

SB 652, SD1

Measure Title: RELATING TO HEALTH.

Report Title: Tobacco Displays and Sales; Advertising; Minors; Electronic Cigarettes

Description: Requires cigarettes and tobacco products to be stored for sale behind a counter. Requires advertisements that promote or encourage the purchase or use of cigarettes or tobacco products to be placed four feet off the floor. Permits exceptions for retail tobacco stores, bars, or establishments where the minimum age for admission is eighteen. Includes electronic cigarettes under the definition of tobacco products. Prohibits the sale of electronic cigarettes to minors. Takes effect 1/1/2050. (SD1)

Companion: [HB672](#)

Package: None

Current Referral: HTH, CPN

Introducer(s): GREEN, CHUN OAKLAND, Nishihara, Ruderman, Shimabukuro

| <u>Sort by Date</u> | | Status Text |
|---------------------|---|---|
| 1/18/2013 | S | Introduced. |
| 1/22/2013 | S | Passed First Reading. |
| 1/22/2013 | S | Referred to HTH, CPN. |
| 2/1/2013 | S | The committee(s) on HTH has scheduled a public hearing on 02-06-13 2:15PM in conference room 229. |
| 2/6/2013 | S | The committee(s) on HTH deferred the measure until 02-11-13 2:30PM in conference room 229. |
| 2/11/2013 | S | The committee(s) on HTH recommend(s) that the measure be PASSED, WITH AMENDMENTS. The votes in HTH were as follows: 4 Aye(s): Senator(s) Green, Baker, Nishihara; Aye(s) with reservations: Senator(s) Chun Oakland ; 1 No(es): Senator(s) Slom; and 0 Excused: none. |
| 2/15/2013 | S | Reported from HTH (Stand. Com. Rep. No. 355) with recommendation of passage on Second Reading, as amended (SD 1) and referral to CPN. |
| 2/15/2013 | S | Report adopted; Passed Second Reading, as amended (SD 1) and referred to CPN. |
| 2/15/2013 | S | The committee(s) on CPN will hold a public decision making on 02-20-13 9:30AM in conference room 229. |

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



LORETTA J. FUDDY, A.C.S.W., M.P.H.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. Box 3378
HONOLULU, HAWAII 96801-3378

In reply, please refer to:
File:

WRITTEN COMMENTS ONLY
SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

SB0652,SD1, RELATING TO HEALTH

Testimony of Loretta J. Fuddy, A.C.S.W., M.P.H.
Director of Health

February 20, 2013
9:30 AM, Room 229

1 **Department's Position:** The Department of Health (DOH) provides comments on this measures. The
2 department appreciates the intent of restricting cigarettes and tobacco products behind the counter and
3 prohibiting the sale of electronic cigarettes to minors as proposed in SB0652,SD1 but has reservations
4 regarding the provision requiring the four foot elevation of tobacco ads as this raises constitutional
5 issues previously decided by the U.S. Supreme Court.

6 **Fiscal Implications:** None

7 **Purpose and Justification:** The Family Smoking Prevention and Tobacco Control Act of 2009
8 (FSPTCA) prohibits self-service tobacco displays and restricts the placement of tobacco sales and
9 advertising. SB0652,SD1 has a provision that goes beyond the FSPTCA in that it requires that tobacco
10 advertisements be placed four feet off the floor.

11 Smoking and tobacco use remain Hawaii's and the nation's leading cause of preventable
12 morbidity and mortality. In Hawaii there are over 1,100 deaths each year attributed to a tobacco-related
13 illness costing approximately \$336 million in medical and health care costs. Each year approximately

1 1,500 Hawaii youth become new daily smokers. The tobacco companies spend more than \$42 million
2 annually in Hawaii on advertising, marketing, and promotions to attract 'replacement smokers'.

3 It has been established that there is a clear relationship between advertising/promotion and
4 increased tobacco use particularly among youth. Because of restrictions on mass media ads in the
5 Master Settlement Agreement, the tobacco companies have now made retail storefronts and points-of-
6 sale venues as the new primary medium for advertising their tobacco products, as well as providing
7 financial incentives to merchants for product placement. Studies show that tobacco marketing has more
8 power to influence youth to smoke than peer pressure or parental smoking.

9 The 2011 Hawaii Youth Tobacco Survey indicated that over 75% of high school students and
10 over 71% of middle school students reported seeing tobacco product ads at local stores and gas stations.
11 In 2008, the Tobacco and Alcohol Advertising Survey found that 44% of stores surveyed in Hawaii had
12 tobacco products placed by the chips and candy and 62% had tobacco products at the eye- level of
13 children (3 feet or less). Studies show a correlation between children and youth exposure to the
14 marketing of tobacco products and initiation.

15 The DOH recognizes that prohibiting self-service displays where the customer has direct access
16 to tobacco products is a realistic strategy to discourage tobacco company products and ads at points-of-
17 sale. By limiting the placement of tobacco products, electronic smoking devices, and ads in retail stores,
18 this policy can help prevent a new generation of youth in Hawaii from being influenced to start smoking.
19 The DOH appreciates the intent of restricting tobacco products and advertising to behind the counter as
20 proposed in this measure, but has reservations regarding the feasibility of the four foot elevation of
21 tobacco ads as this raises constitutional issues that have been previously decided by the U.S. Supreme
22 Court.

23 Thank you for the opportunity to testify on this measure.



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013**

ON THE FOLLOWING MEASURE:
S.B. NO. 652, S.D. 1, RELATING TO HEALTH.

BEFORE THE:

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

DATE: Wednesday, February 20, 2013 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): WRITTEN TESTIMONY ONLY.

(For more information, contact Blair Goto or Earl R. Hoke, Jr.,
Deputy Attorneys General, at 587-3050 or 586-1203)

Chair Baker and Members of the Committee:

The Department of the Attorney General appreciates the intent of this bill in trying to decrease the use of tobacco products. However, we oppose the bill for legal and practical reasons.

The purposes of this bill are to: (1) require advertisements that promote or encourage the purchase or use of cigarettes or tobacco products, including electronic cigarettes, to be displayed at least four feet above the floor, (2) require that cigarettes or tobacco products, including electronic cigarettes, be stored for sale behind a counter in an area accessible only to employees of the business, and (3) ban the sale or furnishing of electronic cigarettes to minors as well as prohibit minors from purchasing electronic cigarettes.

We have a number of concerns with this bill. First, the advertising placement restrictions of this bill as they apply to cigarettes would be pre-empted by federal law. Second, the advertising placement restrictions as they apply to other (non-cigarette) tobacco products would violate the First Amendment of the United States Constitution. Last, the requirement that cigarettes and tobacco products be stored for sale in an area accessible only to employees of the business may have the unintended consequence of impeding the ability of the Tobacco Enforcement Unit of the Department of the Attorney General to enforce diligently the laws that relate to the sale of cigarettes and other tobacco products.

We note that in 1999, the State of Massachusetts adopted numerous advertising regulations limiting outdoor and point-of-sale advertising of cigarettes and tobacco products. With respect to cigarette advertising, the United States Supreme Court found that the regulations were pre-empted by the Federal Cigarette Labeling and Advertising Act (FCLAA). Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 551 (2001). Based upon the reasoning of the Court, we would anticipate, with respect to cigarette advertising, that a court would also find FCLAA pre-emption for a ban on cigarette advertising less than four feet above the floor.

In addition, the United States Supreme Court has recognized that commercial speech falls within the purview of First Amendment protection. The Court has afforded commercial speech a measure of First Amendment protection commensurate with the protection afforded to other constitutionally protected speech. *See Reilly*, at 553-54. The Court reasoned:

The State's interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.

Id. at 564.

The Court went on to state that:

Massachusetts may wish to target tobacco advertisements and displays that entice children, much like floor-level candy displays in a convenience store, but the blanket height restriction does not constitute a reasonable fit with that goal. . . . There is no de minimis exception for a speech restriction that lacks sufficient tailoring or justification.

Id. at 567.

The Reilly Court concluded that, with respect to other tobacco products, the First Amendment bars a ban on tobacco (non-cigarette) product advertising lower than five feet from the floor of a retail establishment. *See Reilly*, at 566-67. Again, based upon the Court's reasoning, we would anticipate, with respect to other tobacco products, that a ban on tobacco advertising less than four feet above the floor would also be invalidated by the First Amendment. This is because the lower-than-four-feet ban on advertising does not directly advance the

governmental interest in preventing youth smoking and is more extensive than necessary to serve that interest. As to Massachusetts' five foot ban, the Supreme Court noted:

[T]he State's goal is to prevent minors from using tobacco products and to curb demand for that activity by limiting youth exposure to advertising. The 5-foot rule does not seem to advance that goal. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.

Id. at 566.

As a result, we recommend that the new section to be added to chapter 328J, Hawaii Revised Statutes (HRS), by section 2 of the bill on pages 4-5, lines 11-21 and lines 1-8, be deleted.

We are also concerned that the new section to be added to chapter 328J, HRS, contained in section 2 of the bill on pages 3-4, lines 10-21 and lines 1-10, will adversely impact the ability of the Tobacco Enforcement Unit of the Department of the Attorney General to ascertain whether cigarettes are properly stamped with tax stamps and whether cigarettes are approved for sale in the State of Hawaii. Historically, those who wished to evade the payment of cigarette taxes often stored the noncompliant product in back areas or under counters that were not readily visible to those tasked with investigating contraband cigarette sales. By requiring that cigarettes and tobacco products that are for sale be stored behind a counter accessible only to the personnel of the business, this new section will, unintentionally, facilitate the sale of untaxed, contraband cigarettes. As a result, we recommend that the new section to be added to chapter 328J, HRS, by section 2 of the bill on pages 3-4, lines 10-21 and lines 1-10, be deleted.

Accordingly, due to the constitutional and other issues with section 2 of this bill, we respectfully ask that section 2 of the bill be deleted and the remaining sections be renumbered if this bill is to pass.



COALITION FOR A
TOBACCO-FREE HAWAII

To: The Honorable Rosalyn Baker, Chair, Committee on Commerce & Consumer Protection
The Honorable Brickwood Galuteria, Vice Chair, Committee on Commerce & Consumer Protection
Members, Senate Committee on Commerce & Consumer Protection
From: Jessica Yamauchi, Executive Director
Date: February 19, 2013
Hrg: Senate Committee on Commerce & Consumer Protection; Wed., February 20, 2013 at 9:30 a.m. in Rm 229
Re: **Support for SB 652, SD1, Relating to Health**

Thank you for the opportunity to offer testimony in support of SB 652, SD1 requiring tobacco products to be stored behind a counter and requiring that advertisements that promote the use of tobacco be placed away from children. Additionally this bill seeks to restrict the sale of electronic cigarettes to minors.

Prior to 2009, due to federal preemption, Hawaii lacked the legal authority to limit the display of tobacco products. In 2009, President Obama signed the Family Smoking Prevention and Tobacco Control Act into law. This federal law now allows local and state governments the ability to address the way tobacco products are sold and advertised.

This is an exciting step in having proactive policies that improve our public health.

This bill addresses three important issues:

- 1) The placement of cigarettes and tobacco products,
- 2) The advertisement of tobacco products at point of sale and
- 3) The sale of electronic cigarettes to minors.

The placement of cigarettes and tobacco products.

The Coalition supports this section of the bill in full. Research has shown that eliminating self-service options for tobacco products reduces youth access to tobacco as well as theft of the products.

Other Tobacco Products or OTPs are usually located on the counter at the point of sale in most convenient stores, where they are easily accessible. Research has shown that preventing the display of tobacco products leads to a decrease in the number of adolescents experimenting with and becoming addicted to those tobacco products.¹ This bill will reduce youth access to tobacco, as well as the theft of tobacco products. The World Health Organization has endorsed a ban on retail tobacco product displays as an effective method of reducing tobacco use.²

¹ Markus P. Bidell, *Case Study of Attempts to Enact Self Service Tobacco Display Ordinances: A Tale of Three Communities*, Tobacco Control, 71-77 (2000)

² World Health Organization Framework Convention on Tobacco Control, *Guidelines for Implementation of Article 13*, adopted Nov. 2008



OTPs should be kept behind the counter, like cigarettes, where the product is only accessible by an employee. This will keep the products away from eyesight of our youth and take away a powerful marketing tool currently enjoyed by a deadly industry. Prohibiting self-service tobacco displays is a promising practice that many states are considering or have enacted. Minnesota law prohibits self-service displays of cigarettes and smokeless tobacco, except in age-restricted retail tobacco stores that derive at least 90 percent of their revenue from the sale of tobacco and tobacco-related products.³ Similarly, New York State prohibits self-service tobacco displays in retail stores that are open to minors.⁴

The advertisement of tobacco products at point of sale.

The Coalition supports the intent of this section but understands that the specific remedies proposed may pose legal challenges to the State. The Coalition strongly urges the Legislature to explore additional options to address the advertisement of tobacco products at the point of sale.

The tobacco industry spends \$25 million on marketing its products to people in Hawaii. This marketing includes ads and product displays at the point of sale and in storefronts. Collectively, this impacts our children and those trying to quit.

In 2010, the Hawaii Tobacco Alcohol and Advertising Survey⁵ results were released. The results summarize data collected from more than 300 stores statewide. Results indicate that tobacco companies aggressively market its products at stores—through storefront ads and through the display of the products themselves. Tobacco products were regularly placed near candy and toys—products often enjoyed by children. 97% of stores had tobacco products at the point of sale and 90% had tobacco ads at the point of sale.

Tobacco ads play a major role in youth smoking. Worldwide and in the US, tobacco advertising, promotion and sponsorship entice young people to use tobacco, encourage smokers to smoke more, and decrease smokers' motivation to quit.⁶ Eighty-three percent of young smokers (aged 12-17) in the United States choose the three most heavily advertised brands.⁷

Unlike other products which outreach to consumers at stores, tobacco is deadly when used as directed.

Including Electronic Cigarettes as unlawful tobacco products to sell to minors.

The Coalition supports this section of the bill fully. Currently, there are no federal regulations for electronic cigarettes. This allows electronic cigarettes to advertise on television and radio,

³ MINN. STAT. § 461.18, subd. 1.

⁴ N.Y. PUB. HEALTH LAW § 1399-cc(7).

⁵The Survey is the result of a partnership among the Coalition for a Tobacco-Free Hawaii, REAL—Hawaii's Youth Movement Exposing the Tobacco Industry, the Cancer Research Center of Hawaii, Mothers Against Drunk Driving, and the State Department of Health (Alcohol Drug Abuse Division and Tobacco Prevention Education Program.

⁶ *World Health Organization Report on the Global Tobacco Epidemic 2008: The mpower Package*. Geneva: World Health Organization; 2008. <http://www.who.int/tobacco/mpower/en/>

⁷ Substance Abuse and Mental Health Services Administration, *The National Survey on Drug Use and Health: 2004 Detailed Tables, Tobacco Brands* (2005);



COALITION FOR A
TOBACCO-FREE HAWAII

offer flavored cartridges, and sell to minors (those under 18 years of age). We recommend that sales to minors and sampling of electronic cigarettes be prohibited.

Tobacco products are still the leading cause of preventable disease and death. We can reduce this by making sure youth never start and tobacco users have every opportunity to quit. This measure will continue to place Hawaii at the forefront of tobacco prevention and control.

Thank you for the opportunity to testify in support of this measure.

Jessica Yamauchi, M.A.
Executive Director

The Coalition for a Tobacco Free Hawaii (Coalition) is an independent organization in Hawaii working to reduce tobacco use through education, policy and advocacy.

Testimony of Professor Mark A. Levin
with *qualified support* for SB 652 SD1, Relating to Health
Senate Committee on Economic Revitalization & Business
February 20, 2013

Chair Baker, Vice-Chair Galuteria, and members of the Committee on Commerce and Consumer Protection:

Aloha. My name is Mark Levin. I am a Professor at the William S. Richardson School of Law. My testimony is based on nearly twenty years of engagement with international and comparative tobacco law and policy. Among many activities in this field, I have published in leading journals and worked as a temporary advisor on tobacco control policy for the World Health Organization. My commentary on the U.S. Supreme Court decision Lorillard Tobacco et al. v. Reilly, 533 U.S. 525 (2001) appeared in Japan's leading law journal, *Jurist* in 2002.

I strongly support requiring all retailers in Hawai'i to store all tobacco products for sale behind the counter for the obvious public health reasons that many other testifiers have shared with you and I shared in my testimony supporting SB 642.

SB 652 is similarly valuable for its limitation on tobacco sales practices as well as its clarification specifically including e-cigarettes as tobacco products. However, it seems important to note and clear nonetheless that e-cigarettes are, in any case, tobacco products. *See e.g., Smoking Everywhere Inc. v. FDA*, 680 F. Supp 2d 62, 67 (D.D.C. 2010) ("There being no dispute that the nicotine in plaintiffs' electronic cigarettes is naturally distilled from actual tobacco and is intended for human consumption, plaintiffs assert that their electronic cigarettes qualify as a tobacco product...." (*citations omitted.*))

I also wish to share two further points addressing the proceedings before the Senate Committee on Health and its report out.

First, Committee Report, SSCR355, mentions concerns regarding constitutionality of this measure. As the Department of the Attorney General's testimony correctly noted, there were likely constitutional issues with regards to the advertising restrictions in SB 652 as originally introduced. I believe such concerns remain in SB 652 SD1 with regards to the provision restricting the display of advertisements; further revision to address this seems advised.

Second, I was troubled by testimony of the Department of the Attorney General suggesting that a law of this kind might adversely impact the ability of the Tobacco Enforcement Unit of the Department to carry out its work. Again with due respect, I find this testimony to be somewhat incredulous. The Department has

been highly capable in enforcing similar issues with regards to liquor sales, where I assume there can be warrantless inspections during operational hours, examination of records, opening of store rooms, and examination of stock, among other things. Would these tools not be available to the Department for illicit trade in tobacco products? In any case, it should be easy to look to the experience in other states to confirm that putting products behind the counter and out of sight does not adversely impact tax enforcement, but I did not note any evidence suggesting the Department had done so before putting forward its opposition.

In fact, illicit trade in tobacco products is a global problem that has attracted attention from nations around the world. After a protracted set of international negotiations bringing together public health, law enforcement, and tax authorities for comment, the United Nations last month opened signature on a new treaty to reduce this problem across national borders. Importantly, the new Protocol to Eliminate Illicit Trade in Tobacco Products fits beneath the global Framework Convention on Tobacco Control, which VERY CLEARLY calls upon parties in Art. 16 to prevent sales to minors, including "banning the sale of tobacco products in any manner by which they are directly accessible, such as store shelves." (FCTC Art. 16.1(b)).

In short, *the understanding and practice agreed upon by 176 nations around the world is that tobacco products should not be directly accessible to youth.* Last November, representatives of 176 nations as parties to the FCTC gathered in Seoul and reached a conclusion opposite to the Department's claim here. This global consensus seems to me to be ample reason to not delay and instead to move forward by amending out the advertising restrictions and then passing SB 652 SD1 in the current legislative session.

Mahalo.

Professor Mark A. Levin
The William S. Richardson School of Law
The University of Hawai'i at Mānoa
2515 Dole St., Honolulu, HI 96822
Tel: 1-808-956-3302

*(Quotes from "Trust Us, We're the Tobacco Industry, Campaign for Tobacco Free-Kids, pp. 42-44, cites to original sources at p. 46 (2001)). Affiliations are given for identification purposes only. Opinions presented here are personal views and not the official views of the University of Hawai'i or any other organization or entity.

SB652

Submitted on: 2/17/2013

Testimony for CPN on Feb 20, 2013 09:30AM in Conference Room 229

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Troy Abraham | Individual | Support | No |

I oppose this motion on grounds of inaccurate and misleading language. Electronic cigarettes are not tobacco products and should not be treated as such. Nicotine and water are not synonymous with tobacco products and should not be paired as one in the same.

Thank you for your consideration in this matter.

Best –

Michael Witte

SB652

Submitted on: 2/18/2013

Testimony for CPN on Feb 20, 2013 09:30AM in Conference Room 229

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Paul Hanada | Individual | Oppose | No |

SB652

Submitted on: 2/19/2013

Testimony for CPN on Feb 20, 2013 09:30AM in Conference Room 229

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Winford Biacan | Individual | Comments Only | No |

Comments: Ecigs are very harmless and should not be treated as cigarettes. It does not have the harmful chemicals, tobacco, and tar that people are being exposed to when compared with Ecigs.