

Sampling: How does the FDA law affect local ordinances in California?

Current Limits on Sampling

The distribution of free tobacco products is already prohibited in many public places by California law,³ the Master Settlement Agreement,⁴ and the Smokeless Tobacco Master Settlement Agreement⁵ —but those restrictions include exceptions for some adult-only locations, such as bars and tents at tobacco-sponsored events on private property such as rodeos. The new FDA law is stricter. As of June 22, 2010, free samples of cigarettes, cigars, little cigars, and hookah accessories that contain tobacco are completely banned, and free samples of smokeless tobacco products are limited.⁶

The chart on the following page describes the FDA law's main limits on tobacco sampling; the loopholes allowed by the FDA law; and suggestions on how communities can close these loopholes via a local ordinance.

Closing the Loopholes

The FDA law expressly grants state and local governments the right to enact measures that are more restrictive than those in the federal law.⁷ Local governments have the power to completely ban the free or low-cost distribution of all tobacco products anywhere in their jurisdictions, including at locations that are exempt from the federal law. TALC has a model sampling ordinance to help communities create their own local law.

TALC's *Model California Ordinance Regulating Tobacco Product Sampling* offers options for communities interested in enacting comprehensive policies to prevent tobacco companies from luring young adults with free samples. Communities can customize this ordinance to fit their specific needs.

TALC also has developed a helpful *Tobacco Sampling Ordinance Checklist* to accompany the ordinance. The checklist outlines the range of policy choices communities must consider when designing their own sampling ordinance to help a community think through each possible option.

You can download both the model ordinance and the checklist from TALC's website at www.phlpnet.org/tobacco-control. TALC staff attorneys are also available to consult with individual communities to help them customize a sampling ordinance and ensure its effectiveness. Additional resources for a new sampling ordinance are available at www.bucktobacco.org/policies/index.html.



For years, tobacco companies have been distributing free samples of tobacco products (a practice known as “sampling”), particularly targeting young people in an effort to lure new customers. The Family Smoking Prevention and Tobacco Control Act, commonly referred to as the FDA law, created new restrictions on sampling, but it does not completely eliminate sampling of smokeless tobacco.¹

Local governments can supplement the FDA law with more restrictive policies that completely ban the free or low-cost distribution of all tobacco products in their communities.² This fact sheet explains what types of sampling the federal law will prevent, and where. It also outlines what communities can do to further restrict free tobacco giveaways.

This document is one in a series of TALC FDA Law Notes addressing issues around the recently enacted Family Smoking Prevention and Tobacco Control Act. All of the FDA Law Notes are available at www.phlpnet.org/tobacco-control.

What is a “Qualified Adult-Only Facility”?

Under the FDA law, smokeless tobacco can be distributed at a “qualified adult-only facility,” which must meet the following criteria:⁸

1. A temporary structure creating an enclosed area for the purpose of distributing free samples of smokeless tobacco. The structure should prevent people from easily seeing inside. It may not be made of a see-through material except for entrances and exits. Also, some open space for ventilation at the ground level is permitted.
2. No tobacco advertising on the exterior, except that a brand name can be used to identify the facility. This means signs saying, for instance, “Copenhagen Territory” are still allowed.
3. The facility must not sell, serve, or distribute alcohol. This means that bars cannot distribute free smokeless tobacco unless they set up a temporary enclosed area outdoors where no alcohol is served. However, bars can still distribute coupons to reduce the cost of cigarettes or smokeless tobacco.
4. A law enforcement officer or licensed security guard must check a government-issued ID to ensure that anyone who enters is at least 18 years old.

There is a limit to how many samples of smokeless tobacco an adult consumer can bring out of a “qualified adult-only facility”: one package per adult per day.⁹ However, there is no limit on the use of tobacco products inside the facility.¹⁰



Eliminating Sampling in Your Community

FDA Law	Loopholes	Closing the Loopholes
Completely bans free sampling of cigarettes, cigars, little cigars, and hookah accessories that contain tobacco ¹¹	Allows distribution of nominal- or low-cost cigarette products (e.g., tobacco company could give away cigarette packs for a penny) Allows distribution of coupons, promotional offers, discounts or rebates to reduce the cost of cigarettes or other tobacco products	Local sampling law can completely ban: Distribution of nominal- or low-cost cigarettes or other tobacco products Distribution of coupons, rebates, etc., to reduce the cost of cigarettes or other tobacco products All sampling of cigarettes and other tobacco products everywhere in the city or county, such as bars, rodeos, fraternity or sorority events, and retail outlets
Limits free sampling of smokeless tobacco products ¹²	Allows smokeless tobacco to be given away for free in a “qualified adult-only facility” (QAF) (see left sidebar) Allows distribution of nominal- or low-cost smokeless tobacco products (e.g., tobacco company could give away tin of smokeless tobacco for a penny) Allows distribution of coupons, promotional offers, discounts or rebates to reduce the cost of smokeless tobacco products	Local sampling law can completely ban: Free tobacco samples everywhere in the city or county Distribution of nominal- or low-cost smokeless tobacco products Distribution of coupons, rebates, etc., to reduce the cost of smokeless tobacco products
Prohibits free sampling of smokeless tobacco at certain sporting events (e.g., football, basketball, baseball, soccer, and hockey events) ¹³	Does not include sports where sampling most commonly occurs, such as rodeos, bull riding, and auto racing (note: the Secretary of Health and Human Services can expand the list of sporting events covered by this provision)	Local sampling law can prohibit sampling at all local sporting events, including rodeos, bull riding, and auto racing
Sampling provisions of FDA law took effect June 22, 2010 ¹⁴	The FDA’s enforcement mechanisms are not yet in place, and the legal challenge to the provision may impede the FDA’s ability to enforce the law (see footnote 1)	Local sampling laws can take effect at any time Local sampling laws allow a community to enforce violations locally

The Technical Assistance Legal Center (TALC) is a project of Public Health Law & Policy (PHLP). PHLP is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state. This material was made possible with funds received from the California Department of Public Health under contract #09-11182.

¹ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 102, 123 Stat. 1776 (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C., and 21 U.S.C.); 21 U.S.C. § 387a-1 (2010). At the time this fact sheet was written, major tobacco companies have challenged the FDA law, including a claim that the law’s limits on free sampling are unconstitutional. The lower court disagreed, but the case was appealed and is waiting to be heard by the Court of Appeal. Regardless of the decision at the appeals court, the case is likely to be appealed again to the U.S. Supreme Court. Only a U.S. Supreme Court decision – whether good or bad – would impact California sampling laws. Please contact TALC for more information on this lawsuit as it moves forward. *Commonwealth Brands, Inc. v. USA*, 678 F.Supp.2d 512 (W.D.Ky. Jan 05, 2010). Available at: <http://howappealing.law.com/Commonwealth-USA-Decision.pdf>.

² This fact sheet applies to communities in California. For information on local policies in other states, consult an attorney who is familiar with the laws of that state.

³ Cal. Health & Safety Code § 118950 (West 2009); Cal. Bus. & Prof. Code § 17537.3 (West 2009).

⁴ Master Settlement Agreement. 1998, § III(g). Available at: <http://ag.ca.gov/tobacco/pdf/1msa.pdf>.

⁵ Smokeless Tobacco Master Settlement Agreement. 1998, § III(g). Available at: <http://ag.ca.gov/tobacco/pdf/1stmsa.pdf>.

⁶ 21 U.S.C. § 387a-1 (2009).

⁷ 21 U.S.C. § 387p(a)(1) (2009).

⁸ 21 U.S.C. § 387a-1(a)(2)(G) (2009).

⁹ *Id.*

¹⁰ See 21 U.S.C. § 387a-1(a)(2)(G) (2009).

¹¹ 21 U.S.C. § 387a-1(a)(2)(G) (2009).

¹² *Id.*

¹³ *Id.*

¹⁴ 21 U.S.C. § 387a-1(a)(2)(F) (2009).