

**TOBACCO SETTLEMENT REVENUE OVERSIGHT COMMITTEE  
MEETING**

**August 3, 2012**

Presenter: Rebecca Parish, Assistant Attorney General

**Questions Presented:**

*What are the restrictions placed on marketing tobacco products to youth, as provided in the Master Settlement Agreement?*

*Is there enforcement in New Mexico of these MSA restrictions?*

**The Legal Landscape**

- I. What the MSA says (Applies to OPMs only)
- II. What the Federal Laws Say (Applies to all TPMs)
- III. New Mexico Requirements for Certification (Applies to All Sellers in New Mexico)

**I. THE MSA (FULL RELEVANT TEXT IN APPENDIX)**

**Section III**

(a) **Prohibition on Youth Targeting.** No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within any Settling State.

(b) **Ban on Use of Cartoons.** Beginning 180 days after the MSA Execution Date, no Participating Manufacturer may use or cause to be used any Cartoon in the advertising, promoting, packaging or labeling of Tobacco Products.

(c) **Limitation of Tobacco Brand Name Sponsorships.**

(1) Prohibited Sponsorships. After the MSA Execution Date, no Participating Manufacturer may engage in any Brand Name Sponsorship in any State consisting of:

- (A) concerts; or
- (B) events in which the intended audience is comprised of a significant percentage of Youth; or
- (C) events in which any paid participants or contestants are Youth; or
- (D) any athletic event between opposing teams in any football, basketball, baseball, soccer or hockey league.

[...]

(g) **Ban on Youth Access to Free Samples.** After the MSA Execution Date, no Participating Manufacturer may, within any Settling State, distribute or cause to be distributed any free samples of Tobacco Products except in an Adult-Only Facility. For purposes of this Agreement, a "free sample" does not include a Tobacco Product that is provided to an Adult in connection with (1) the purchase, exchange or redemption for proof of purchase of any Tobacco Products (including, but not limited to, a free offer in connection with the purchase of Tobacco Products, such as a "two-for-one" offer), or (2) the conducting of consumer testing or evaluation of Tobacco Products with persons who certify that they are Adults.

(h) **Ban on Gifts to Underage Persons Based on Proofs of Purchase.** Beginning one year after the MSA Execution Date, no Participating Manufacturer may provide or cause

to be provided to any person without sufficient proof that such person is an Adult any item in exchange for the purchase of Tobacco Products, or the furnishing of credits, proofs-of-purchase, or coupons with respect to such a purchase. For purposes of the preceding sentence only, (1) a driver's license or other government-issued identification (or legible photocopy thereof), the validity of which is certified by the person to whom the item is provided, shall by itself be deemed to be a sufficient form of proof of age; and (2) in the case of items provided (or to be redeemed) at retail establishments, a Participating Manufacturer shall be entitled to rely on verification of proof of age by the retailer, where such retailer is required to obtain verification under applicable federal, state or local law.

[...]

**(1) Corporate Culture Commitments Related to Youth Access and Consumption.**

Beginning 180 days after the MSA Execution Date each Participating Manufacturer shall: promulgate or reaffirm corporate principles that express and explain its commitment to comply with the provisions of this Agreement and the reduction of use of Tobacco Products by Youth, and clearly and regularly communicate to its employees and customers its commitment to assist in the reduction of Youth use of Tobacco Products; designate an executive level manager (and provide written notice to NAAG of such designation) to identify methods to reduce Youth access to, and the incidence of Youth consumption of, Tobacco Products; and encourage its employees to identify additional methods to reduce Youth access to, and the incidence of Youth consumption of, Tobacco Products.

## **II. FEDERAL LAW**

On June 22, 2009, President 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 new law represents the most sweeping action taken to date to reduce what remains the leading preventable cause of death in the United States.

The Act added a new chapter to the Food, Drug and Cosmetic Act, establishing and governing the regulation of tobacco products. In addition to these new powers to regulate, the new law does the following:

- Restricts tobacco advertising and promotion in order to promote overall public health;
- Stops illegal sales of tobacco products to minors;
- Bans all cigarettes that have a characterizing flavor, including all fruit and candy flavors other than tobacco or menthol;
- Prohibits health claims about purported reduced risk products, where such claims are not scientifically proven or would cause net public health harms;
- Requires tobacco companies to disclose the contents of tobacco products, changes to their products and research about the health effects of their products;

- Requires much larger, more visible, and more informative health warning labels, including color and graphics, on cigarette and smokeless tobacco product packages;<sup>1</sup>
- Prohibits terms such as “light,” “mild” and “low-tar” on tobacco product packages and advertisements, while authorizing the FDA to restrict additional terms in the future.

In addition, the Family Smoking Prevention and Tobacco Control Act mandates restrictions on marketing and advertising of cigarettes and smokeless tobacco. The new law:

- Bans outdoor advertising within 1,000 feet of schools and playgrounds;
- Bans brand sponsorships of sports and entertainment events;
- Bans free giveaways of any non-tobacco item with the purchase of a product or in exchange for coupons or proof of purchase;
- Bans free samples, and the sale of cigarettes in packages that contain fewer than 20 cigarettes;
- Limits any outdoor and all point-of-sale tobacco advertising, except in adult-only facilities, to black text on white background only;
- Limits advertising in publications with significant teen readership to black text on white background only;
- Limits audio-visual advertising (e.g., at point of purchase), except in adult-only facilities, to black text on white background visuals and spoken words (no music, images or moving images);
- Restricts vending machines and self-services displays to adult-only facilities;
- Establishes 18 as a federal nationwide minimum age for legal cigarette and smokeless tobacco sales with strong federal penalties.
- Requires retailers to verify age of all over-the-counter sales by checking a photographic ID, and provides for federal enforcement and penalties against retailers who sell to minors.

#### **A. The State’s Involvement with the Federal law:**

The Tobacco Control Legal Consortium<sup>2</sup> states as follows:

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<sup>1</sup> This portion of the law is currently under judicial review. U.S. District Judge Leon in Washington ruled that the federal mandate to put the images, which include a sewn-up corpse of a smoker and a picture of diseased lungs, on cigarette packs violates the free speech amendment to the Constitution. This portion of the law is stayed pending further litigation.

<sup>2</sup> The Tobacco Control Legal Consortium is America’s award-winning legal network for tobacco control policy. Drawing on experts in its eight affiliated legal centers, the Consortium works to assist communities with tobacco law-related issues, ranging from smoke-free policies to tobacco control funding laws to regulation of flavored cigarettes.

The Consortium’s team of legal and policy specialists provides legislative drafting and policy assistance to community leaders and public health organizations. We are experts in designing, enacting and

**The looming question for state policymakers and health advocates is what state and local governments can do now that the FDA will regulate tobacco products and tobacco product marketing.**

**The basic bottom line is that state and local governments will retain the authority to engage in a sweeping array of tobacco control policy actions long championed by the public health advocacy communities.**

The Centers for Disease Control (CDC) provides guidelines to identify the most effective population-based approaches within the following categories:

- State and community interventions, including local policies and programs, chronic disease and tobacco-related disparity elimination initiatives and intervention aimed at influencing youth;
- Health communication intervention and counter-marketing strategies that employ paid broadcast, billboard, print, and web-based advertising at the state and local levels; media advocacy endeavors; and efforts to reduce or replace tobacco industry sponsorship and promotions;
- State-supported cessation interventions encompassing a broad array of policy, system and population-based measures;
- State surveillance which involves monitoring tobacco-related attitudes, behaviors and health outcomes at regular intervals;
- Administration and management infrastructure and staffing, since internal capacity within a state health department is essential for program sustainability, efficacy and efficiency.

States retain the power to:

- Raise tobacco tax rates;
- Enact and enforce smoke-free laws in workplaces and public places;
- Fund comprehensive state tobacco prevention programs;
- Implement counter-marketing campaigns;
- Enhance access to effective cessation treatments;
- Restrict the sale, distribution, and possession of tobacco products;
- Implement anti-smuggling and tax evasion measures.

### **III. NEW MEXICO REQUIREMENTS FOR CERTIFICATION**

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implementing laws that are evidence-based, workable, effective and legally sound.  
<http://publichealthlawcenter.org/programs/tobacco-control-legal-consortium>

AGO requires significant proof at the time of annual certification for all tobacco manufacturers requesting to do business in NM and placed on our directory of compliant brands. This includes but is not limited to:

- Actual sample of each pack and carton for every brand, style and family that is being manufactured by that manufacturer that they intend to sell in New Mexico.
- In the case of roll your own tobacco, an actual pouch or container that is used for those products for every brand, style and family being sold in NM. (while RYO does not require a state excise stamp, it is included for purposes of escrow collection because it is included in the definition of "cigarette" in the MSA).
- A copy of the State Fire Marshall's certification that the brands, styles, families have been approved as fire safer under the Fire-Safer Cigarette and Firefighter Protection Act, NMSA, 1978, §57-2B, and that the pack bears the letters "FSC" in the proximity of the bar code on the pack.
- Proof from the Department of Treasury, Alcohol and Tobacco Tax and Trade Bureau (TTB) that the manufacturer has a current permit to manufacture the cigarettes being sold.
- Approval from the Federal Trade Commission, Division of Advertising Practices, (generally in letter form) that the FTC approves of the quarterly rotation of warnings on packaging and that the warnings on the sample packs and cartons submitted to them continue to meet the requirements of the Cigarette Tact in force as of the date of that letter for size and conspicuousness. (Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, et seq.)
- Annual Certificate of Compliance from the Department of Health & Human Services, Offices on Smoking and Health, National Center for Chronic Disease Prevention and Health Promotion that the ingredient reports submitted by the manufacturers to the Department meet the requirements of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1335a.

The Office of the Attorney General strictly enforces compliance with all federal rules and laws and demands strict proof annually of adherence to all such rules and regulations.

In addition, the Office of the Attorney General has stopped the sponsorship of various sporting events, including rodeos by certain tobacco products in the last several years.