

940 CMR 21.00: SALES AND DISTRIBUTION OF CIGARETTES, SMOKELESS TOBACCO PRODUCTS AND ELECTRONIC SMOKING DEVICES IN MASSACHUSETTS

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21.01: Purpose

The Attorney General of Massachusetts promulgates 940 CMR 21.00 relating to cigarette, smokeless tobacco product, and electronic smoking device manufacturers and retailers pursuant to his or her authority in M.G.L. c. 93A, § 2(c). The purpose of 940 CMR 21.00 is to eliminate deception and unfairness in the way cigarettes, smokeless tobacco products, and electronic smoking devices are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking, the use of smokeless tobacco and electronic smoking devices by youth. 940 CMR 21.00 imposes requirements and restrictions on the sale and distribution of cigarettes and smokeless tobacco products and electronic smoking devices in Massachusetts in order to prevent access to such products by underage consumers and accidental injury to children as a result of ingestion of or contact with liquid nicotine.

21.02: Scope

The Attorney General's regulations define unfair or deceptive acts or practices. They are not intended to be all inclusive as to the types of activities prohibited by M.G.L. c. 93A, § 2(a) and they do not legitimize acts or practices not specifically prohibited by 940 CMR 21.00. 940 CMR 21.00 is designed to supplement existing regulations.

940 CMR 21.00 shall apply to any person who manufactures, packages, imports for sale, distributes or sells within Massachusetts cigarettes, smokeless tobacco products, or electronic smoking devices as defined in 940 CMR 21.00.

940 CMR 21.00 shall not apply to the manufacture, packaging, importation for sale or distribution within Massachusetts of cigars and little cigars. These products are regulated by 940 CMR 22.00: *Sales and Distribution of Cigars in Massachusetts*.

21.03: Definitions

Adult-only Retail Facility means a facility where the retailer ensures that no person younger than the Minimum Legal Sales Age is present or permitted to enter at any time.

Brand Name means a brand name (alone or in conjunction with any other word), trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of cigarette, smokeless tobacco, or electronic smoking devices.

Cigarette shall be defined as that term is defined in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.*

Distributor means any person who furthers the distribution of cigarettes, smokeless tobacco, or electronic smoking devices whether domestic or imported, at any point from the original place of manufacture to the person who sells or distributes the product to individuals for personal consumption.

Electronic Smoking Device means any product that can deliver nicotine to the user through inhalation of vapor. Electronic Smoking Device includes any component part of such product, including liquid for use in the device regardless of whether the liquid contains nicotine, whether or not sold separately, and does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product and is being marketed and sold solely for the approved purpose.

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Manufacturer means any person, including any repacker and/or relabeler, who manufactures, fabricates, assembles, processes, or labels a finished cigarette, smokeless tobacco product, or electronic smoking device.

Minimum Legal Sales Age means the age an individual must be before that individual can be sold cigarettes, smokeless tobacco products, or electronic smoking devices as established by statute, regulation, by-law or local ordinance which in no instance shall be younger than 18 years old.

Package means a pack, box, carton, pouch, or container of any kind in which cigarettes, smokeless tobacco products, or electronic smoking devices, are offered for sale, sold, or otherwise distributed to consumers.

Point of Sale means any location at which a consumer can purchase or otherwise obtain cigarettes, smokeless tobacco products, or electronic smoking devices, for personal consumption.

Retailer means any person who sells cigarettes, smokeless tobacco products, or electronic smoking devices to individuals in Massachusetts for personal consumption, or who operates a facility located within Massachusetts where vending machines are located.

Sale or Distribution shall be defined to include the exchange of cigarettes, smokeless tobacco, or electronic smoking devices for money and the sampling or any other distribution of cigarettes, smokeless tobacco, or electronic smoking devices not for sale.

Secret Shopper Program shall be defined to include, at a minimum, six visits per year to a retail sales outlet by a person retained by a retailer, where the person poses as a customer in order to ensure the outlet's employees compliance with laws and/or local ordinances prohibiting the sale of cigarettes, smokeless tobacco products, or electronic smoking devices to minors, with each visit made on a different day and at a different time, and, where practical, to a different outlet employee.

Smokeless Tobacco shall be defined as that term is defined in the Federal Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401 *et seq.*

21.04: Point of Sale Restrictions

(1) Retail Sales Practices. Except as otherwise provided in 940 CMR 21.04(4), it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:

- (a) sampling, promotional give-aways, or any other free distribution of cigarettes, smokeless tobacco products, or electronic smoking devices;
- (b) breaking or otherwise opening any cigarette, smokeless tobacco product, or electronic smoking device's package to sell or distribute any number of unpackaged or repackaged cigarettes or any quantity of smokeless tobacco or electronic smoking devices that is smaller than the smallest package distributed by the manufacturer for individual consumer use;
- (c) distributing cigarettes, smokeless tobacco products, or electronic smoking devices through the mail, including redemption of coupons, credits and proofs-of-purchase, except as otherwise provided in 940 CMR 21.00; or
- (d) selling or distributing cigarettes, smokeless tobacco products, or electronic smoking devices where apparel or merchandise (other than cigarettes, smokeless tobacco, or electronic smoking devices) bears a brand name and is offered in consideration of the purchase of cigarettes, tobacco products, and electronic smoking devices.

(2) Retail Outlet Sales Practices. Except as otherwise provided in 940 CMR 21.04(4), it shall be an unfair or deceptive act or practice for any person who sells or distributes cigarettes, smokeless tobacco products, or electronic smoking devices through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:

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- (a) Selling cigarettes, smokeless tobacco products, or electronic smoking devices in any manner other than in a direct, face-to-face exchange without the assistance of any vending machines or any other electronic or mechanical device, except as otherwise provided in 940 CMR 21.00;
- (b) Failing to verify by means of valid government-issued photographic identification that each person purchasing cigarettes, smokeless tobacco, or electronic smoking devices is the Minimum Legal Sales Age or older. No such verification is required for any person who appears 27 years of age or older; or
- (c) Using self-service displays of cigarettes, smokeless tobacco products, or electronic smoking devices; or
- (d) Failing to place cigarettes, smokeless tobacco products, or electronic smoking devices out of the reach of all consumers, and in a location accessible only to retail outlet personnel.

(3) Retail Outlet Prevention Measures. It shall be an unfair or deceptive act or practice for any person who sells or distributes cigarettes, smokeless tobacco products, or electronic smoking devices through a retail outlet located within Massachusetts to sell cigarettes, smokeless tobacco products, or electronic smoking devices to consumers without implementing all prevention measures reasonably necessary to prevent the sale of cigarettes or smokeless tobacco products to consumers younger than the Minimum Legal Sales Age. A person is presumed to have complied with this provision if such person has implemented the following prevention measures:

- (a) For any retailer who employs six or more persons, undertaking an in-house secret shopper program at all retail outlets as a routine part of its business, and implementing and operating the prevention measure set forth in 940 CMR 21.04(3)(b). A retailer who receives during any calendar year official written notification from a state or local governmental authority of passing a tobacco compliance check is presumed to comply with this prevention measure for the next calendar year as to each retail sales outlet referenced in such notification as passing the compliance check; or
- (b) For any retailer who employs five or fewer persons, implementing and operating a training program for all employees who handle exchanges of cigarettes, smokeless tobacco products, or electronic smoking devices regarding compliance with laws and/or local ordinances prohibiting the sale of such products to minors. A model training program for tobacco retailers is available to all retailers at the Office of the Attorney General.

(4) Exceptions to Prohibited Retail Sales and Retail Sales Outlet Practices. The following retail sales and retail sales outlet practices are not unfair or deceptive:

- (a) Mail-order or internet sales that are subject to verification that the purchaser is at least the Minimum Legal Sales Age. Verification of age through the mail or internet shall consist of, at a minimum:

1. verification that the purchaser is of the Minimum Legal Sales Age through a commercially available database, or aggregate of databases, that is regularly used by government and business for the purpose of age and identity verification; and
2. use of a method of mailing, shipping, or delivery that requires signature of a person who is of the Minimum Legal Sales Age before the shipping package is released.

Any information required to complete the age verification process must be requested on a form separate from that used to collect payment information, shall not include Personal Information as defined by M.G.L. c. 93H, and shall not be used for any purposes other than age verification. Mail order or internet sales are subject to the sales practices described in 940 CMR 21.04(1)(a) and (b).

- (b) Vending machines that are located in an Adult-only Retail Facility licensed under M.G.L. c. 138, § 12, to serve alcoholic beverages for consumption on the premises, if the vending machine:

1. is equipped with a lock-out device that locks out sales from the vending machine unless the locking mechanism is released by an outlet employee. The release mechanism must not allow continuous operation of the vending machine and must be out of the reach of all consumers and in a location accessible only to outlet personnel;
2. is located within the immediate vicinity and exclusive control of outlet personnel such that all purchases are observable by the outlet employee(s) controlling the lock-out device; and

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3. is posted with a sign stating that those below the Minimum Legal Sales Age are not permitted to purchase tobacco and notifying customers of the lock-out device and identifying the outlet employee(s) to contact to purchase tobacco from the machine.
- (c) Self-service displays that are located within an Adult-only Retail Facility.

21.05: Liquid Nicotine Packaging

It shall be an unfair or deceptive act or practice for any person to sell or distribute nicotine in a liquid or gel substance in Massachusetts after March 15, 2016, unless the liquid or gel product is contained in a child-resistant package that, at a minimum, meets the standards for special packaging as set forth in 15 U.S.C. §§ 1471 through 1476 and 16 CFR § 1700 *et seq.*

21.06: Relation to Other Laws

Nothing in 940 CMR 21.00 shall relieve any person from liability at common law or under Massachusetts statutory law to any other person.

Nothing in 940 CMR 21.00 shall be construed to preempt any existing law, ordinance, bylaw, regulation or rule which requires a permit or license for the sale of cigarettes, smokeless tobacco, or electronic smoking devices, or which regulates the sale, use, or distribution of cigarettes, smokeless tobacco, or electronic smoking devices. Nothing in 940 CMR 21.00 shall prohibit any city, town or board of health from enacting or enforcing any law, ordinance, bylaw, regulation or rule which requires a permit or license for the sale of cigarettes, smokeless tobacco, or electronic smoking devices, or which regulates the sale, use, or distribution of cigarettes, smokeless tobacco, or electronic smoking devices. Without limiting the generality of the foregoing, nothing in 940 CMR 21.00 shall prohibit any city, town, or board of health from enacting or enforcing any law, ordinance, bylaw, regulation or rule which imposes a monetary penalty, permit suspension or permit revocation for a violation of the local law. In cases where the ordinance, bylaw, regulation or rule is more restrictive than the provisions of 940 CMR 21.00, it shall control to the extent of any inconsistency with 940 CMR 21.00.

21.07: Severability

If any provision of 940 CMR 21.00 or the application of such provision to any person or circumstances is held to be invalid, the validity of the remainder of 940 CMR 21.00 and the applicability of such provision to other persons or circumstances shall not be affected.

REGULATORY AUTHORITY

940 CMR 21.00: M.G.L. c. 93A, § 2(c).