STATE AND LOCAL POLICY OPTIONS TO REGULATE E-CIGARETTES
LEGAL TECHNICAL ASSISTANCE

- Legal Research
- Policy Development, Implementation, Defense
- Publications
- Trainings
- Direct Representation
- Lobby
Preservation of State/Local Authority
Nothing in the Act limits state/local authority to enact a law “prohibiting the sale . . . of tobacco products.”

Preemption of State/Local Laws
No state/locality may establish “any requirement which is different from . . . any requirement under [the Act] relating to tobacco product standards.”

Saving Clause
The preemption restriction above “does not apply to [state or local] requirements relating to the sale” of tobacco products.
# Deeming Rule Provisions

<table>
<thead>
<tr>
<th></th>
<th>Cigarettes</th>
<th>Smokeless Tobacco</th>
<th>Cigars</th>
<th>E-Cigarettes &amp; Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimum sales age of 18 and age verification under 27</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Prohibition on vending machine sales</td>
<td>Allowed in adults-only facilities</td>
<td>Allowed in adults-only facilities</td>
<td>Allowed in adults-only facilities</td>
<td>Allowed in adults-only facilities</td>
</tr>
<tr>
<td>Prohibition on self-service displays</td>
<td>Allowed in adults-only facilities</td>
<td>Allowed in adults-only facilities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minimum package size requirements</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prohibition on breaking packages by retailers (e.g., sales of loosies)</td>
<td>✓</td>
<td></td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Prohibition on free samples</td>
<td></td>
<td></td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Prohibition on characterizing flavors</td>
<td>Menthol and tobacco allowed</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mandatory warning labels on packages and advertisements</td>
<td>9 Rotating warnings</td>
<td>4 Rotating warnings</td>
<td>6 Rotating warnings</td>
<td>1 Static warning</td>
</tr>
<tr>
<td>Prohibition on brand names on non-tobacco products and brand name sponsorship of sporting and cultural events</td>
<td>✓</td>
<td></td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Required notice of advertising in any non-traditional medium</td>
<td>✓</td>
<td></td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>
BOTTOM LINE
STATE VERSUS FEDERAL AUTHORITY

FDA can enact:
• Product standards
• Nicotine yields
• Ingredients, constituents
• Construction requirements

FDA can not enact:
• Smoke-free laws
• Taxes
• Ban a class of products

States/Locals can enact:
• Smoke-free
• Taxes and pricing
• Sales & distribution
• Advertising and promotion

States/Locals can not:
• Adopt product standards
WHAT’S AN E-CIGARETTE?
POLICY OPTIONS

• Use restrictions
• Retail environment
  – Type of store
  – Location, number, density
  – Internet sales
• Sales restrictions
  – Minimum legal sale age
  – Restrict sale of certain products
  – Pricing
    • True minimum (e.g., $10.50 per pack)
    • Prohibition on discounts, coupons
    • Taxation
  – Advertising and warnings
  – Anti-preemption
POLICY DRAFTING

• Strong findings section
• Clear, consistent definitions
  – Comprehensive definition of tobacco
• Penalties focused on the seller, not youth
• Retailer education and signage
• Enforcement provisions
• Cessation support
• Anti-preemption language for state laws
• Watch out for exemptions
STATE AND LOCAL POLICY OPTIONS
SMOKE-FREE AND TOBACCO-FREE
STATE AND LOCAL POLICY OPTIONS
SMOKE-FREE AND TOBACCO-FREE

Use in schools

• Updating school policies and state and local smoke-free/tobacco-free workplace laws (i.e. adding or updating definitions and policy language), to prohibit e-cigarette use in same places where smoking is prohibited and e-cigarette possession where tobacco possession is prohibited.
LICENSING

• Selling tobacco is not a right.
• Provides information to the state where such products are being sold.
• Structure under which most other policies can be placed.
RETAIL ENVIRONMENT
RESTRICTIONS ON TYPES OF STORES

– Tobacco-only retailers
– Pharmacies
LOCATION

Restricting Retailers

- Location
  - Near schools
  - Districts
- Density
  - How close to each other
- Quantity
  - Total number overall
WASHINGTON

RCW 70.155.140
Shipping or transporting tobacco products ordered or purchased by mail or through the internet prohibited—Penalty.

MAINE

Maine Revised Statutes Title 22 Health and Welfare § 1555-F. Delivery sales of tobacco products

These laws have clear:
• Descriptions of violations
• Scope of application
• Enforcement tools
STATE AND LOCAL POLICY OPTIONS
SALES RESTRICTIONS: T21

Source: https://tobacco21.org/
STATE AND LOCAL POLICY OPTIONS
SALES RESTRICTIONS: FLAVORS
STATE AND LOCAL POLICY OPTIONS
NON-TAX PRICING

Pricing policy options:

• Prohibiting all free/nominal price sampling of e-cigarettes/e-liquids;

• Prohibiting discounting of products and redeeming coupons;

• Establishing price floors.
STATE AND LOCAL POLICY OPTIONS
MARKETING AND TESTING

Marketing

• Addressing false or misleading claims through use of state consumer protection/unfair trade practice laws;
• Placing limits on advertising as permitted by law; and
• Point-of-sale warnings.

Ingredient disclosure/lab testing

• Requiring manufacturers to report lab tests of ingredients and concentration levels.
ANTI-PREEMPTION PROVISIONS

- Allowing laboratories to experiment
STATE AND LOCAL POLICY OPTIONS
PUBLICATIONS

REGULATING ELECTRONIC CIGARETTES & SIMILAR DEVICES

Electronic cigarettes or electronic nicotine delivery systems (e-cigarettes) include a range of devices designed to deliver nicotine or other substances to users in the form of an aerosol.²

Over the last few years, these products have changed dramatically in their appearance and enjoyed a boom in popularity, thanks in part to an enormous increase in marketing efforts.¹ Many public health organizations and policymakers are concerned about the safety and public health impact of these products due,

JUUL & THE GUINEA PIG GENERATION
Public Health Concerns about Use by Young People

JUUL, the recent rapid rise in popularity of this flavored, potent, nicotine-based e-cigarette product, particularly among youth and young adults, as well as the apparent ease of access, use, and ability to open and custom-fill its supposedly closed-system cartridges, has alarmed the public health community.¹

¹ Youth use of e-cigarettes is now more common than use of conventional ciga-
CONTACT US

651.290.7506

publichealthlawcenter@mitchellhamline.edu

www.publichealthlawcenter.org

@phealthlawctr

facebook.com/publichealthlawcenter
BASELINE QUESTIONS

• Why tax?
• Which products should be taxed?
• Where should tax be levied?
• What is the appropriate level of taxation?
• How is the tax enforced?
WHY TAX E-CIGARETTES?
POLICY GOALS?

• General love of taxes?
• Discourage initiation/use?
• Revenue generation?
• Combination – revenue/incentive to switch or quit/disincentive to start?

11/20/2018
WHICH PRODUCTS SHOULD BE TAXED?
Product definitions

- Clear definition of what is being taxed is essential
- Define and tax as “tobacco products”?
WHAT IS THE APPROPRIATE LEVEL OF TAXATION?

- On parity with cigarettes?
- Lower rate based on risk?
- Same as other tobacco products?
HOW SHOULD TAX BE STRUCTURED?

• Ad valorem
• By volume?
• By concentration?
• Where is it collected?
IMPLEMENTATION AND ENFORCEMENT

Key issues:

• Effective licensing
• Burden of proof
• Laboratory for testing
• Internet sales

PUBLIC HEALTH LAW CENTER
Tobacco Control Legal Consortium

11/20/2018