

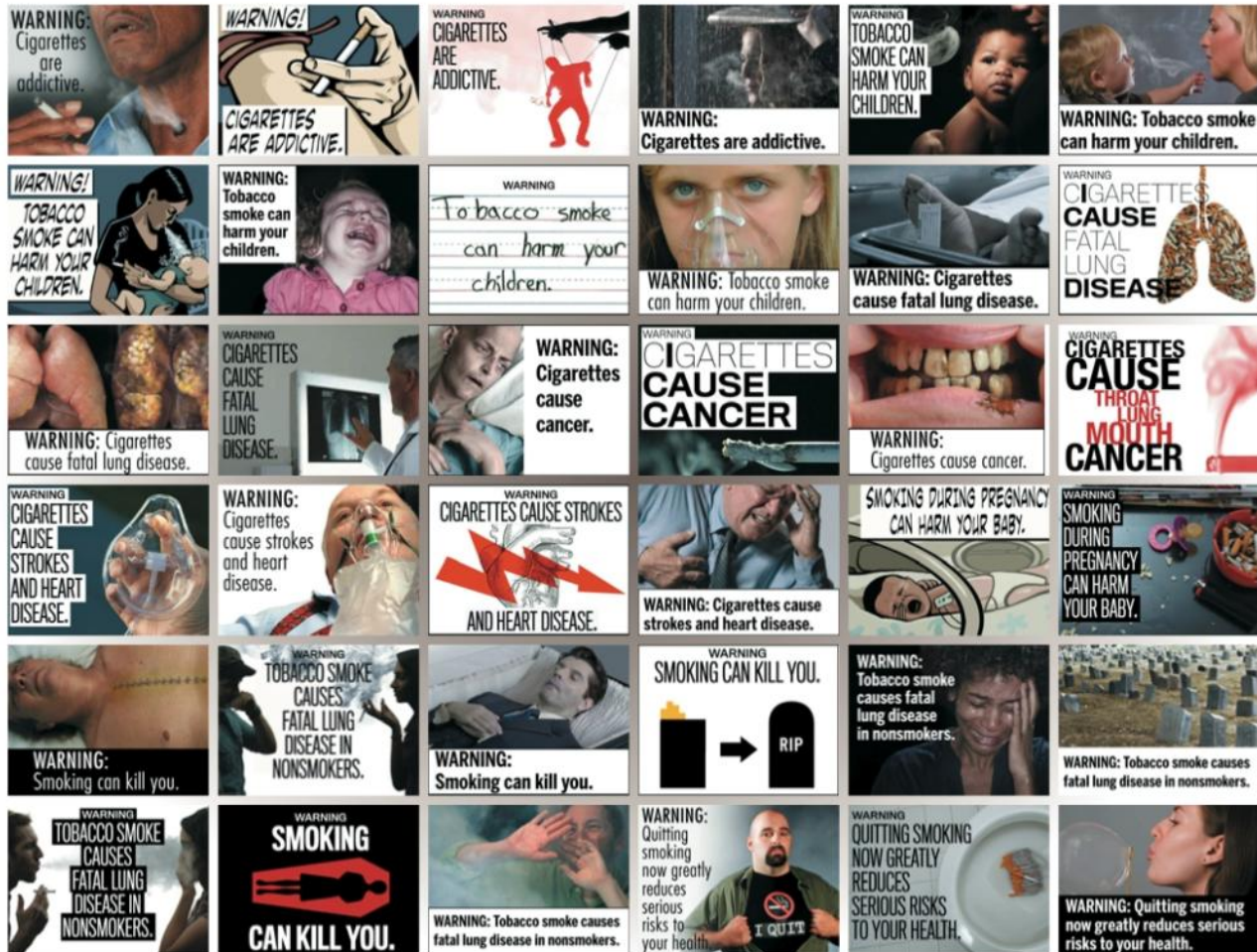
SMOKESHOP®

THE INDUSTRY AUTHORITY ON TOBACCO RETAILING

Official Publication of the International Premium Cigar & Pipe Retailers Association (IPCPR)

DECEMBER 2010

Which Nine Will the FDA Choose?



Graphic New Warning Labels Coming to US Cigarettes

PLUS:

- > Scandinavian Tobacco Group Ushers in Changes at CAO and General Cigar Company
- > Catering to Pipe Customers
- > Vitolier's Arsen Gasparayan Launches Own Cigar Line

Cigarette Manufacturers Win Concessions from FDA

The government's latest legal attack, on brand names, puts small companies at risk. > **TROUTMAN SANDERS TOBACCO GROUP**

On March 19, 2010, the U.S. Food and Drug Administration ("FDA") adopted a regulation restricting the use of certain cigarette brand names. This regulation, known as the "Product Name Restriction," makes it illegal to sell cigarettes under brand names that also are used on non-tobacco products, unless those names were being used on both tobacco and non-tobacco products prior to January 1, 1995. The Product Name Restriction was scheduled to take effect June 22, 2010. As originally proposed by the FDA, the Product Name Restriction would have meant that a small cigarette manufacturer that began selling cigarettes under a particular brand name after January 1, 1995, would have had to stop using that brand name or face severe civil and criminal penalties, simply because, for example, the automaker Hyundai happens to sell vehicles under the same name.

Three tobacco companies brought a lawsuit seeking to enjoin the FDA's enforcement of the Product Name Restriction on constitutional grounds. The plaintiffs in the lawsuits—Renegade Tobacco, Alternative Brands, and Seneca-Cayuga Tobacco—argued that the Product Name Restriction would violate the free speech rights of tobacco manufacturers. The free speech arguments rest on the fact that the plaintiffs' use of their trademarks on cigarettes was commercial speech protected by the First Amendment of the Constitution and the government's proposed regulation of such speech in this case was more extensive than necessary.

The plaintiffs also argued that the Product Name Restriction would protect the brands of the "Big Four" tobacco manufacturers, Philip Morris Inc., R.J. Reynolds Tobacco Co., Brown &

Williamson Tobacco Corp., and Lorillard Tobacco Co., which were established before January 1, 1995, while the brands of the smaller manufacturers that came into existence after the 1998 Master Settlement Agreement would be destroyed. Finally, the plaintiffs argued that the Product Name Restriction would deprive them of a valuable property interest—namely, their trademark rights, without due process of law.

> Three tobacco companies brought a lawsuit seeking to enjoin the FDA's enforcement of the Product Name Restriction on constitutional grounds... arguing that the Product Name Restriction would violate the free speech rights of tobacco manufacturers.

On May, 4, 2010, about a week after the plaintiffs filed their lawsuit, the FDA issued a "Guidance" report (visit www.fda.gov/TobaccoProducts), which contains the broad disclaimer that it "does not create or confer any rights for or on any person and does not operate to bind the FDA or the public." Regardless of this report, the plaintiffs informed the FDA that they were moving forward with their request for an injunction. The FDA responded by agreeing to enter into a stipulation in which the FDA would not enforce the Product Name Restriction against the plaintiffs' products until it had concluded its consideration of amendments to the Product Name Restriction. The FDA also agreed that it would provide the plaintiffs with at least 90 days written notice before commencing any action to

enforce the Product Name Restriction (or any amended version of the Product Name Restriction).

The stipulation shields the plaintiffs from a number of adverse consequences that small manufacturers would otherwise face. First, the FDA guarantees that it will not enforce the Product Name Restriction against the plaintiffs while its consideration of the regulation is pending. Other small manufacturers are forced to rely on the FDA's Guidance report, which creates no rights for manufacturers and is not binding on the FDA.

Second, sellers of other cigarettes produced by small brand manufacturers will likely curtail their purchases of cigarettes because of the uncertainty and assumed risk. This will likely cause sell-

ers to purchase more cigarettes from the plaintiffs who have a written guarantee of non-enforcement from the FDA.

Third, if and when the FDA amends its Product Name Restriction, most small manufacturers will immediately be exposed to liability for selling cigarettes under brand names that run afoul of the regulation. The plaintiffs, however, will enjoy a 90-day window in which to sell current inventory and adopt new brand names, if necessary.

Fourth, if the FDA does not address all of the constitutional infirmities raised in the lawsuit when it issues a revised regulation, then the plaintiffs will be poised to challenge the FDA's regulation as applied to their brands. It is highly likely the FDA will release a decision later this year regarding whether and how it will amend the Product Name Restriction. **S**