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Welcome to the first edition of the Center for Public Health and Tobacco Policy (Center) newsletter! The Center will be distributing this newsletter on a monthly basis for the foreseeable future as we delve into a wide array of tobacco-related issues. At some point in the future we will very likely shift to publishing newsletters only on a periodic basis as relevant information arises.

We hope to share information about new and interesting tobacco law cases, recent developments in tobacco policy, and the latest Center initiatives. Between newsletters, please visit our [website](#) for news and content updates.

We hope that the Center and this newsletter will be valuable resources for the many community partners working throughout the state of New York to reduce the harms from tobacco use. Here is a little bit more information about the Center:

### BACKGROUND

The Center is funded by a grant from the [New York State Tobacco Control Program](#) and is affiliated with [New England Law | Boston](#). Our organization is comprised of three staff members (bios are available [here](#)), as well as several student law clerks who assist with our research. Our mission is to be a first-rate legal and policy resource for New York tobacco control advo-

cates working to reduce tobacco use and the effects of tobacco.

### WEBSITE

Our website – [www.tobaccopolicycenter.org](http://www.tobaccopolicycenter.org) – will be updated regularly with the latest news in the world of tobacco law and policy. The website will also contain summaries of New York tobacco laws and relevant case law, electronic copies of toolkits and fact sheets, links to useful resources, and more. In the next few months, we will be working with a web designer to create a completely new website customized to our needs, so please check back often.

### PROJECTS

In response to the priority issues that the New York State Tobacco Control Program have outlined, the Center has been focusing on many different issues. As the New York Department of Health recently received approval for American Recovery and Reinvestment Act (ARRA) funding to work on the issues of point-of-sale promotion restrictions and limiting tobacco retail density ([press release](#)), we have begun research on those topics. We have also begun work on the statewide tobacco-free school law, as well as

smokefree outdoor air policies. We will be putting together model policies and fact sheets on these topics in the near future, which will be available on our website.

### WE NEED YOUR INPUT

You probably received an email with a survey link to provide us initial feedback on your tobacco policy needs. We very much value your input to ensure that our services are as useful to you as possible. The survey will remain open until **April 1**, so if you have not done so already, please [visit the survey here](#) to let us know how we can best assist you.

We are still looking for copies of existing smokefree outdoor policies (for example, local park resolutions or ordinances that address smoking on the park's grounds) in New York, as well as any other local tobacco control policies. If you are aware of any such policies, please let us know or send a copy to [tobacco@nesl.edu](mailto:tobacco@nesl.edu) or (617) 422-1368 (fax).

### Inside this issue:

- New York City Bans Flavored Tobacco **2**
- New York State Increases Tobacco Retail Registration **2**
- U.S. Supreme Court Ruling Complicates New York City's Efforts to Stop Tax Evasion **2**
- FDA Act Challenged **3**
- FDA Battles in Court to Regulate E-Cigarettes **3**
- San Francisco Prohibits Tobacco Sales in Pharmacies **4**

## New York City Bans Flavored Tobacco

On October 28, 2009, Mayor Bloomberg signed a new law prohibiting the sale of certain flavored tobacco products in any location other than a tobacco bar. This new law builds on the recent federal ban on flavored cigarettes and makes New York City the first city to ban flavored tobacco in all forms, including flavored cigars, cigarettes, chewing tobacco, and pipe tobacco. Research shows that nearly 90 percent of all smokers begin smoking as adolescents, and by disguising the harsh flavor and odor of tobacco, flavored tobacco increases the likelihood that children will try tobacco. The ban covers a variety of flavors, with the exception of menthol, mint, and wintergreen. Penalties for selling flavored

tobacco products range from \$500 to \$2,000, and tobacco retailers can have their licenses suspended for repeated offenses.

U.S. Smokeless Tobacco Manufacturing Company LLC and U.S. Smokeless Tobacco Brands Inc. filed suit in federal court against New York City in January 2009. In the lawsuit, they argue that the Family Smoking Prevention and Tobacco Control Act preempts local laws that exceed federal restrictions on tobacco. They also argue that New York City violated the Commerce Clause by enacting a law that restricts or bur-

dens commerce between states and that the Commerce Clause gives Congress sole power to make laws regulating interstate commerce. In addition, the Cigar Association of America wrote a letter to the New York City agencies stating that the new law does not address how retailers and distributors are to determine what products are prohibited. The ban was scheduled to take effect on February 26, 2010. The city is delaying enforcement of the ban until rules can be established, which likely will not be before early April.

A similar statewide proposal to ban flavored tobacco has been introduced in the State Assembly but has not yet been approved.

## New York State Increases Tobacco Retail Registration Fee

Last year, the New York State Assembly approved an increase in the tobacco retail registration fee for 2010. This fee had last been changed in 1990 and set a flat fee of \$100 per tobacco retail location. The increase raises fees to \$1,000 for retailers with total annual gross sales under \$1 million; \$2,500 for retailers with total annual gross sales between \$1 million and \$10 million; and \$5,000 for retailers with total annual gross sales of \$10 million or more. Annual gross sales include all products sold at the retailer's location.

In September 2009, five retail trade associations filed suit in state court (Nassau County), seeking to block the licensing fee increase. The associations argue that the license fee increase violates the Due Process Clause and the Equal Protection

Clause of the Fourteenth Amendment because there is no "rational basis" for calculating the fee based on total gross sales (as opposed to tobacco sales). The associations also claim that the increase will substantially harm or destroy their businesses because it will force them to discontinue the sale of cigarettes.

Shortly after the retail associations filed suit, State Supreme Court Justice Thomas Feinman issued a temporary restraining order barring the increase in retail tobacco registration fees. The order allowed retailers to file 2010 registration renewal forms at the previous fee of \$100 per business location.

**Update 1:** On March 10, 2010, Justice Feinman dismissed the lawsuit, finding that the retail associations had not provided any evidence that their members would be harmed by the retail fee increase, and that they therefore lacked "standing" to challenge the law.

The legal battle is far from over, however. The retail associations have appealed this ruling, and even if they lose the appeal, they are likely to refile the suit and attempt to establish proper standing. The full text of Justice Feinman's ruling is available [here](#).

**Update 2:** On March 19, 2010, the appellate court ruled that the temporary restraining order should remain in effect until it can hear arguments from the parties. The appellate court will hold a hearing on March 31.

## U.S. Supreme Court Decision Complicates New York City's Efforts to Stop Tax Evasion

On January 25, 2010, the United States Supreme Court decided that the City of New York (City) failed to properly assert a claim against out-of-state cigarette retailers for the City's loss of tax revenue resulting from the retailers' failure to report their sales to New York State. The City of New York filed a lawsuit under the State Racketeer Influenced and Corrupt Organizations Act (RICO) alleging that out-of-state cigarette retailers did not submit customer information to the State for taxation purposes, as required by the Jenkins Act. The Jenkins Act requires out-of-state cigarette sellers to register and file a report with state tobacco tax administrators listing the name, address, and quantity of cigarettes purchased by state residents. The City's theory of liability was that by failing to comply with the Jenkins Act, the retailers committed mail and wire fraud, and the City was thereby injured because it

could not collect the taxes owed to it. However, the court held that the City could not establish a RICO claim against Hemi because the City's loss of tax dollars was not "directly caused" by Hemi's failure to report its sales. The decision was reached by a 5-3 vote, with Justices Breyer, Stevens, and Kennedy dissenting. Justice Sotomayor did not participate in the decision because she had been involved in hearing the case at the Appeals Court.

In reaching its decision, the Supreme Court found that there was too great a disconnect between the asserted injury and the alleged fraud. According to the Court, the City's harm was caused by those customers purchasing cigarettes from Hemi who failed to pay their taxes, and not Hemi

itself.

In addition, since the Jenkins Act requires customers to be reported to the State and not the City, the Court suggested that "the State certainly is better situated than the City to seek recovery from Hemi," and it has the incentive to sue, because it lost tax dollars as well as result of the Jenkins Act violations. If the State were to sue, there may be some recourse for the State's lost tax revenue; however, it is unclear whether Hemi and others will be held responsible for their violation of the Jenkins Act, not to mention the "tens of millions of dollars" lost by the City.

The case is *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010), and the full text of the decision is available [here](#).

## FDA Act Challenged

The Family Smoking Prevention and Tobacco Control Act (Act) grants new powers to the U.S. Food and Drug Administration (FDA) and states to regulate tobacco products. Not surprisingly, the Act was quickly challenged in court by R.J. Reynolds and other tobacco companies.

Plaintiffs, five tobacco companies and one retailer, filed their case in federal district court in Bowling Green, Kentucky. District Court Judge Joseph H. McKinley Jr. issued his opinion on January 5th, 2010. The plaintiffs were: Commonwealth Brands, whose headquarters is in Kentucky (Malibu, Montclair, Sonoma, and Fortuna brands); Conwood Company (now the American Snuff Company, producing smokeless tobacco); Lorillard Tobacco Company (Newport, etc.); National Tobacco Company (Zig Zag products and loose tobacco); and the R.J. Reynolds Tobacco Company (Camel, etc.). Discount Tobacco City and Lottery is the plaintiff-retailer.

The tobacco companies challenged many aspects of the Act, alleging that various parts of it violated their First Amendment right of free speech and their Fifth Amendment right to due process. The Fifth Amendment protects all persons—including corporations—from the federal government depriving them of "life, liberty, or property, without *due process of law*."

The tobacco companies only won on two of their points: The court struck down a ban on the use of color and images in advertisements and packaging and a ban on statements that imply that tobacco is safer because of the new FDA regulations. The court decided that the decision to ban all colors and graphics in advertisements and packaging was too broad and restricted commercial free speech too much. According to the court, banning all color and images from packaging and ads would unfairly prevent companies from expressing harmless branding or product information.

The court also decided that the FDA could not stop tobacco companies from making statements suggesting that FDA regulation made cigarettes safer. It reasoned that the statute was worded too broadly and could have been applied to anyone—even doctors or journalists—who make public statements about tobacco products.

The government successfully defended the other challenged aspects of the Act. These aspects include bans on free tobacco samples, free gifts with tobacco purchases, brand-name sponsorship of events, and pairing tobacco and non-tobacco products for marketing purposes. The court also decided that the FDA may require larger, graphical warnings on tobacco packages.

The court did not decide whether there was a Fifth Amendment "taking" of personal property. The Act increases the health warnings to 50 percent of both sides of a pack of cigarettes and 30 percent of a smokeless tobacco product's packaging. The court determined that the tobacco companies would have to file a separate action with the Court of Federal Claims to determine whether the new rule "takes" property away from the cigarette companies by taking away space they normally use for branding and using it for a different government purpose.

Although a decision was handed down, the case is not closed. Both sides have filed their notices of appeal to the Sixth Circuit Court of Appeals. The tobacco companies filed their notice on March 5, 2010, and the government filed its notice of appeal on March 8, 2010. The new case name for the appeal will be *Discount Tobacco City & Lottery v. United States*. As of this writing, the parties have not submitted arguments to the appellate court.

Any ruling by the Sixth Circuit is likely to be appealed to the U.S. Supreme Court. Thus, the battle over the constitutionality of the Act is likely to go on for some time.

The full text of Judge McKinley's opinion is available [here](#).

## FDA Battles in Court to Regulate E-Cigarettes

As a result of steadily declining smoking rates over the past few decades, a proliferation of new tobacco products has been introduced in the last several years to capture some of the lost revenue from lower cigarette sales. One of the newest products on the market is the electronic cigarette (e-cigarette), a cigarette-like device with a heating element that vaporizes a nicotine-laced liquid. Many e-cigarette distributors have marketed the product as a way for smokers to satisfy their nicotine dependence without many of the harmful ingredients of cigarette smoke—and as an aid to continue the ritual of smoking. However, there is not a large body of evidence related to the harmfulness of these products. Furthermore, the Division of Pharmaceutical Analysis in the U.S. Food and Drug Administration's Center for Drug Evaluation and Research issued a warning in July 2009 that their tests of e-cigarettes revealed significant traces of carcinogens and toxins. The debate continues among the tobacco control community regarding the use of other tobacco products to reduce harm.

Smoking Everywhere, an e-cigarette distributor, filed suit in U.S. District Court against the U.S. Food and Drug Administration (FDA). NJOY, another e-cigarette distributor, also intervened to join the suit as a plaintiff. In *Smoking Everywhere, Inc. v. U.S. Food and Drug Administration*, Smoking Everywhere imported e-cigarette devices from a foreign manufacturer, and the FDA seized the

shipments and ordered that they be exported or destroyed. The FDA justified the action by stating that the e-cigarettes are subject to FDA authority as unapproved drug-delivery devices. Smoking Everywhere filed for a preliminary injunction to release the seized products, arguing that e-cigarettes should be classified by the FDA as a tobacco product.

Smoking Everywhere made several arguments in favor of the FDA treating e-cigarettes as a tobacco product. They argue that e-cigarettes are the functional equivalent of traditional cigarettes. They also point out that the nicotine used in e-cigarettes is derived from tobacco plants. Although the Family Smoking Prevention and Tobacco Control Act (Act) now grants the FDA the authority to regulate tobacco products, the Act places significantly more restrictions on how the FDA can regulate tobacco products as opposed to drug-delivery devices.

The FDA made several arguments of their own to justify regulating e-cigarettes as a drug-delivery device, as it has regulated products like nicotine patches for years. A drug-delivery device is defined as a product "intended to affect the structure or any function of the body." The FDA claims that the way e-cigarettes are labeled and marketed "represent and suggest that the product[s] will provide the same drug effects on the structure and function of the human body as cigarettes." The FDA also contends that Smoking Everywhere (as opposed to

NJOY) markets its e-cigarettes as cessation products, which would satisfy an alternate definition of drug-delivery devices as a product "intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease."

The court determined that "any product made or derived from tobacco that is intended for human consumption" was not under FDA authority prior to the recent Act, but would now be regulated as a tobacco product as a result of the Act. Furthermore, the court rejected the FDA's argument that Smoking Everywhere marketed its product as a cessation device, finding that its marketing and labeling encouraged nicotine use. Accordingly, the court determined that Smoking Everywhere was likely to succeed on the merits when its case goes to trial. Accordingly, the court granted Smoking Everywhere's motion for preliminary injunction to release the seized e-cigarettes. The FDA appealed the decision and was granted a temporary stay of the U.S. District Court's injunction until the appeals court can review the case.

Both the Attorneys General of California and Oregon have sued e-cigarette distributors for health claims made, as well as for marketing to children. A bill to prohibit the sale of e-cigarettes has been introduced in the New York State Assembly and can be found [here](#).

## San Francisco Prohibits Tobacco Sales in Pharmacies

On October 1, 2008, an ordinance went into effect in San Francisco, CA (City) banning tobacco sales at pharmacies. Under the ordinance, pharmacies are not allowed to sell tobacco products, with the exception of pharmacies housed within grocery stores and big box stores such as Costco. The ordinance reflects public health interests, since pharmacies are generally perceived as retail outlets aimed towards improving the health of their customers.

Philip Morris USA, Inc. and Walgreens swiftly engaged in litigation in an effort to invalidate the law. On September 24, 2008, Philip Morris filed a lawsuit challenging the ordinance, insisting that it infringes on the company's freedom of speech because it interferes with its ability to communicate with customers. The City

countered this argument by maintaining that the ordinance only applies to conduct and not to speech. The Court agreed. U.S. District Judge Claudia Wilken denied Philip Morris's request for a temporary restraining order that would have prevented enforcement of the ordinance until the case went to trial. The Ninth Circuit Court of Appeals affirmed the decision in September 2009, and Philip Morris decided to dismiss its claim in October.

Walgreens also had filed a lawsuit on September 8, 2008, in San Francisco Superior Court claiming the ordinance is discriminatory against drug stores and requesting a preliminary injunction. The chain operates 52 stores in San Francisco and argued that the ordinance was a violation of the Equal Protection Clause of the Fourteenth Amendment and would result in major financial losses for Walgreens. The Equal Protection Clause

prohibits states from denying "to any person within its jurisdiction the equal protection of the laws." The drugstore chain's request for a preliminary injunction was denied on September 30, 2008. The Court agreed with the City that it has a legitimate interest in banning tobacco sales at specific businesses, like pharmacies, that are seen as having a purpose of promoting public health. On December 23, 2008, Walgreens appealed the decision to the state appellate court where it is currently being litigated.

In Boston, MA the Boston Public Health Commission unanimously passed a similar law that bans the sale of tobacco products in pharmacies. The ban took effect on February 9, 2009. The Boston law has not been challenged in court.

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The Center for Public Health and Tobacco Policy (Center) is a new resource for the New York tobacco control community. The Center is funded by the New York State Department of Health and works with the New York State Tobacco Control Program and its contractors to develop and support policy initiatives that will reduce tobacco-related morbidity and mortality in New York.

The Center is located at New England Law | Boston and is a project of the Center for Law and Social Responsibility. The Center is also affiliated with the Tobacco Control Legal Consortium.

The Center works with tobacco control advocates in New York to support the adoption of evidence-based policies that reduce the availability of tobacco products, protect non-smokers from secondhand smoke, and minimize tobacco advertising and promotion.

**Please note: The Center is funded to provide assistance to the New York State Tobacco Control Program and its contractors. At this time, the Center is unable to provide assistance to individuals and groups who are not funded by the New York State Tobacco Control Program.**