PUBLIC HEALTH LAW CENTER
at Mitchell Hamline School of Law

RETAIL SALES

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USING RETAILER AVCs AS A TOOL IN TOBACCO CONTROL

Photo: CounterTobacco.Org

The commercial tobacco industry[1] spends over $7 billion annually advertising and promoting its products.[2] Of that amount, more than 80 percent is for retail price promotions and discounts, payments for prominent tobacco product displays, and other marketing tactics at the retail level.[3]

Studies have shown the effectiveness of tobacco marketing in increasing youth initiation and in making it harder for tobacco users to quit.[4] As a result, restricting tobacco advertising has long been a key tobacco control strategy.

The tobacco industry is already limited to a certain extent in the way it can advertise many of its products. Under the 1998 Master Settlement Agreement and Minnesota tobacco settlement — negotiated between the tobacco companies and state attorneys general to settle lawsuits against the tobacco industry — the major tobacco companies agreed to several advertising restrictions.[5] The settlement agreements apply to marketing practices such as cartoon ads, brand name merchandise, and billboards and other outdoor advertising, but still allow many other forms of tobacco marketing, and only apply to participating tobacco manufacturers — not tobacco retailers.[6]

Another group of tobacco advertising restrictions, known as Assurances of Voluntary Compliance (AVCs), are also based on legal agreements with state attorneys general.[7] These agreements resolved investigations by state attorneys general into alleged violations of state consumer protection laws stemming from illegal tobacco sales to underage youth by tobacco companies and national retail chains. This factsheet provides a brief overview of AVCs and addresses common questions related to their use in regulating tobacco advertising in the retail environment.[8]

Q: How many tobacco retail stores operate in the U.S.?

A: Approximately 380,000 retail stores sell tobacco products, including stores that exclusively sell e-cigarettes (i.e., "vape shops"), in the U.S.[9] This number is equivalent to 25 tobacco retailers for every Starbucks and 28 tobacco retailers for every McDonalds.[10] Retail locations range from convenience stores, supermarkets and liquor stores to pharmacies, tobacco shops, and vape shops. The prevalence of tobacco retailers, along with the tobacco industry's significant investment in marketing at the retail level, has a clear impact on tobacco product sales and use, particularly by youth.[11]

Q: What authority do state governments have to regulate tobacco advertising at the retail level?

A: In 2009, the federal Family Smoking Prevention and Tobacco Control Act expanded the authority of state governments to regulate tobacco advertising, including the retail environment at the point of sale.[12] The retail environment refers to any location where tobacco products are advertised, displayed, or purchased, including at the register, and outside the store.[13] In addition, state consumer protection laws grant state attorneys general the authority to regulate tobacco marketing by tobacco retailers that is unfair, deceptive or, in some states, unconscionable (i.e., sales of addictive tobacco products to minors).[14]

Q: What are tobacco-related AVCs?

A: An AVC is a formal, legally binding agreement between a state attorney general and an individual or company that the attorney general believes either violated or may in the future violate state consumer protection law.[15] AVCs are typically drawn up as part of an ongoing multi-state tobacco enforcement effort among state attorneys general. Multi-state tobacco-related AVCs have been entered into with the parent companies of national convenience store chains such as 7-Eleven, ConocoPhilips, BP Products, Exxon, Shell and Valero.[16] Other AVCs

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cover retail chains such as Kroger, Walgreens, Rite Aid and WalMart.[17] The AVC provisions apply directly to stores owned by the parent company signing the agreement (company-owned stores), and also can contain commitments form the parent-company to extend certain provisions to franchise-owned stores.

These agreements incorporate "best practices" developed in consultation with public health researchers and state and federal tobacco control officials, such as limits on the type and location of tobacco advertising permitted in retail stores. If there is sufficient evidence of a violation of an AVC, the state attorney general that signed the AVC can file an action in court to enforce the agreement. The violating company could then be held in contempt of court and ordered to pay monetary restitution, attorney's fees, and penalties related to violating the agreement.

Q: Do the tobacco settlement agreements apply to advertising by tobacco retailers?

A: Tobacco settlement agreement provisions only apply to advertising by the *tobacco manufacturers* who agreed to the settlements — not to tobacco retailers.[18] For example, the settlement agreement provisions alone would not prohibit tobacco retailers from advertising or marketing their tobacco products in ways forbidden to settling tobacco manufacturers unless that manufacturer is in some way involved in the advertising (that is, by acquiescing in the use of its trademarks, logos, or brands or by contributing to the costs of an advertisement).

Tobacco-related AVCs limit advertising by tobacco retailers subject to the AVC, and cover tobacco products regardless of manufacturer. An AVC also can incorporate Master Settlement agreement provisions in order to apply them to a tobacco retailer. For example, an AVC between multiple state attorneys general and the national convenience store chain 7-Eleven requires that tobacco advertising signage outside of its company-owned stores is consistent with the terms of the 1998 Master Settlement Agreement.[19]

Q: What are some common AVC provisions?

A: The terms of tobacco-related AVCs vary, depending upon negotiations between parties. Some of the most common provisions for tobacco retailers include:

- **Advertising.** Companies agree to refrain from using advertising that targets youth.
- **Candy Cigarettes and Other Tobacco Look-Alike Products.** Companies agree to refrain from selling candy cigarettes and other tobacco product look-alikes.
- **Equipment.** Companies agree to install and use cash registers that require store clerks to enter the customer's birth date before completing the sale.
- **Franchises.** Companies agree to provide franchisees with opportunities to participate in monitoring and enforcement programs, and other tobacco retailing programs. Also, companies agree to include in their franchise agreements that violations of youth access laws can be taken into consideration for continuing or renewing franchise agreements.
- **Monitoring and Enforcement Programs.** Companies agree to use an independent agency to perform unannounced compliance checks on company stores. These unannounced visits are often referred to as "mystery shopper" programs.
- **Hiring Policies.** Companies agree not to hire anyone under 18 for positions that involve selling tobacco products.
- **Placement of Tobacco Products within Store.** Companies agree to prohibit the use of vending machines on store premises, and to store and display tobacco products in an area that requires employee assistance in retrieving them (in other words, no self-service of tobacco products).
- **Sales Restrictions.** Companies agree not to sell smoking paraphernalia, including matches and lighters, to youth under the age of 18, or single cigarettes or other modes of packaging cigarettes in packs of less than 20.

- **Training Policies.** Companies agree to provide comprehensive training for each new employee about the law and company policy regarding underage sales. Many AVCs require companies to test employees on company policy and underage sales laws prior to selling and again on an annual basis.[20]

Q: How do AVCs apply to e-cigarettes?

A: Virtually all of the existing multi-state tobacco-related AVCs pre-date the proliferation of e-cigarettes and their regulation as tobacco products at the state level. E-cigarettes were introduced into the U.S. in 2007, and the first state laws banning sales of e-cigarettes to minors were enacted in 2010.[21]Multi-state tobacco-related AVCs were executed between 2002 and 2011.[22] However, there is some evidence that AVCs can have an impact on illegal e-cigarette sales to minors. Community audits of adherence to AVCs by local retailers has resulted in retail chains voluntarily applying AVC provisions to e-cigarette products.[23] One study of the impact of AVCs on e-cigarette sales in California convenience stores found that stores directly subject to an AVC (that is, company-owned stores) were less likely to engage in illegal sales of e-cigarettes to underage youth than franchise-owned stores that are not direct parties to an AVC.[24]

Q: What are the advantages of multi-state agreements like AVCs as a tobacco control tool?

A: Coordinated agreements by attorneys general, on behalf of states, have become more common as businesses have grown larger and more technologically advanced. States have found that combining their efforts and resources allows them to tackle issues few states could handle alone. Multi-state agreements can restrict advertising without being subject to First Amendment challenges; include provisions that states would be preempted or prevented by federal law from enacting as a state statute or regulation; and provide payments for consumers, attorney’s fees, and consumer education programs. By joining together to resolve problems of nationwide significance (such as tobacco product advertising), states can accomplish more than they could by tackling issues separately.

Tobacco retailers and related businesses also have a vested interest in these multi-state agreements. Even in smaller cases, a company’s financial exposure increases if a settlement is not reached. Without the multi-state approach, a company is likely to find itself the target of numerous individual state actions filed simultaneously in various state courts. The cost of defending such actions can become prohibitive and usually there is no way a defendant can require consolidation of these actions in a single federal court, since each action is based upon

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state law. An AVC also can contain a "Release and Resolution of Claims," where the state attorneys general signing the AVC agree not to prosecute consumer protection claims for certain unlawful conduct (such as illegal tobacco sales to minors) that happened before the AVC went into effect.[25]

Q: What are a few examples of tobacco-related AVCs?

A: The table below contains select examples of advertising provisions from tobacco-related, multistate AVCs. These examples apply to company-owned stores. This list is not comprehensive and is provided for illustrative purposes only. Summaries and links to the full texts of tobacco-related AVCs are available here.

Examples of Advertising-Specific AVC Provisions

AVC Provision	7-Eleven[26] (convenience stores/gas stations)	Kroger[27] (supermarkets)	Rite Aid[28] (pharmacies)
Limit tobacco signage to brand names, logos, and prices		✓	✓
Confine all tobacco advertising signage inside the store to the area where tobacco products are sold		✓	✓
Maintain a company policy that prohibits tobacco advertising inside the store that appeals to or directly or indirectly targets youth	✓		
Prohibit tobacco advertising signs that are located outdoors or on windows facing outward at stores located within 500 feet of any public playground area or any elementary or secondary school	✓	✓	
Maintain a company policy that prohibits placement of tobacco signage adjacent (within two feet) to candy, toys or other products typically purchased by or for children	✓		

* Kroger currently owns the following retailers: Baker's, City Market, Dillons, Food 4 Less, Foods Co, Fred Meyer, Fry's, Gerbes, Jay C Food Store, King Soopers, Kroger, Mariano's, Metro Market, Pay-Less Supermarkets, Pick'n Save, QFC, Ralphs, Ruler, Smith's Food, and Drug.[29]

Contact Us

Please feel free to contact the Public Health Law Center at publichealthlawcenter@wmitchell.edu or (651) 290-7506 with any questions about the information in this publication.

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Endnotes

1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. Comparatively, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit http://www.keepitsacred.itcmi.org. When the word "tobacco" is used throughout this document, a commercial context is implied and intended.

2 Fed. Trade Comm'n, Cigarette Report for 2020 (2021), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-cigarette-report-2020-smokeless-tobacco-report-2020/p114508fy20cigarettereport.pdf (finding that U.S. tobacco marketing costs increased from $7.62 billion in 2019 to $7.84 billion in 2020).

3 *Id.* at 20 (finding that $6.4 billion was spent on advertising and promotion at the retail level in 2020 (this figure does not include promotional payments made to tobacco wholesalers)).

4 *See, e.g.,* Tobacco Control Legal Consortium, *Cause and Effect: Tobacco Marketing Increases Youth Tobacco Use: Findings from the 2012 Surgeon General's Report on Youth and Young Adult Tobacco Use* (2012), https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-SGReport-Findings-Youth-Marketing-2012.pdf.

5 The 1998 Minnesota Tobacco Settlement settled a historic consumer fraud and antitrust case against the major tobacco companies. State of Minnesota v. Philip Morris, Inc., No. C1-94-8565 (Minn. Dist. Ct., May 8, 1998), https://www.publichealthlawcenter.org/sites/default/files/resources/mn-settlement-agreement.pdf. The 1998 Master Settlement Agreement settled cases brought by 46 state attorneys general against the major tobacco companies. Master Settlement Agreement (1998), https://www.publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf.

6 *See, e.g.*, Dennis Eckhart, Tobacco Control Legal Consortium, *The Tobacco Master Settlement Agreement: Enforcement of Marketing Restrictions* (2004), http://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-marketing-2004.pdf.

7 In some states, these agreements are also called "assurances of discontinuance." Brad S. Krevor et al., *Application of Consumer Protection Authority in Preventing Tobacco Sales to Minors*, 11 Tobacco Control 109 (2002).

8 The information contained in this document is not intended to constitute or replace legal advice.

9 Ctrs. for Disease Control & Prevention, *STATE System Licensure Fact Sheet* (Jan. 27, 2022), https://www.cdc.gov/statesystem/factsheets/licensure/Licensure.html#:~:text=There%20are%20at%20least%20380%2C000%20tobacco%20retailers%20in%20the%20United%20States.&text=As%20of%20December%2031%2C%202021,products%E2%80%9D)%20over%20the%20counter.

10 Statista, Number of Starbucks stores in the United States from 2005 to 2021 (Nov. 2021), https://www.statista.com/statistics/218360/number-of-starbucks-stores-in-the-us/#:~:text=Number%20of%20Starbucks%20stores%20in%20the%20U.S.%20from%202005%20to%202021&text=Globally%20famous%20coffeehouse%20chain%2C%20Starbucks,the%20United%20States%20in%202021; Statista, Number of McDonald's restaurants in North America from 2012 to 2020, by Country (Feb. 2021), https://www.statista.com/statistics/256040/mcdonalds-restaurants-in-north-america/.

11 Ctr. for Pub. Health Systems Sci., *Point-of-Sale Report to the Nation Realizing the Power of States and Communities to Change the Tobacco Retail and Policy Landscape* (2016), https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/e/1037/files/2017/10/Reporttothenation_2016-2mfepqr.pdf.

12 Public Health Law Center, *Regulating Tobacco in a Post-Deeming World: State and Local Options* (2016), https://www.publichealthlawcenter.org/sites/default/files/resources/phlc-tobacco-post-deemingreg-2016.pdf.

13 Ctr for Pub. Health Systems Sci., *supra* note 11.

14 Krevor et al., *supra* note 7.

15 *Id.*

16 State of Cal. Dep't of Just., Enforcement Areas, Responsible Retailing: Assurances of Voluntary Compliance (AVCs), https://oag.ca.gov/tobacco/highlights#assurances (last visited April 29, 2022).

17 *Id.*

18 Note that as a result of amendments since 1998, the Minnesota Settlement and the Master Settlement Agreement are now enforceable against the largest U.S. manufacturer of smokeless tobacco as well as dozens of smaller tobacco manufacturers. *See* Nat'l Ass'n of Att'ys Gen., *Participating Manufacturers under the Master Settlement Agreement as of July 10, 2019*, https://www.tn.gov/content/dam/tn/revenue/documents/taxes/tobacco/MasterSettlement20190710PMList.pdf.

19 Assurance of Voluntary Compliance, In the Matter of 7-Eleven (2005), https://oag.ca.gov/system/files/attachments/press_releases/n1188_assurance_of_voluntary_compliance-final.pdf.

20 Kan. Att'y Gen.'s Off., Tobacco Enf't Unit, Assurance of Voluntary Compliance Agreements, https://ag.ks.gov/licensing/tobacco-enforcement/avc (last visited April 29, 2022).

21 Marie-Claude Tremblay et al., *Regulation Profiles of E-cigarettes in the United States: A Critical Review with Qualitative Synthesis*, 13 BMC Med 130 (2015), https://doi.org/10.1186/s12916-015-0370-z.

22 State of Cal. Dep't of Just., Enforcement Areas, Responsible Retailing: Assurances of Voluntary Compliance (AVCs), https://oag.ca.gov/tobacco/highlights#assurances (last visited April 29, 2022).

23 Counter Tobacco, Assurances of Voluntary Compliance, https://countertobacco.org/resources-tools/store-assessment-tools/assurances-of-voluntary-compliance/ (last visited April 29, 2022).

24 Lisa Henriksen et al., *Assurances of Voluntary Compliance: A Regulatory Mechanism to Reduce Youth Access to E-Cigarettes and Limit Retail Tobacco Marketing*, 110 Am. J. of Pub. Health 209 (2020).

25 Kan. Att'y Gen.'s Off., *supra* note 20.

26 Assurance of Voluntary Compliance, In the Matter of 7-Eleven, *supra* note 19.

27 Assurance of Voluntary Compliance, In the Matter of the Kroger Co. (2007), https://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/tobacco_litigation_file_22.pdf.

28 Assurance of Voluntary Compliance, In the Matter of Rite Aid Corporation (2004), https://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/Rite_Aid.pdf.

29 Kroger, Kroger Family of Companies, https://www.kroger.com/i/kroger-family-of-companies (last visited April 29, 2022).