



A Note from WVWA President Jim Cunningham

Let me begin by thanking Jan, Traci, Sarah and Ryan for their tireless collective effort during the 2016 regular and extended sessions of the West Virginia Legislature.

The countless hours that Jan spends at the Capitol and elsewhere on our behalf, the work of WVWA members visiting the Capitol and contacting their legislators in combination with the numerous email updates/alerts coordinated by the WVWA office, have all contributed to our success during the regular session.

The Executive Director's column will include briefings on the bills that affect and impact our industry, so I will not address the specifics of the legislation. Suffice it to say, there were many anxious days and some very surprising committee and floor actions taken, not to mention some unpredicted lop sided votes. We, as wholesalers, faced a myriad of issues and still came out of the session pretty much unscathed up to this point, but it's far from over.

Knowing that with many readers I will be "preaching to the choir," I ask that you please indulge the following opinions and observations.

We all know that positive legislative outcomes seldom materialize without extremely hard work and strong relationships with our representatives in Charleston. It is critical that those who represent us know who we are and that they understand our respective businesses and the potential impacts that a particular piece of legislation may have on the viability of our business. This is where I want to commend our association members for taking the time to contact their legislators and enlighten them on the potential effects of the numerous bills that were under consideration.

For those members who were not personally engaged this session, it is very important that you know that legislators do not receive a significant number of contacts from their constituents, on most issues. When they do receive a call or a personal visit, more often than not, they are happy to hear from someone from their district. And, generally, most legislators are receptive to the opinions of those whom they represent.

Many issues that legislators face are quite intricate and complicated; and they cannot possibly understand all the implications of every bill. With a combined Senate and House total of 1,894 bills introduced this session, how could any individual have a comprehensive understanding of every issue? If they do not think there would be adverse ramifications for their constituents, it is unlikely that they will have a strong position on the matter. In their defense, if there is no perceived issue, why devote the time necessary to get up to speed on all legislation that comes before them? And so ambivalence sets in. A single phone call or visit could quickly turn a legislator's ambivalence into advocacy for a constituent who they now know may be adversely affected.

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That's where we as businesspeople come in. If we have an issue with a bill, then we must give our representatives a reason to educate themselves on the ramifications of that particular piece of legislation. That educational process begins with us simply contacting them, showing how our business would be affected if the bill were to become law. The impact of a legislator hearing from someone who employs voters back home can be dramatic.

During the upcoming election cycle, I encourage you to get to know the candidates seeking office and support those who you feel will best represent your interests.

As of this writing, there is a great deal of uncertainty about how the West Virginia state budget stalemate will be resolved. That uncertainty will likely go on for weeks and perhaps months. Undoubtedly tax increases will be proposed and it is imperative that we be vigilant and involved in the process, during this time of uncertainty, in order to protect our business interests.

Your legislative committee is prepared to meet on an as needed basis as new information becomes available and the WVWA office will issue Legislative Alerts to keep you informed.

Jim



From the Director

I have lobbied now for twenty-two years, four of those I have been under contract for WVWA. Each session is unique and takes on a life of its own. With West Virginia facing one of its toughest periods in history, this session was particularly challenging for our industry. Our state is in a severe fiscal crisis and a workforce participation rate that's below 50 percent. It took a lot of bold decisions by President Cole and Speaker Armstead to put our state on the track of prosperity and growth. I'm eager to see the benefits of those decisions in the coming years.

The Legislature enacted several bills to move West Virginia forward:

- Passed the West Virginia Workplace Freedom Act, which would eliminate the requirement of an employee to be a member of a labor organization as a condition of employment;
- Eliminated the prevailing wage rate on public construction projects. That's a move that's expected to save West Virginia taxpayers money;
- Passed a comprehensive regulatory reform package to remove outdated or obsolete rules from the West Virginia State Register;
- Passed a measure to drug test and screen recipients of Temporary Assistance for Needy Families that provides drug abuse treatment for those in need;
- Passed several new legal reform measures in an effort to make West Virginia more business friendly, That includes preventing plaintiffs from recovering damages for injuries that occur as a result of their wrongful conduct

Session Industry Highlights

Unfair Trade Practices Act (UTPA) Modernization – Avoiding Full Repeal

The Unfair Trade Practices Act (UTPA) bill, SB 259, passed and has been signed by Governor Tomblin. As originally introduced, the bill called for the full repeal of the UTPA. I, along with OMEGA members and a large number of stakeholders, spent countless hours and effort working with legislators through the process to develop a bill that worked for all parties involved. This was a hard fought battle and one now that we consider a victory.

We consider this a modernization of the UTPA. We are extremely pleased that we were able to keep our 4% wholesale as well as the 7% retail mark-ups. The bill removes language allowing plaintiffs to get triple damages. The bill addresses rebates, discounts and coupons, stating that they must be earned.

No Tobacco Tax Increases

During the regular session, we prevented any tax increases to tobacco. There were several bills introduced this session by both chambers of the Legislature that called for increases in the tobacco tax. The Governor proposed a tobacco tax bill, SB 420, would have increased to tax on cigarettes .45 cent per pack, added a tax on e-cigarettes of 7.5 cents per milliliter and increased the OTP tax from 7% to 12%. The bill was amended to \$1 a pack and overwhelmingly passed the Senate, but the bill quickly died in the House.

No Food, Soft Drink, Beer or Other Tax Increases

There were a few bills introduced this session that called for an increase on other products vital to our industry's consumers. SB 418 would have added a three percent consumer tax back on food sales. SB 668 would have increased the consumer sales tax on soft drinks, syrups and dry mixes. HB 2029 and HB 2262 would have allowed counties or municipalities to add up to three percent in additional taxes to food and beverages sold at restaurants and SB 4701 would have allowed for increased taxes on beer, liquor and wine. We prevented these bills from ever gaining consideration in the committee process. Late into the session, there was serious talk of placing amendments into SB 420, which would have increased not only the tax on soft drinks, but beer and candy as well. We cannot allow for the nickel and diming of our industry's consumers and we'll continue to work against taxes of this nature.

No Increase in Legal Tobacco Usage Age

There were two bills, SB 248 and HB 4509, introduced this session that would have raised the legal age to buy tobacco products in West Virginia to 21 years of age. These bills would have had a significantly negative impact on our industry and we were able to prevent this legislation from ever gaining momentum for serious consideration. This issue is quickly gaining popularity around the country. This year, Hawaii became the first state to raise the legal age to 21 and, just today, California's legislature passed legislation to do the same. It is likely this issue will become more popular as time passes and there will be a larger push to increase the legal tobacco usage age. We will continue to monitor the issue and stay proactive going forward.

Regulatory Reform

The main legislation addressing reforming the State's regulatory practices, SB 619, also known as the 2016 Regulatory Reform Act. The bill changes the current rule-making statute, including mandating both an economic and a health impact statement on each proposed rule and requiring all proposed rules include data on whether the rule will be "overly burdensome" to business and industry. Several other regulatory reform bills, including HB 2101, were passed this session, which will erase obsolete regulations from state code and reviews state agencies, boards and other entities to determine their necessity going forward. Approximately 12% of the rules on the books in WV were deleted this session. These reforms are a great first step and one that deserves recognition.

Budget - Special Session

The Legislature and the Administration continue to work on the Budget and the Governor will call members back into special session. The Governor's Office announced tax estimates for 2017 were lowered by about \$240 million, thus predicting a hole of \$554 million, which will require more significant work on the budget than previously anticipated. It is highly likely that a tobacco tax increase could be included, along with other increases, in the Governor's Call for a Special Session. At best guess, this session will happen in mid-April, but it could be later. We are continuing to work against any measure that would negatively impact our members and weaken our competitiveness on our state's borders.

Elections

Election season is upon us. The primary election is May 10th. For the first time court races are non-partisan and will be elected in May. I urge you to support **Beth Walker** for **Supreme Court**, who has been endorsed by our Association. Get involved in the other races as well. If you have questions about a candidate please feel free to call me. I have information on the statewide, Senate and House of Delegate races. If you have a candidate that you would like to recommend please feel free to call us on that as well.

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PAC

Donate to the WHOLE PAC! A strong PAC enables us to support the candidates we need in office. The balance in the WHOLE PAC account is \$9366.

MALC Conference

I hope that you have made plans to attend the 2016 Mid-Atlantic Conference, which will be held June 1st and 2nd at The Greenbrier Resort. Once again, MALC Chairman Rob Sincavich has put together a great event! If you have not signed up, please visit the WVWA web site and download the forms for this event or call the Association Office. Also, if you have not made your room reservation at The Greenbrier, please call 855.859.2294 as soon as possible. The cut-off date to make reservations is April 26th. If you have any questions regarding this event, please call the Association Office at 304.205.5496.

Thanks

I am proud to represent WVWA. I want to personally thank those that came to Charleston made calls and got involved during the Legislative Session.

This is your Association. If you have compliments, complaints or suggestions please feel free to contact me. I am always eager for new ideas and new opportunities.

Jan



WVWA PAC Committee Endorses Beth Walker for Supreme Court

In February, the WV Wholesalers Association's Political Action Committee endorsed **Beth Walker for the West Virginia Supreme Court of Appeals**. The Committee decided that, as an Association, we couldn't stand on the sidelines with such an important election on the line. It is critical we elect an experienced, business-friendly candidate to a seat on our state's highest court in May.

With last year's passage of HB 2010, judicial races are now non-partisan and will be decided during Primary Elections. It is vital that we get out and **vote for Beth Walker on May 10th!**

State Update

State's Revenue Collection Deficit "Trending Upwards"

The state's revenue deficit for this fiscal year is "trending upwards," state Revenue Secretary Bob Kiss told reporters in a conference call on March

3rd detailing last month's revenue collection numbers.

The state missed the collection mark by \$17.5 million mainly because severance tax collections were \$31.1 million below estimates and the consumer sales tax brought in \$6.4 less than projected.

The Tomblin administration had predicted a revenue hole of \$354 million for the current budget year. That hole will be deeper, Kiss said, how much deeper he's not yet certain.

"It's not a catastrophic trending upward but it's a trending upward," he said.

When you look at the bottom line for February the state was actually \$51 million above estimates but that's because state lawmakers approved several measures in recent weeks to help the situation including taking money from the Rainy Day Fund.

Kiss urged lawmakers to stick with the governor's plan to raise the cigarette tax and other measures to deal with the growing shortfall.

Kiss thanked lawmakers for passing the workers' comp debt bill (SB 419) that shifts revenues from special taxes that have been paid into that fund into the general revenue fund for this budget year. He said the bill provided \$20 million more than the governor originally proposed.

Other revenue highlights for February included:

- Tobacco Product Excise Tax: collections totaled \$8.5 million in February. Monthly collections were more than \$1.2 million above estimate. Cumulative collections of \$67.5 million were \$0.1 million below estimate and 3.5 percent below prior year receipts.
- State Road Fund: Collections of nearly \$55.7 million fell short of the February estimate by \$13.0 million and prior year receipts by 21.8 percent. Cumulative collections of \$463.2 million were \$2.1 million below estimate and 4.9 percent below prior year collections.

West Virginia Unemployment Rate Rises in January

West Virginia's seasonally adjusted unemployment rate inched higher in January.

WorkForce West Virginia says in a news release that the unemployment rate rose one-tenth of a percentage point to 6.3 percent. The number of unemployed state residents increased by 1,000 in January to 49,400.

Job declines including 1,100 in leisure and hospitality, 800 in government, 600 in construction, and 500 each in professional and business services, and educational and health services. Job gains included 1,000 in manufacturing and 600 in financial activities.

Nationally, the unemployment rate fell one-tenth of a percentage point to 4.9 percent in January.

Ketchum Chief Justice in 2016

State Supreme Court Justice Menis Ketchum became the court's chief justice on January 1st. Justice Menis Ketchum will serve as chief justice next year.

Ketchum, who was elected to a 12-year term on the High Court in 2008, served as chief justice in 2012. The position usually rotates among the five sitting justices. Ketchum will replace Chief Justice Margaret Workman who has served in the position during the past year.

Tomblin Appoints New Acting Cabinet Secretary of the Department of Administration

Gov. Earl Ray Tomblin has appointed Mary Jane Pickens Acting Cabinet Secretary of the Department of Administration.

Pickens has assumed the role in the wake of the resignation of former Acting Cabinet Secretary Jason Pizatella.

Pickens has served as Deputy Secretary for the Department of Administration, as well as Executive Director of the Board of Risk and Insurance Management, a role which she'll continue to hold.

Pickens also served as General Counsel of the West Virginia Offices of the Insurance Commissioner from 2003 to 2011.

Expand Your Political Clout Seven Easy Ideas

1. **Host a "meet & greet."** Legislators like to have meet & greets where they publicize an opportunity for constituents to stop by a location where the legislator will be available during certain hours. Call a legislator whom you support and offer your business as a location for a meet & greet. Promote the event to your customers and donate beverages to attendees. Bonus if you serve beverages in containers with your company logo.
2. **Give a party.** Host a lunch, cookout or other event on the day of an election. Invite your customers, neighbors, elected officials and candidates for office. Bonus if you partner with suppliers to serve food that is featured in your store.
3. **Do something social.** Invite an elected official to lunch, breakfast or coffee.
4. **Invite elected officials to tour your facility.** Explain how your company operates and introduce them to your employees.
5. **Encourage your employees to get out and vote.**
6. **Provide bottled water.** Deliver cases of water to a legislator's campaign headquarters for volunteers.
7. **Invite elected officials to ribbon-cuttings, store openings and other events.** When you open a new store or complete a major remodel, be sure to invite the legislators in that district to the opening or tour the remodeled facility - so they know about the capital investment that you're making in their district.

West Virginia Losing More People Than Any Other State

West Virginia lost more people in the year prior to July 2015 than any other state, according to new population numbers from the U.S. Census Bureau.

As of July 1, 2014, there were 1,848,751 state residents compared with 1,844,128 on July 1, 2015, a decline of about .25 percent. The counties that saw the largest drops in population were in Southern West Virginia: -2.2 percent in McDowell County, -1.7 in Wyoming County, -1.7 in Logan County, -1.5 in Boone County and -1.5 in Mingo County. Roane County was not far behind at -1.2 with Tyler County showing a loss in population of -1.1 percent. In all, 36 counties lost population.

The largest population increase in West Virginia, 1.4 percent, was recorded in Berkeley County. Both Jefferson County and Monongalia County recorded gains of 1.3 percent. They were among 13 counties that gained people.

Six counties showed neither population increases nor declines.

Kanawha County is still the most populated county in West Virginia, with 188,332 people as of July 1, 2015,

Federal Update

U.S. Department of Transportation Bans E-Cigs on Commercial Flights

U.S. Transportation Secretary Anthony Foxx recently announced a final rule that explicitly bans the use of electronic cigarettes on commercial flights. The final rule applies to all scheduled flights of U.S. and foreign carriers involving transportation in, to, and from the U.S.

"This final rule is important because it protects airline passengers from unwanted exposure to electronic cigarette aerosol that occurs when electronic cigarettes are used onboard airplanes," said Secretary Foxx. "The Department took a practical approach to eliminate any confusion between tobacco cigarettes and e-cigarettes by applying the same restrictions to both."

The final rule, to be published in the Federal Register, clarifies that the Department's airline smoking rule prohibits the use of electronic cigarettes and similar products in addition to the existing prohibition on the smoking of tobacco products.

The Department views its current regulatory smoking ban to be sufficiently broad to include the use of electronic cigarettes; however, the prior rule did not explicitly define "smoking." The Department took this action to eliminate any confusion over whether its ban includes electronic cigarettes.

Electronic cigarettes cause concern because studies have shown that e-cigarette aerosol can contain a number of harmful chemicals. While further study is needed to fully understand the risks, the Department believes that a precautionary approach is best. The Department is particularly concerned that vulnerable populations (such as children, the elderly, and passengers with respiratory issues) would be exposed to the aerosol within a confined space, without the opportunity to avoid the chemicals.

This rule explicitly bans the use of electronic cigarettes in all forms, including but not limited to electronic cigars, pipes, and devices designed to look like everyday products such as pens. The ban does not include the use of medical devices such as a nebulizers.

The Department also extended the ban on smoking, including electronic cigarettes, to all charter (nonscheduled) flights of U.S. carriers and foreign air carriers where a flight attendant is a required crewmember. This change was necessary to implement the Department's rule with a 2012 statutory amendment that extended the smoking ban to include all flights where a flight attendant is a required crewmember.

The rulemaking finalized today is a part of the Department's broader effort to strengthen airline passenger rights and improve information available to the public. The final rule is available at www.regulations.gov, docket number DOT-OST-2011-0044.

The Department's Pipeline and Hazardous Materials Safety Administration (PHMSA) previously addressed safety concerns regarding the transport of electronic cigarettes. In October 2015, PHMSA issued an interim final rule prohibiting passengers from carrying battery-powered portable electronic smoking devices in checked baggage and prohibiting them from charging these devices or batteries on board aircraft.

President Obama Proposes Cigarette/OTP Tax Increases

Again this year, President Obama submitted to Congress his proposed federal budget which included a federal cigarette tax increase of \$.94/pack and a proportionate increase in all federal OTP tax rates to fund "Preschool for All," the President's universal pre-kindergarten education program. Although the budget proposal has been formally submitted, both chairmen of the Republican-controlled House and Senate budget committees have gone on record saying they do not see the proposal receiving a formal hearing.

Judge Sides with Retailers on Tobacco Violations

NACS and retail member Orton Motor Co. launched a legal challenge in December 2015 to some of the practices the U.S. Food and Drug Administration's Center for Tobacco Products (CTP) has engaged in to enforce its tobacco regulations. Administrative Law Judge Lewis T. Booker Jr. ruled in favor of Orton and NACS. NACS members have been concerned that retailers have been cited for multiple violations of the Tobacco Control Act in a single transaction (failing to check ID and making an underage sale) and/or a single inspection. Retailers have also been concerned that they have not had the right to a hearing to challenge a violation the first time they receive one from CTP.

Judge Booker ruled in favor of Orton on both of these questions. He decided that Orton's failure to check an ID and sale of the product to an underage individual in one transaction amounted to one violation of the Tobacco Control Act—not two—as CTP had alleged. The Judge also ruled that this was Orton's first violation because, even though Orton had received a warning letter for a 2013 violation, Orton was not given a chance to ask for a hearing (the necessary due process to challenge that violation). Without due process, the first violation was in effect never assessed.

Federal Trade Commission Considers Wading Into E-Cigarette Regulation

The Federal Trade Commission (FTC) has asked the Office of Management and Budget (OMB) to authorize a study of e-cigarette sales and marketing, potentially injecting itself into a contentious debate that will become more intense in the coming months when the Food and Drug Administration (FDA) is expected to adopt a final rule regulating electronic cigarettes and vapor/liquid nicotine products.

The FDA and FTC have long shared responsibility to regulate tobacco products. The FDA regulates the manufacture, marketing, and distribution of tobacco products, while the FTC has jurisdiction over unfair and deceptive practices and advertisements of tobacco products. Many travel centers and truckstops sell e-cigarettes and related products, so the potential for additional regulations over their marketing and sale could have real impacts on NATSO members.

The FDA issued a proposed rule regulating e-cigarettes in 2014. That rule would extend the Agency's authority over traditional cigarettes to e-cigarettes. (NATSO's summary of FDA's regulation's over traditional cigarettes can be found [here](#). NATSO's summary of the proposed regulation governing e-cigarettes can be found [here](#). It is expected to be finalized this year.

The FTC has been gathering information from cigarette and smokeless tobacco manufacturers and issuing an annual report since 1967, which tobacco-control advocates say helps inform effective regulation and efforts to counter tobacco advertising.

Tobacco advertising restrictions are often drafted in a manner that catches retailers in the crossfire, imposing liability on them when the responsibility for compliance belongs on manufacturers of tobacco products. NATSO and its members take tobacco sales restrictions seriously, but retailers should not be held responsible for conduct that they do not control. NATSO will continue to closely follow and advocate on these issues.

House Republicans Plan to Change Tax Code

Republicans in the House are proposing new plans to eliminate the current tax code. The proposals are designed to switch the U.S. from taxing income to taxing consumption. Congressman Rob Woodall (R-GA) wants a national sales tax; Congressman Devin Nunes (R-CA) wants to tax business cash flow by allowing immediate write-offs of capital expenses and disallowing interest deductions; and Congressman Michael Burgess (R-TX) is for a flat tax. Each of the plans could encourage more savings and investment, but could also pose political problems. Republicans both on the presidential campaign trail and in Congress are split, with some pushing multi-trillion-dollar tax cuts and others seeking consumption taxes. Recently, Speaker of the House Paul Ryan (R-WI) rejected a focus on the distribution of the tax burden.

Three More Findings from the FDA's Tobacco Study

Data from the U.S. Food and Drug Administration (FDA) and National Institute of Health's landmark Population Assessment of Tobacco and Health (PATH) long-term tobacco use study was presented for the first time during this month's Society for Research on Nicotine and Tobacco Conference. While a lot of the data focused on electronic cigarettes, Cowen Group analyst Vivien Azer broke down three other interesting data points from the FDA's presentation.

1. **75% of Minors Get Cigarettes from Social Sources:** Perhaps the most important retailer takeaway from the PATH study was the reinforcement of the fact that minors are not getting their cigarettes from retailers, but from social sources. Of the 15- to 17-year-old smokers surveyed as part of the PATH study, 43% said they'd obtained cigarettes in the past 30 days from either asking someone or someone offering; 32% said they'd given someone else money to purchase cigarettes; just 14% said they'd bought cigarettes themselves.
2. **43% of Minors Reported Using Two or More Tobacco Products:** "While cigarettes remain the largest segment in the tobacco category, the PATH study also examined closely the growing trend of poly-use among tobacco users," Azer wrote in a research note. "Poly-use was slightly more common among youth, with 43% of 12- to 17-year-olds reporting they used at least two tobacco products." Cigarettes were the most used product, with 76% of adult and 71% of minor poly-users saying they use cigarettes. Electronic cigarettes were next (45% of adults and 54% of youths), followed by cigarillos (38% of adults, 46% of youths).
3. **Only 3.1% of Non-Tobacco Consumers are Interested in Reduced-Harm Products:** "Looking beyond e-cigs, the PATH survey also looked to evaluate the appeal of reduced-harm products," wrote Azer. "Among current experimental and established smokers, more than half expressed interest in reduced-risk products, and more important, only 3.1% of nicotine naive consumers expressed such an interest."

Specifically, 54.5% of current established smokers were interested in reduced-harm products, while 51.3% of current experimental smokers and 22% of consumers who had ever used tobacco expressed interest. For non-nicotine naive consumers, 25.8% of recent former smokers and 8.6% of long-term former smokers were attentive to reduced-harm products.

The data suggested regular use of electronic cigarettes is still very low, with just 5.5% of adults and 3.1% of 12- to 17-year-olds having used e-cigs in the past month. Azer added that daily e-cig users make up a very small percentage of these 30-day e-cig users.

The data also seemed to dispute claims that e-cigs act as a gateway to other tobacco products, as the majority of e-cig users in the study were already consumers of other tobacco products.

"Overall, 15.9% of adult current e-cig users were nicotine naive," Azer said. "While a smaller 8.5% of daily e-cig users had not previously used tobacco."

In terms of flavors in e-cigs and other tobacco products, PATH researchers found the use of flavors was most prominent in e-cig users across the board. For e-cig consumers 25 years and older, 63% reported using flavors, while 85% of e-cig users ages 12 to 17 reported using flavors (though Azer noted this youth group exhibited a strong flavor preference across all tobacco categories).

Azer said the Wave 1 database is currently only available for restricted use, but full dataset will be available later this year. The second wave of data is currently being reviewed, and Wave 3 is 40% complete. PATH researchers announced last week that the study will be extended four years and will now include seven waves, with the final wave set to be completed in 2022.

"We view the extension of the study as a positive (given the agency will take time to evaluate findings from the study and could potentially push back any incremental regulations)," Azer said.

FDA Determined to Curtail Tobacco Use, Agency Official Tells Distributors

The Food and Drug Administration (FDA) has launched a broad campaign aimed at curtailing tobacco use, particularly among youth, and convenience distributors can expect to feel the impact in the years ahead.

That was the gist of remarks presented by Ann Simoneau, director of compliance and enforcement at the FDA's Center for Tobacco Products, who noted that the controversial FDA "deeming" regulations are still being reviewed at the U.S. Office of Management and Budget (OMB), but are expected to be released soon. Those rules will regulate e-cigarettes and related products, plus cigars and other tobacco products not already regulated by the agency. "We've received over 135,000 comments, and the agency was required to read each one," said Simoneau. "When we issue the final rule, all of those comments will be addressed."

The most controversial component of the deeming regulation is the Feb. 15, 2007 date set by the law as the cut-off for tobacco products that will be grandfathered and not subject to the rule's requirements. Products introduced for sale or altered will be required to apply for approval from the FDA, which industry experts say will force some smaller e-cigarette companies to close because they will be unable to afford the cost of compliance.

The overall attack on tobacco use includes a "public education" campaign (advertising) targeted at youth and focused "on the adverse effects associated with tobacco use," said Simoneau.

To help distributors and other businesses comply, there are educational materials available from the FDA and webinars to help businesses navigate through the regulatory requirements. In addition, there are surveillance efforts, inspections and investigations to determine violators, followed by enforcement action.

Senate Approves Obama's FDA Chief

The Senate voted overwhelmingly on February 24th to confirm President Obama's nominee to lead the Food and Drug Administration (FDA).

Senators voted 89-4 on Robert Califf's nomination after he easily jumped a procedural hurdle earlier this week.

Sen. Kelly Ayotte (R-N.H.) — who has made combating the opioid epidemic central to her reelection bid — joined with Democratic Sens. Richard Blumenthal (Conn.), Ed Markey (Mass.) and Joe Manchin (W.Va.) to oppose his nomination. The senators voiced concerns about Califf's ties to the pharmaceutical industry. They've also raised questions about the FDA's plan to tackle the growing abuse of prescription drugs and heroin after the Centers for Disease Control and Prevention reported in December that overdose deaths reached an all-time high in 2014.

DOL Releases Final Persuader Rule

The Department of Labor has finalized its rule regarding the use of third-party consultants and lawyers throughout the course of union elections. The rule will require more frequent and substantial disclosures from employers regarding the guidance they receive from outside counsel, including the fees paid to any outside consultants.

The rule does not force employers to disclose the content of the advice received by counsel, but does require that they report when they "plan, direct, or coordinate managers to persuade workers; provide persuader materials to employers to disseminate to workers; conduct union avoidance seminars; and develop or implement personnel policies or actions to persuade workers" on union organizing.

There is a high level of concern about the impacts the rule will have on employers. The rule penalizes companies that are not large enough to hire in-house legal counsel, and negatively affects smaller business owners who do not have access to in-house counsel and may be less inclined to seek legal advice due to the new rule. The new rule is set to go into effect 30 days from its publication on March 24, on April 23, 2016.

Labor Issues Update: Key Developments on Overtime, Joint Employer Issues

There were several important developments the week of March 14 on two labor issues that are critical to NATSO members: Efforts to expand the universe of employees entitled to overtime pay and the joint employer issue, which could expose companies to legal liability for how their subcontractors, staffing agencies, and franchisees treat their employees.

Overtime

Legislation was introduced that would prevent the Department of Labor (DOL) from finalizing rules revising overtime pay requirements until DOL conducts a comprehensive economic analysis on the impact of mandatory overtime expansion to small businesses, nonprofits, and public employers. The Protecting Workplace Advancement and Opportunity Act was introduced in the Senate and House by Sen. Tim Scott (R-S.C.) and Rep. Tim Walberg (R-Mich.), and cosponsored by Sen. Lamar Alexander (R-Tenn.) and Rep. John Kline (R-Minn.).

In July 2015, DOL proposed new rules governing which employees are eligible for overtime pay. The proposal would significantly expand the number of employees who are required to receive overtime pay for hours worked in excess of 40 hours per week. That rule was sent to the Office of Management and Budget the week of March 14, which is typically the final stage of the rulemaking process. The rule is expected to be finalized within the next 45-90 days. It is uncertain when the final rule will formally take effect.

Specifically, the proposal would increase the minimum salary threshold for overtime eligibility to \$970/week (\$50,440/year) and index this number to inflation. DOL is also considering changing the "duties test" that governs what types of activities employees exempt from overtime pay are able to do as part of their jobs in order to still be exempt.

If enacted, the legislation introduced would help ensure that regulators account for these important considerations in developing a final overtime rule.

Joint Employer

Opening arguments kicked off the week of March 14 in a long-awaited National Labor Relations Board (NLRB) case that could make franchisers liable for labor violations committed by their franchisees. The case could have a number of significant ramifications for NATSO members, many of whom operate franchise restaurants and are potentially franchisors to various travel plaza locations.

The NLRB has recently revised the so-called "joint employer" standard to expand the scope of determining "co-employment" under the National Labor Relations Act. Specifically, the NLRB decided that a company could be considered a "joint employer" if it possesses the right to control various terms and conditions of employment, regardless of whether that company actually exercises such control. It also makes businesses more susceptible to workforce unionization by imposing new collective bargaining obligations and allowing unions the ability to strike or picket a large corporate entity rather than the individual location where there is a dispute.

The attorney for McDonald's blasted the NLRB's effort to expand the joint employer standard as politically motivated, brought by the NLRB "at the behest of the SEIU." He said that "independent franchises alone" control the core terms and conditions of employment at their stores, and that if any business owners are found to have violated labor law, they bear responsibility, not McDonald's corporate.

This case is highly fact-intensive, so while a ruling against McDonald's would be a negative development, it will not be determinative for other franchise relationships. For example, although McDonald's does not set wages, benefits, or work schedules at franchise-operated locations, certain operations consultants have reportedly crossed the line from giving "advice" into providing "direction."

FTC Releases 2013 Tobacco Reports

The Federal Trade Commission (FTC) has recently released reports on 2013 cigarette and smokeless tobacco sales and marketing expenditures. The reports show that cigarette sales declined and smokeless tobacco sales increased from 2012 to 2013.

The number of cigarettes sold by the largest cigarette companies in the United States to wholesalers and retailers in the U.S. declined from 267.7 billion in 2012 to 256.7 billion in 2013, according to the most recent Federal Trade Commission Cigarette Report.

The amount spent on cigarette advertising and promotion decreased from \$9.17 billion in 2012 to \$8.95 billion in 2013, due mainly to a decrease in spending on price discounts (discounts paid to cigarette retailers or wholesalers in order to reduce the price of cigarettes to consumers). Spending on price discounts decreased from \$7.8 billion in 2012 to \$7.64 billion in 2013. The price discounts category was the largest expenditure category in 2013, as it has been each year since 2002; in 2013, it accounted for 85.4 percent of industry spending.

The Commission has issued the Cigarette Report periodically since 1967 and the Smokeless Tobacco Report periodically since 1987.

According to the 2013 Smokeless Tobacco Report, spending on advertising and promotion by the major manufacturers of smokeless tobacco products in the U.S., which had decreased from \$452 million in 2011 to \$435.9 million in 2012, increased to \$503.2 million in 2013. As with cigarettes, price discounts made up the largest spending category, totaling \$282.7 million – or 56.2 percent of all spending in 2013.

Smokeless tobacco sales rose from 125.5 million pounds in 2012 to 128.0 million pounds in 2013. The revenue from those sales increased from \$3.08 billion in 2012 to \$3.26 billion in 2013.

The Commission vote to issue the reports was 4-0. (FTC File No. P114508)

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about consumer topics and file a consumer complaint online or by calling 1-877-FTC-HELP (382-4357). Like the FTC on Facebook(link is external), follow us on Twitter(link is external), read our blogs and subscribe to press releases for the latest FTC news and resources.

Miscellaneous

Is Minimum Age the New Smoking Ban?

One of the major tobacco regulatory trends of the past year has been increasing the tobacco purchasing age to

21. While Hawaii has been the only state to successfully move to 21, 16 states are currently looking at proposals to do the same.

With California likely to do so, the 21 “movement” seems to be gaining momentum—although Cowen Group analyst Vivien Azer noted that both Vermont and Tennessee rejected 21 measures.

“Indeed, we have seen five states already reject similar proposals this year, which gives us confidence that a change to the national age for tobacco purchases will occur over time,” Azer wrote in a research note. “[It’s] similar to the rollout that we have seen for indoor smoking bans in the U.S.”

To better understand how minimum age increases might roll out and affect the industry, Azer examined the history of indoor smoking bans in the United States. Utah was the first state to implement an indoor smoking ban in 1995, with that ban applying specifically to restaurants; California was next, with a more comprehensive smoking ban in 1998.

California lawmakers recently approved a measure that would raise the state's minimum age to purchase tobacco products from 18 to 21, according to the Associated Press. It was part of a package of six anti-tobacco bills passed by both houses, which the American Cancer Society described as California's most substantial anti-tobacco effort in two decades.

"While those two states were early movers, most of the state level activity did not begin to occur until 2002," said Azer. "And, between 1998 and 2008, we saw that only 60% of states (in volume terms) had widespread smoking restrictions, a good reminder that tobacco regulation tends to come in fits and starts."

Assuming minimum purchase age restrictions also follow the pattern of taking 10 years for 60% of the country to adopt 21 laws, Azer predicted the industry would lose an incremental 0.1% volumes over the next five years as a result. Should 21 laws move at a faster pace (with 60% of the country moving to 21 in five years instead of 10), Azer predicted a 0.24% loss in industry volumes.

Convenience Distribution Marketplace in Las Vegas - Highlights

2016 CDA Chairman Chad Owen opened the 2016 Convenience Distribution Marketplace in January, welcoming distributors and exhibitors from across the country to Las Vegas and outlining major improvements made at CDA over the past year.

"Like many of you here, I come from a family-run business," said Owen, noting that he is the fifth generation to work at his family's business, Chambers & Owen, based in Janesville, WI. "We're proud of that heritage; proud of where we have come from." Owen said his company, over the years, recognized the need to change with the times and that many CDA programs and services "are helping us do that."

CDA, he said, is adapting to deliver "a more robust menu of offerings -- from an enhanced government affairs program, to webinars, to upgraded meetings and InfoMetrics. The list goes on and on. We are working to make the association more relevant in today's environment." He said CDA is working more closely with state associations and other national organizations, as well.

Owen recognized **2015 CDA Chairman Rob Sincavich**, Team Sledd, Wheeling, WV, for his outstanding work on behalf of CDA, "helping us navigate the rapidly-changing business we are in."

Tom Briant, executive director of the National Association of Tobacco Outlets (NATO), during a presentation in the CDA Cafe & Theater, outlined for Marketplace attendees a broad attack being waged against tobacco use at the federal, state and local levels across the nation.

Briant discussed details of the Food and Drug Administration's (FDA) "deeming" regulation, noting that if the Office of Management and Budget (OMB) wants changes in the rule, the FDA will need to comply and then resubmit the rule to OMB for final approval. So, further delays in final implementation can be expected. Meanwhile, efforts to change the Feb. 15, 2007 date mentioned in the above story to the actual date that the regulation takes effect are continuing, he said, adding that the industry, CDA included, is working to get that date changed.

Beyond that, Briant said the FDA is now spending more than \$500 million on research studies on the impact of flavored tobacco, nicotine's relationship to addiction, and the impact of price promotion on human behavior. The objective is to develop additional fodder for further regulations on the industry, he said, warning that "prohibition by regulation" may be lurking in the years ahead.

He outlined the many initiatives at the state and local level to impose regulations and generate revenue, including increasing the legal age for purchasing cigarettes and imposing new and increased taxes.

"We need wholesalers to get involved with their retail accounts to oppose these initiatives at the state and local level," he said. "It is the new way that the antis are going after tobacco products. The power of wholesalers, retailers and consumers working together is what it takes."

Breakfast, Beverages Among Top Grocery Growth Trends

If Nielsen's top category growth trends of the year illustrate anything, it's that consumers increasingly want a fast and easy way to eat breakfast.

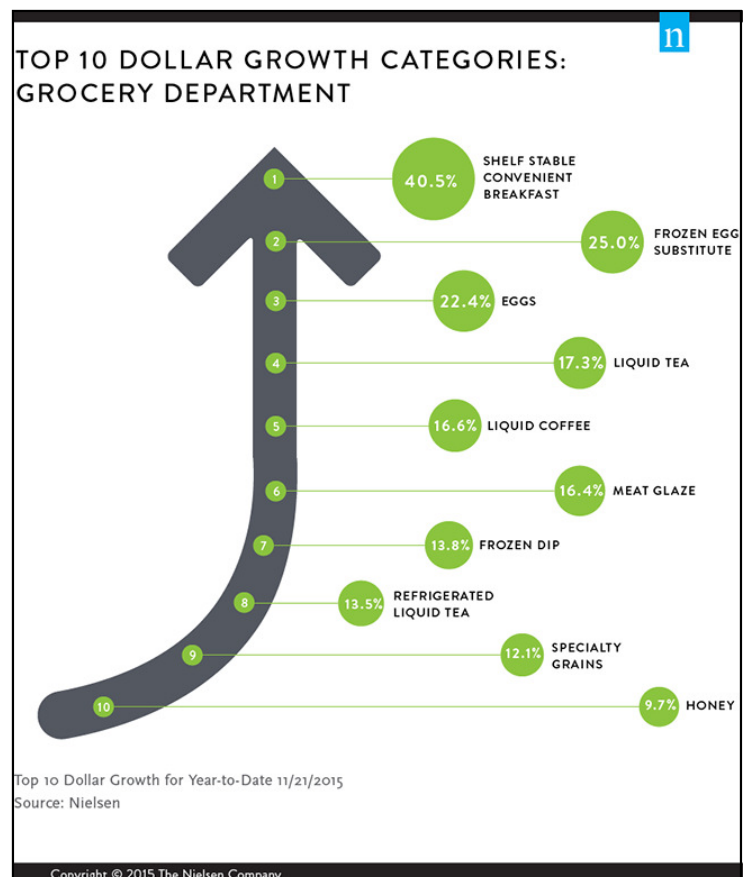
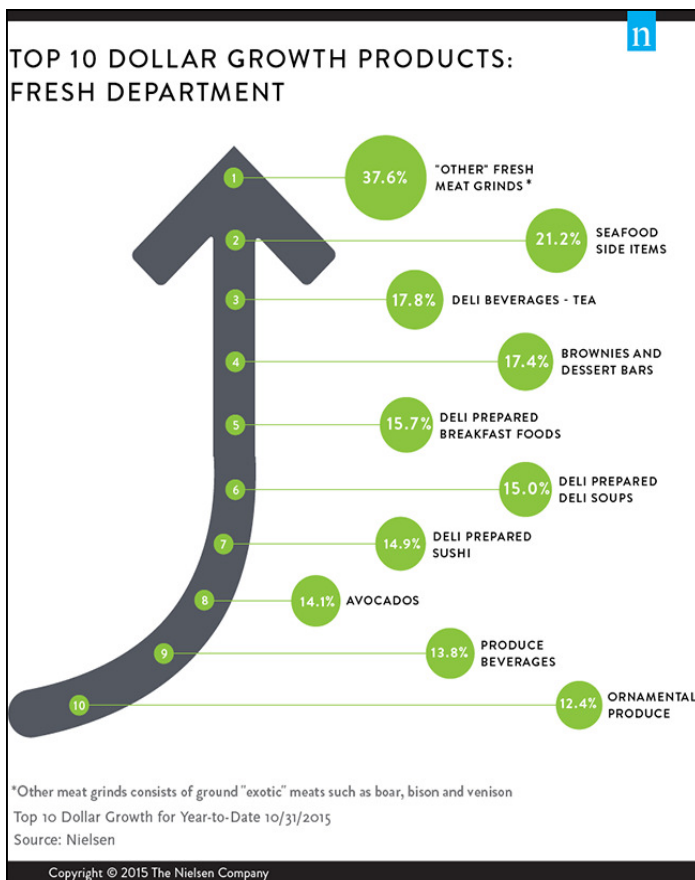
According to the data company's Tops of 2015: U.S. Grocery report, shelf-stable convenience breakfast items made up the fastest-growing category in grocery with dollar sales up a stunning 40.5% . Other major growth categories include frozen egg substitute (+25.0%), eggs (+22.4%) and RTD tea (+17.3%) and coffee (+16.6%).

"Two thousand fifteen was a year of shifting consumer consumption trends within the U.S. grocery landscape. It ushered in changing meal-time occasions, welcomed on-the-go consumption and rolled out the red carpet for the all-day breakfast movement," Nielsen said. "Health and wellness was top of mind for consumers, which evoked a new thirst for teas and juicing, along with a hunger for avant-garde offerings like avocado toast, ancient grains, traditional protein and protein alternatives."

Americans spent more money eating out than on groceries, according to Nielsen, perhaps presenting an opportunity to draw more foodservice customers to convenience stores and other retail.

"With this notion came the rise of the 'grocerant' and new opportunities within the fresh-prepared section, offering ready-to-eat or ready-to-heat offerings," Nielsen said.

In the center store, "notable categories like salty snacks, new-age beverages and candy all posted significant sales gains."



How Big Will the U.S. E-Cigarette Market Get?

The United States is anticipated to continue with its influence in the global electronic-cigarette market value, poised to grow more than \$20.17 billion by 2025 at an estimated compound annual growth rate(CAGR) of 22.5% from 2015 to 2025, according to a new Research & Markets report, U.S. E-Cigarette & Vaporizer Market--Analysis, Estimation & Forecast.

Being home to one of the largest distribution networks for the sale of e-cigarette and accessories, the United States alone accounted for more than 45% share of the total revenue generation in 2014.

The involvement of the major tobacco companies through multiple acquisitions and brand image has given an impetus to the demand of e-cigarettes; however, state policies and proposals to levy modest taxes on e-cigarettes sales is expected to restrict the market growth during the forecast years.

While China is home to the invention of e-cigarettes, it is the United States that gave the much needed impetus to the e-cigarette market in 2006. Since then, the U.S. market has grown to become one of the most aggressively progressing markets involving some of the biggest names in tobacco, pharmaceuticals and governmental organizations. Where on one hand, established tobacco players are securing their positions with acquisitions and introducing new brands, the pharmaceutical companies have been identified as opposing the increasing trend of e-cigarette in this fledgling market. Amidst an overall non-uniformity in the regulatory framework, the companies are enjoying an increasing flow of revenue from a host of distribution channels.

Eby-Brown Announces Acquisition of Liberty, USA

Eby-Brown Co., LLC announced Mar. 2 it has reached a definitive agreement to purchase Liberty, USA, West Mifflin, PA.

Based in Naperville, IL, Eby-Brown is the largest privately held c-store distributor in the U.S. with annual revenues in excess of \$5 billion, serving retail accounts throughout the Midwest and Southeast. Liberty, USA is the largest independently owned c-store supplier in Pennsylvania, serving 2,000 retail customers in the Midwest, Northeast and on the east coast.

R.J. Reynolds Appeals Reinstatement of FDA Menthol Report

A decision that would allow the Food and Drug Administration (FDA) to use a contested Tobacco Products Scientific Advisory Committee (TPSAC) report on menthol cigarettes has been appealed by R.J. Reynolds Tobacco Co. The TPSAC unanimously recommended the FDA ban the use of menthol cigarettes.

According to a report in the Winston-Salem Journal, the appeal comes after a Jan. 15, 2016, decision by a three-judge panel for the U.S. Court of Appeals for D.C. reversing a previous federal court judge ruling in favor of Reynolds and Lorillard Inc. Reynolds and Lorillard had argued the FDA allowed three advisory committee members to serve despite having conflicts of interest due to financial relationships with pharmaceutical tobacco-cessation-product manufacturers.

If the FDA were to ban menthol, analysts project a potential surge in demand for smoking-cessation products due to the fact that 30% of all adult smokers use menthol products.

New Member

We would like to welcome the following new member to the Association:

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*2016 Mid-Atlantic Legislative Conference
June 1st & 2nd
The Greenbrier*



Why should you attend the Mid-Atlantic Legislative Conference?

Rob Sincavich of Team Sledd says about this event: "The Mid-Atlantic Legislative Conference consistently provides the highest level of important information on products that are the lifeblood of the wholesaler. It's tailored to the wholesale community uniquely and is instrumental for decision making with products and allied manufacturers as we move forward into uncharted regulatory waters."

What do attendees say about this conference?

Dave Riser with R. J. Reynolds Tobacco Company says about this event: "If you are interested in understanding the legislative and regulatory landscape – what you need to know and what issues affect your business – then every wholesaler should attend the Mid-Atlantic Legislative Conference".

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