

# Expansion of State and Local Authority

Federal Regulation of Tobacco: Impact on State and Local Authority  
July 2009

## Background

On June 22, 2009, President Barack Obama signed into law the Family Smoking Prevention and Tobacco Control Act, giving the U.S. Food and Drug Administration (FDA) comprehensive authority to regulate the manufacturing, marketing, and sale of tobacco products. The new law represents the most sweeping action taken to date to reduce what remains the leading preventable cause of death in the United States.

Before enactment of the new law, tobacco products were largely exempt from regulation under the nation's federal health and safety laws, including the Food, Drug, and Cosmetic Act. The FDA has regulated food, drugs and cosmetics for many decades, but not tobacco products, except in those rare circumstances when manufacturers made explicit health claims.

## What the New Law Does

The Family Smoking Prevention and Tobacco Control Act adds a new Chapter IX to the Food, Drug, and Cosmetic Act, establishing and governing the regulation of tobacco products. A new Center for Tobacco Products is created within the FDA to establish tobacco product standards, among other things. Chapter IX vests the FDA with jurisdiction to regulate both current and new tobacco products and restrict tobacco product marketing, while also directly implementing a wide array of provisions that will restrict tobacco product marketing and advertising, strengthen cigarette and smokeless tobacco warning labels, reduce federal preemption of certain state cigarette advertising restrictions, and increase nationwide efforts to block tobacco product sales to youth.

The law explicitly limits the current federal preemption against state and local regulation of cigarette advertising under the Federal Cigarette Labeling and Advertising Act (FCLAA), by allowing states and localities to restrict the location, color, size, number and placement of cigarette advertisements. In this way, the law clearly expands what states can do to prohibit or restrict certain tobacco product marketing.

Since the adoption of amendments to the FCLAA in 1969, federal law had blocked state and local governments from restricting cigarette advertising and promotion specifically for health purposes. Advocates and policymakers attempted to tailor the regulations in such a way as to thwart legal challenges (e.g., by arguing that such laws were enacted for reasons other than protecting health), but often without success. For example, some local regulations sought to ban promotions of tobacco products at retail establishments (e.g., buy one, get one free, and discount coupons). By weakening the preemptive language of the FCLAA, the new law strengthens the hand of local regulators and allows state and local governments to pass these types of regulations.

It should be pointed out that no similar federal preemption of state regulation of advertising and promotion of tobacco products other than cigarettes existed, although, as in the case of cigarettes, such restrictions may be tested in the courts to determine that they are consistent with the First Amendment's protections of commercial speech.

Specifically, the new law permits states to:

- Expand the law's requirement that retail ads for cigarettes and smokeless tobacco products be limited to black-and-white text to cigar and other tobacco product advertisements

- Restrict or eliminate the display of so-called power walls of cigarette packages at retail outlets, which will be the only presentation of cigarette brand logos, labels and colors permitted in retail outlets under the new law (“power walls” are the large displays of cigarettes found near cash registers at such places as convenience stores and gas stations)
- Limit the number and size of tobacco ads at retail outlets
- Require that tobacco products and advertisements be kept a minimum distance from cash registers in order to reduce impulse purchases by smokers trying to quit

Again, enactment of some of the above measures are likely to face legal challenges by tobacco or allied interests. This should not unduly dissuade advocates and policymakers from pursuing such policies, but when doing so, advocates must take appropriate steps to strengthen the case that such regulations are valid under the First Amendment. Policymakers must conscientiously develop both a strong legislative history and a substantial evidentiary record demonstrating that such restrictions (e.g., prohibiting power walls) directly advance the legitimate and substantial government interest of preventing youth tobacco use, reducing adult tobacco use or otherwise protecting and promoting public health. The legislative record should also make explicit that the restrictions will not entirely prevent tobacco companies from communicating truthful information to their legal adult customers, and that the restrictions are reasonably related to the government interests they seek to address.

Advocates and policymakers may also consider using age-based criteria to avoid potential First Amendment concerns. For example, while the new law already limits outdoor and point-of-sale tobacco advertising to black-and-white text only, except in adult-only facilities, a state or locality could potentially prohibit outright point-of-sale advertising and require keeping tobacco products and paraphernalia out of sight in venues that admit persons under age 18.

Finally, state and local advocates should be aware that the law provides for new FDA assistance to states to enforce restrictions on promotion, advertising and sales to youth, including assistance focused on preventing underage tobacco use in communities with a disproportionate use of menthol cigarettes by minors.

**To learn more about FDA regulation of tobacco, visit [www.tclconline.org](http://www.tclconline.org).**

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