

STATE AND LOCAL POLICY OPTIONS TO REGULATE E- CIGARETTES



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Tobacco Control Legal Consortium

11/20/2018

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TOBACCO CONTROL ACT



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TOBACCO CONTROL ACT

STATE AND LOCAL AUTHORITY

Preservation of State/Local Authority

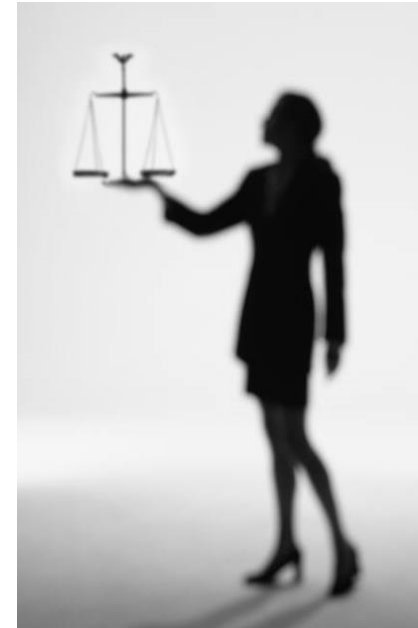
Nothing in the Act limits state/local authority to enact a law “prohibiting the sale . . . of tobacco products.”

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

	 CIGARETTES	 SMOKELESS TOBACCO	 CIGARS	 E-CIGARETTES & OTHERS
Minimum sales age of 18 and age verification under 27	✓	✓	✓	✓
Prohibition on vending machine sales	Allowed in adults-only facilities	Allowed in adults-only facilities	Allowed in adults-only facilities	Allowed in adults-only facilities
Prohibition on self-service displays	Allowed in adults-only facilities	Allowed in adults-only facilities		
Minimum package size requirements	✓			
Prohibition on breaking packages by retailers (e.g., sales of <u>loosies</u>)	✓	✓		
Prohibition on free samples	✓	Allowed in qualified adults-only facilities	✓	✓
Prohibition on characterizing flavors	Menthol and tobacco allowed			
Mandatory warning labels on packages and advertisements	9 Rotating warnings	4 Rotating warnings	6 Rotating warnings ¹⁰	1 Static warning
Prohibition on brand names on non-tobacco products and brand name sponsorship of sporting and cultural events	✓	✓		
Required notice of advertising in any non-traditional medium	✓	✓		



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?



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Sample Number:
AGO-2018-032
Collected From:
Kingman H.S.
Submitted:
4-10-18

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AGO-2018-032
Collected From:
Kingman H.S.
Submitted:
4-10-18

11/20/2018

Derek A. Neblas
05/31/00 09/05/16

K100
BIOLOGICAL FLUORESCENCE
ANALYSIS

SAFE PRO
Pen Cap
FLUORESCENCE
ANALYSIS

Bestimung
11.10.18

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



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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



JCH

The New York Times

BUSINESS DAY

CVS Stores Stop Selling All Tobacco Products

By RACHEL ABRAMS SEPT. 3, 2014



Antismoking signs are posted where cigarettes once were displayed at a CVS in Manhattan that no longer sells tobacco products. Andrew Rensen/The New York Times



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LOCATION

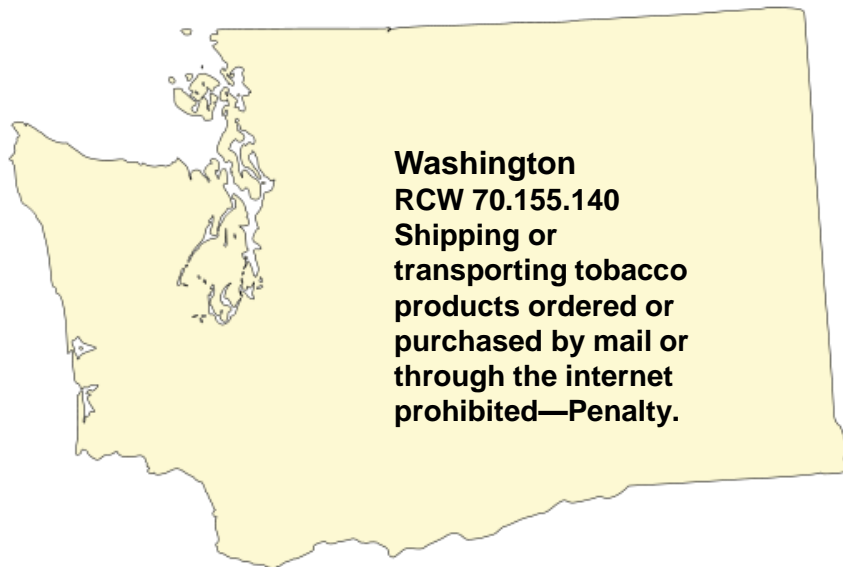
Restricting Retailers

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



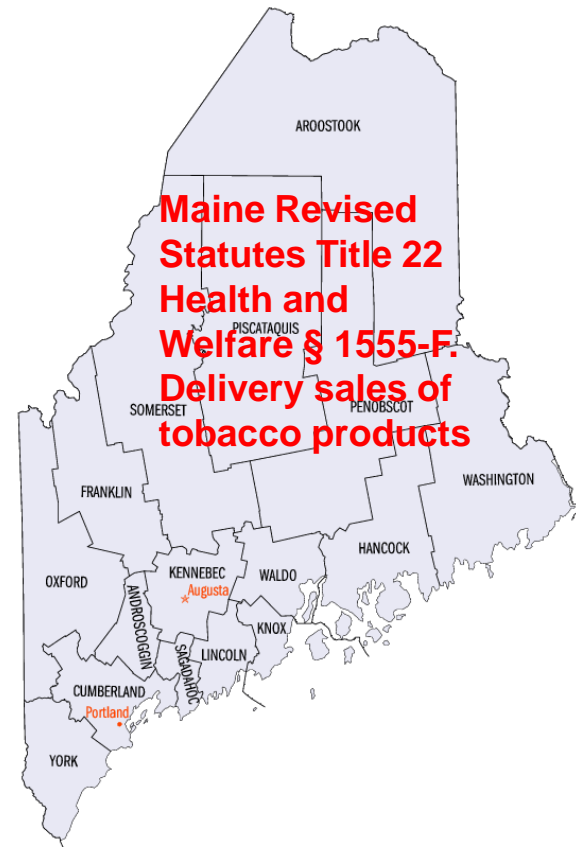
STATE AND LOCAL POLICY OPTIONS

INTERNET SALES RESTRICTIONS



These laws have clear:

- Descriptions of violations
- Scope of application
- Enforcement tools



TOBACCO 21 MOVEMENT



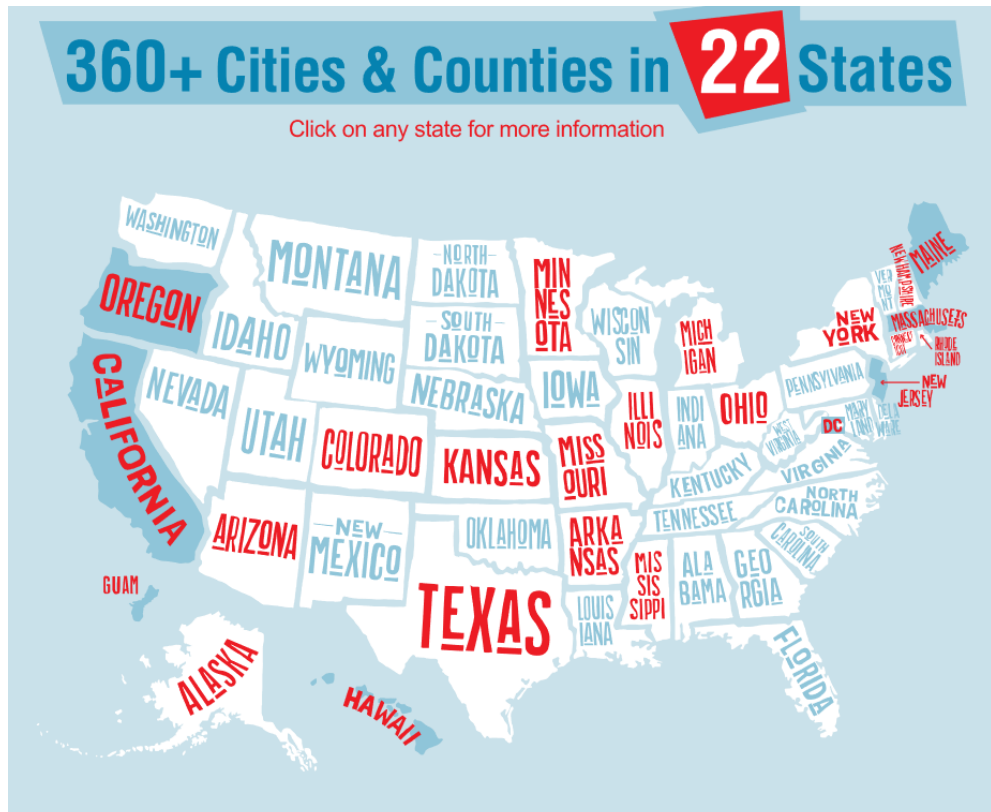
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STATE AND LOCAL POLICY OPTIONS

SALES RESTRICTIONS: T21



Source: <https://tobacco21.org/>



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SALES RESTRICTIONS: FLAVORS



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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.



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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



grassrootschange.net

STATE AND LOCAL POLICY OPTIONS PUBLICATIONS

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**E-CIGARETTE
REGULATION**

January 2017



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.³

Many public health organizations and policymakers are concerned about the safety and public health impact of these products due,



**These products
have enjoyed
a boom in
popularity.**

**PUBLIC HEALTH
LAW CENTER**
at Mitchell Hamline School of Law

E-CIGARETTES

April 2018



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

Youth use of e-cigarettes is now more common than use of conventional cigarettes.⁴ The most significant concern is e-



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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?



WHICH PRODUCTS SHOULD BE TAXED?



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- 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

