



## **THE REGULATION OF RETAIL TOBACCO SALES**

**-- UPDATED JUNE 8, 2010 --**

### **Introduction and Summary**

The enactment of the Family Smoking Prevention and Tobacco Control Act (the "Act" or the "FSPTCA") last year imposes numerous new, stringent regulations on retailers of tobacco products. This memorandum will outline those requirements in two categories: (1) regulations currently in effect and (2) regulations that will become effective on June 22, 2010.

An important note: the Act grants the Food and Drug Administration ("FDA"), the federal agency charged with implementing the law, with fairly sweeping powers in how to do so. As a result, the regulation of retail sales of tobacco products will be subject to change as the Act is put into effect. Moreover, the Act permits states and local governments to implement their own rules and regulations governing retail sales. As a result, retailers are well-advised to err on the safe side when it comes to any aspect of tobacco sales, and to consult with NACS and counsel should questions arise.

#### **DISCLAIMER**

*The following contains general information with respect to the Tobacco Control Act and FDA's Final Rule. It does not constitute the legal advice of either NACS or its counsel, Steptoe & Johnson. Readers should consult their own counsel prior to make any decisions on the legality or illegality of any specific activity that may be addressed by applicable law, regulations, or other authorities.*

## **Current Federal Regulations on the Retail Sale of Tobacco Products**

The following regulations are currently on the books:

### **1. Retailers May Not Market Tobacco Products with other Regulated Products**

The Act prohibits retailers from combining tobacco products for sale with other products that are or may be regulated by the FDA as of June 22, 2009. Here are some examples of what is not permitted under the Act:

- Adding compressed or powdered tobacco to candy or gum and the candy or gum is identified as containing a tobacco product.
- Selling a pack of cigarettes in a box, bag, or other container with a bottle of mouthwash or a bottle of skin cream.
- Offering a coupon or a 50 cent discount on a specifically identified mouthwash with the purchase of a pack of cigarettes.

Retailers should be very cautious about the sale of any tobacco product in conjunction with the sale of a non-tobacco product.

### **2. Retailers May Not Sell Flavored Cigarettes**

Effective June 22, 2009, The Act outright banned the sale of “flavored” cigarettes, and FDA has been enforcing this ban over the last six months. The ban applies to “a cigarette . . . (including the tobacco, filter, or paper) [that] contain[s an] . . . additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke.”

Retailers should never advertise or sell flavored cigarettes.

### **Retailer Regulations That Will Take Effect on June 22**

On March 18, 2010,, the FDA issued an enormous set of regulations that will become effective on June 22, 2010. The new rule contains numerous provisions of importance to retailers, including:

- No retailer may sell cigarettes or smokeless tobacco to anyone under the age of eighteen (18).



- Retailers must verify the age, through a picture identification, prior to making sales to persons under the age of twenty seven (27).
- All sales must be made in face-to-face transactions. That is, retailers may not use vending machines, self-service machines, or self-service displays of any kind to sell cigarettes or smokeless tobacco. In other words, customers may not touch cigarettes or smokeless tobacco in a store prior to purchasing a product.
- Retailers may not break open standard-sized cigarette packages (twenty (20) cigarettes per pack) and sell cigarettes in lesser quantities.
- Each retailer has an obligation to comply with the advertising and labeling requirements of the regulations. We anticipate severe limits on the ability of retailers to advertise tobacco products outdoors. EPA has initiated a rulemaking proceeding on this subject. It is not clear what requirements, if any, the FDA will impose on in-store advertising; the Act gave the FDA very wide latitude in this area. Advertising issues are highly likely to wind up in court after the final rule is announced.
- Retailers may not alter or remove the warning labels on tobacco products.
- Retailers may not offer free samples of tobacco products.
- Retailers may not accept coupons, proofs-of-purchase or similar items received from the purchase of tobacco products in exchange for any “gift” or “item.”
- Retailers may not offer a gift or other item in connection with the sale of a tobacco product (for instance, a free Marlboro shirt with the purchase of a carton of Marlboros).

Finally, though the first wave of FDA regulation of tobacco retailers has arrived, the FDA is likely to issue more stringent and broader regulations in the future. NACS will have the opportunity to comment on and challenge these regulations as appropriate.

Obviously, the regulations outlined above raise many questions for retailers. NACS has therefore prepared a question and answer document to address the matters that our members have been asking.