

EXPLANATORY MEMORANDUM TO
THE TOBACCO ADVERTISING AND PROMOTION (DISPLAY AND
SPECIALIST TOBACCONISTS) (ENGLAND) (AMENDMENT)
REGULATIONS 2012

2012 No. 677

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of this instrument

2.1. These regulations amend the Tobacco Advertising and Promotion (Display) (England) Regulations 2010 (the “Display Regulations”) and the Tobacco Advertising and Promotion (Specialist Tobacconists) (England) Regulations 2010 (the “Specialist Tobacconist Regulations”). For clarity these regulations are referred to as the “Amending Regulations”. The overarching legislation to end the open display of tobacco products in shops is referred to as “tobacco display legislation”.

2.2. These Amending Regulations fulfil the Government’s commitment set out in *Healthy Lives, Healthy People: A Tobacco Control Plan for England* published on 9 March 2011 to amend the tobacco display legislation to mitigate burdens on business while maintaining the expected public health benefits of the legislation in the longer-term. In a written ministerial statement to the House of Commons on 9 March 2011, the Secretary of State for Health stated that the implementation of tobacco display legislation would be deferred and made more practical for shop keepers by:

- increasing the size of temporary displays allowed when serving customers and re-stocking (from 0.75 square metres to 1.5 square metres)
- adding to the circumstances in which such displays can occur, for example, to carry out stock-taking and other activities necessary in running a business.

2.3. The deferral of implementation for tobacco display legislation has already been achieved; the coming into force dates of the Display and Specialist Tobacconist Regulations were amended by the Tobacco Advertising and Promotion (Display and Specialist Tobacconists) (England) (Amendment) Regulations 2011 (S.I.2011/1256).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None.

4. Legislative Context

4.1. The Display Regulations provide exemptions from the prohibition of tobacco displays imposed by section 7A(1) of the Tobacco Advertising and Promotion Act 2002 (“the Act”)(section 7A was introduced by section 21 of the Health Act 2009). The Display Regulations do not apply to

Specialist Tobacconists. They will come into force on 6 April 2012 for the purpose of large shops other than bulk tobacconists (as defined in the Display Regulations), and on 6 April 2015 for all other purposes. The coming into force dates were amended by S.I. 2011/1256 as mentioned above.

- 4.2. The Specialist Tobacconist Regulations make provision for exemptions in relation to specialist tobacconists from the prohibition of tobacco advertising imposed by section 2 of the Act and from the prohibition of tobacco displays imposed by section 7A of the Act. They will come into force on 6 April 2015.
- 4.3. These Amending Regulations have been notified to the European Commission under the Technical Standards Directive 98/34/EC (reference 2011/451/UK). The stand-still period for these regulations ended on 29 February 2012.

5. Territorial Extent and Application

- 5.1. This instrument applies to England.

6. European Convention on Human Rights

As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

- 7.1. Tobacco smoking is the leading cause of preventable morbidity and premature death, accounting for over 80,000 deaths in England in 2009. In England, deaths from smoking are more numerous than the next six most common causes of preventable death combined, that is drug use, road accidents, other accidents and falls, preventable diabetes, suicide and alcohol abuse. Each year in England around 320,000 children under 16 first try smoking, and the majority of smokers start smoking regularly before they are 18 years old. Smoking is also the single biggest cause of inequalities in death rates between the richest and the poorest in our communities. Further information on tobacco and health in England can be found in *Healthy Lives, Healthy People: A Tobacco Control Plan for England*. Tobacco displays are a form of tobacco promotion: evidence shows that they can encourage young people to start smoking and undermine efforts to quit by prompting impulse purchases.
- 7.2. The policy objective of the legislation is to protect young people and adults who want to quit from the promotional effects of unsolicited displays of tobacco products. The Act excludes tobacco displays arising in the course of wholesale tobacco trade provided that these are made only to people engaged in the tobacco trade, and is for the purpose of that trade. The Act also makes limited provision for temporary displays which are “requested displays” to individuals who have specifically asked to buy a tobacco product, or for information about a tobacco product. The Display Regulations provide exemptions and detail the circumstances in which temporary displays of tobacco products are lawful.

- 7.3. Prior to the Amending Regulations, the Display Regulations allowed for the temporary displays of tobacco products necessary for retailers to be able to serve customers and restock shelves without breaching the prohibition, as well as displays to relevant enforcement authorities. In recognition of the particular nature of the specialist tobacconist trade, the Specialist Tobacconist Regulations allow specialist tobacconists (businesses that meet the definition of Specialist Tobacconist, as set out in section 6 of the Tobacco Advertising and Promotion Act 2002, of which there are only around 50 shops in England) to display and advertise tobacco products inside their shops, provided such products and advertisements are not visible to the public from outside the shops.
- 7.4. The Display Regulations and the Specialist Tobacconist Regulations were made before the 2010 general election and have since been reviewed by the Coalition Government. In November 2010 the Chancellor announced the Growth Review which is jointly led by the Treasury and Department for Business, Innovation and Skills and aims to ensure all Government Departments are doing everything they can to help the country grow and recover from recession by reducing the burden of regulation, especially on small businesses. The Government's review of the tobacco display legislation was undertaken in the context of the Growth Review and recognised the dual aims of promoting public health by reducing tobacco consumption and reducing burdens on businesses.

8. Consultation Outcome

- 8.1. The Display Regulations and the Specialist Tobacconist Regulations were subject to a full public consultation exercise from October 2009 to January 2010. The Coalition Government's subsequent review took full account of the views of parties with an interest in this legislation. Stakeholders' views are well known to Government, with information about them available from a variety of sources, including from the two public consultations (prior to the Health Act 2009 and on the draft regulations), stakeholder meetings, correspondence, press articles and extensive lobbying activities undertaken by public health groups, retailers and tobacco manufacturers.
- 8.2. The Government took particular account of points raised by retailers in their responses to the consultation on the draft regulations, specifically about the need for greater flexibility in being able to display tobacco products during day to day activities such as stocktaking.
- 8.3. The outcome of the Government's review was announced on 9 March 2011, on publication of *Healthy Lives, Healthy People: A Tobacco Control Plan for England* and confirmed by the Secretary of State for Health in his written ministerial statement on that day (Hansard 9 March col 67WS). In keeping with the Growth Review, the Secretary of State committed to mitigate burdens on business while maintaining the expected public health gains of the legislation. He announced the intention to defer commencement and to amend the Display Regulations to make the legislation more practical for retailers by:
- increasing the size of temporary displays allowed when serving customers and re-stocking (from 0.75 square metres to 1.5 square metres)

- adding to the circumstances in which such displays can occur, for example, to carry out stocktaking and other activities necessary in running a business.
- 8.4. To deliver this commitment, the Amending Regulations make changes in three areas. First, the size of temporary displays allowed when serving customers is increased by changing the figure in regulation 4(2) of the Display Regulations from 0.75 square metres to 1.5 square metres.
- 8.5. Secondly, the Amending Regulations substitute a new regulation 6 to the Display Regulations which adds to the circumstances in which incidental displays can occur. The new regulation 6 provides that no offence is committed under section 7A of the Act by the temporary display of tobacco products inside a storage unit if that display occurs during the course of one of the following activities being actively carried out in the ordinary course of a business:
- i) assessing stock levels for the purpose of stock control
 - ii) restocking
 - iii) staff training
 - iv) cleaning the tobacco storage unit
 - v) maintenance of the tobacco storage unit
 - vi) refurbishment of the tobacco storage unit.
- 8.6. It is a condition in all cases (i) to (vi) above, that the display is solely as a consequence of the activity being carried out, that the display lasts no longer than necessary for the activity to be carried out and the area displayed does not exceed 1.5 square metres. The substituted regulation 6 also provides an exemption for temporary displays of tobacco products outside a storage unit during restocking on condition that the display occurs during the course of the products being placed in the storage unit and the display last no longer than necessary to place them there.
- 8.7. Thirdly, the Amending Regulations will also introduce new duties to review the Display and Specialist Tobacconist Regulations. In keeping with the current Government guidance issued by the Department for Business Innovation and Skills, the duty requires the Secretary of State to review the operation and effect of the Display and Specialist Tobacconist Regulations every five years from the date on which they come fully into force. The Secretary of State must publish a report setting out the objectives of the regulations, the extent to which they have been achieved, whether the objectives remain appropriate and the extent to which the objectives could be achieved with less regulation.
- 8.8. The Amending Regulations also correct a minor error in regulation 2(4)(a) of the Specialist Tobacconist Regulations, by changing the words "not more than half" to "half or more".

9. Guidance

- 9.1. Guidance on implementation, for both retailers and local authority trading standards officers who are responsible for the enforcement of the legislation, has been prepared by the Local Government Regulatory Support Unit with the Department of Health, in consultation with the British Retail Consortium and the Association of Convenience Stores.

The guidance is available on the Businesslink website at:
www.businesslink.gov.uk/tobacdisplay.

10. Impact

- 10.1. An updated Impact Assessment has been prepared which supersedes all earlier assessments published to inform consideration of the Health Act 2009 and included in the Explanatory Memorandum to the Display Regulations and the Specialist Tobacconist Regulations. The updated IA can be found on the Department of Health website at:
www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_132877

11. Regulating Small Business

- 11.1. The legislation applies to small businesses. The Government is clear that small and micro businesses have specific needs and can be particularly affected by regulation. Reducing the burdens of regulation for them is a particular priority for the Government and in March 2011, as part of the Growth Review, the Government announced a moratorium on new domestic regulation affecting micro-businesses until 31 March 2014. The Government's decision to defer the commencement of the display legislation took account of the moratorium by allowing small businesses until 6 April 2015 to prepare for implementation.

12. Monitoring and Review

- 12.1. In keeping with the Government's deregulation priorities, these Amending Regulations also introduce duties to review the Display and Specialist Tobacconist Regulations. It was always the intention that the impact of the overall legislation governing the display of tobacco products would be kept under review by the Department of Health. In practice, the new statutory duties to review the Regulations will be fulfilled by a review of the legislation applying to the display of tobacco products in its entirety, including the primary provisions.

13. Contact

- 13.1. Fran Mente at the Department of Health can answer any queries about this instrument: e-mail Fran.Mente@dh.gsi.gov.uk or tel 020 7972 4872.