



# NCTOH: The buzz about the FDA regulating tobacco

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*This is a series of special reports from the National Conference on Tobacco or Health in Phoenix, AZ.*

The bill allowing the FDA to regulate tobacco was a main subject of conversation at the Tobacco Conference. There seemed to be several contrasting opinions. Some individuals are adamantly opposed believe the tobacco industry is evil incarnate, corrupt, and this bill is like dancing with the devil. Those mildly opposed, see that there are some good points in the bill but believe that the tobacco industry is always two steps ahead of any legislation and there are too many loopholes in this bill for it to really make a difference. Those mildly supporting the bill, say it's a step in the right direction, now lets make it better. Others believe this is the best possible bill that could have been passed since it's been 14 years in the making and it has been approved three times by both the House and the Senate before it's finally become reality.

The journey started in 1995 with David Kessler, former head of the FDA. He tried to regulate tobacco during his tenure but in 2000, the Supreme Court ruled that the FDA did not have the authority and only Congress could grant this authority. In 2001, Senator Kennedy first introduced legislation to allow FDA regulation of tobacco products and 3 years later the Senate passed the bill twice. In 2008, the House of Representatives passed their version but time ran out before the Senate voted on it. It is believed that the leader of the Senate allowed the time to expire because former President Bush had threaten to veto the bill if it had passed. Earlier this year the [House passed another version](#) of tobacco regulation. With overwhelming support, the Senate passed (79-17) their version on Thursday with only minor differences than the House bill and on Friday, also with overwhelming support, the House approved (307-97) this final version. President Obama has said that he will sign this bill into law.

What this bill will do:

- Repeals the Federal Cigarette Labeling and Advertising Act of 1965 which restricted local communities from regulating tobacco advertising. This will give control back to local communities.
- Manufacturers will not be able to make any unsubstantiated health claims.
- All new tobacco products will be reviewed.
- All flavored cigarettes will be banned, the only flavors allowed are tobacco and menthol.
- The labels of "low", "mild" and "light" will be banned.
- Contains provisions to stop youth access.
- Has marketing and advertising restrictions, especially when directed towards youth.
- New graphic warning labels that will cover one half of both sides of a pack of cigarettes.
- Ingredients and additives to be disclosed.
- Product standards to be established.

Stanton Glanz, PhD. Professor of Medicine and Director for the Center for Tobacco Control, Research and Education at University of California at San Francisco warn of loopholes in the bill. An advisory board is to be established and three seats will be members from tobacco companies. Glanz states this would be like allowing mobsters to have a seat on a crime prevention board. Another concern is that the tobacco companies will use FDA regulation as a perception of a safer product and will try to preempt any local or state laws that would further restrict the marketing, advertising and use of tobacco.

Doug Blanke, an attorney with the Tobacco Control Legal Consortium has concerns about the wording of some parts of this bill, that it opens the door for lawsuits by the tobacco companies. The bill preserves the legal rights of any pending lawsuits but future cases could be protected under the product liability law of any state. Most of the past lawsuits that have been successful against the tobacco companies, have not been under product liability but have been filed for fraud, misrepresentation and under the Racketeer Influenced and Corrupt Organizations Act (RICO). The bill also states that the tobacco companies are barred from stating their product is regulated by the FDA but the Supreme Court has ruled that under commercial speech, a company is allowed to make statements that are true. Many in tobacco control are concerned about the public's perception that regulation means a safer product, and this will legitimize the tobacco industry just when they have been adjudicated as Racketeers by the U.S. Court of Appeals and are likely to continue "bad acts" into the future.

Phillip Gardiner of the National African American Tobacco Prevention Network (NAATPN) warned that if we fail to learn from history, we are doomed to repeat it. The tobacco companies have misled the public numerous times. The NAATPN withdrew their support of the FDA regulation when the flavoring of menthol was not included as a banned flavor. Seventy-six per cent of African American smokers use menthol cigarettes which represents 28% of the total tobacco market. The NAATPN is now proposing that communities of color are represented on an oversight advisory panel to watch and ensure that the FDA panel which includes the tobacco industry, is doing the correct job of regulating tobacco. As Glantz said, having the tobacco industry on the advisory board is like having the fox in the hen house, it makes them look like good guys but we need to distrust them.

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### **Author**



VJ Sleight is an Examiner from Houston. You can see VJ's articles at: "<http://www.Examiner.com/x-4742-LA-Smoking-Examiner>"