

Leslie Zellers and Ian McLaughlin: State and Local Policy as a Tool to  
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# Hastings Science & Technology Law Journal

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CITE AS: 2 HASTINGS SCI. AND TECH. L.J. 117

### **Abstract**

With the recent passage of the Family Smoking Prevention and Tobacco Control Act of 2009, the U.S. Food and Drug Administration now has the authority to regulate tobacco sales, marketing, and use. Though this law is a beneficial step, some gaps remain. There are significant merits to state and local governments enacting local laws to fill these gaps. State and local governments can also effectively partner with the Food and Drug Administration in enforcing various provisions of the law. There are a great deal of local policy options available to state and local governments. This Article provides both recommendations and questions about how to effectively enforce Food and Drug Administration law.

# State and Local Policy as a Tool to Complement and Supplement the FDA Law

by LESLIE ZELLERS\* AND IAN MCLAUGHLIN\*\*

## I. Introduction

The recent passage of the Family Smoking Prevention and Tobacco Control Act (the “FDA law”) has given the U.S. Food and Drug Administration the authority to limit tobacco sales, marketing, and use in a variety of ways.<sup>1</sup> The law leaves significant gaps, however, which state and local governments can fill by enacting local laws.<sup>2</sup> State and local governments also can be an effective partner with the FDA in enforcing various provisions of the law.

This article discusses why adopting a state or local tobacco control law is beneficial, offering examples of local policy options a community might consider and describing how legal technical assistance can help with local policy development and adoption. It also provides both recommendations and questions about how to effectively enforce FDA law.

## II. Advantages of a State or Local Tobacco Control Law

Adopting a tobacco control law at the state or local level offers numerous advantages, such as by enabling the state or local government to act sooner to protect its citizens and to directly enforce

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1. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C., and 21 U.S.C.).

2. The following analysis is based on California law. Please consult an attorney in your state to determine what laws exist and what policies are legal to pursue.

any law adopted on the state or local level. The FDA law explicitly grants state and local governments the right to enact measures that are more restrictive than those in the federal law, specifically stating that the federal law does not preempt any “measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age.”<sup>3</sup>

One of the greatest advantages to adopting a state or local measure is that the state or local government does not have to wait until the FDA law is implemented in order to benefit from the public health protections contained in the federal law. The FDA law’s numerous provisions are scheduled to take effect at different times, ranging from the date of enactment (June 2009) to up to three years later.<sup>4</sup> Many of the key policy provisions will not take effect until June of 2010, including the regulation of self-service displays, restrictions on free tobacco samples, advertising restrictions, and limits on tobacco sponsorship of events.<sup>5</sup>

Additionally, at the time this essay was written, several tobacco companies have challenged the FDA law in federal district court in Kentucky, claiming that the law (1) violates the First Amendment; (2) is an unconstitutional taking; and (3) violates their due process rights.<sup>6</sup> If the plaintiffs are successful in winning an injunction, implementation of part of the FDA law could be further delayed.

A second advantage to state or local action on tobacco control policy issues is that such a law can be broader than the FDA law and can be customized to meet the specific needs of the jurisdiction. For example, the FDA law prohibits self-service tobacco displays but includes an exception for adult-only facilities.<sup>7</sup> Many jurisdictions in California have already adopted laws that completely ban the self-

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3. Family Smoking Prevention and Tobacco Control Act § 916(a)(1) (codified as 21 U.S.C. § 387p).

4. Campaign for Tobacco-Free Kids, Effective Dates of FDA Tobacco Law (2009), [http://www.tobaccofreekids.org/reports/fda/effective\\_dates.shtml](http://www.tobaccofreekids.org/reports/fda/effective_dates.shtml) (last visited Oct. 23, 2009).

5. *Id.* at 1–2.

6. Complaint for Declaratory Judgment and Injunctive Relief at 5, *Commonwealth Brands, Inc. v. United States*, No. 1:2009cv00117 (W.D. Ky. filed Aug. 31, 2009), available at <http://static.mgnetwork.com/rtd/pdfs/complaint.pdf>.

7. Family Smoking Prevention and Tobacco Control Act § 102 (incorporating by reference 61 Fed. Reg. 44615-44618).

service display of tobacco products.<sup>8</sup> California state law is also more restrictive than the FDA law with regard to self-service displays, authorizing such displays only in tobacco retailer stores (and vending machines in adult-only facilities).<sup>9</sup>

Another advantage to adopting a state or local law is that it provides a means to directly enforce local violations, rather than waiting for the federal government to enforce violations of the FDA law.<sup>10</sup>

Finally, a state or local law can be less susceptible to political lobbying and influence than a federal law and therefore may be able to include stronger public health protections.<sup>11</sup>

### III. Examples of Local Policy Options

State or local governments can enact tobacco control laws in a number of areas not preempted by the FDA law.<sup>12</sup> For example, a state or local government could:

1. Prohibit the sale of certain tobacco products, such as bidis,<sup>13</sup> snus,<sup>14</sup> or menthol-flavored cigarettes or smokeless tobacco products.

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8. See Technical Assistance Legal Center (TALC), Public Health Law and Policy, ANRF List of Communities with Licensing and Self-Service Display Ordinances (2009), available at <http://www.phlpnet.org/tobacco-control/products/anrf-list-communities-licensing-and-self-service-display-ordinances> (follow “ANRF List of Communities with Licensing and Self-Service Display Ordinances” hyperlink under “Attachment” (listing California communities with a local ordinance restricting self-service tobacco displays) (last visited Oct. 23, 2009). TALC has developed a model ordinance to prohibit self-service tobacco displays. Technical Assistance Legal Center, Public Health Law and Policy, Model California Ordinance Prohibiting Self-Service Display of Tobacco Products (2002), available at [http://www.phlpnet.org/sites/phlpnet.org/files/A\\_SelfServiceDisplayOrdinance\\_3\\_02.doc](http://www.phlpnet.org/sites/phlpnet.org/files/A_SelfServiceDisplayOrdinance_3_02.doc) (last visited Oct. 23, 2009).

9. Family Smoking Prevention and Tobacco Control Act § 102; CAL. BUS. & PROF. CODE § 22962 (West 2009).

10. See *infra* Section IV, for more information about this issue.

11. See Bruce Samuels & Stanton A. Glantz, *The Politics of Local Tobacco Control*, 266 J. AM. MED. ASS’N 2110 (1991), available at <http://tobaccoscam.ucsf.edu/pdf/9.4-Samuels-PoliticsofLocalTobaccoControl.pdf>.

12. The following laws are legal in California. An analysis of state law is required before embarking on any of these policies in another state. See also FEDERAL REGULATION OF TOBACCO: IMPACT ON STATE AND LOCAL AUTHORITY, (Tobacco Control Legal Consortium, St. Paul, Minnesota) available at <http://www.tclconline.org/FDA-fact-sheets.html> (last visited October 30, 2009).

13. Bidis are hand-rolled filterless cigarettes that are imported primarily from India and some Southeast Asian countries.

2. Prohibit the sale of non-tobacco products, such as candy designed to look like cigarettes and “e-cigarettes” (electronic cigarettes).
3. Prohibit the sale of tobacco in pharmacies.
4. Expand the definition of “tobacco product” in laws limiting exposure to secondhand smoke, for example by prohibiting the smoking of e-cigarettes in places where secondhand smoke exposure is limited.
5. Completely eliminate the distribution of free tobacco products or coupons for free tobacco products (a practice known as “sampling”).
6. Require a retailer to obtain a license to sell tobacco products, and allow the government to suspend the tobacco license for a violation of any local, state, or federal law including the new FDA law.

Some communities in California have already begun adopting policies in these areas.<sup>15</sup> More than ninety cities and counties in California have passed laws requiring a local license to sell tobacco products.<sup>16</sup> San Francisco, city and county, passed a law prohibiting the sale of tobacco products in most pharmacies.<sup>17</sup> The cities of Chico and San Francisco have adopted strong local ordinances to prohibit the distribution of free tobacco samples.<sup>18</sup>

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14. Snus are a form of snuff that is consumed by placing it under the lip and typically does not result in the need for spitting.

15. Note that this article does not address policy options to restrict tobacco marketing or advertising because the law in this area is unsettled. *See supra* note 5.

16. Technical Assistance Legal Center, Public Health Law and Policy, ANRF List of Communities with Licensing and Self-Service Display Ordinances, *available at* <http://www.phlpnet.org/tobacco-control/products/anrf-list-communities-licensing-and-self-service-display-ordinances> (follow “ANRF List of Communities with Licensing and Self-Service Display Ordinances” hyperlink under “Attachment”) (last visited Oct. 23, 2009).

17. S.F., CAL., HEALTH & SAFETY art. 19J, SS 1009.91-1009.99 (2008). The ordinance has been challenged by Philip Morris USA, Inc. and Walgreen Co. The 9th Circuit Court of Appeals denied Philip Morris’ request for a temporary restraining order and a preliminary injunction on September 9, 2009. *Philip Morris USA, Inc. v. City and County of San Francisco*, No. 08-17649 (9th Cir. Sept. 9, 2009) (order denying temporary restraining order and preliminary injunction). Philip Morris subsequently dropped the lawsuit on October 15, 2009. Stipulation of Dismissal; Order, No. C-08-4482-CW (N.D.Cal. October 15, 2009). The Walgreen Co. challenge has yet to be resolved as of the date of this publication.

18. *See* Buck Tobacco Sponsorship, Policy Materials, <http://www.bucktobacco.org/policy/index.html> (last visited Oct. 23, 2009).

Eliminating sampling—the distribution of free or low-cost tobacco products—is a policy option many communities are considering in light of the new FDA law. For years tobacco companies have been providing free tobacco product samples or coupons or rebates for free or low-cost tobacco products, particularly targeting young people in an effort to lure new customers. According to the Federal Trade Commission, the amount of money cigarette companies spent on sampling increased from \$17.2 million in 2005 to \$29.43 million in 2006.<sup>19</sup> Spending on sampling by smokeless tobacco companies is even higher, increasing from \$28.2 million in 2005 to \$42.0 million in 2006.<sup>20</sup>

The FDA law created new restrictions on sampling, but it does not completely eliminate sampling of smokeless tobacco.<sup>21</sup> State or local governments can supplement the FDA law with more restrictive policies that completely ban the free or low-cost distribution of all tobacco products in their communities, depending on the law in their state.<sup>22</sup>

In California, the distribution of free tobacco products is already prohibited in many public places by California law,<sup>23</sup> the Master Settlement Agreement,<sup>24</sup> and the Smokeless Tobacco Master Settlement Agreement<sup>25</sup>—but those restrictions include exceptions for some adult-only locations, such as bars and tents at tobacco-sponsored events on private property such as rodeos. The new FDA law is stricter. If the law goes into effect as planned, as of June 22, 2010, free samples of cigarettes, cigars, little cigars, and hookah

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19. FED. TRADE COMM'N, FEDERAL TRADE COMMISSION CIGARETTE REPORT FOR 2006, at 49-50 (2009), *available at* <http://www.ftc.gov/os/2009/08/090812cigarettereport.pdf>.

20. FED. TRADE COMM'N, FEDERAL TRADE COMMISSION SMOKELESS TOBACCO REPORT FOR THE YEAR 2006, at 4 (2009), *available at* <http://www.ftc.gov/os/2009/08/090812smokelesstobaccoreport.pdf>.

21. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102, 123 Stat. 1776 (codified as 21 U.S.C. § 387a-1).

22. This analysis applies to communities in California. For information on local policies in other states, consult an attorney who is familiar with the laws of that state.

23. CAL. HEALTH & SAFETY CODE § 118950 (West 2009); CAL. BUS. & PROF. CODE § 17537.3 (West 2009).

24. Master Settlement Agreement, Section III(g) (1998), *available at* <http://ag.ca.gov/tobacco/pdf/lmsa.pdf>.

25. Smokeless Tobacco Master Settlement Agreement, Section III(g) (1998), <http://ag.ca.gov/tobacco/pdf/1stmsa.pdf>.

accessories that contain tobacco will be completely banned, and free samples of smokeless tobacco products will be limited.<sup>26</sup>

Specifically, the FDA law completely bans free sampling of cigarettes, cigars, little cigars, and hookah accessories that contain tobacco;<sup>27</sup> limits free sampling of smokeless tobacco products;<sup>28</sup> and prohibits free sampling of smokeless tobacco at certain sporting events (i.e., football, basketball, baseball, soccer, and hockey events).<sup>29</sup>

However, the law contains a number of loopholes. For instance, it continues to allow the following activities:

1. The distribution of coupons, promotional offers, discounts or rebates for cigarettes or other tobacco products.
2. The distribution of nominal- or low-cost cigarette products (e.g., a tobacco company could give away cigarette packs for a penny).
3. The free distribution of smokeless tobacco in a “qualified adult-only facility.”<sup>30</sup>

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26. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102, 123 Stat. 1776 (codified as 21 U.S.C. § 387a-1).

27. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102(a)(2)(G), 123 Stat. 1776 (codified as 21 U.S.C. § 387a-1(a)(2)(G)).

28. *Id.*

29. *Id.*

30. A “qualified adult-only facility” must meet the following criteria:

1. A temporary structure creating an enclosed area for the purpose of distributing free samples of smokeless tobacco. The structure should prevent people from easily seeing inside. It may not be made of a see-through material except for entrances and exits. Also, some open space for ventilation at the ground level is permitted.
2. No tobacco advertising on the exterior, except that a brand name can be used to identify the facility. This means signs saying, for instance, “Copenhagen Territory” are still allowed.
3. The facility must not sell, serve, or distribute alcohol. This means that bars cannot distribute free smokeless tobacco unless they set up a temporary enclosed area outdoors where no alcohol is served. However, bars can still distribute coupons for free cigarettes or smokeless tobacco.
4. A law enforcement officer or licensed security guard must check a government-issued ID to ensure that anyone who enters is at least 18 years old.

There is a limit to how many samples of smokeless tobacco an adult consumer can bring out of a “qualified adult-only facility”: one package per adult per day. However, there is no limit on the use of tobacco products inside the facility. *Id.*

4. Sampling at sports such as rodeos, bull riding, and auto racing.

Because the FDA law grants state and local governments the right to enact more restrictive measures,<sup>31</sup> local governments can ban sampling completely, anywhere in their jurisdictions, including at locations that are exempt from the federal law.<sup>32</sup>

#### **IV. The Role of Legal Technical Assistance**

For state and local governments looking to enact tobacco control policies that complement or supplement the FDA law, the California Tobacco Control Program provides a strong model of coordinated support. In 1997, the California Tobacco Control Program established the Technical Assistance Legal Center (“TALC”) as a legal resource for the tobacco control movement in California. TALC does not represent clients or file lawsuits. Instead, TALC provides legal technical assistance to community organizations, local and state health department employees, government attorneys, elected officials and their staff, and others working to denormalize tobacco use through state and local legislation. TALC has been a resource for California communities that want to change their social environment by adopting local policies to reduce the availability of tobacco products, protect the public from exposure to secondhand smoke, and to minimize the visibility of tobacco advertising in communities.

TALC developed a legal technical assistance model that it has tested and refined for more than a decade. This model breaks down into five related parts: conducting legal research and writing, developing model ordinances and policies, creating user-friendly publications and trainings for advocates and other non-legal audiences to help demystify legal concepts, and offering one-on-one

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31. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 101, 123 Stat. 1776 (codified as 21 U.S.C. § 387p).

32. The Technical Assistance Legal Center (“TALC”) has a model California ordinance to prohibit tobacco product sampling. Technical Assistance Legal Center, Public Health Law and Policy, Sampling Ordinance, *available at* <http://www.phlpnet.org/tobacco-control/products/model-california-ordinance-regulating-cigarette-and-tobacco-product-samplin> (last visited Oct. 23, 2009). TALC also has developed a checklist to accompany the ordinance outlining the range of policy choices communities should consider when designing their own sampling ordinance.. Technical Assistance Legal Center, Public Health Law and Policy, Sampling Ordinance: CHECKLIST, *available at* <http://www.phlpnet.org/tobacco-control/products/prohibiting-tobacco-sampling-checklist> (last visited Oct. 23, 2009).

legal technical assistance.<sup>33</sup> For more information on the mission, vision, and structure of TALC, the California Department of Health Services wrote a monograph describing the organization as it existed in 2002.<sup>34</sup>

TALC's model ordinances have been widely used and adapted by California communities. For example, an analysis by TALC's external evaluator showed that of the twenty six local tobacco retailer licensing ordinances adopted in California while the first version of TALC's model ordinance was in effect, twenty three of these ordinances contained four of the five key provisions of the TALC model ordinance. These data suggest that the TALC model ordinance had a substantial influence on the structure and wording of local ordinances.<sup>35</sup>

A handful of other states have established centers to help provide legal technical assistance on tobacco control.<sup>36</sup> These centers are based mostly in a university/law school setting. Additionally, the Tobacco Control Legal Consortium is a national network that grew out of collaboration among existing legal programs serving five states.<sup>37</sup> Based at William Mitchell College of Law in St. Paul, Minnesota, the Consortium provides legal technical assistance to support the creation of new tobacco control legal programs and to

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33. Samantha Graff & Jacob Ackerman, *A Special Role for Lawyers in a Social Norm Change Movement: From Tobacco Control to Childhood Obesity Prevention*, 6 *PREV. CHRONIC DIS.* 3 (2009), available at [http://www.cdc.gov/pcd/issues/2009/jul/08\\_0262.htm](http://www.cdc.gov/pcd/issues/2009/jul/08_0262.htm) (last visited October 25, 2009).

34. TALC, Public Health Law and Policy, Legal Technical Assistance on Tobacco Control Policy (A Guide for Other States) (2002), <http://www.phlpnet.org/tobacco-control/products/legal-technical-assistance-tobacco-control-policy-guide-other-states> (follow "Legal Technical Assistance on Tobacco Control Policy (A Guide for Other States)" hyperlink under "Attachment") (last visited Oct. 23, 2009).

35. Carol D'Onofrio & Leslie Zellers, TALC written materials, July 1, 2007–June 30, 2009: Evaluation report, (2009) (on file with TALC).

36. See, e.g. Maryland's Legal Resource Center for Tobacco Regulation, Litigation & Advocacy <http://www.law.umaryland.edu/programs/tobacco/index.html> (last visited October 23, 2009); Massachusetts' Tobacco Products Liability Project <http://www.tobacco.neu.edu/> (last visited October 23, 2009); Michigan's Smokefree Environments Law Project <http://www.tcs.org/sfelp/home.htm> (last visited October 23, 2009); Minnesota's Tobacco Law Center <http://www.wmitchell.edu/tobaccolaw/default.asp> (last visited October 23, 2009); Ohio's Tobacco Public Policy Center [www.law.capital.edu/tobacco](http://www.law.capital.edu/tobacco) (last visited October 23, 2009). See also TALC, Public Health Law and Policy, Directory of State Legal Resources for Tobacco Control, <http://www.phlpnet.org/tobacco-control/products/legalresourcesdirectory> (last visited Oct. 23, 2009).

37. The Tobacco Control Legal Consortium, <http://tclconline.org/Tclc.asp> (last visited Oct. 23, 2009).

help communities with urgent legal needs. Consortium technical assistance services may include help with legislative drafting, legal research, legal analysis and strategy, training and presentations, preparation of friend-of-the-court legal briefs and litigation support.

## V. Enforcement

While the FDA Law greatly advances the cause of tobacco control nationwide, the effectiveness of any policy—local, statewide, or federal—depends on how well it is enforced.

The Department of Health and Human Services is the agency with primary authority to directly enforce the restrictions established in the FDA law.<sup>38</sup> Given the enormity of this task on a national level, and since it is still not clear whether the User Fees<sup>39</sup> paid by tobacco manufacturers and importers will generate sufficient revenues for a comprehensive enforcement effort, it remains to be seen how vigorously this law will be enforced.

State governments will likely play a role in enforcing the regulations through contracts with the federal government. Moreover, local governments in California can also “enforce” the FDA law through local tobacco retailer licensing ordinances. Both of these issues are described in more detail in this section.

### A. Collaboration Between Federal Government and States

The FDA law imposes several substantive restrictions on the way retailers advertise, promote, and distribute tobacco products.<sup>40</sup> Among other things, retailers may not sell tobacco products to consumers under 18 years of age,<sup>41</sup> must check the ID of all tobacco

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38. Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. § 372 (2009), *see also* generally Chapter VII.

39. Most of the administration and enforcement of the FDA Law is intended to be funded by tobacco manufacturers and importers through the imposition of “User Fees” on these businesses, which are mandated in the law. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 919, 123 Stat. 1776.

40. Many of the retailer-specific restrictions are contained in the “1996 Rule” (21 CFR sections 987.1 – 8978.34), originally promulgated in 1996 by the Secretary of Health and Human Services but overturned by the United States Supreme Court in [Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)], because the Court found that the FDA had acted outside the scope of its authority in promulgating the regulations. In Section 102 of the FDA law [Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, S 102, 123 Stat. 1776], Congress gave the Secretary specific authority to promulgate regulations and directed the Secretary to republish the 1996 Rule as a final rule, with certain amendments specified in the FDA Law.

41. 21 C.F.R. § 897.14 (1999).

purchasers under the age of 27,<sup>42</sup> may not sell individual cigarettes or any cigarettes in packs of fewer than 20,<sup>43</sup> may not have self-service displays except in adult-only facilities,<sup>44</sup> must comply with the FDA law's advertising and labeling requirements,<sup>45</sup> and may not offer promotional items in conjunction with a tobacco product purchase.<sup>46</sup> All of these requirements are set to take effect on June 22, 2010.<sup>47</sup> Several of these provisions duplicate existing state law and numerous local laws throughout the United States.

To enforce all of these restrictions, inspectors will need to physically evaluate retailers' premises and sales techniques. Historically the FDA has not conducted tobacco retailer inspections or undercover youth decoy operations, but many states (and local communities) have been doing so for years to enforce similar state and local laws.

The FDA law provides an important opportunity for state agencies to collaborate with the federal government to enforce these retailer restrictions. The FDA law amends § 702 of the Food, Drug and Cosmetic Act to provide:

For a tobacco product, to the extent feasible, the Secretary [of Health and Human Services] shall contract with the States in accordance with this paragraph to carry out inspections of retailers within the State in connection with the enforcement of this Act.<sup>48</sup>

Since the law directs the Secretary to "contract" with the States, this provision will likely provide a source of funding for state tobacco control enforcement.

In addition, the FDA law directs the Secretary to "coordinate with the States in enforcing the provisions of this Act [the Food, Drug and Cosmetic Act]."<sup>49</sup> It remains to be seen how this collaboration

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42. *Id.*

43. *Id.*

44. *Id.*; 21 C.F.R. § 897.16 (1996).

45. 21 C.F.R. §§ 897.30-.31 (1996).

46. 21 C.F.R. § 897.34 (1996).

47. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, S 102(a)(2), 123 Stat. 1776; At the time this article was written, some of these requirements are subject to legal challenge as part of the tobacco industry lawsuit. Campaign for Tobacco-Free Kids, Effective Dates of FDA Tobacco Law, *supra* note 2.

48. 21 U.S.C.A. § 372 (West 2009).

49. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, S 103(q)(2)(C), 123 Stat. 1776

will take shape, and how much control over state enforcement efforts the FDA will attempt to exert. However, for states that are already enforcing various retailer laws, this is a tremendous opportunity for the FDA to fund state enforcement techniques that are effective and to import some of those proven techniques to other states.

Importantly, the FDA law only specifically authorizes the Secretary to contract with States to help enforce the FDA law itself, not to enforce state tobacco control laws that may be stronger in many cases. The FDA law contains its own civil monetary penalties for retailer violations,<sup>50</sup> and provides:

The Secretary . . . for purposes of mitigating a civil penalty to be applied for a violation by a retailer of any restriction promulgated under section 906(d) [which includes the violations listed above in this section], *shall* consider the amount of any penalties paid by the retailer to a State for the same violation.<sup>51</sup>

This provision implies that a retailer will not be penalized under both state law and the FDA law for the same violation. This will create a dilemma for states that have stronger penalties than those provided in the FDA law itself. If a state has passed a strong law prohibiting certain conduct, should a state fund its own enforcement efforts and impose its own penalties (i.e., enforce state law) or use FDA funds to enforce the weaker penalties contained in the FDA law?<sup>52</sup> Will it be possible for a state to use funds from an FDA contract to enforce state law rather than the FDA law?

There are even more unanswered questions. For example, what happens when a retailer is penalized under a local ordinance rather than state law? In California, more than 90 cities and counties have adopted local tobacco retailer licensing ordinances, and many have active enforcement programs and penalize retailers for violation of any federal, state or local tobacco control law (see section IV.B). These penalties often include suspension of the retailer's license, prohibiting the retailer from selling tobacco products during the suspension period. If a retailer has been penalized through suspension of its tobacco retailer license rather than imposition of a

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50. See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 103(q)(2)(A), 123 Stat. 1776 (emphasis added).

51. Family Smoking Prevention and Tobacco Control Act § 103(q)(2)(C).

52. The FDA Law specifically does not preempt more stringent state laws in many areas. See Family Smoking Prevention and Tobacco Control Act § 916(a)(2).

monetary fine, how will this be considered by the Secretary in imposing fines under the FDA law?

These are all questions that must be resolved before a coordinated enforcement effort between states and the federal government can be implemented. Despite these uncertainties, however, the contracting and coordination requirements present tremendous opportunities for both the states and the federal government.

Finally, it is also possible that city and county governments may benefit from the state-federal collaboration. There is nothing in the FDA law that prevents a state from subcontracting with any of its political subdivisions for enforcement, so it is theoretically possible that some cities and counties could take advantage of federal funds for their local enforcement efforts.

### **B. Tobacco Retailer Licensing as an Enforcement Tool**

As noted earlier, in California, more than ninety cities and counties have adopted local ordinances requiring tobacco retailers to obtain a local license for the privilege of selling tobacco products. A majority of these ordinances require retailers to comply with all federal, state, and local tobacco control laws, and authorize suspension of the retailer's license for failure to do so.

These local licensing ordinances are primarily aimed at preventing illegal sales of tobacco to minors, which is prohibited by two California state laws: Penal Code § 308 and the Stop Tobacco Access to Kids Enforcement (STAKE) Act.<sup>53</sup> Instead of directly enforcing these state laws, local tobacco retailer licensing ordinances impose conditions on retailers: that they comply with all tobacco control laws. If a retailer is found to have sold tobacco to a minor (i.e., conduct that is a violation of state law), the authorized penalty is suspension of the retailer's license for failure to abide by the conditions of the license (in lieu of, or in addition to, the relative minor monetary fines contained in state law.)

There are numerous advantages to a local tobacco retailer licensing ordinance, most notably a very strong penalty that provides an effective deterrent against violations of tobacco control laws. In addition, since it is a local ordinance that is actually being enforced (based on an underlying violation of another law), communities have greater control over enforcement. That is, even state or federal laws

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53. CAL. BUS. & PROF. CODE §§ 22950-22963 (West 2009).

that local governments are not authorized to enforce directly are still conditions of a local license and can still be the basis for suspension.

Since the FDA law is a federal tobacco control law, it is already incorporated into these local tobacco retailer licensing ordinances. Although local governments are not authorized to directly enforce the FDA law, they can still conduct compliance checks for violations of the FDA law and if they find such violations, take action against a local license.

## **VI. Conclusion**

The passage of the FDA law marks a historic step for tobacco control policy nationwide. The FDA law explicitly does not preempt stricter state or local regulation in certain areas, and state or local governments may wish to enact laws that complement or supplement the FDA law for a number of reasons, including that such laws may be tailored for their community and may be directly enforced by the jurisdiction. To help communities develop and implement strong local laws, organizations like California's Technical Assistance Legal Center can provide tools such as model ordinances, training, and one-on-one consultation.

The FDA law offers a valuable opportunity for state agencies to contract with the federal government to enforce restrictions on tobacco sales. State or local governments also may be able to use tobacco retailer licensing laws as a way to enforce provisions of the FDA law. Full and comprehensive enforcement is critical to ensuring that the public health protections of the new FDA law are truly achieved.

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