

# The Voice

of the Nebraska Grocery Industry

March/April 2010





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● AWG Distribution Center    ■ AWG Trade Area  
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- |           |                |
|-----------|----------------|
| FLORIDA   | IOWA           |
| LOUISIANA | MISSISSIPPI    |
| VIRGINIA  | INDIANA        |
| NEBRASKA  | ILLINOIS       |
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# C O N T E N T S

## features & departments

3	Amendment to NGIA By-Laws
4	Executive Director's Corner
8-10	2010 NGIA Annual Conference
9	Scholarship Application Form
12-17	Analysis of the Family Smoking Prevention Tobacco Control Act
20-21	No Federal Income Tax Paid by 47 Percent
16-17	The Do's and Don't of Social Media Marketing
24-25	Clearing the Way for Electronic Document Storage

## advertisers

22	Advantage Sales
OBC	Affiliated Foods Midwest
5	American Italian Pasta Company
28	Arctic Glacier Premium Ice
2	Associated Wholesale Grocers
22	Bunzl
28	Cash Register Sales
11	Coca-Cola
7	ConAgra Foods
28	Crystal Farms
26	Dean Foods/Land O' Lakes Milk
5	Diageo
25	Dr. Pepper/Snapple Bottling Co.
6	Frito Lay
22	Kemps
18	Kraft
20	Harry A. Koch Co.
IFC	Nash Finch
22	Nebraska Lottery
27	Pepsi
17	Retail Data Systems
3	Roberts Dairy
19	Sara Lee
29	Shazam
5	Sparboe Farms
5	The Brenmar Company
20	The Mark Anthony Brands
23	Wells Blue Bunny

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advertisement or copy content deemed inappropriate or inconsistent with our goals  
and objectives to serve our members.

## Amendment to NGIA By-Laws

In 2009 NGIA developed a Political Action Committee. We have always accepted the employees of dues paying members as members in good standing. However, in order to accept PAC donations from employees of dues paying members, the underlined language inserted below must be added to the NGIA By-Laws.

This publication of the proposed By-Laws change serves as a 30 day notice to members. A non-response is considered a vote in favor of the By-Laws change. To vote in opposition to the change please do so by sending a written statement to: NGIA, 5935 S. 56 Street, Suite B, Lincoln, NE 68516 within 30 days of receipt of this publication.

### Nebraska Grocery Industry Association, Inc., Constitution & By-Laws, ARTICLE II Membership

Section 1. Regular Membership: Any individual person, firm, or corporation actively engaged in the retail or wholesale grocery business is eligible to apply for regular membership in this Association. An employee of any regular member is considered a member of this organization.

Section 2. Wholesaler Membership: Any firm or corporation actively engaged in the wholesale grocery business is eligible to apply for wholesaler membership in this Association. An employee of any Wholesaler member is considered a member of this organization.

Section 2.3. Associate Membership: Any manufacturer, distributor, broker, or other business connected with the grocery industry is eligible to apply for associate membership. An employee of any Associate member is considered a member of this organization.

Section 3.4. Honorary Membership: The Board of Directors, by a two-thirds majority vote, may award an honorary membership to any retired, or former member in recognition of service on behalf of this Association. Honorary members shall not have the right to vote or hold office.

Section 4.5. Regular members shall be entitled to one vote for each store or group of stores under common ownership for which dues have been paid.

Section 5.6. Any eligible applicant for membership may be elected to membership under terms and procedures determined by the Board of Directors.

Section 6.7. Membership may be suspended or terminated for violation of the Association's Bylaws, rules, or regulations under terms and procedures determined by the Board of Directors.

Section 8. Membership in all categories is based on dues payment made by each location or entity doing business in Nebraska.

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## Executive Director's Corner

I work with so many members of the food industry, every day, all year long, that I sometimes take individuals for granted. I don't mean to, it's just that there are so many people in this industry that step up to the plate when needed, that it becomes common place. Like everyone else who is trying to make things better, I get busy and don't properly thank those that go the extra mile. It's a difficult thing to do given the fact that in any given day, issues come across my desk that need immediate attention, from liquor licenses to food inspectors, from WIC to SNAP, to new payment systems. We deal with predatory pricing, interchange fees, worker's compensation and unemployment issues. And that's just in one day. Each of these issues requires the involvement of members who are willing to give the time to either educate me on the issue, or provide assistance in getting stats put together. We go from issue to issue to issue. In my defense, it is hard to keep track of everyone that donates time to make this industry better because there are so many. These are individuals who represent this industry – not because they have to – but because they want to. My greatest fear is that if I start naming names, I might unintentionally leave someone out. But here goes.....

We had a WIC Advisory Committee meeting yesterday. We have people serving on that Committee that donate an entire day 3 or 4 times a year. Some travel several hours to get to the meeting. The individuals include Bill Huenemann, 5th Street IGA in Minden; Dave McCleery, store director for Russ's Market in Lincoln; Colleen Weber with the Grocery Kart in Broken Bow; Scott Halstead, store director for Hy-Vee in Omaha; Doug Cunningham of Affiliated Foods and Peggy Ingersoll of Nash Finch. Karen Lopez of Wal-Mart in Kearney also serves on the Advisory Committee. There are vacancies for retailers so if you are willing to volunteer, this is a committee that really does make a difference. As a result of the involvement of the above listed individuals, we have been able to positively affect how WIC works in grocery stores. It's still not perfect, but small changes are taking place and those changes add up to a better experience for both our stores and our customers. A huge thank you to the WIC Advisory Committee members who donate their time and expertise!

During the legislative session there are many individuals who are called on to provide information, testimony, insight, and sometimes even product! Our State Senators make \$12,000 per year. In my opinion this is a wage that limits those who are able to serve - because individuals simply can't afford to earn wages that low. We try to make things a bit easier for everyone so our Vendor members supply items that we donate to Senators (yes – we report every single item to Accountability & Disclosure!). We thank Travis Smalley of Hershey's for donating cases of Hershey products, Bob O'Neill of Palmer Candy for donating Bings, Tim Albers of Advantage Sales & Marketing, John Shores and Diane Ramsey of Frito Lay for

donating cases of chips, all of which ended up on the desks of Senators on the Floor of the Legislature. Carl Andersen of Advantage Sales & Marketing donated ice cream toppings for the Senator/Lobbyist Fun Night (we bowled. Oh, boy, some people are really bad at that game!) and frosting for cookies at the Governor's Mansion for the kids from Cedars. Bob DeStefano of Nash Finch donated breath mints so the Senators would come out and talk to the lobbyists without being "halitosed" to death. At the end of the session, Dana Loseke of Dean Foods donated ice cream bars that were placed in the Senator's Lounge. It was a very long session and little things that bring a few moments of enjoyment are appreciated by all.

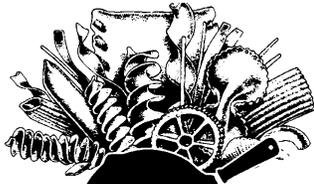
Then there were those who, week after week, participated in the Legislative Update Conference Call, every Friday morning. These people are invaluable because they put the issues into perspective, they provide input on how various twists and turns that legislation takes throughout the session, affects members of the food industry. We discussed various issues repeatedly because they evolved. A special thanks goes out to Pat Hensley, Hy-Vee and Chairman of the NGIA Legislative Committee, Tim Henderson, Steve Dolezal, Doug Cunningham, Dick Cosaert, and Paula Turner.

And there are so many more..... Fred Witecy and Steve Moskovits met with Omaha Senator Tom White in an effort to work out opposition to the bill that allows for the scanning of driver's licenses and holding that information for limited uses. Lezlie Maguire has made the trip to Lincoln to testify on various issues. Mic Jurgens of Hy-Vee and Saul Winsten of Affiliated Foods Midwest both weighed in on a bill that dealt with delivery service.

Members of the Golf Committee that helped plan our June 8 outing by researching various courses and meeting to determine the best location include Tom Schulte, Fred Witecy, Jeff Holling, Steve Williams, Ron Cose, Tony Siraco and Brian Hytrek. Their willingness to provide assistance and input saves hours in researching the various potential locations the event can be held. Location is important because if it's not a great course, we have no golfers. The golf event is the fundraiser for our annual scholarship awards. Many thanks go out to these individuals.

And then we have the NGIA Board of Directors – a group of individuals who truly care about the welfare of the food industry in Nebraska. Their leadership, their willingness to keep giving both time, effort and funding, has help build this organization to be a successful state trade association that represents our industry well. I am proud to be part of such a team.

Kathy



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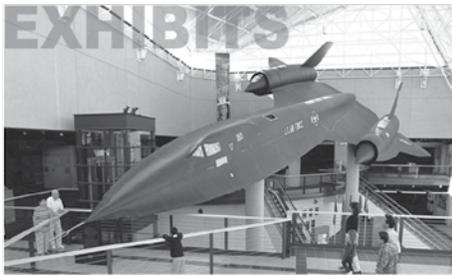
To learn more about how to drive growth in your store, contact your ConAgra Foods representative.



## 2010 NGIA Annual Conference: Strategies for Success Strategic Air Command & Space Museum - August 10-11

In former years the Strategic Air Command Museum was located at Offutt Air Force Base, and everyone knew what it was about ..... bombs and the hardware that carried them; axis-cracking bunker-busters and big, bad, Commie-toasting fryboys, slung inside the bellies of B-52s. If Brezhnev or Mao ever got cocky, all they had to do was look at pictures of the old SAC Museum, and they'd simmer down.

But the Cold War is history now, and the SAC Museum has softened with age. The facility moved from its old Omaha tarmac to a \$30 million, grit-free complex out in suburban-prairie Ashland, adopting a new name. It has become the region's "look-at-the-cool-aircraft museum," inviting tough comparisons to the much larger National Museum of the United States Air Force.



The Strategic Air and Space Museum has lots of nice air candy. An SR-71A Blackbird tilts at eye-level as you enter and beyond, in two cavernous hangars, are dozens of rare warbirds, including a B-52, a U-2 spy plane, a B-1A bomber, and a North Vietnamese MiG-21. You can walk underneath most of these, poke your head up into an open bomb bay, sit in a cockpit trainer, or walk the upper balcony to see the aircraft from every angle.

Out front, Atlas, Minuteman, and Titan missiles cast bold shadows across the parking lot. Displayed down on the hangar floors, along otherwise tall, blank walls, are obsolete control consoles and panels that were the brains of the operation. Their toggle switches, mechanical counters, and vacuum-tube boxiness make you realize that the jets and rockets look slick because they have to plow through the air, not because the military had an eye for design. Off to one side, behind a low wall of sandbags, flight simulators and motion-master rides beckon the kids -- and probably have more processing power than all of SAC did in its heyday.

Also down on the floor are classic displays from the old Museum, scattered around the periphery. Two exhibits had dents in them, deliberately left in place by the Museum's restoration staff. One is the Apollo 009 test capsule, the first one launched into space. It was later dropped by helicopter onto the desert floor to gauge the possibility of dry-land landings -- but it tended to bounce and roll after impact (bad for astronauts) which nixed the idea. The other is an XF-85 Goblin -- also known as "the flying egg" -- a tiny single-seat jet fighter designed to drop out of a bomber and fly around as an escort. But it could never get back into the bomber because of the turbulence, and since it had no wheels, it crashed a lot.



In the main hangar groups can make advance reservations to "Lunch under the B-36," with tables arranged beneath the plane -- right next to a massive 1950s Mark-36 hydrogen bomb. No one seems to notice the nuke, and the museum seems in no hurry to point it out.

**August 10, 2010**



10:00 a.m. – 12:00 **Enjoy the Ride by Steve Gilliland.** Through humor and reality-tested techniques, Steve Gilliland reveals the way to face conflicting demands in an unforgiving business environment that keeps getting tougher. From the beginning when he shows people how to ignite their passion, to the end with his compelling challenge to never lose your focus, he releases an “explosion of enthusiasm” that is absolutely contagious. This keynote speech will challenge you personally and professionally. It is simple and easy to grasp – yet profound!

Fasten your seat belt and hold on as one of North America’s premier speakers shows you how to keep your passion, cure your destination disease, and redefine your focus.

12:00 p.m. - 1:00 **Buffet Lunch and Awards**



1:00 p.m. - 2:00 **Building Sales Through Special Event Merchandising by Steve Dillard.** Independent retailers throughout the country are experiencing double digit sales increases with special event merchandising. These events create excitement with your customers that translate into increased sales and profits for you. The key to a successful event is implementing a carefully crafted plan to maximize the impact of the promotion and drive sales. During this presentation Steve will explain how you can increase sales through special events such as tent sales, truckload sales, one, two or three day meat sales, backroom sales and back to school promotions. Included will be examples of how to plan, set up and execute a successful special event that has your customers asking when the next one is scheduled.



2:15 p.m. - 3:00 **The New Media by Mark Carpenter,** Partner and Vice President of Creative Strategy for SKAR Advertising in Omaha. This presentation will address advertising options, what is available today, the advertising of tomorrow and how retailers can take advantage of all media formats. One of the state’s most experienced and award-winning creatives. Mark has worked at several ad agencies in the Midwest, serving as creative director at three of them. He has developed advertising for some of the region’s most successful brands.



3:00 p.m. - 4:00 **Colonel Michael J. Allshouse** is the Commander of the 55th Mission Support Group located at Offutt Air Force Base, Nebraska. In this capacity he leads a diverse 1,500 person group consisting of six squadrons and logistics organizations that support Air Combat Command's largest wing and 90 associate units, including United States Strategic Command and the Air Force Weather Agency. He manages a 4,006 acre base with over six million square feet of facilities and the largest privatized housing area in the continental United States. He orchestrates mobility processing for 4,747 personnel and 2,580 short tons of cargo deploying over 3,000 personnel per year. He provides mission support to 41,000 active duty, dependent and retired personnel.



4:00 p.m. - 5:00 **Tour of SAC Museum**  
 5:00 p.m. - 6:00 **Cocktails & Hors d' oeuvres** under the Wing at Strategic Air & Space Museum. Take time to visit, to share success stories, and to network with fellow members of the food industry.

**August 11, 2010**

8:00 a.m. **Shotgun start at Iron Horse Golf Club, Ashland**  
 12:00 **Lunch** following Golf

# Nebraska Grocery Industry Association

## 2010 Annual Conference

### & Golf Outing

August 10, Strategic Air & Space Museum

August 11, Iron Horse Golf Club, Ashland, NE

**“Strategies for Success”**



## Registration Form

Company Name \_\_\_\_\_ Contact Person \_\_\_\_\_

Street Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Telephone (\_\_\_\_) \_\_\_\_\_ Fax:(\_\_\_\_) \_\_\_\_\_ E-mail Address \_\_\_\_\_

Name (please print)	Registration \$90 Includes every event except golf. \$10 after July 23	Discount of 20% when 10 or more people from the same company register	Golf Outing at Iron Horse. \$125 for members; \$225 non-members. Includes driving range, green fees, golf cart, beverages & lunch. You establish your foursome.	Total
<b>TOTAL</b>				

Please complete this form and

- a) Enclose payment, and remit to: **NGIA, 5935 South 56th Street, Suite B, Lincoln, NE 68516-3307** or
- b) Fax this form with Credit Card information to: **(402) 423-8686**
- c) E-Mail this form to [mkuca@nebgrocery.com](mailto:mkuca@nebgrocery.com)

**We prefer payment via check (those darned interchange fees!),** but if you must use a credit card, please provide the following:

Credit Card Information: \_\_\_ MasterCard \_\_\_ Visa \_\_\_ Discover (*We don't take American Express!*)

Card # \_\_\_\_\_ Exp. Date \_\_\_\_\_

Card Name \_\_\_\_\_ Signature \_\_\_\_\_

Please feel free to make copies of this form for additional registrations.

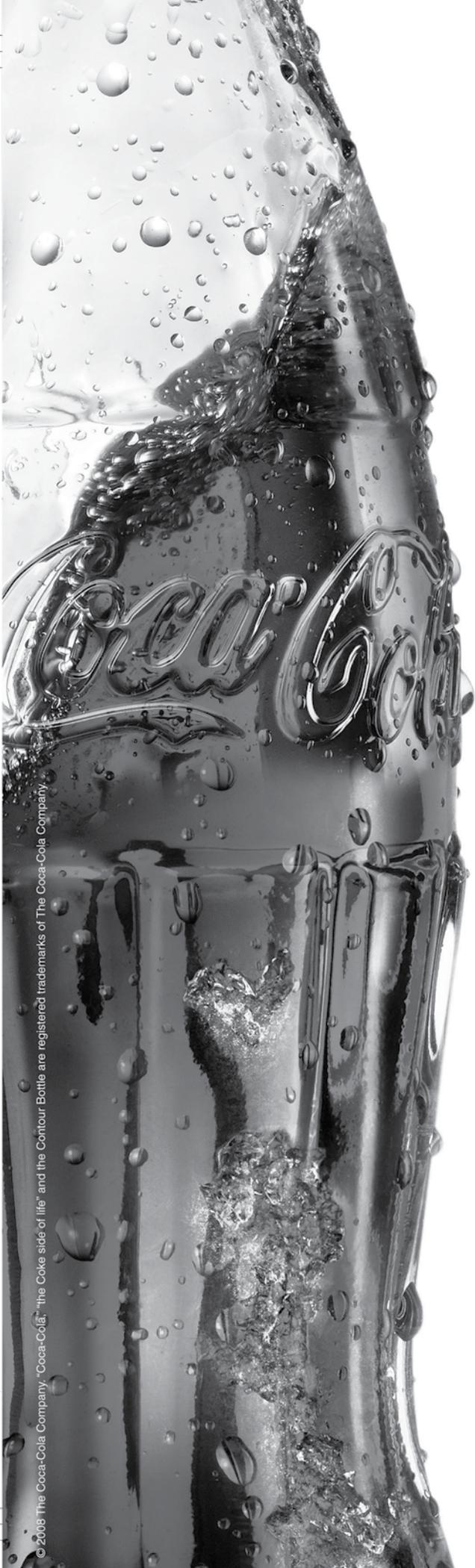
*Attire: Casual*

**For More Information Contact:**

**Nebraska Grocery Industry Association**

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# Analysis of the Family Smoking Prevention and Tobacco Control Act

Public Law 111-31  
Food Marketing Institute  
November 18, 2009

## I. Overview

The President, on June 22, 2009, signed the Family Smoking Prevention and Tobacco Control Act (the “Tobacco Act”)<sup>1</sup> that addresses the 2000 United States Supreme Court decision in *FDA v. Brown & Williamson Tobacco Corp.* In that case, the Supreme Court decided that the Federal Food, Drug & Cosmetic Act (the “FD&C Act”) did not give the U.S. Food and Drug Administration (FDA) the authority to regulate tobacco products.

The Tobacco Act adds a new chapter to the FD&C Act that grants FDA the authority to regulate the sale, manufacture and marketing of tobacco and tobacco products. The term “tobacco product” means any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product, including among other products, cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco. The Health and Human Services Secretary can include other tobacco products (e.g., cigars) within this law, by regulation.

Under its newly granted authority, FDA has created the “Center for Tobacco Products” which will oversee and implement the new law. Newly-appointed director Dr. Lawrence Deyton, M.D. will start with a \$5 million budget from fiscal year 2009. Future funding for the Center will come from user fees paid by manufacturers and importers of tobacco products.

As amended, the FD&C Act sets a new standard for the regulation of tobacco: the “appropriate protection of public health” standard. FDA does not have the authority – a power retained by Congress – to completely ban nicotine. FDA can, however, reduce nicotine levels in tobacco products.

The new law includes important deadlines and milestones, such as the following:

**September 22, 2009** Cigarettes may not have candy, fruit, or spice flavors as their characterizing flavors; menthol cigarettes are not affected by the ban.

**January 2010** Tobacco manufacturers and importers must submit information to FDA about ingredients and additives in tobacco products.

**180 Days** The Tobacco Act requires FDA to reissue, as a final rule, the original 1996 regulation with certain changes prescribed in the Tobacco Act (“1996 Tobacco Regulation”) in 180 days or more after June 22, 2009.

**June 22, 2010** The 1996 regulation will become effective on June 22, 2010.

**July 2010** Tobacco manufacturers may no longer use the terms “light,” “low” or “mild” on tobacco products without an FDA order in effect, unless the product was marketed in commerce prior to February 2007 (see below).

**July 2010** Stronger new warning labels for smokeless tobacco products will apply.

**September 2011** Regulations will be issued regarding retail sale or distribution of tobacco through means other than direct, face-to-face exchange.

**March 2012** Regulations will be issued regarding promotion or marketing of tobacco products sold through means other than direct, face-to-face exchange.

**October 2012** Warning labels for cigarettes will be revised and strengthened.

## II Retailer-Specific Provisions

The Tobacco Act includes important provisions relevant to retailers. As discussed more fully below, retailers are prohibited from selling tobacco products to minors and must train their employees in this regard. New federal penalties will apply to retailers who sell tobacco products to minors; stiffer penalties apply to retailers

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<sup>1</sup> To view a copy of the Tobacco Act: <http://www.govtrack.us/congress/billtext.xpd?bill=h111-1256>

without the proper employee training programs. Retailers should also be mindful of new labeling, marketing and advertising restrictions.

A. General Sales Restrictions

Both the Tobacco Act and the 1996 Regulation<sup>2</sup> (which will become effective on June 22, 2010) prohibit the sale of tobacco products from vending machines or self-service displays except in adult-only facilities, which are defined as facilities that prohibit entry of persons under 18. No retailer, manufacturer or distributor may provide free samples of cigarettes, smokeless tobacco<sup>3</sup> or other tobacco products. In addition, retailers may not sell packages of cigarettes containing fewer than 20 cigarettes.<sup>4</sup>

B. Sales to Minors

Retailers must continue to prohibit the sale of tobacco to persons under the age of 18. As required by the Tobacco Act, an expert panel will be convened to conduct a study on the public health implications of raising the minimum age to purchase tobacco products. The results of this study are to be submitted to Congress.

C. Retailer Training

Retailers must implement written policies and procedures that include employee training procedures and disciplinary actions with regard to sales of tobacco products to minors. The employee-training program must be approved by FDA and must include (1) procedures to verify picture identification or the use of an electronic scanning device; (2) informing employees of all applicable laws; and (3) establishing disciplinary sanctions for employee noncompliance.

The Tobacco Act defines the term “approved training program” as “a training program that complies with standards developed by the FDA for such programs.” At this point, however, no such FDA standards or procedures have been developed, other than the three items listed in the previous paragraph and no date certain has been given for when they will be.

Nonetheless, FMI serves on the Board of Directors for the “We Card” Training and Education Program ([www.wecard.org](http://www.wecard.org)). We Card has trained hundreds of thousands of retail employees to successfully prevent underage tobacco sales and properly comply with laws and regulations. FMI will seek to ensure that the We Card program qualifies as an “approved training program.”

D. Penalty Provisions

1. “Safe Harbor” and Monetary Penalties for Sales to Minor Violations

The Tobacco Act establishes a “safe harbor” on a first violation for retailers that sell tobacco to minors if the retailer has the correct procedures in place (including an “approved training program”) and the retailer relies in good faith on a government-issued picture identification, even if the identification is false. For a second and third violation, however, monetary penalties will be issued to the retailer, but at a lesser amount than those retailers without an approved training program. Once a retailer with an FDA approved training program in place reaches a fourth violation in a 24 month period, the reduced monetary phase ends and the penalty schedule intersects with the fine provisions for retailers without an approved training program.. (See the chart below.)

<sup>2</sup> The 1996 Regulation as modified by the Tobacco Act – the original statute and preamble no longer has binding effect.

<sup>3</sup> Free samples of smokeless tobacco may be distributed in an adult-only facility. In addition; states or local government may prohibit or otherwise restrict the distribution of free samples of smokeless tobacco in adult-only facilities.

<sup>4</sup> According to FDA, 20 was selected because most U.S. cigarette packs contain 20 cigarettes, and this is intended to preclude firms from manufacturing packages that contain less, as these packs are easier to conceal, and are less expensive than full-size packs and therefore may be more appealing to children.

Penalty Schedule		
Violations	Retailers with Approved Training	Retailers without Approved Training
First	Warning Letter – no monetary penalty	\$250
Second within 12 months	\$250	\$500
Third within 24 months	\$500	\$1,000
Fourth within 24 months	\$2,000	\$2,000
Fifth within 36 months	\$5,000	\$5,000
Sixth within 48 months	\$10,000	\$10,000

2. “No Tobacco Sale” Order and Request for Hearing for Sales to Minors Violations  
 If the Secretary finds that a person has committed repeated violations<sup>5</sup> of sales to minors (section 906d) at a particular retail outlet, then a no-tobacco-sale order can be placed on that person prohibiting the sale of tobacco products in that outlet. Repeated violations are defined as five violations in a 36 month period at the same retail outlet. Before issuing a violation, FDA will provide retailers with notice by certified or registered mail or personal delivery that includes information related to procedures for a hearing. A retailer may request a hearing by telephone or at the nearest regional or field office of the FDA.

3. Coordination with States

The Tobacco Act directs FDA to consider the amount of any penalties a retailer pays to a state for the same violation of the Tobacco Act and directs FDA to mitigate civil penalties accordingly.

IV. Labeling, Marketing and Advertising

A. Labeling

By July 2010, warning labels for *smokeless tobacco* products will be revised and strengthened. By October 2012, warning labels for *cigarettes* will be revised and strengthened. Warnings for cigarettes will comprise the top 50 percent of the front and rear panels of the cigarette package. The word, “warning” must appear in all capital letters. One of the following labels must appear on each package:

- WARNING: Tobacco smoke can harm your children.
- WARNING: Cigarettes cause fatal lung disease.
- WARNING: Cigarettes cause cancer.
- WARNING: Cigarettes cause strokes and heart disease.
- WARNING: Smoking during pregnancy can harm your baby.
- WARNING: Smoking can kill you.
- WARNING: Tobacco smoke causes fatal lung disease in nonsmokers.
- WARNING: Quitting smoking now greatly reduces serious risks to your health.
- WARNING: Cigarettes are addictive.

Additionally, specific warnings must appear on the labels of smokeless tobacco, (e.g., “WARNING: This product can cause mouth cancer.”) FDA will issue regulations requiring graphics on labels depicting the negative health consequences of smoking. Once established, FDA will communicate with industry and the public about implementation.

<sup>5</sup> The Tobacco Act directs FDA to issue guidance in more precisely defining the term, “repeated violation.”

## B. Marketing

### 1. “Light” Cigarettes and Premarket Review

The Tobacco Act imposes new requirements on “modified risk” tobacco products,<sup>6</sup> such as cigarettes that are marketed as “light,” “low” or “mild.” Specifically, as of July 2010, all new tobacco products marketed with these terms must undergo premarket review and obtain FDA approval before they are marketed. A new tobacco product is one that was not commercially marketed or test marketed as of February 15, 2007. All tobacco products that were commercially marketed or test marketed, in the United States before that date may continue to be marketed without premarket approval, but must comply with all provisions of the Tobacco Act. The premarket review requirement applies to all tobacco products (not just, “modified risk”) that were marketed prior to February 15, 2007 but that are subsequently modified in specified ways including in terms of design, ingredients or nicotine content.

### 2. Combination Products

Section 201(rr)(4) of the FD&C Act as amended by the Tobacco Law prohibits the marketing of tobacco products in combination with any other article or product regulated under the FD&C Act (including drugs, biologics, food, cosmetics, medical devices or dietary supplements). In September 2009, FDA issued draft guidance<sup>7</sup> interpreting the new statutory provision entitled, “The Scope of the Prohibition Against Marketing a Tobacco Product in Combination with Another Article or Product Regulated under the Federal Food, Drug, and Cosmetic Act (FDCA).”<sup>8</sup> According to the draft guidance, FDA interprets the new provision to prohibit the following:

- a coupon for a 50 cent discount on a specifically identified mouthwash is offered contingent upon the purchase of a pack of cigarettes;
- compressed or powdered tobacco is added to candy or gum (which are foods under the FD&C Act) and the candy or gum is identified as containing a tobacco product; and,
- a tobacco product and a non-tobacco product regulated under the FD&C Act packaged together in a single package or as a unit, such as a pack of cigarettes shrink-wrapped or sold in a box, bag, or other container with a bottle of mouthwash.

The same guidance also states FDA’s belief that the following activities would not be prohibited:

- a tobacco product and a non-tobacco product regulated under the FD&C Act are advertised on the same store sign or in the same store circular or advertised in the same place; or,
- two or more tobacco products are packaged together in a single package or as a unit.

Comments should be filed with FDA on this guidance by January 4, 2010. See:

[www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm184283.htm](http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm184283.htm)

## C. Advertising

The Tobacco Act imposes new restrictions on tobacco product advertising. For example, the new law prohibits tobacco companies from sponsoring sporting events. Moreover, tobacco products may not be advertised within 1,000 feet of a school or public playground.<sup>9</sup>

The Tobacco Act also relegates tobacco product advertising to so-called, “tombstone advertising” (black and white) and states that all advertising must contain a warning statement, such as those required

<sup>6</sup> A “modified risk” tobacco product is one that is sold or distributed for sale to reduce harm or the risk of tobacco-related disease associated with commercially marketed tobacco products.

<sup>7</sup> See: <http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm184283.htm>

<sup>8</sup> This draft guidance, when finalized, will represent the FDA’s current thinking on this topic. According to FDA, an alternative approach may be used if the approach satisfies the requirements of the applicable statutes and regulations. Alternative approaches may be discussed with FDA staff.

<sup>9</sup> Neither the Tobacco Act nor the 1996 Regulation addresses line-of-sight implications for retailers near schools and playgrounds other than the aforementioned 1,000 foot stipulation.

on tobacco product packages (see “Labeling,” above). Specific provisions regulate advertising in newsprint and on matchbooks.

#### **D. Retailer Violations of Labeling, Marketing and Advertising Provisions**

A retailer is responsible for advertising if it is displayed in a location open to the public. However, retailers will not be held in violation of the advertising or packaging requirements if the ad or package (1) contains a warning label; (2) is supplied to the retailer by a licensed or permit-holding tobacco product manufacturer, importer, or distributor; and (3) has not been altered by the retailer in a manner that is specified by law.

#### **V. Flavored Tobacco Products**

Effective September 22, 2009, cigarettes that contain certain characterizing flavors are considered adulterated. Specifically, section 907(a)(1)(A) of the FD&C Act, as amended by the Tobacco Act, establishes a tobacco product standard special rule for cigarettes that states in part:

...a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke.

This standard applies to all tobacco products that meet the definition of a “cigarette” in section 900(3) of the FD&C Act even if they are not labeled as “cigarettes” or are labeled as cigars or as some other product.<sup>10</sup>

Currently, menthol is not included in this ban. However, the Tobacco Products Scientific Advisory Committee, which advises the FDA Commissioner in discharging responsibilities as they relate to the regulation of tobacco products, will submit a recommendation on the impact of the use of menthol in cigarettes on the public health. Adulterated products sold or held for sale in the United States may be subject to seizure under section 304 of the Tobacco Act. In addition, manufacturers, distributors, and retailers may be subject to injunctions, civil money penalties, and criminal prosecution for violating the requirements of the Tobacco Act.

#### **VI. Preservation of State and Local Authority**

In addition to the provisions outlined in the federal law, states, localities, and tribal governments are permitted to impose requirements that are in addition to or more stringent than FDA requirements. For example, states may:

- impose specific bans or restrictions on the time, place, and manner – but not the content – of cigarette advertising;
- may prohibit or restrict the distribution or free samples of smokeless tobacco in any location; and,
- may tax tobacco products.

The Tobacco Act directs FDA to coordinate with the states in enforcing the provisions of the Tobacco Act.

#### **VII. Regulatory Proceedings**

Much of the new law will require implementation through rulemaking as an initial matter. FDA has established a public docket to obtain comments on the overall implementation of the Tobacco Act. Comments should be submitted by December 28, 2009 to <http://www.regulations.gov>. To view submitted comments:

<http://www.regulations.gov/search/Regs/home.html#docketDetail?R=FDA-2009-N-0294>

In addition, FDA is also seeking public comment on draft guidance entitled, “The Scope of the Prohibition Against Marketing a Tobacco Product in Combination with Another Article or Product Regulated under the Federal Food, Drug, and Cosmetic Act.” Comments should be filed with FDA on this guidance by January 4, 2010. See: [www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm184283.htm](http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm184283.htm)

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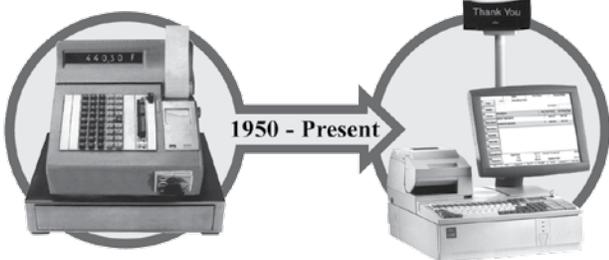
<sup>10</sup> See, “Letter to Industry on Cigarettes Containing Certain Characterizing Flavors” at: <http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm182186.htm>

**VIII. Summary**

The Tobacco Law will impose new requirements on those who manufacture and import tobacco products, as well as those who sell or distribute them. The most important provisions for retailers concern sales to minors and employee training. In addition, retailers should be aware of new requirements related to labeling, marketing and advertising tobacco products.

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## No Federal Income Tax Paid by 47 Percent

WASHINGTON (AP) -- Tax Day is a dreaded deadline for millions, but for nearly half of U.S. households it's simply somebody else's problem.

About 47 percent will pay no federal income taxes at all for 2009. Either their incomes were too low, or they qualified for enough credits, deductions and exemptions to eliminate their liability. That's according to projections by the Tax Policy Center, a Washington research organization.

Most people still are required to file returns by the April 15 deadline. The penalty for skipping it is limited to the amount of taxes owed, but it's still almost always better to file: That's the only way to get a refund of all the income taxes withheld by employers.

In recent years, credits for low- and middle-income families have grown so much that a family of four making as much as \$50,000 will owe no federal income tax for 2009, as long as there are two children younger than 17, according to a separate

analysis by the consulting firm Deloitte Tax.

Tax cuts enacted in the past decade have been generous to wealthy taxpayers, too, making them a target for President Barack Obama and Democrats in Congress. Less noticed were tax cuts for low- and middle-income families, which were expanded when Obama signed the massive economic recovery package last year.

The result is a tax system that exempts almost half the country from paying for programs that benefit everyone, including national defense, public safety, infrastructure and education. It is a system in which the top 10 percent of earners -- households making an average of \$366,400 in 2006 -- paid about 73 percent of the income taxes collected by the federal government.

The bottom 40 percent, on average, make a profit from the federal income tax, meaning they get more money in tax credits than they would otherwise owe in taxes. For those people, the government sends them a payment.

"We have 50 percent of people who are getting something for nothing," said Curtis Dubay, senior tax policy analyst at the Heritage Foundation.

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The vast majority of people who escape federal income taxes still pay other taxes, including federal payroll taxes that fund Social Security and Medicare, and excise taxes on gasoline, aviation, alcohol and cigarettes. Many also pay state or local taxes on sales, income and property.

That helps explain the country's aversion to taxes, said Clint Stretch, a tax policy expert Deloitte Tax. He said many people simply look at the difference between their gross pay and their take-home pay and blame the government for the disparity. "It's not uncommon for people to think that their Social Security taxes, their 401(k) contributions, their share of employer health premiums, all of that stuff in their mind gets lumped into income taxes," Stretch said.

The federal income tax is the government's largest source of revenue, raising more than \$900 billion -- or a little less than half of all government receipts -- in the budget year that ended last Sept. 30. But with deductions and credits, especially for families with children, there have long been people who don't pay it, mainly lower-income families.

The number of households that don't pay federal income taxes increased substantially in 2008, when the poor economy reduced incomes and Congress cut taxes in an attempt to help recovery.

In 2007, about 38 percent of households paid no federal income tax, a figure that jumped to 49 percent in 2008, according to estimates by the Tax Policy Center.

In 2008, President George W. Bush signed a law providing most families with rebate checks of \$300 to \$1,200. Last year, Obama signed the economic recovery law that expanded some tax credits and created others. Most targeted low- and middle-income families.

Obama's Making Work Pay credit provides as much as \$800 to couples and \$400 to individuals. The expanded child tax credit provides \$1,000 for each child under 17. The Earned Income Tax Credit provides up to \$5,657 to low-income families with at least three children.

There are also tax credits for college expenses, buying a new home and upgrading an existing home with energy-efficient doors, windows, furnaces and other appliances. Many of the credits are refundable, meaning if the credits exceed the amount of income taxes owed, the taxpayer gets a payment from the government for the difference.

"All these things are ways the government says, if you do this, we'll reduce your tax bill by some amount," said Robertson Williams, a senior fellow at the Tax Policy Center.

The government could provide the same benefits through spending programs, with the same effect on the federal budget, Williams said. But it sounds better for politicians to say they cut taxes rather than they started a new spending program, he added.

Obama has pushed tax cuts for low- and middle-income families and tax increases for the wealthy, arguing that wealthier taxpayers fared well in the past decade, so it's time to pay up. The nation's wealthiest taxpayers did get big tax breaks under Bush, with the top marginal tax rate reduced from 39.6 percent to 35 percent, and the second-highest rate reduced from 36 percent to 33 percent.

But income tax rates were lowered at every income level. The changes made it relatively easy for families of four making \$50,000 to eliminate their income tax liability.

Here's how they did it, according to Deloitte Tax:

The family was entitled to a standard deduction of \$11,400 and four personal exemptions of \$3,650 apiece, leaving a taxable income of \$24,000. The federal income tax on \$24,000 is \$2,769.

With two children younger than 17, the family qualified for two \$1,000 child tax credits. Its Making Work Pay credit was \$800 because the parents were married filing jointly.

The \$2,800 in credits exceeds the \$2,769 in taxes, so the family makes a \$31 profit from the federal income tax. That ought to take the sting out of April 15.

Internal Revenue Service: <http://www.irs.gov>

Tax Policy Center: <http://www.taxpolicycenter.org>

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## Clearing the Way for Electronic Document Storage

by Jack L. Shultz

HARDING & SHULTZ, P.C., L.L.O.

Lincoln, Nebraska

Changes in federal and state laws allow retention of most employment records in electronic format. For example, in 2000, the Electronic Signatures in Global and National Commerce Act (ESIGN) was signed into law. See 15 U.S.C. § 7001 et seq. This federal law broadly allows the use of electronic signatures in contracts relating to or affecting interstate or foreign commerce. In 2002, the Nebraska legislature enacted a similar law when it adopted the Uniform Electronic Transactions Act (ETA), which broadly allows an electronic record to be maintained for any record that “a law requires . . . to be in writing,” and provides that an electronic signature satisfies “a law [that] requires a signature.” NEB. REV. STAT. § 86-634 (Reissue 2008).

The United States Office of Personnel Management (OPM) recently converted its personal records and civil service retirement records from paper to electronic format. As part of that process, OPM’s General Counsel issued an opinion letter that converting the documents to electronic format would not affect their admissibility in federal court. OPM Legal Counsel Op., Vol. 32 (May 30, 2008). Significantly, the United States Air Force and the United States Postal Service have also implemented programs aimed at converting their paper records to electronic format.

### **EEOC Documents**

In 2006, the Equal Employment Opportunity Commission (EEOC) issued an Informal Discussion Letter stating that nothing in the regulations governing Title VII, the Americans with Disabilities Act, or the Age Discrimination in Employment Act, required preservation of records in paper format so long as electronic storage preserved all information contained in the original format.

### **OFCCP Documents**

In 2008, the Office of Federal Contract Compliance Programs (OFCCP) issued a Notice in which it referred to the 2006 EEOC Letter and set forth its own policy

regarding electronic document storage. OFCCP Trans. No. 279 (May 14, 2008). In its Notice, the OFCCP stated that contractors may use electronic storage to satisfy record retention requirements and that paper records could be destroyed so long as the electronic record could accurately reproduce the original record.

For employers interested in trading in boxes of paper documents for an electronic storage system, the following guidelines will be helpful:

- **Applications for Employment; Acknowledgment of Receipt of Employee Handbook/Orientation Material; Disciplinary Actions; Employee Evaluation; and Payroll Change Forms**

Under the broad language of ESIGN and the ETA, an employer may utilize electronic signatures with the described documents and the documents may, therefore, be stored in electronic format. The suggested retention period is five years.

- **IRS Form W-4**

The Internal Revenue Service (IRS) has several requirements for employers utilizing an electronic system for submission and storage of Forms W-4. IRS Pub. 15-A (2010). These requirements are that the system provides assurances regarding sender and recipient identity, the system provides the same information as the paper form, the electronic submission is signed with the employee’s electronic signature which is the final entry on the submission, the employer provides a hard copy of the form to the IRS if requested, the employer and employee provide sworn statements to the IRS, and the system meets usual recordkeeping requirements. The retention period is three years.

- **IRS Form I-9; E-Verify; Social Security Number Verification; Copy of Drivers License**

Employers may electronically generate and store Forms I-9 so long as they satisfy certain requirements. See USCIS Handbook for Employers, Part III. These requirements include requirements similar to those for W-4 Forms and also require that the resulting document is legible, that the employee receives instructions for completing the Form, and that a retrieval system permits searches by any data element. The retention period is three years from the hire date or one year from the termination date, whichever is later.

**• Nebraska UI Form 350 (Unemployment)**

The UI Form 350 may be submitted electronically by fax. 218 NAC 1-02.

Although the Nebraska Department of Labor regulations are silent as to whether the record may be stored electronically, the broad language of the ETA likely authorizes electronic storage of the record. See NEB. REV. STAT. § 86-634. The retention period is two years after the current year.

**• IRS § 401(k) Enrollment, Changes and Distribution; Group Insurance and Flexible Spending Account Enrollment and Changes**

The United States Department of Labor allows records of benefit plans covered by Title I of the Employment Retirement Income Security Act (ERISA), to be stored in electronic format provided that safeguards are in place to ensure the electronic storage system is reliable and records stored electronically are complete, accurate, and accessible. Plans regulated by the Pension Benefit Guaranty Corporation (PBGC) may also be stored in electronic format. See 29 C.F.R. § 4000.43. The retention period for these documents is six years and if the document is filed, six years from the filing date.

**• Credit Union; Direct Deposit**

Pursuant to ESIGN, these documents may be stored in electronic format so long as the records can be reconstructed back into the original paper format. See 15 U.S.C. § 7001(a)(1). The retention period is three years.

**• Employee Medical Records (FMLA)**

Records relating to medical history which are maintained pursuant to the Family and Medical Leave Act may be stored electronically provided that they meet certain requirements for confidentiality and can be reproduced clearly and identifiably by date or pay period. See 29 C.F.R. § 825.500. The retention period is three years.

**• IRS Form 8850 (Work Opportunity Tax Credit)**

Although Form 8850 may not be submitted electronically, the Form may be stored electronically after the submitting employer receives a certificate from the Nebraska Department of Labor verifying the eligibility of the subject employee. See IRS Rev. Proc. 97-22.

**CONCLUSION**

While recent developments in the law seem to favor electronic document storage, many laws still require that records be retained in original paper format. If you are interested in electronic storage of employment records, you should consult with your legal counsel to determine which records can be kept by electronic storage and for what retention period. Maybe it's time to get rid of those boxes!

*Editor's Note: This article is not intended to provide legal advice to our readers. Rather, this article is intended to alert our readers to new and developing issues and to provide some common sense answers to complex legal questions. Readers are urged to consult their own legal counsel or the author of this article if the reader wishes to obtain a specific legal opinion regarding how these legal standards may apply to their particular circumstances. The author of this article, Jack L. Shultz, can be contacted at 402/434-3000, or at Harding & Shultz, P.C., L.L.O., P.O. Box 82028, Lincoln, NE 68501-2028, or jshultz@hslegalfirm.com.*

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