

After the FDA Tobacco Control Law: Which Policies Are Legal To Pursue?

October 2009 (updated July 2010)

The passage of the Family Smoking Prevention and Tobacco Control Act (“the 2009 FDA law”) makes it possible to create some local tobacco regulations that communities were not legally able to pursue before the law passed. However, there are still a number of legal limits on what communities may do to restrict tobacco marketing and advertising.

TALC and the Center have been asked about the legality of a number of new policy ideas that local communities have been interested in pursuing. This document lists the policy ideas that are affected by the 2009 FDA law in some way. The chart explains whether the suggested policies are legally safe to pursue and why.

Key:

GREEN	To the best of our knowledge, actions and policies created pursuant to these indicators are legal. There is, however, a lawsuit pending against the 2009 FDA law, which may affect the legality of some of the items marked “green,” particularly the indicators for creating local policies related to advertising, sponsorship, and sampling. Communities should take care when drafting laws to use the TALC model ordinances and to work with TALC to ensure that the new laws are as legally sound as possible.
YELLOW	These indicators touch on legal issues that require further legal research or on which a lawsuit is pending. Some communities may be interested in setting new precedent by pursuing these indicators, which are likely to draw a lawsuit if adopted as a local ordinance. If your community is particularly interested in one of the indicators marked “yellow,” contact TALC to discuss the implications.
RED	These policy ideas are not legally permissible at this time and should not be pursued.

Policy	Rationale	Related CX Indicator(s) (if applicable)
Green Light		
A resolution encouraging the FDA to ban flavorings in all tobacco products	There is no legal barrier to passing resolutions that encourage FDA action.	1.1.15 - Number of local resolutions in support of the FDA regulating use of menthol in cigarettes and/or the use of an artificial or natural flavor, herb, spice or other flavoring additive in other tobacco products (e.g., smokeless, little cigars, hookah tobacco, dissolvable tobacco products) including but not limited to strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee flavorings
Law banning tobacco sampling	The 2009 FDA law adds some new restrictions, but communities can fill in the remaining gaps. See the TALC fact sheet, "Sampling: How does the FDA law affect local ordinances in California," available at www.phlpnet.org/tobacco-control .	3.2.4 - Number and type of venues/events (e.g., county fairs, rodeos, motor sports, other sporting events, parades, concerts, museums, dances, festivals, business) with a voluntary policy that prohibits the distribution of free or low-cost tobacco and nicotine products, coupons, coupon offers, gift certificates, gift cards, rebate offers or other similar offers for tobacco and nicotine products -or- Number of communities with a policy that prohibits the distribution of free or low-cost tobacco and nicotine products, coupons, coupon offers, gift certificates, gift cards, rebate offers or other similar offers for tobacco and nicotine products
Voluntary policy banning tobacco corporate event sponsorship	Under the new 2009 FDA law, voluntary policies (where the venue voluntarily restricts its sponsorship) face no legal barrier. See the yellow light section for information on laws (mandatory policies) banning sponsorship.	1.1.6 - Number of public and private entertainment and sporting venues with a voluntary policy that regulates tobacco company sponsorship (e.g., county fairs, rodeos, motor sports, other sporting events, parades, concerts, museums, dances, festivals, business)
Voluntary policy restricting the time, place, and manner of advertising, such as restricting in-store or outdoor advertising, banning powerwall displays, etc.	Under the new 2009 FDA law, voluntary policies (where the store voluntarily restricts tobacco advertising) face no legal barrier. See the yellow light section for information on laws (mandatory policies) restricting advertising.	1.1.1 - Number, type, time, place and manner of in-store tobacco advertising and promotions 1.1.2 - Number, type, time, place, and manner of tobacco advertising and promotions outside of stores

Policy	Rationale	Related CX Indicator(s) (if applicable)
Voluntary policy prohibiting the sale of tobacco products in pharmacies	<p>This policy is not affected by the 2009 FDA law. Voluntary policies (where the store voluntarily stops selling tobacco) face no legal barrier.</p> <p>See the yellow light section for information on laws (mandatory policies) restricting tobacco sales in pharmacies.</p>	3.2.7 - The number of independent/chain pharmacy stores, health care facilities or businesses that engage in the delivery of direct health care services that have a voluntary policy to NOT sell tobacco products
Voluntary policy banning tobacco company/product marketing/sponsorship	<p>Under the 2009 FDA law, voluntary policies (where the venue voluntarily restricts tobacco marketing) face no legal barrier.</p> <p>See the yellow light section for information on laws (mandatory policies) banning sponsorship.</p>	1.1.7 - Number of adult-only-facilities (e.g., bars, night clubs) with a voluntary policy prohibiting tobacco company/product marketing/sponsorship
Monitoring violations of the 2009 FDA law	The 2009 FDA law requires that the FDA set up enforcement plans, and violations of the 2009 FDA law may be reported to the FDA. However, local communities may also enforce the 2009 FDA law through a local tobacco retailer licensing law. If your community does not have a local licensing law, contact TALC or the Center for more info.	3.1.7 - Number and type of violations of the MSA and FDA tobacco control legislation by tobacco companies, distributors/wholesalers or retailers for tobacco sale and distribution requirements

Yellow Light		
Law restricting the time, place, and manner of tobacco advertising, such as restricting in-store or outdoor advertising, etc.	The 2009 FDA law amends the Federal Cigarette Labeling and Advertising Act (FCLAA) to allow communities to regulate the time, place, and manner of cigarette promotion. However, the portion of the 2009 FDA law restricting tobacco advertising has been challenged by several tobacco companies on First Amendment free speech grounds. (<i>Commonwealth Brands, Inc., et al. v. United States of America</i> , No. 1:2009CV00117 (W. Ky. Dist. Ct. filed Aug. 31, 2009).) Communities that enact policies restricting tobacco advertising may face similar legal challenges. The ultimate outcome of the lawsuit will determine whether such policies may legally be enforced in California. NOTE: restricting the time, place, or manner of just one type of tobacco advertising, such as ads for menthol cigarettes, is NOT legal. See "Red Light" section below for more details.	<p>1.1.1 - Number of communities with a policy that imposes a specific ban or restrictions on time, place, and manner of in-store tobacco advertising and promotions consistent with the First Amendment and Food and Drug Administration (FDA) tobacco control legislation</p> <p>1.1.2 - Number of communities with a policy that imposes a specific ban or restrictions on time, place, and manner of outdoor store tobacco advertising or promotions consistent with the First Amendment and FDA tobacco control legislation</p> <p>1.1.16 - Number of communities with a policy that imposes a specific ban or restrictions on time, place, and manner of any tobacco advertising or marketing (other than retail or sponsorship) consistent with the First Amendment and FDA tobacco control legislation</p>
Law requiring counter ads or point-of-sale warnings	Mandatory policies (where the city or county requires certain counter-advertisements through a new law) require more legal research. For example, New York City recently adopted such a policy, but it has been challenged in court. (<i>23-34 94th St. Grocery Corp., et al. v. New York City Bd. of Health, et al.</i> , No. 10CV4392 (S.D.N.Y. filed June 2, 2010)) The outcome of the case will determine the legality of this policy.	1.1.17 - Number of communities with a policy that requires a 1:1 or 3:1 placement of anti-tobacco advertising in prime retail locations to counter tobacco company buydown or promotion offers

Minimum price laws that ban or restrict price manipulation strategies, such as buydowns, multi-pack offers, retail value added schemes (2 for price of 1)	Mandatory policies (where the city or county restricts certain tobacco marketing practices through a new law) require more legal research.	1.2.6 - Number of communities with a policy that sets a minimum retail sale price for tobacco products and bans or constrains buydowns and tobacco industry promotional practices such as buydowns, multi-pack offers, and discounts
Enforcing existing local laws that restrict tobacco advertising and predate the 2009 FDA law	The 2009 FDA law amends the FCLAA to allow communities to regulate the time, place, and manner of cigarette promotion. However, portions of the 2009 FDA law allowing restriction of tobacco advertising have been challenged by several tobacco companies on First Amendment free speech grounds. (<i>Commonwealth Brands, Inc., et al. v. United States of America</i> , No. 1:2009CV00117 (W. Ky. Dist. Ct. filed Aug. 31, 2009).) The ultimate outcome of the lawsuit will determine whether such policies may legally be enforced in California. Communities that enforce existing policies restricting tobacco advertising may face similar legal challenges.	No corresponding CX indicator.
Law banning the sale of mentholated cigarettes or other tobacco products flavored by natural or artificial flavor	The 2009 FDA law bans most flavored cigarettes, but menthol flavored cigarettes may still be sold. Local governments may close this loophole by banning the sale of any or all flavored products in the city or county. New York passed a law banning the sale of flavored tobacco products, and this law was challenged in court. (<i>U.S. Smokeless Tobacco Mfg. Co., LLC, et al. v. City of New York</i> , 2010 U.S. Dist. LEXIS 39112.) The outcome of the case will determine the legality of this policy.	3.2.9 - Number of tobacco retailers that adopt a voluntary policy to eliminate the sale of mentholated cigarettes and other tobacco products (e.g., smokeless tobacco, hookah tobacco, little cigars, and dissolvable tobacco products) flavored by artificial or natural flavor, herb, spice, or other flavoring additive including, but not limited to strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee flavorings -or- Number of communities with a policy that prohibits the sale and distribution of mentholated cigarettes and other tobacco products (e.g., smokeless tobacco, little cigars, hookah tobacco, and dissolvable tobacco products) flavored by artificial or natural flavor, herb, spice, or other flavoring additive including, but no limited to strawberry, grape, orange, clove, cinnamon , pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee flavorings
Law requiring that cigarettes be shelved behind opaque containers	The 2009 FDA law does not prohibit this, but there are some other restrictions that must be followed to ensure the policy is legal. Communities interested in pursuing this should consult TALC.	No corresponding CX indicator.

Policy	Rationale	Related CX Indicator(s) (if applicable)
Law banning the distribution of promotional items either in person or via the internet	<p>Portions of the 2009 FDA law banning the distribution of tobacco companies' promotional items have been challenged by several tobacco companies on First Amendment free speech grounds. (<i>Commonwealth Brands, Inc., et al. v. United States of America</i>, No. 1:2009CV00117 (W. Ky. Dist. Ct. filed Aug. 31, 2009).) The ultimate outcome of the lawsuit will determine whether such policies may legally be enforced in California. Local communities who enforce existing policies restricting tobacco advertising may face similar legal challenges.</p>	<p>1.1.6 - Number and type of tobacco company sponsorship at public and private events including entertainment and sporting venues (e.g., county fairs, rodeos, motor sports, other sporting events, parades, concerts, museums, dances, festivals, business) -or- Number of communities with a policy that imposes a specific ban or restrictions on time, place, and manner of tobacco company sponsorship and marketing consistent with the First Amendment and FDA tobacco control legislation at public, entertainment and sporting venues (e.g., county fairs, rodeo, motor sports, other sporting events, parades, concerts, museums, dances, festivals, businesses)</p> <p>1.1.7 - Number of communities with a policy that imposes a specific ban or restrictions on time, place, and manner of tobacco product marketing and sponsorship at adult-only facilities (e.g., bars and night clubs) consistent with the First Amendment and FDA tobacco control legislation</p>
Law banning tobacco sponsorship in the corporate or brand name via a local ordinance	<p>Portions of the 2009 FDA law limiting tobacco company event sponsorship have been challenged by several tobacco companies on First Amendment free speech grounds. (<i>Commonwealth Brands, Inc., et al. v. United States of America</i>, No. 1:2009CV00117 (W. Ky. Dist. Ct. filed Aug. 31, 2009).) The ultimate outcome of the lawsuit will determine whether such policies may legally be enforced in California. Local communities who enforce existing policies restricting tobacco advertising may face similar legal challenges.</p>	<p>1.1.6 - Number of communities with a policy that imposes a specific ban or restrictions on time, place, and manner of tobacco company sponsorship and marketing consistent with the First Amendment and FDA tobacco control legislation at public, entertainment and sporting venues (e.g., county fairs, rodeo, motor sports, other sporting events, parades, concerts, museums, dances, festivals, businesses)</p>
Law prohibiting the sale of tobacco products in pharmacies	<p>This policy is not affected by the 2009 FDA law. However, there is still a pending lawsuit challenging San</p>	<p>3.2.7 - Number of communities with a policy that bans the sale of tobacco products wherever prescription medications are sold and dispensed -or- Number of communities with a policy that prohibits the issuance of a tobacco</p>

Policy	Rationale	Related CX Indicator(s) (if applicable)
	<p>Francisco's ordinance banning the sale of tobacco in pharmacies. (<i>Walgreen Co., v. City and County of San Francisco, et al.</i>, 2010 Cal. App. LEXIS 845.) The outcome of that lawsuit will determine whether this policy is legal in California.</p>	<p>retail license to any business or facility that engages in the delivery of direct health care services to consumers including, but not limited to, such activities as dispensing prescription medications, providing health screenings, and direct health care services provided by a licensed health care professional</p>

Policy	Rationale	Related CX Indicator(s) (if applicable)
Red Light		
Law banning advertising of only some types of tobacco products, such as banning ads for menthol cigarettes or snus, but not all tobacco ads	The Federal Cigarette Labeling and Advertising Act (FCLAA) prohibits laws that ban advertising for only certain types of tobacco products but not others.	No corresponding CX indicator.
Law requiring that tobacco package warning labels appear in more than one language	Requiring warnings in addition to those already required by the 2009 FDA law violates the FCLAA.	No corresponding CX indicator.
Law requiring additional warnings on packages	Requiring warnings in addition to those already required by the 2009 FDA law violates the FCLAA.	No corresponding CX indicator.
Laws regarding tobacco product standards, premarket approval, adulteration, misbranding, labeling, registration, good manufacturing standards, or reduced risk product claims	The 2009 FDA law assigns jurisdiction over these areas to the FDA only, so no state or local government may pass policies in these areas.	No corresponding CX indicator.

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