

Regulating Tobacco Retailers: Options for State and Local Governments



Tobacco Control
Legal Consortium



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Regulating Tobacco Retailers: Options for State and Local Governments

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 Act represents the most sweeping action taken to date to reduce what remains the leading preventable cause of death in the United States.

In addition to granting the FDA power to establish tobacco product standards, the new law gives the agency wide-ranging authority to regulate tobacco product marketing and advertising. The Act leaves state and local governments free to restrict the sale, distribution and possession of tobacco products. State and local governments are considering appropriate measures they can take to regulate the retail sale of tobacco products. The Tobacco Control Legal Consortium, a collaborative network of legal centers, has prepared this summary of guidelines and drafting tips to help governments identify strategies for regulating tobacco retailers and potential ways these strategies might be limited by federal law.

Introduction

Tobacco products are sold at nearly every gas station, convenience store, grocery store or pharmacy in the United States. The prevalence of these retailers and their placement of tobacco products at every turn exacerbates the health crisis brought on by tobacco use in this country, with tobacco use continuing to be the leading preventable cause of death in the United States.¹ When people approach or enter tobacco retail establishments, they invariably encounter a wide array of vivid and compelling tobacco advertisements designed to persuade them to purchase these products.²

While anti-tobacco education and legislation have contributed to a decline in smoking in recent years, more can be done to reduce the impact tobacco products have on public health. This publication looks at reducing tobacco use by regulating the retail sale of tobacco products. The Family Smoking Prevention and Tobacco Control Act (“the 2009 FDA law”) provides state and local governments with the freedom to engage in a wide range of tobacco control policy options.³ At the same time, state and local governments need to be aware of federal restrictions that might apply to measures they take to regulate tobacco retailers.

This publication examines three of the many legally and politically viable strategies that state and local governments might consider using to regulate the retail sale of tobacco products: (1) limiting the sale of tobacco products to face-to-face transactions only;

(2) requiring retailers to keep tobacco products out of sight from customers; and (3) reducing or eliminating the number of tobacco retailers within 1,000 feet of schools and playgrounds. By understanding the way courts might view these three regulatory strategies, state and local governments will be better prepared to draft laws that stand a good chance of surviving legal challenges.

Barriers to Public Health Laws

As we explore these regulatory approaches, it is important to keep in mind a few barriers state and local governments will want to consider when drafting new public health laws.

Lack of State and Local Public Health Authority

Opponents to public health laws often claim that state and local governments lack the legal authority to pass such legislation. This claim is almost always rejected by the courts, which recognize that state and local governments have broad legal authority to pass laws to protect the public’s health.

Historically, public health protection resides within the stewardship of states.⁴ Courts recognize that states have the authority to regulate conditions related to the general health and welfare of their community—often referred to as their “police power.”⁵ Most states, in turn, delegate public health authority to lower levels of government through a statute⁶ or a Home Rule

Amendment to the state constitution.⁷ The scope of these grants of authority vary by state.⁸

Drafting Tips: When drafting a tobacco control law, consider referencing the authority under which the governmental body is operating. A formal citation to the granting law may assist in defending the law against allegations that the government lacks the authority to pass the law.

Preemption

The doctrine of federal preemption, derived from Article VI, Section 2 of the U.S. Constitution (known as the Supremacy Clause), essentially means that a hierarchy of laws exists where, in certain circumstances, federal law trumps (or preempts) state law. Similarly, in some circumstances, state law trumps (preempts) local law. For example, a federal law might expressly state that it is preemptive, thereby prohibiting state and local governments from regulating the same area of the law. Absent express preemption language in the law, preemption can also exist. In this scenario, if both federal and state laws exist in the same area of the law and if those laws are in conflict, the federal law preempts the state law.⁹ The difficulty is knowing exactly when two or more laws conflict.

To help determine whether a conflict exists and preemption can occur, courts follow a few basic rules. First, they rely largely on a plain reading of the laws.¹⁰ If a federal statute states that it “does not preempt state or local law,” courts will respect that limitation on the preemptive scope of the federal law. Second, courts generally interpret laws in a manner designed to read them in concert as opposed to finding a conflict.¹¹ However, if the federal law appears comprehensive in nature, the courts may conclude that any state or local law on the issue is preempted.¹² This is known as “field preemption.”¹³

Courts can also look at the law’s legislative history to interpret ambiguous terms and phrases when deciding whether a law is preemptive.¹⁴ Records of committee hearings, floor debates, and congressional testimony may provide the judge with insights as to whether the legislative body intended for the law to be preemptive.¹⁵

Drafting Tips: State and local governments should review other related laws to determine whether any of them impact the proposed tobacco control law being

considered. Special attention should be paid to the preemptive effect of the other laws. If higher levels of government have passed similar laws that are not expressly preemptive, the lower levels of government should ensure that their proposed laws do not conflict with the other law. Finally, to avoid preemption problems in the future, public health practitioners drafting new state-level public health laws should strive to include language that expressly states that the law is not preemptive, so that local governments may later implement stronger regulations.

Other Federal Constraints

State and local public health laws may be constrained by federal laws, in addition to those that might be preemptive. Numerous provisions in the U.S. Constitution prevent governments from intruding too far into individual behavior. Complex constitutional issues of due process, equal protection, and freedom of speech, for example, may occasionally arise. The First Amendment in particular provides protection to a broad range of spoken and written communication, including expressions of political, religious or other fundamental opinions (fully protected “core speech”). Over the years, the Supreme Court has established a less robust level of “intermediate” protection for what the Court calls commercial speech, or speech related to the economic interests of the speaker.¹⁶ Some opponents to laws that curb the retail sale of tobacco products may claim these laws violate the First Amendment’s commercial speech provision.

Drafting Tips: Tobacco manufacturers have successfully argued in court that their tobacco product advertisements are protected commercial speech.¹⁷ Thus, drafters of laws restricting tobacco marketing need to pay close attention to First Amendment cases, as well as cases interpreting other constitutional provisions. Knowing how courts might analyze a law restricting tobacco retailers will help in drafting it so it will be likely to survive a First Amendment review if it is challenged in court. A law that restricts commercial speech should restrict the least amount of speech possible, while still achieving the law’s goal.¹⁸ For more information about First Amendment issues related to restrictions placed on tobacco marketing, and drafting tips, see our companion publication, *Regulating Tobacco Marketing: “Commercial Speech” Guidelines for State and Local Governments*, at www.publichealthlawcenter.org.

Regulatory Strategy: Limiting Sales to Face-to-Face Only Transactions

Defining and Describing a Face-To-Face Only Sales Law

One regulatory approach that states and localities might consider is to restrict tobacco sales to face-to-face transactions only. With this strategy, vending machines and self-service displays would be prohibited. Tobacco products would only be accessible to store personnel, thereby requiring customers to ask for tobacco products, and ideally, to have their identification checked to ensure compliance with the minimum age sales law.

Twenty-six states have adopted this face-to-face sales requirement for cigarettes and some have enacted a face-to-face requirement for other tobacco products.¹⁹ Massachusetts law, for example, states:

[I]t shall be an unfair or deceptive act or practice for any person who sells or distributes cigarettes or smokeless tobacco products through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:

Selling cigarettes or smokeless tobacco products in any manner other than in a direct, face-to-face exchange [;]

Using self-service displays of cigarettes or smokeless tobacco products ... [except in adult only facilities; and]

Failing to place cigarettes and smokeless tobacco products out of the reach of all consumers, and in a location accessible only to outlet personnel.²⁰

While the new 2009 FDA law includes a face-to-face sales requirement by prohibiting the sale of certain tobacco products through vending machines and self-service displays except in adult-only facilities,²¹ state and local governments should consider passing their own similar prohibition. With the passage of a state or local law, state or local enforcement officials, who likely have a better knowledge of their own jurisdiction's laws than other agencies, will have unquestionable authority to enforce these laws.²² Also, any monetary fines imposed by a state or local law would be revenue for the state or local government.

Furthermore, state and local governments may also impose stricter retail sales regulations. For example, the FDA ban on self-service displays and vending machines only applies to cigarettes and smokeless tobacco products and does not cover adult-only establishments. State and local governments may want to expand this ban and impose more restrictive controls. In Massachusetts, for instance, even in adult-only facilities, vending machines include a lock that an employee needs to open for each tobacco product purchase.²³ Governments might consider limiting self-service or vending machine sales of all tobacco products to adult-only facilities or prohibiting vending machines altogether, given that youth frequently gain entrance to adult-only facilities despite the proprietor's efforts to impose stricter regulations.

Drafting Tips: Drafters should consider writing face-to-face transaction requirements into their laws. They should also consider ways to make their local laws more effective in reducing tobacco use within their local community. For instance, in some communities, small cigars and other tobacco products are gaining popularity with youth because such products are relatively inexpensive.²⁴ It is unclear how many states have adopted face-to-face sales requirements for cigars and other tobacco products. State and local governments could consider requiring those products to be included in any such law and could also consider requiring face-to-face transactions in adult-only facilities.

Legal Considerations

Face-to-face sales laws have been tested and upheld in the federal courts, including the 2001 case *Lorillard Tobacco Co. v. Reilly*. This landmark case involved a challenge to a series of tobacco control regulations promulgated by the Massachusetts Attorney General.²⁵ In *Lorillard*, the U.S. Supreme Court concluded that prohibiting self-service displays and vending machines is a legally appropriate means for preventing minors from obtaining tobacco products.²⁶ The Court upheld those regulations that restricted access to tobacco products by consumers by requiring face-to-face direct contact with a salesperson, finding that such sales practices regulated conduct rather than speech, and were thus valid under the First Amendment.²⁷ The Court found that even though the regulated conduct had a communicative component, the reason for the regulation was unrelated to the communication of

ideas or expression. Thus the Court did not apply the First Amendment test in *United States v. O'Brien* related to the restriction of expressive conduct.²⁸ (See the “Sample Tobacco Retailer Regulations and Legal Tests Applied by Court” chart at the end of this document.)

Federal Law Does Not Preempt State and Local Laws that Limit Tobacco Sales to Face-to-Face Transactions

The 2009 FDA law does not in any way diminish the legal validity of bans on self-service displays and vending machines addressed in the *Lorillard* case.²⁹ If anything, the FDA law affirms that no federal law impedes state and local governments from enacting such bans. The FDA law states:

[n]othing in this [Act] ... or rules promulgated under this subchapter, shall be construed to limit the authority of ... a State or political subdivision of a State ... to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this [Act], including a law, rule, regulation, or other measure relating to or prohibiting *the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products*³⁰ (Emphasis added.)

The legality of this language was upheld in *Commonwealth Brands Inc. v. FDA*.³¹ In *Commonwealth Brands*, tobacco manufacturers claimed that the language from the 2009 FDA law, quoted above, amounts to an unconstitutional delegation of authority to state and local governments.³² The Court rejected this argument and concluded that the language instead articulates the very limited preemptive scope of the 2009 FDA law.³³ In other words, the anti-preemption language within the 2009 FDA law instructs state and local governments that they may continue to exercise their public health law authority to enact and enforce laws regulating the manner in which tobacco products are sold.

State and Local Laws that Limit Tobacco Sales to Face-to-Face Transactions Do Not Violate Commercial Speech Protections

Bans on self-service displays and vending machines comport with commercial speech protections under the

First Amendment. In *Lorillard*, the Court concluded that bans on self-service displays are “unrelated to expression” of product information.³⁴ To understand why the Court reached this conclusion, it is helpful to look at a recent case from California that upheld the City and County of San Francisco’s ban on the sale of tobacco products in pharmacies.³⁵ In that case, the largest domestic manufacturer of cigarettes, Philip Morris, argued that the San Francisco law violated the company’s right to communicate product information to customers.³⁶ The Court disagreed and pointed out that a cigarette manufacturer’s “advertising is protected expressive activity [but] . . . [s]elling cigarettes isn’t because it doesn’t involve conduct with a significant expressive element.”³⁷

Drafting Tips: Keep in mind that state and local governments continue to have broad authority to regulate the manner in which tobacco products are sold. The new FDA oversight of tobacco products is intended to complement this authority. Regulation of the manner in which tobacco products are sold does not trigger commercial speech protections under the First Amendment.

Drafters should consider writing face-to-face transaction requirements into their laws. They should also consider ways to make their local laws more effective in reducing tobacco use within their local community. For instance, in some communities, small cigars and other tobacco products are gaining popularity with youth because such products are relatively inexpensive.³⁸ It is unclear how many states have adopted face-to-face sales requirements for cigars and other tobacco products. State and local governments could consider requiring those products to be included in any such law and could also consider requiring face-to-face transactions in adult-only facilities.

Regulatory Strategy: Keeping All Tobacco Products Out of Sight

Defining and Describing an Out-of-Sight Requirement for Tobacco Products

A regulatory strategy requiring retailers to keep all tobacco products out of sight means just that: all products must be kept out of the public view. It is well documented that tobacco manufacturers pay retailers to display promotional materials.³⁹ One of the most

powerful pieces of promotional materials currently used by the tobacco industry is the so-called “power wall.”⁴⁰ A power wall consists of substantial product shelving located behind the retail sales counter.⁴¹ Power walls can be very large, from ceiling to counter height and several feet in width.⁴²

Legal Considerations

Federal Law Would Not Preempt a Requirement that All Tobacco Products Be Kept Out of Sight

The 2009 FDA law does not preempt or lessen the ability of state or local governments to prohibit power walls.⁴³ Rather, the FDA law clarifies that it will not preempt any state or local law that regulates the “advertising and promotion of” tobacco products.⁴⁴ The 2009 FDA law also states that “a State or locality may enact statutes and promulgate regulations . . . [that impose] specific bans or restrictions on the time, place and manner, but not content, of the advertising or promotion of any cigarettes.”⁴⁵ This language specifically instructs courts not to interpret the 2009 FDA law in a way that preempts state or local governments from regulating the time and placement of tobacco advertising.

A Requirement that All Tobacco Products Be Kept Out of Sight May Result in Claims that the Law Violates the First Amendment

Although federal law would not appear to preempt a state or local requirement that retailers keep tobacco products out of sight, such a measure would likely trigger legal claims reviewed under the First Amendment. The issue was discussed briefly by the U.S. Supreme Court in the *Lorillard* case, which dealt with self-service displays along with a series of tobacco advertising and sales restrictions established by the Massachusetts Attorney General.⁴⁶ The tobacco manufacturers claimed that self-service displays were protected commercial speech.⁴⁷ Although the Court disagreed, it stated that the ban on self-service displays left “open ample channels of communication” within the store.⁴⁸ As an example of one such channel of communication, the Court suggested that the display of packaging itself had promotional value. The Court stated:

Moreover, retailers have other means of exercising any cognizable speech interest in the presentation of their products. We presume that

vendors may place empty tobacco packaging on open display, and display actual tobacco products so long as that display is only accessible to sales personnel.⁴⁹

The court reached a similar conclusion in the ongoing case *Commonwealth Brands, Inc. v. FDA* regarding a legal challenge brought by tobacco manufacturers against numerous aspects of the 2009 FDA law.⁵⁰ The trial court in the *Commonwealth Brands* case struck down the FDA law’s ban on color and graphics in tobacco advertising, based in part on the argument that the ban would prohibit manufacturers from “depicting their own packaging in their advertising.”⁵¹ The court stated that tobacco manufacturers “are clearly right when they say that images of packages of their products, simple brand symbols, and some uses of color communicate important commercial information about their products, i.e., what the product is and who makes it.”⁵² Whether the tobacco package appears in advertising or behind the store clerk on a shelf, the court’s reasoning would seem to apply. Thus, a law that requires cigarette packages (or other tobacco product packages) to be stored where customers cannot see them would be subject to a heightened level of judicial scrutiny.

When analyzing an out-of-sight law challenged on First Amendment grounds, the courts would likely apply a four part (prong) test first developed in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*:⁵³ –

1. Is the required statement false, deceptive or concerning illegal activities?
2. Is the law justified by a substantial government interest?
3. Does the law directly advance the governmental interest?
4. Is there a reasonable fit between the goal and the means chosen to accomplish the goal?

Given the *Lorillard* Court’s application of this test, we can be relatively confident of the answer to at least the first two questions. The *Lorillard* Court found that the advertising of tobacco products in and around stores is not false, deceptive or illegal because tobacco is a legal product used by adults.⁵⁴ The Court also found that governments have a substantial interest in reducing youth smoking rates.⁵⁵

However, the answers to the second two questions are less apparent. The *Lorillard* Court, for example, concluded that a ban on advertising of tobacco products within five feet of the floor did not directly advance a governmental interest.⁵⁶ Massachusetts argued that the five-foot limit would reduce tobacco advertising directed at children.⁵⁷ The Court disagreed and concluded that children could simply look up and that some children were taller than five feet.⁵⁸

Nevertheless, research conducted since the *Lorillard* decision in 2001 demonstrates the dramatic effect of tobacco advertising in stores on enticing children to try to buy or use tobacco products.⁵⁹ These studies may “provide evidence that young people respond to cigarette marketing even when it is aimed at adults, showing that new restrictions are needed to curb illegal, as well as highly addictive and harmful, under-age smoking.”⁶⁰ This recent empirical evidence linking youth smoking to advertising targeting adults may be pivotal to any future First Amendment legal challenges to tobacco advertising regulations.⁶¹

A court considering a First Amendment challenge to an out-of-sight regulation will also need to consider the fourth and final prong in *Central Hudson*: whether a reasonable fit exists between the goal and the means

chosen to accomplish the goal. In *Lorillard*, the Court evaluated the legality of a ban on billboard advertising near schools as well as the five-foot limitation discussed above, and the Court held that the restriction on billboards failed this fourth prong. Although the ban was designed to prevent tobacco billboard ads from being viewed by children, the ban was overly broad because it restricted too much speech that was suitable for adults.⁶² The Court reached this conclusion even though it agreed that the billboard ban would directly advance the state’s interests in protecting children.⁶³ Opponents to an out-of-sight requirement would likely argue that the Court’s reasoning in the *Lorillard* case applies to the display of packages, because the display communicates the range of tobacco products available for sale in the store. In response, proponents of the law would need to identify an alternative means for retailers (and manufacturers) to communicate such information. Thus, a law that requires retailers to keep products out of sight from customers will need to be drafted carefully to withstand a legal challenge under the First Amendment.

Drafting Tips: Lawmakers should proceed with caution when considering direct restrictions of tobacco marketing. One option would be to require health warnings of a type and size sufficient to compete with tobacco marketing in stores. For example, the New York City Department of Health and Mental Hygiene implemented a requirement that retailers post point-of-sale health warnings that contain graphic images and strong language.⁶⁴ Another regulatory option would be to prohibit tobacco retailers in certain locations as discussed below, which would have a side effect of decreasing tobacco promotions in these locations. Yet another option might be to require the products to be out of sight, but to respect the tobacco industry’s First Amendment rights, by allowing items to be advertised in a menu of products that adults could view upon request or to allow limited signage to communicate the existence of tobacco products in the stores.

As mentioned earlier, a law that restricts commercial speech should restrict the least amount of speech possible, while still accomplishing the law’s goal. Drafters should document the extent of the problem the law is intended to solve, why the law’s approach must be taken, and why other approaches to solving the problem that have a lesser impact on commercial



speech would not work (or why they did not work in the past). This documentation can be included in the law's findings (often included as "whereas" clauses at the beginning of the law's text).

Regulatory Strategy: Prohibiting the Sale of Tobacco Products Within 1,000 Feet of Playgrounds and Schools

Defining and Describing the 1,000-Foot Buffer Zone Around Schools and Playgrounds

The regulatory strategy of creating tobacco-free zones around schools and playgrounds was also addressed, to some extent, in the *Lorillard* case, when the U.S. Supreme Court struck down a Massachusetts regulation that prohibited most tobacco advertising within 1,000 feet of schools and playgrounds.⁶⁵ The *Lorillard* Court made two important findings regarding the 1,000-foot buffer zone. The Court concluded that tobacco advertising is protected commercial speech and that Massachusetts' interests in protecting minors from tobacco advertising was not sufficient to justify the 1,000 foot buffer zones.⁶⁶

The *Lorillard* decision, however, does not foreclose all options for creating buffer zones around schools.

The ruling applies to the advertising and promotion of tobacco products. It does not include the actual sale of tobacco. In an effort to create tobacco-free zones for children, state and local governments could consider prohibiting the sale of tobacco products near schools, playgrounds and other similar areas. The buffer zones could extend even further than 1,000 feet if doing so was adequately supported by the findings included within the law.

This strategy of tobacco-free zones has support within the public health community. For example, the Centers for Disease Control and Prevention recommends "the use of regulatory authority (e.g., through licensing and zoning) to limit alcohol outlet density on the basis of sufficient evidence of a positive association between outlet density and excessive alcohol consumption and related harms."⁶⁷ According to research reported in the *American Journal of Public Health*, experimental smoking among high school-aged minors increases when tobacco retailers are closer to schools and densely populate those locations.⁶⁸

As a practical matter, state or local governments can establish tobacco-free buffer zones in at least two ways. The first option is to require tobacco retailers to obtain a tobacco retailer license, and make the issuance of licenses conditional on the retailers not operating within a certain distance, such as 1,000



feet, of schools or playgrounds. A second option is to amend the local zoning code to prohibit the sale of tobacco products within a certain distance, such as 1,000 feet, of schools and playgrounds. Under either option, the law should clearly and comprehensively define what constitutes a school or playground. The law should also define whether the 1,000 feet is measured by the distance pedestrians travel or the shortest straight line.⁶⁹ For example, the law might read as follows:

No Tobacco Retailer shall be located within one thousand (1,000) feet, as measured by a straight line, of the boundary of a property occupied by (i) a public or private kindergarten, elementary, middle, junior high or high school; (ii) a licensed child-care facility or preschool; (iii) playground; (iv) youth center; (v) recreational facility; (vi) arcade; (vi) park; or (vii) library.⁷⁰

Legal Considerations

Courts would likely evaluate either type of tobacco-free buffer zone law (licensure or zoning) as a type of land use regulation. Local governments have the legal authority to establish permissible uses of land.⁷¹ Although state governments have commensurate legal authority for establishing land use laws, the responsibility has historically been left to local governments.⁷²

The legal validity of zoning was established in the landmark case *Village of Euclid v. Ambler Realty*, in which the U.S. Supreme Court stated that a zoning ordinance violates due process protections only if it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”⁷³ Courts will “refrain from reviewing the merits of [such] decisions, absent a showing of arbitrariness or irrationality.”⁷⁴

State and local governments interested in creating tobacco-free zones around playgrounds and schools should consider the well established laws prohibiting the sale of alcoholic beverages within certain distances of schools, playgrounds and the like. States can (and frequently do) require that alcohol retailers obtain a license and be located away from schools and similar locations.⁷⁵ These laws are generally regarded as constitutional.⁷⁶ Local governments could establish comparable restrictions for tobacco retailers.

Federal Law Does Not Preempt State and Local Governments from Prohibiting Tobacco Sales within 1,000 Feet of Schools and Playgrounds

The 2009 FDA law does not preempt or in any way lessen the ability of local governments to create tobacco-free zones around schools and playgrounds. Rather, the 2009 FDA law clarifies that it will not preempt any state or local law that regulates the “sale, distribution, possession, exposure to, [or] access to” tobacco products.

Tobacco-Free Buffer Zones Can Be Established but Careful Implementation is Critical

While laws prohibiting tobacco sales licenses to retailers located within 1,000 feet of schools and playgrounds are constitutional,⁷⁷ some difficulty can arise during implementation. The Fifth Amendment of the U.S. Constitution states that “private property [shall not] be taken for public use, without just compensation.”⁷⁸ Although this provision traditionally is applied to the physical taking of property, courts have extended this constitutional protection to regulatory takings as well. To determine whether a regulatory taking has occurred, the court considers (1) the character of the governmental action (for example, whether it is a licensing or land use regulation or a response to a public health problem); (2) the economic impact of the action on the property owner; and (3) the extent to which the action interferes with the property owner’s reasonable “investment-backed expectations.”⁷⁹

A licensing or land use regulation is more likely to inspire a takings challenge when it prohibits a use that was previously permitted. Prospective regulations are less likely to raise constitutional concerns than regulations that are retroactive. A primary issue with the implementation of tobacco-free zones is that tobacco retailers may claim that prohibiting existing businesses from continuing amounts to an unconstitutional regulatory taking.

The case of *City of Antonio v. El Dorado Amusement Co.* illustrates problems that can arise with rezoning.⁸⁰ This case focused on whether rezoning that excluded the sale of alcoholic beverages constituted an unconstitutional taking of property that was leased to a licensed retailer of alcoholic beverages. The appellate court found that although the property was not physically taken from the retailer, the rezoning had

a “severe economic impact” on the retailer’s business and “unreasonably interfered with [the owner’s] investment-backed expectations.”⁸¹

Given that gas stations, convenience stores and other retailers that sell tobacco products derive substantial profits from tobacco, the immediate implementation of a tobacco-free buffer zone would likely trigger takings claims. As such, state and local governments should carefully consider how they will deal with retailers who were in operation before tobacco-free sales zones are to be implemented, and whether such businesses should be grandfathered in or be deemed nonconforming uses and allowed to continue.

Nevertheless, the law recognizes the importance of not perpetuating businesses that do not conform to existing land uses.⁸² Depending on the jurisdiction, it may be possible to limit the transferability of a tobacco retailer license or to limit the period in which businesses are grandfathered in or can operate as nonconforming uses.⁸³

One important regulatory tip to consider is that licensees who violate their license requirements could be deemed to have waived their nonconforming use status. In *Kertsetter v. City of Bridgeport*, for example, the operator of a used car lot repeatedly violated its license requirements.⁸⁴ When the city pulled the license, the zoning board pulled the nonconforming use status.⁸⁵ The court concluded that the licensee’s noncompliance demonstrated intent to abandon the lawful operation of a business, which amounted to a waiver of the licensee’s right to the nonconforming use status.⁸⁶ Similarly, a tobacco retailer located in a 1,000-foot zone that continually sells to minors arguably waives its right to nonconforming use status.

Another option for eliminating nonconforming uses is to establish an amortization schedule, where retailers are given a reasonable period of time to recover the full value of their business.⁸⁷ Calculating amortization is a complex and fact-specific process.⁸⁸

Drafting Tips: State and local governments that use land use regulation or licensing as strategies to control the tobacco retail environment should be familiar with the zoning and licensing law in their jurisdictions. Because the implementation of these regulations can pose problems, policymakers might find it helpful to research how similar laws (both for tobacco and other products such as alcohol) have been enforced

in other localities, and the way legal or policy issues or challenges were addressed.

Conclusion

The Family Smoking Prevention and Tobacco Control Act leaves state and local governments free to adopt a wide range of tobacco control policy options, including more restrictive retail sales regulations. Many legally and politically viable regulatory options are available, including laws that require face-to-face only sales of tobacco products, laws that keep all tobacco products out of sight in retail establishments, and laws that prohibit the sale of tobacco products within 1,000 feet of playgrounds and schools. In drafting any of these regulatory measures, policymakers will want to be aware of conflicts with existing state or federal law, and other possible federal or state constraints or limitations. They will also want to focus on what they are regulating (for example, speech or conduct), where the law applies, and how the law will be enforced, so they will be better able to anticipate legal tests the courts may apply if the law is challenged. By using tips outlined in this publication and by including factual findings that support the legislation, state and local governments will be able to draft strong tobacco retailer laws likely to withstand legal challenge.

The following chart may be helpful when state and local governments consider strategies for regulating tobacco retailers in their jurisdictions. Because it provides an overview of tests that might be applied to new tobacco laws challenged in court, it can be used to draft the strongest laws possible. For more information on Commerce Clause considerations when drafting state and local regulations that restrict tobacco advertising and promotion, see the Tobacco Control Legal Consortium’s *Regulating Tobacco Advertising and Promotion: A “Commerce Clause” Overview for State & Local Governments* and *Regulating Tobacco Product Pricing: Guidelines for State and Local Governments* (2010). For information on related Commercial Speech considerations, see the Tobacco Control Legal Consortium’s *Regulating Tobacco Marketing: “Commercial Speech” Guidelines for State and Local Governments* (2010); *Regulating Tobacco Marketing: A “Commercial Speech” Factsheet for State and Local Governments* (2010); and *Regulating Tobacco Marketing: A “Commercial Speech” Flowchart for State and Local Governments* (2010).

Select Tobacco Product Pricing Regulations and Legal Tests Applied by Courts

Type of regulation	Possible legal challenge	Test applied by courts	Notes and drafting tips
"Face-to-face" requirement for all tobacco sales	No federal preemption concerns	N/A.	<ul style="list-style-type: none"> When drafting a tobacco control law, consider referencing the authority under which the governmental body is operating. A formal citation to the granting law may assist in defending the law against allegations that the government lacks the authority to pass the law.
	No First Amendment restriction on expressive conduct concerns	<p>See <i>Lorillard Tobacco Co. v. Reilly</i>, 533 U.S. 525 (2001), where the Supreme Court analyzed the requirement that tobacco be kept behind the counter or in a locked case. The Court declined to apply the expressive conduct test set out in <i>United States v. O'Brien</i>, 391 U.S. 367 (1968).</p> <p>4 prongs:</p> <ol style="list-style-type: none"> 1) Does the government have the authority to pass the law? 2) Does the restriction further a substantial governmental interest? 3) Is the restriction unrelated to the suppression of free expression? 4) Is the incidental restriction on First Amendment freedoms no greater than is essential to achieve the government's interest? 	<ul style="list-style-type: none"> Document the problem the law was drafted to solve, the government's interest in solving the problem, the way the law advances the government's interest, and way the government's goal fits with the means chosen to accomplish it. The law's purpose must not be to limit communication. Any suppression or restriction of commercial speech must be incidental to the law's goal in keeping tobacco from minors.

1 Other possible legal challenges, such as claims based on Equal Protection, are not discussed here.

Select Tobacco Product Pricing Regulations and Legal Tests Applied by Courts

Type of regulation	Possible legal challenge	Test applied by courts	Notes and drafting tips
<p>"Out-of-sight" requirement for all tobacco products</p>	<p>No federal preemption concerns</p>	<p>N/A.</p>	<ul style="list-style-type: none"> When drafting a tobacco control law, consider referencing the authority under which the governmental body is operating. A formal citation to the granting law may assist in defending the law against allegations that the government lacks the authority to pass the law.
	<p>First Amendment restriction on speech Burden: high hurdle</p>	<p><i>Central Hudson Gas v. Public Services Commission</i>, 447 U.S. 557 (1980). 4 prongs: 1) Is the restricted speech false, deceptive, or advertising illegal activities? 2) Is the law justified by a substantial governmental interest? 3) Does the law directly advance the governmental interest? 4) Is there a reasonable fit between the goal (the government's interest) and the means chosen to accomplish the goal? OR 4) Does the law restrict the least possible amount of speech necessary to achieve its goal?</p>	<ul style="list-style-type: none"> Fully document the extent of the problem the law was drafted to solve, and include a careful, thorough analysis of how the law would impact commercial speech in the law's "findings" (sometimes included as "whereas" clauses preceding the text of the law that document, through statistical data or other means, the problem the law was drafted to solve and how the law would solve it). Clearly state the government's goal in enacting the law, because doing so helps to show the law satisfied prong two: that the government has a substantial interest in solving the problem, and prong three: that the law as written will achieve the goal it seeks. The law must clearly advance the objective the government enacted the law to achieve. The findings should also indicate why the law's approach must be taken and why other approaches to solving the problem that have a lesser impact on commercial speech would not work or, if they were tried before, have not worked in the past. Be sure that the new law restricts the least amount of speech possible, while still achieving the law's goal.
	<p>First Amendment restriction on expressive conduct (incidental) Burden: moderate hurdle</p>	<p><i>United States v. O'Brien</i>, 391 U.S. 367 (1968). 4 prongs: 1) Does the government have the authority to pass the law? 2) Does the restriction further a substantial governmental interest? 3) Is the restriction unrelated to the suppression of free expression? 4) Is the incidental restriction on First Amendment freedoms no greater than is essential to achieve the government's interest?</p>	<ul style="list-style-type: none"> The findings must clearly state the reason for the law and include as much research as possible showing the need for the law. The law's purpose must not be to limit communication; any effect on speech must be a side-effect of a conduct regulation. Drafters should show that the law's goal is being met without a wider than necessary impact on expressive conduct. The findings must not suggest that the law's real purpose is to suppress speech, because that will undermine the argument that any impact on commercial speech is incidental and not the purpose of the law.

Select Tobacco Product Pricing Regulations and Legal Tests Applied by Courts

Type of regulation	Possible legal challenge	Test applied by courts	Notes and drafting tips
<p>Prohibition of the sale of tobacco products within 1,000 feet of playgrounds and schools</p>	<p>No federal preemption concerns</p>	<p>N/A.</p>	<ul style="list-style-type: none"> When drafting a tobacco control law, consider referring the authority under which the governmental body is operating. A formal citation to the granting law may assist in defending the law against allegations that the government lacks the authority to pass the law.
	<p>First Amendment restriction on commercial speech Burden: Moderate hurdle</p>	<p>See <i>Lorillard Tobacco Co. v. Reilly</i>, 533 U.S. 525 (2001), where the Supreme Court analyzed the requirement that tobacco billboards be located at least 1,000 feet away from schools and playgrounds and found the restriction on speech unconstitutional under the test set out in <i>Central Hudson Gas v. Public Services Commission</i>, 447 U.S. 557 (1980).</p> <p>4 prongs:</p> <ol style="list-style-type: none"> 1) Is the restricted speech false, deceptive, or advertising illegal activities? 2) Is the law justified by a substantial governmental interest? 3) Does the law directly advance the governmental interest? 4) Is there a reasonable fit between the goal (the government's interest) and the means chosen to accomplish the goal? <p>OR</p> <ol style="list-style-type: none"> 4) Does the law restrict the least possible amount of speech necessary to achieve its goal? 	<ul style="list-style-type: none"> Fully document the extent of the problem the law was drafted to solve, and include a careful, thorough analysis of how the law would impact commercial speech in the law's "findings" (sometimes included as "whereas" clauses preceding the text of the law that document, through statistical data or other means, the problem the law was drafted to solve and how the law would solve it). Clearly state the government's goal in enacting the law, because doing so helps to show the law satisfied prong two: that the government has a substantial interest in solving the problem, and prong three: that the law as written will achieve the goal it seeks. The law must clearly advance the objective the government enacted the law to achieve. The findings should also indicate why the law's approach must be taken and why other approaches to solving the problem that have a lesser impact on commercial speech would not work or, if they were tried before, have not worked in the past. Be sure that the new law restricts the least amount of speech possible, while still achieving the law's goal.
	<p>Fifth (& Fourteenth) Amendment taking (partial regulatory) Burden: Moderate hurdle</p>	<p>See <i>D.A.B.E. Inc. v. City of Toledo</i>, 292 F. Supp. 2d 968 (N.D. Ohio 2003), aff'd 393 F.3d 692 (6th Cir. 2005).</p> <p>3 prongs:</p> <ol style="list-style-type: none"> 1) What is the character of the governmental action (for example, is it a land use regulation or a response to a public health problem?) 2) What is the economic impact of the action on the property owner? 3) To what extent does the action interfere with the property owner's reasonable "investment-backed expectations"? 	<ul style="list-style-type: none"> Drafters must clearly identify the state interest at stake, the level of government intrusion, and the impact this intrusion has in preventing the property owner from realizing the property's economic use. Drafters might consider – <ul style="list-style-type: none"> o Exempting or "grandfathering" preexisting uses of land that become nonconforming when local zoning ordinances are amended, or o Requiring that any new land use regulation not apply to existing business concerns for a particular period of time.

Endnotes

- 1 Centers for Disease Control and Prevention, *Tobacco Use: Targeting the Nation's Leading Killer – At a Glance 2010*, 1 (2010).
- 2 See Lisa Henriksen et al., *Effects of Youth Exposure to Retail Tobacco Advertising*, 32(9) J. APPLIED SOC. PSYCHOL., 1771 (2002); See also Ellen Feighery et al., *An Examination of Trends in Amount and Type of Cigarette Advertising and Sales Promotions in California Stores, 2002-2005*, 17 TOBACCO CONTROL 93 (2008) (describing cigarette promotions and trends in retail environments); Sandy Slater et al., *The Impact of Retail Cigarette Marketing Practices on Youth Smoking Uptake*, 161 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 440 (2007) (noting that point-of-sale cigarette promotions correspond to an increase in tobacco use among youth).
- 3 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (West 2010) (codified, in relevant part, at 15 U.S.C.A. §§ 1333-34 and 21 U.S.C.A. § 301 et seq.) The Act has been challenged in court (*Commonwealth Brands, Inc. v. United States*, No. 1:09-CV-117-M, 2010 WL 65013 (W.D. Ky. Jan. 5, 2010)), but this publication assumes that all provisions of the Act are being enforced.
- 4 See James Hodge, Jr., *Implementing Modern Public Health Goals Through Government: An Examination of New Federalism and Public Health Law*, 14 J. CONTEMP. HEALTH L. & POL'Y, 93, 94 (1997).
- 5 See *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824); Wendy Parmet, *After September 11: Rethinking Public Health Federalism*, 30 J.L. MED. & ETHICS 201, 202-03 (2002).
- 6 See, e.g., MASS. GEN. LAWS ch. 111, § 31 (2009) (noting that "Boards of health may make reasonable health regulations").
- 7 See 56 Am. Jur. 2d *Municipal Corporations* § 107 (2009).
- 8 See 56 Am. Jur. 2d *Municipal Corporations* § 110 (2009).
- 9 See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).
- 10 See *id.*
- 11 See *Bates v. Dow Agrosiences, LLC*, 544 U.S. 431 (2005).
- 12 See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988).
- 13 See *id.*
- 14 See *Bank of New York v. Hoyt*, 617 F. Supp. 1304 (D.R.I. 1985).
- 15 See *id.* at 1311.
- 16 *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).
- 17 See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).
- 18 See Elisa P. Laird-Metke, Tobacco Control Legal Consortium, *Regulating Tobacco Marketing: A "Commercial Speech" Factsheet for State and Local Governments* (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-speech-2010.pdf>.
- 19 AMERICAN LUNG ASS'N, STATE OF TOBACCO CONTROL 2009 29 (2009), available at http://sotc2009.pub30.convio.net/2009/ALA_SOTC_09.pdf (last visited June 15, 2010).
- 20 940 MASS. CODE REGS. 21.04 (2000).
- 21 Family Smoking Prevention and Tobacco Control Act, *supra* note 3. Section 102 of the Act revives federal rules previously passed on August 28, 1996 by the FDA. §102(a)(2) (requiring the FDA to promulgate rules identical to 61 Fed. Reg. 44615-18).
- 22 See *Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (stating that congressional intent on whether state and local authorities can enforce federal law is to be considered when determining enforcement authority).
- 23 See 940 MASS. CODE REGS. 21.04(4)(b).
- 24 See MASSACHUSETTS DEP'T OF PUB. HEALTH, TRENDS IN YOUTH TOBACCO USE IN MASSACHUSETTS, 1993-2007, 5-6 (2008), available at http://www.mass.gov/Eeohhs2/docs/dph/tobacco_control/adolescent_tobacco_use_youth_trends_1993_2007.pdf (last visited June 15, 2010).
- 25 See *id.* at 532-37 (citing 940 MASS. CODE REGS. 21.04 (2000)).
- 26 See *Lorillard*, 533 U.S. at 570. The Massachusetts law does not actually prohibit vending machines but it places many restrictions on their use. Under the Massachusetts law, vending machines can only be in adult-only facilities, within sight of workers and locked at all times, except during actual sales transactions. In other words, anyone who wants to use a vending machine to purchase cigarettes must first get an employee to unlock it..
- 27 See *id.* at 570.
- 28 391 U.S. 367 (1968).

- 29 Family Smoking Prevention and Tobacco Control Act, *supra* note 3.
- 30 21 U.S.C. § 387p (2009).
- 31 678 F. Supp. 2d 512 (W.D. Ky. 2010).
- 32 *See id.* at 528.
- 33 *See id.*
- 34 *See Lorillard*, 533 U.S. at 570.
- 35 Philip Morris USA v. City and County of San Francisco, No. C 08-04482 CW, 2008 WL 5130460 (N.D. Cal. 2008) , *aff'd*, No. 08-17649, 2009 WL 2873765 (9th Cir. 2009).
- 36 *See id.*
- 37 *See Philip Morris USA*, 2009 WL 2873765 at 1 (internal quotations omitted).
- 38 *See* MASSACHUSETTS DEP'T OF PUB. HEALTH, TRENDS IN YOUTH TOBACCO USE IN MASSACHUSETTS, 1993-2007, 5-6 (2008), available at http://www.mass.gov/EeoHhs2/docs/dph/tobacco_control/adolescent_tobacco_use_youth_trends_1993_2007.pdf (last visited June 15, 2010).
- 39 *See* FED. TRADE COMM'N, CIGARETTE REPORT FOR 2006 (2009), available at <http://www.ftc.gov/os/2009/08/090812cigarettereport.pdf> (last visited June 15, 2010); *See also* FED. TRADE COMM'N, SMOKELESS TOBACCO REPORT FOR 2006 (2009) available at <http://www.ftc.gov/os/2009/08/090812smokelesstobaccoreport.pdf> (last visited June 15, 2010).
- 40 Lynn Greaves, *Canada: Demolishing the Power Walls*, 12(1) TOBACCO CONTROL 7 (2003).
- 41 *See id.*
- 42 *See id.*
- 43 Family Smoking Prevention and Tobacco Control Act, *supra* note 3.
- 44 21 U.S.C. §387p.
- 45 15 U.S.C. §1334.
- 46 *Lorillard*, 533 U.S. at 569.
- 47 *See id.*
- 48 *Id.*
- 49 *Id.* at 570.
- 50 *See Commonwealth Brands*, 2010 WL 65013.
- 51 *Id.*
- 52 *Id.* at *6.
- 53 Central Hudson Gas & Electric Corp., 447 U.S. 557 (1980).
- 54 *Lorillard*, 533 U.S. at 578-79. Note that the regulation at issue in this case applied to all tobacco advertising. This decision leaves room open for restriction of certain types of advertising: namely advertising that is shown to be targeted at youth. An easy example of this type of youth targeted advertising is the use of cartoons, which is already prohibited among signatories to the 1998 Master Settlement Agreement. (All major U.S. tobacco product manufacturers are signatories to the Master Settlement Agreement.) Less obvious examples of youth targeted tobacco advertising would need to be identified either through an admission by a manufacturer or rigorous scientific evaluation of the advertising.
- 55 *See id.* at 570.
- 56 *See id.* at 566.
- 57 *See id.*
- 58 *See id.*
- 59 *See* Campaign for Tobacco-free Kids, Tobacco Company Marketing to Kids (2009) (containing a survey of studies on tobacco marketing to children and adolescents); *See also* National Cancer Institute, *Changing Adolescent Smoking Prevalence*, Smoking and Tobacco Control Monograph No. 14, National Institutes of Health Pub. No. 02-5086 (Nov. 2001).
- 60 Duff Wilson, *Tobacco Regulation is Expected to Face a Free-Speech Challenge*, N.Y. TIMES, June 16, 2009, at B1.
- 61 Courts do not require empirical evidence showing that a particular policy would advance a public health goal. *See* Florida Bar v. Went For It, 515 U.S. 618, 628 (1995). Related studies supporting the policy are sufficient. *See id.*
- 62 *Lorillard*, 533 U.S. at 561-62.
- 63 *See id.* at 562.

- 64 See New York City Health Code §181.19 (2009).
- 65 *Lorillard*, 533 U.S. at 556-66.
- 66 See *id.*
- 67 See CENTERS OF DISEASE CONTROL AND PREVENTION, GUIDE TO COMMUNITY PREVENTIVE SERVICES, PREVENTING EXCESSIVE ALCOHOL USE: REGULATION OF ALCOHOL OUTLET DENSITY, available at www.thecommunityguide.org/alcohol/outletdensity.html (last visited June 15, 2010).
- 68 William McCarthy et al., *Density of Tobacco Retailers Near Schools: Effects on Tobacco Use Among Students*, 99 AM. J. PUB. HEALTH 11, 2006 (Nov. 2009).
- 69 See *City of Bastrop v. Johnny's Pizza House, Inc.*, 712 So.2d 156 (La. Ct. App. 1998).
- 70 Based on model language developed by the Technical Assistance Legal Center at Public Health, Law and Policy in Oakland, California.
- 71 See 83 Am. Jur. 2d *Zoning and Planning* § 31 (2010).
- 72 See *id.*
- 73 *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 395 (1926).
- 74 See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977).
- 75 45 Am. Jur. 2d *Intoxicating Liquors* §108 (2010).
- 76 See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).
- 77 See *id.*
- 78 U.S. CONST. AMEND. V.
- 79 *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).
- 80 *City of San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238 (Tex. App. 2006).
- 81 *Id.* at 247.
- 82 See, e.g., *Peoria v. Danz*, 585 N.E.2d 1207 (Ill. App. Ct. 1992).
- 83 See *County of Isanti v. Peterson*, 469 N.W.2d 467 (Minn. Ct. App. 1991) (upholding termination of nonconforming use status based on a one-year discontinuation standard in the zoning code); See also *Outdoor Media Dimensions Inc. v. State*, 20 P.3d 180 (Or. 2001) (noting that a billboard blank for six months lost its nonconforming use status).
- 84 *Kertsetter v. City of Bridgeport*, No. CV030401479, 2008 WL 2168900 (Conn. Super. Ct. 2008).
- 85 *Id.*
- 86 *Id.* at *2-3.
- 87 See, e.g., *Murmur Corp. v. Bd. of Adjustments*, 718 S.W.2d 790 (Tex. App. 1987).
- 88 See *Art Neon Co. v. Denver*, 488 F.2d 118, 122 (10th Cir. 1973).

About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.



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