

The Land of 10 000 Tobacco Products: How Minnesota Led the Way in Regulating Tobacco Products

As state and local governments increase restrictions on cigarette smoking, tobacco manufacturers have shifted to marketing alternative tobacco products. Tobacco control laws need to be updated to reflect this shifting marketplace. With the 2010 enactment of the Tobacco Modernization and Compliance Act, Minnesota addressed regulatory gaps and created a model law for other states. We have detailed the updated definitions of tobacco and tobacco products and identified ways that future laws could be strengthened. (*Am J Public Health*. Published online ahead of print December 12, 2013; e1–e3. doi:10.2105/AJPH.2013.301747)

Michael Freiberg, JD, Raymond G. Boyle, PhD, Molly Moilanen, MPP, Ann W. St. Claire, MPH, and Susan R. Weisman, JD

THE CONSUMPTION OF

tobacco products has shifted in recent years. Domestic sales of cigarettes have decreased more than 30% since 2001,¹ and reported use of other products such as cigarette-like cigars, roll-your-own tobacco, moist snuff, and smokeless tobaccos is increasing.^{2–4} Since 2006, each of the 4 major US tobacco companies test marketed or launched new smokeless tobacco products.⁵ Tobacco companies are also investing in alternative nicotine delivery devices such as electronic cigarettes.⁵ It is likely that the marketplace for tobacco products will continue to evolve.

Most tobacco control laws were adopted during the latter half of the twentieth century, when cigarette smoking was the predominant form of tobacco use and many modern products were not yet introduced to the market. Consequently, many state and local tobacco tax and use laws do not account for these new products. Tobacco tax laws may not account for snus, dissolvable tobacco products, and electronic cigarettes. Use restrictions, such as smoke-free laws, may not apply to water pipes and electronic cigarettes. Minimum pack size regulations generally apply only to cigarettes, not to products such as little cigars and dissolvable tobacco products. Perhaps most important, neither the Family Smoking Prevention and Tobacco Control Act—the 2009 federal law giving the Food and Drug Administration (FDA) authority over tobacco

products—nor the FDA itself has imposed new regulations on cigars, pipe tobacco, or electronic cigarettes.⁶

In the Family Smoking Prevention and Tobacco Control Act, some provisions apply even more narrowly. For example, the prohibitions on characterizing flavors and the sale of single products apply only to cigarettes. The FDA has authority to assert jurisdiction over other products and has stated its intention of doing so, but the agency has not yet exercised its authority and the scope of any potential federal regulation is unknown.

In 2010, Minnesota tobacco control advocates partnered with state legislators to lead an effort to update the state's tobacco regulations. The resulting legislation, the Tobacco Modernization and Compliance Act of 2010 (TMCA) addressed several regulatory gaps. We have summarized the TMCA and suggested ways it could serve as a model for other states.

TOBACCO MODERNIZATION AND COMPLIANCE ACT OF 2010

The primary goal of the TMCA was to update definitions in Minnesota's laws to ensure regulations covered all tobacco products.⁷ By limiting the definitions of tobacco and tobacco products to those that were chewed or smoked, Minnesota's laws potentially allowed products such as snus and dissolvables to escape regulation and taxation. Snus

users do not chew a snus pouch; rather, the pouch remains between the user's gum and lip. Similarly, tobacco companies recommend against chewing dissolvable tobacco products; these products are designed to be sucked like a lozenge. Another excluded product category was electronic cigarettes. Users of these products inhale vapors produced by an electronic nicotine delivery system.

The TMCA updated the definitions of tobacco and tobacco products in Minnesota statutes that address taxation, local retail licensing, and criminal penalties for selling or providing tobacco to minors. The law amended definitions of tobacco and tobacco products to include “any products containing, made, or derived from tobacco that is intended for human consumption” that are ingested by any means and to include “any component, part, or accessory of a tobacco product.” FDA-approved tobacco cessation products were excluded. The TMCA's amended definitions led to changes in a variety of Minnesota's laws (Table 1).

Although they were included in the TMCA, electronic cigarettes and other nontobacco products that deliver nicotine were treated differently from smoked and smokeless tobacco products. Although smokeless tobacco products like snus and dissolvables were defined as tobacco and therefore incorporated into the state's youth access laws, a separate statute was created within the

TABLE 1—Minnesota Laws Affected by the Tobacco Modernization and Compliance Act: 2010

| Section of Act | Statute Updated | Subject | Effect |
|----------------|-------------------|---|---|
| 2 | 297F.01, subd. 19 | Tobacco taxes | Updated definition of tobacco products in state tax law to include tobacco products intended for human consumption including those that are “chewed, smoked, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means” as well as components, parts, or accessories of tobacco products |
| 3 | 325F.77 | Promotional distribution | Expanded coverage of statute prohibiting free distribution of tobacco products to apply to all tobacco products, not just those intended for smoking |
| 4 | 461.12, subd. 1 | Municipal tobacco license | Authorized local governments to license and regulate the retail sale of an expanded list of tobacco products and tobacco-related devices, including all types of pipes for smoking and cigarette papers |
| 5 | 461.12, subd. 2 | Administrative penalties (licensees) | Applied local licensing penalties—for retailers who sell tobacco to minors—to an expanded list of tobacco products and to tobacco-related devices |
| 6 | 461.12, subd. 3 | Administrative penalties (individuals) | Applied local licensing penalties—for clerks who sell tobacco to minors—to an expanded list of tobacco products and to tobacco-related devices |
| 7 | 461.12, subd. 4 | Minors | Expanded list of tobacco products covered by statute requiring local governments to develop alternative penalties for minors who purchase, possess, or consume tobacco and expanded coverage to include purchases or possession of tobacco-related devices, including all types of pipes for smoking and cigarette papers |
| 8 | 461.12, subd. 5 | Compliance checks | Expanded list of tobacco products covered by statute requiring local governments to conduct compliance checks and expanded coverage to include tobacco-related devices |
| 9 | 461.12, subd. 6 | Affirmative defense | Expanded list of tobacco products covered by statute allowing retailers and clerks to rely in good faith on proof of age and expanded coverage to include tobacco-related devices |
| 10 | 461.18, subd. 1 | Self-service of tobacco products (except in adult-only retail establishments) | Expanded list of tobacco products covered by statute prohibiting self-service to include smokeless, nonchewed products, and prohibited self-service of tobacco-related devices, including all types of pipes for smoking and cigarette rolling papers |
| 11 | 609.685, subd. 1 | Sale of tobacco to children | Expanded list of products covered by criminal statute prohibiting sale of tobacco products to minors and prohibited sales of tobacco-related devices to minors or possession by minors of such products or devices and exempted FDA-approved cessation products |
| 12 | 609.6855 | Sale of nicotine delivery products | Created new statute prohibiting sales of nicotine delivery devices to children and possession by children of such products, except for FDA-approved cessation products |

Note. FDA = Food and Drug Administration.

state’s criminal code making it a crime to sell electronic cigarettes and other nontobacco products that deliver nicotine to a minor and for a minor to possess, purchase, or attempt to purchase such products. Because electronic cigarettes were not included in the comprehensive youth access to tobacco law, they can be sold by self-service methods under state law.

The TMCA addressed some, but not all, of the gaps in Minnesota laws related to noncigarette tobacco products. For example, the tax rate for noncigarette tobacco products remained low compared with that for cigarettes. Furthermore, the state’s minimum

price law applied only to cigarettes. The lack of minimum pack size regulations on cigars also enabled tobacco companies to market small packages that are more affordable for minors. Use restrictions, most notably the Minnesota Clean Indoor Air Act, have applied only to combustible tobacco products, not to products like electronic cigarettes and smokeless tobacco. The fire-safe law has applied only to cigarettes, not to other combustible tobacco products. In the 2013–2014 legislative session, Minnesota significantly raised the tax rates on cigarettes and noncigarette products, achieving greater parity, and extended the minimum price law

to include little cigars, which are now defined as cigarettes.⁸

THE ACT AS A MODEL FOR OTHER STATES

Many states’ laws suffer from flaws similar to those of Minnesota’s laws before passage of the TMCA.⁹ By updating tobacco tax and youth access definitions of tobacco products, states would go a long way toward correcting these issues. States can pursue more ambitious legislation, for example, by prohibiting self-service of electronic cigarettes, equalizing all tobacco product tax rates to those of cigarettes, and applying use restrictions, minimum price

laws, and fire safety provisions to noncigarette tobacco products. In the absence of decisive federal regulation, states can follow Minnesota’s early lead and adopt strong regulations that treat all tobacco products equally.

In addition to advancing sound public policy, the TMCA exemplified good politics by providing a way to sustain statewide momentum from earlier tobacco control policy initiatives. In 2005, Minnesota increased the tax on all tobacco products and, in 2009, tobacco control advocates pushed for another increase. However, the federal cigarette tax increased that same year, tempering interest in a state increase. Similarly, the

TABLE 2—Policies Adopted by Cities and Counties After the Tobacco Modernization and Compliance Act: Minnesota, 2010

| Local Community | Code Reference | Sample Provision |
|---------------------|--------------------------|---|
| Faribault | Sec. 14.22(4) | Expanded prohibition on sale of single cigarettes to single cigars |
| Golden Valley | 6.34, Subd. 7 | Prohibited self-service sales of nicotine delivery devices |
| Little Canada | 802.045 | Prohibited new tobacco licensees from being located within 500 feet of schools and other youth-oriented facilities |
| Rock County | Ord. 2013-01, Sec. 3(16) | Prohibited sale of tobacco products in pharmacies |
| Rosemount | 3-9-1 | Prohibited tobacco product sampling, removing tobacco product shop exemption from Clean Indoor Air Act and prohibiting hookah lounges |
| St. Cloud | 424:15 | Prohibited all tobacco sales by vending machines, removing exemption in state law for adult-only facilities |
| White Bear Township | Ord. 69, Sec. 3B | Prohibited new tobacco licensees from being located within 2000 feet of existing licensees |

passage in 2007 of a comprehensive indoor smoke-free workplace law, including bars and restaurants, following a contentious multiyear campaign, left policymakers with little appetite for additional tobacco-related legislation. Tobacco control advocates needed a policy vehicle to keep tobacco control on lawmakers' radar.

Advocates began by highlighting the new tobacco products in the media and with partner agencies. When they explored the gaps in Minnesota statutes regarding these new products, the idea for the TMCA emerged as a solution that could advance tobacco control policy in Minnesota.

Once the bill was drafted, tobacco control advocates built broad support for most components of the legislation by developing messages and strategies with common appeal. Messages focused on supporting youth prevention, exposing tobacco industry tactics to addict younger smokers, and ensuring conformity and compliance. The bill was described as "revenue neutral" with no new taxes. Committee hearings offered new opportunities for tobacco control advocates to educate legislators about new tobacco products and publicly expose the industry's manipulative tactics to attract new customers and keep current smokers

addicted in jurisdictions with smoke-free laws like Minnesota. Elected officials from both parties agreed that selling these new products to minors should be illegal and most agreed as well that, like traditional cigarettes, these products should be kept behind the counter not out front next to candy and gum. Most lawmakers, including those opposed to increasing taxes, also agreed that these new products should be taxed like traditional tobacco products and supported updating the state definitions to ensure tax conformity.

Minnesota law requires local units of government to license tobacco retailers and to enforce state tobacco control laws. This regulatory framework facilitated implementation and enforcement of the TMCA and provided an additional platform for advocates to continue the tobacco products discussion with local policymakers. Following implementation of the TMCA, tobacco control advocates worked with local coalitions and elected officials to review and update local ordinances to, at a minimum, conform to the amended definitions in state law. In some instances, this led cities and counties to revisit and strengthen their tobacco-control policies (Table 2).

Although the TMCA cannot claim responsibility for driving

down state tobacco use rates, it has been a very important and effective tool to advance innovative policy, engage grassroots advocates, demonstrate to lawmakers that the tobacco industry is evolving and requires their ongoing attention, generate bipartisan support for tobacco control, and lay the groundwork for future tobacco control policy efforts such as increasing the state tax on tobacco products. Other states can build on Minnesota's model by pursuing stronger policies that will apply tobacco control laws more consistently to all tobacco products. ■

About the Authors

Michael Freiberg and Susan R. Weisman are with the Public Health Law Center, William Mitchell College of Law, St. Paul, MN. Raymond G. Boyle, Molly Moilanen, and Ann W. St. Claire are with ClearWay Minnesota, Minneapolis.

Correspondence should be sent to Ann W. St. Claire, MPH, Senior Research Program Manager, ClearWay Minnesota, 8011 34th Avenue, South Suite 400, Minneapolis, MN 55425 (e-mail: astclair@clearwaymn.org). Reprints can be ordered at <http://www.ajph.org> by clicking the "Reprints" link.

This article was accepted October 13, 2013.

Contributors

M. Freiberg and R. G. Boyle conceptualized and drafted the article. M. Moilanen, A. W. St. Claire, and S. R. Weisman contributed to the background research, context, and drafting of the article, and editorial guidance and critical review of the article.

Human Participant Protection

No protocol approval was required because no human participants were involved.

References

1. Federal Trade Commission. *Federal Trade Commission Cigarette Report for 2011*. Technical report. Washington, DC: 2013.
2. Centers for Disease Control and Prevention. Consumption of cigarettes and combustible tobacco—United States, 2000–2011. *MMWR Morb Mortal Wkly Rep*. 2012;61(30):565–569.
3. Campaign for Tobacco-Free Kids. Not your grandfather's cigar. A report from the campaign for tobacco-free kids. 2013. Available at: <http://www.tobaccofreekids.org>. Accessed June 15, 2013.
4. Delnevo CD, Wackowski OA, Giovenco DP, Manderski MTB, Hrywna M, Ling PM. Examining market trends in the United States smokeless tobacco use: 2005–2011. *Tob Control*. 2012;Epub ahead of print.
5. Rogers JD, Biener L, Clark PI. Test marketing of new smokeless tobacco products in four US cities. *Nicotine Tob Res*. 2010;12(1):69–72.
6. Federal Food, Drug, and Cosmetic Act. 21 U.S.C. §387a(b) (2013).
7. Ashley DL, Backinger CL. The Food and Drug Administration's regulation of tobacco: the Center for Tobacco Products' Office of Science. *Am J Prev Med*. 2012;43(5, suppl 3):S255–S263.
8. Public Health Law Center. Minnesota tobacco tax legislation. 2013. Available at: http://publichealthlawcenter.org/sites/default/files/resources/2013%20Session%20Tobacco%20Tax%20Short%20Summary_FINAL.pdf. Accessed October 16, 2013.
9. Freiberg M. Options for state and local governments to regulate non-cigarette tobacco products. *Ann Health Law*. 2012;21(2):407–445.