laws can be taken into consideration for continuing or renewing franchise agreements.
- **Monitoring and Enforcement Programs.** Companies agree to use an independent agency to perform unannounced compliance checks on company stores. These unannounced visits are often referred to as “mystery shopper” programs.
- **Hiring Policies.** Companies agree not to hire anyone under 18 for positions that involve selling tobacco products.
- **Placement of Tobacco Products within Store.** Companies agree to prohibit the use of vending machines on store premises, and to store and display tobacco products in an area that requires employee assistance in retrieving them (in other words, no self-service of tobacco products).
- **Sales Restrictions.** Companies agree not to sell smoking paraphernalia, including matches and lighters, to youth under the age of 18, or single cigarettes or other modes of packaging cigarettes in packs of less than 20.
- **Training Policies.** Companies agree to provide comprehensive training for each new employee about the law and company policy regarding underage sales. Many AVCs require companies to test employees on company policy and underage sales laws prior to selling and again on an annual basis.

Q: What are the advantages of multi-state agreements like AVCs as a tobacco control tool?

A: Coordinated agreements by attorneys general, on behalf of states, have become more common as businesses have grown larger and more technologically advanced. States have found that combining their efforts and resources allows them to tackle issues few states could handle alone. Multi-state agreements can provide payments for consumers, attorney’s fees, consumer education programs, and adjustments for consumers who may not have been properly compensated before the agreement. By joining together to resolve problems of nationwide

significance (such as tobacco product advertising), states are able to accomplish more than they could by tackling issues separately.

Tobacco retailers and related businesses also have a vested interest in these multi-state agreements. Even in smaller cases, the financial exposure for a company will increase if settlement is not reached. Without the multi-state approach, a company is likely to find itself the target of numerous individual state actions filed simultaneously in various state courts. The cost of defending such actions can become prohibitive and usually there is no way a defendant can require consolidation of these actions in a single federal court, since each action is based upon state law.

Q: What are a few examples of tobacco-related AVCs?

A: Below is a table containing select examples of tobacco-related multistate assurances of voluntary compliance. This list is not comprehensive and is provided for illustrative purposes only.

| Retailer | Signatory States | Brands¹⁶ | Link |
|-----------------|---|---|---|
| ConocoPhillips | AZ, AR, CA, CO, CT, FL, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NY, OK, OR, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, and WY | Conoco, Phillips 66, 76 | http://ag.ks.gov/docs/tobacco-documents/conocophillips.pdf?sfvrsn=2 |
| Circle K | AL, AK, AZ, AR, CA, CO, CT, DE, FL, GA, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MS, MT, NV, NJ, NM, NY, OH, OK, OR, PA, RI, TN, TX, UT, VT, VA, WA, WY and the District of Columbia | Circle K, Quick Stop | http://ag.ks.gov/docs/tobacco-documents/circlek.pdf?sfvrsn=2 |
| Exxon Mobil | AZ, AR, CA, CT, DE, DC, FL, GA, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MT, NE, NV, NH, NJ, NM, NY, N. Marian Islands, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, Virgin Islands, VA, WA, WV, WI, WY | Exxon Mobil Corporation | http://ag.ks.gov/docs/tobacco-documents/exxon.pdf?sfvrsn=2 |
| Kroger | AL, AK, AZ, AR, CA, CO, CT, DE, FL, GA, HI, ID, IL, IA, KS, KY, LA, ME, MD, MI, MS, MT, NE, NV, NJ, NM, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WY and Guam | Kroger, Ralph's, King Soopers, City Market, Dillon's, Smith's, Fry's, QFC, Baker's, Owen's, JayC, Hilander, Gerbes, PayLess Super Markets, Scott's, Food 4 Less, Foods Co., Fred Meyer, Fry's | http://ag.ks.gov/docs/tobacco-documents/kroger-avc.pdf?sfvrsn=2 |

| | | | |
|-----------------------|---|--|---|
| | | Marketplace, Turkey Hill, Kwik Shop, Loaf n Jug, Quik Stop, Tom Thumb, Smith's Express | |
| Shell | AL, AK, AZ, AR, CA, CO, CT, DE, FL, GA, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WY and the District of Columbia | Shell ¹⁷ | http://ag.ks.gov/docs/tobacco-documents/shell-avc.pdf?sfvrsn=2 |
| Valero | AL, AK, AR, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MT, NE, NV, NH, NJ, NM, OH, OK, OR, PA, TN, TX, UT, VT, VA, WA, WY | Valero, Beacon, Diamond, Shamrock, Ultramar, Corner Store, Stop N Go, Total | http://ag.ks.gov/docs/tobacco-documents/valero.pdf?sfvrsn=2 |
| Walgreens | AL, AZ, AR, CA, CO, CT, FL, GA, ID, IL, IA, KS, KY, LA, MA, MD, ME, MI, MN, MS, NH, NJ, NM, NY, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, WA, WV, WI, WY | Walgreens | http://ag.ks.gov/docs/tobacco-documents/walgreens-avc.pdf?sfvrsn=4 |
| Wal-Mart Stores, Inc. | AL, AZ, AR, CA, CO, CT, DE, FL, GA, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MT, NE, NV, NH, NJ, NM, NY, OH, OK, OR, RI, SC, SD, TN, TX, UT, VA, WA, WV, WI, WY | Walmart, Wal-Mart, Sam's Club, Marketside, Neighborhood markets | http://ag.ks.gov/docs/tobacco-documents/wal-mart-avc.pdf?sfvrsn=2 |
| 7-Eleven | AZ, AR, CA, CO, CT, DC, DE, FL, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MO, MT, NE, NV, NH, NJ, NY, OH, OK, OR, PA, RI, SC, SD, TX, UT, VT, VA, WA, WV, WI, WY | 7-Eleven, Southwest Convenience Stores, Inc. | http://ag.ks.gov/docs/tobacco-documents/7-eleven.pdf?sfvrsn=2 |

Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at publichealthlawcenter@wmitchell.edu or (651) 290-7506 with any questions about the information in this publication.

Last updated: June 2015

Notes

¹ Federal Trade Commission, Cigarette Report for 2012 (2015), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-cigarette-report-2012/150327-2012cigaretterpt.pdf> (finding that in 2012, the latest year data are available, U.S. tobacco marketing costs rose from \$8.366 billion to \$9.168 billion).

² *Id.* at 4.

³ *See, e.g.*, Tobacco Control Legal Consortium, *Cause and Effect: Tobacco Marketing Increases Youth Tobacco Use: Findings from the 2012 Surgeon General's Report on Youth and Young Adult Tobacco Use* (2012), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-SGReport-Findings-Youth-Marketing-2012.pdf>.

⁴ The two major agreements are the 1998 Minnesota tobacco settlement agreement, which settled a historic consumer fraud and antitrust case against the major tobacco companies, and the 1998 Master Settlement Agreement, which settled cases brought by 46 state attorneys general against the major tobacco companies. *See* State of Minnesota v. Philip Morris, Inc., No. C1-94-8565 (Minn. Dist. Ct., May 8, 1998) (known as the Minnesota Tobacco Settlement); Master Settlement Agreement (1998), available at http://www.naag.org/naag/about_naag/naag-center-for-tobacco-and-public-health/master-settlement-agreement/master-settlement-agreement-msa.php.

⁵ *See, e.g.*, Dennis Eckhart, Tobacco Control Legal Consortium, *The Tobacco Master Settlement Agreement: Enforcement of Marketing Restrictions* (2004), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-marketing-2004.pdf>.

⁶ The information contained in this document is not intended to constitute or replace legal advice.

⁷ State and Community Tobacco Control Research, *Point-of-Sale Report to the Nation: The Tobacco Retail and Policy Landscape 3* (2014), available at http://cphss.wustl.edu/Products/Documents/ASPiRE_2014_ReportToTheNation.pdf (nothing that because only 36 states mandate tobacco retailer licensing, the exact number of tobacco retailers in the U.S. is difficult to determine).

⁸ *Id.*

⁹ *Id.*

¹⁰ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009) (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C., and 21 U.S.C.), available at <http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm262084.htm>.

¹¹ *See, e.g.*, the Public Health Law Center webpage, Federal Regulation of Tobacco Collection, <http://www.publichealthlawcenter.org/topics/special-collections/federal-regulation-tobacco-collection> (containing many resources on state and local policy options for regulating tobacco advertising and marketing, in light of the 2009 federal tobacco legislation).

¹² State and Community Tobacco Control Research, *supra* note 7, at 1.

¹³ In some states, such as Minnesota, these agreements are also called “assurances of discontinuance.”

¹⁴ Tobacco Project of the National Association of Attorneys General (NAAG), available at http://naag.org/naag/about_naag/naag-center-for-tobacco-and-public-health.php.

¹⁵ Note that as a result of amendments since 1998, the Minnesota Settlement and the Master Settlement Agreement are now enforceable against the largest U.S. manufacturer of smokeless tobacco as well as dozens of smaller tobacco manufacturers. *See, e.g.*, Participating Manufacturers under the Master

Settlement Agreement as of January 27, 2015, *available at* <http://www.naag.org/assets/redesign/files/msa-tobacco/2015-01-27%20%20PM%20List.pdf>.

¹⁶ Check with each company for the latest AVC-related information.

¹⁷ Many chains and independent retailers sell Shell branded gas, including companies that may have stronger AVC provisions under their direct corporate ownership (Circle K, for example).