

COURT ORDER REQUIRING TOBACCO MANUFACTURERS TO POST CERTAIN STATEMENTS AT RETAIL LOCATIONS

In 1999, the United States Government sued the major cigarette companies under various federal statutes. In 2006, a federal judge entered judgment in favor of the Government on certain claims and, among other things, ordered Altria, Philip Morris USA Inc. (“PM USA”), and R.J. Reynolds Tobacco Company (“RJR”) to make “corrective statements” on certain topics. ITG Brands LLC (“ITG”) became a party to the litigation for purposes of the remedies when it purchased four cigarette brands from RJR in 2015. As part of the remedy, the companies now have to amend their agreements with retailers to require the placement of corrective-statement signs in retail stores. For years, NACS and the tobacco manufacturers have litigated against this decision, including by filing successful briefs with the United States Court of Appeals for the DC Circuit and additional briefs with the trial court.

After years of litigation, PM USA, RJR, and ITG (the “Manufacturers”) have reached an agreement with the United States and several public health organizations that requires the Manufacturers to place corrective-statement signs in retail stores that participate in a cigarette retail program agreement with one or more of the Manufacturers. NACS participated in those discussions to advocate for retailers’ perspectives. Key provisions of the agreement include:

- The Manufacturers are required to display corrective-statement signs in all retail locations that have a contract with one or more of the Manufacturers for a period of at least 21 months (the “Implementation Period”). Manufacturers will have six months to amend the contracts and produce the corrective-statement signs and then, during the next three months, will visit stores to post corrective-statement signs before the start of the Implementation Period to post corrective-statement signs.
- The Manufacturers will amend their agreements to require the retailer to agree to placement of the corrective-statement signs as required by the court order.
- The amended agreements will include a graduated scale of penalties if retailers repeatedly fail to comply with the corrective-statement sign placement requirements. These penalties range from the placement of additional corrective-statement signs to the potential loss of promotional funds, and ultimately—after repeated violations—suspension from the Manufacturers’ contracts programs for a period of 17 weeks.

A final version of the parties’ agreement, in the form it will be presented to the court for approval, is available [here](#) and answers to frequently asked questions developed by NACS can be found [here](#).

A hearing to consider whether to approve the settlement agreement is set for July 28 and 29, 2022, beginning at 10:00 AM EDT, before the Honorable Paul L. Friedman, Senior Judge, United States District Court for the District of Columbia, in Courtroom 20 at the E. Barrett Prettyman U.S. Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. 20001. You may, if you wish, submit written statements supporting or opposing the proposed order and address the court at the public hearing.

Written statements supporting or opposing the Proposed Point-of-Sale Consent Order must be submitted to the Court on or before July 25, 2022 by emailing the statement to the following address: DCD_PhilipMorrisSettlement@dcd.uscourts.gov or by mailing it to:

The Honorable Paul L. Friedman
U.S. District Court for the District of Columbia,
E. Barrett Prettyman U.S. Courthouse
William B. Bryant Annex Room 6012
333 Constitution Avenue, N.W.
Washington, D.C. 20001

All written statements must be received no later than **July 25, 2022**.

If you want to make comments during the hearing, you may do so in person or virtually. Virtual attendance at the Point-of-Sale Settlement Hearing will be permitted only for participating retailers who have submitted written statements to the Court in advance of the hearing. Zoom videoconference information will be made available upon request by the Courtroom Deputy Clerk, Tanya Johnson, who can be contacted at Tanya.Johnson@dcd.uscourts.gov.

Due to technology constraints, those participating virtually will not be able to present any exhibits to the Court or view any that are physically displayed in the Ceremonial Courtroom during the hearing. Virtual attendance at the Point-of-Sale Settlement Hearing will not be permitted for any participating retailer that has not submitted a written statement to the Court in advance of the hearing. Any participating retailers may listen to the hearing via the public phone line.

RETAIL IMPACT

The agreement will impact all retailers that have contracts with at least one of the Manufacturers. If you do not have a contract with one of the Manufacturers, the agreement and Court order do not apply to you.

Below is a brief summary of key terms of the agreement. The entire agreement can be found [here](#).

POSTING CORRECTIVE-STATEMENT SIGNS

The part of the agreement most relevant for retailers is the requirement to post corrective-statement signs as ordered by the Court. The Manufacturers must produce those corrective-statement signs within 6 months of the Court's order and will work over the following 3 months to visit stores and post the corrective-statement signs, which Retailers will need to have in place by no later than 9 months after the Court's order. The retailers must keep the corrective-statement signs in place for a total of at least 21 months. The first corrective-statement sign will be posted for 9 months. Then, there will be 3 months during which Manufacturers will provide a different corrective-statement sign to every store and those new corrective-statement signs must be put in place. The new corrective-statement signs will be required to stay in place for 9 months following the end of the 3-month period.

The corrective-statement signs (to be distributed by the Manufacturers) will carry one of 17 different court-imposed messages. The messages on the corrective-statement signs and a full explanation of how they will look can be found [here](#). But, for example, two of the messages would look like this:



The main corrective-statement sign will be 348 square inches in size (except for kiosks). If a second corrective-statement sign needs to be posted it will need to be 144 square inches. Kiosks are able to post a 144 square inch primary corrective-statement sign. The requirements for the corrective-statement signs are described in greater detail below.

In most cases, the Manufacturers' representatives will post the required corrective-statement signs. In some cases, a retailer may be instructed how to post the corrective-statement signs. In all cases, the corrective-statement signs must be provided by one of the Manufacturers.

MAIN SIGN REQUIREMENT

The main corrective-statement sign must be 348 square inches in size. A corrective-statement sign must be placed, listed in order of preference:

1. The main corrective-statement sign should be attached to or hung above the main cigarette merchandising set.
2. If this is not possible given the placement of the merchandising set in the store, the corrective-statement sign shall be attached or hung adjacent to the main cigarette merchandising set.
3. If options 1 and 2 are not possible, the corrective-statement sign should be placed in a highly visible location next to the store entrance or cash register.

4. If options 1-3 are not possible, the corrective-statement sign should be placed perpendicular to the main cigarette merchandising set or on a wall in front of a recessed merchandising set.

If options 1-4 are not possible, the retailer may ask a working group appointed by the court to settle such questions for permission to use an alternate location in the retail store.

Additional Requirements

If a retailer displays Manufacturers' cigarette advertising with respect to the brands covered by the remedy in the store that is not on or attached to the merchandising set, a second corrective-statement sign must be placed in the store. This corrective-statement sign must be 144 square inches and placed in a highly visible location within 4 feet of the entrance to the store and in a position that customers will see when entering the store.

The Manufacturers cannot require retail stores to post advertisements that are not located on the main cigarette merchandising set (often referred to as off-set signs) if a retailer does not post off-set advertisements of other manufacturers' products.

Kiosk Stores

Kiosk stores are subject to slightly different requirements. Kiosk stores must post a single 144 sq. in. corrective-statement sign near the selling window. The corrective-statement sign must be visible to customers as they approach the store or are standing at the selling window. If a Kiosk store does not have a selling window, then the corrective-statement sign shall be placed in a highly visible location, that can be seen by customers as they approach the store or are standing at the cash register/point of sale.

CONSEQUENCES FOR FAILING TO POST A CORRECTIVE-STATEMENT SIGN OR NOT POSTING A CORRECTIVE-STATEMENT SIGN CORRECTLY.

The consequences for failing to post a corrective-statement sign or not posting a corrective-statement sign correctly range from the Manufacturers helping the retailer post the corrective-statement sign correctly to having to post an additional corrective-statement sign to—for major violations such as intentionally failing to post the corrective-statement sign or intentionally obstructing its view—making a payment to the Manufacturer. The consequences increase after repeated violations.

1. If you are found in “minor non-compliance”—that is a technical, unintentional error in posting the corrective-statement signs (examples below), the consequences range as follows:

- a. 1st incidence, counseled into compliance by the Manufacturers.
- b. 2nd incidence, counseled into compliance by the Manufacturers and receive a warning letter that the third finding of non-compliance will result in posting another corrective-statement sign.
- c. 3rd incidence, required to post an additional 144 sq. in. Corrective-

Statement Sign for 120 days.

2. If you are found in major non-compliance—such as, for example, intentionally not posting or obstructing the corrective-statement signs, the consequences range as follows:

- a. 1st incidence, counseled into compliance and required to post an additional 144 sq. in. Corrective-Statement Sign for the remainder of the time.
- b. 2nd incidence, counseled into compliance and owe to each Manufacturer a payment equal to any Price Promotion for Covered Brands owed to the Participating Retailer Location by each contracted Manufacturer for a period of 4 weeks.
- c. 3rd incidence, owe to each Manufacturer a payment equal to any Price Promotion for Covered Brands owed to the Participating Retailer Location by each contracted Manufacturer for a period of 13 weeks.
- d. 4th incidence, be suspended for 17 weeks from the Participating Retailer Contracts of each Manufacturer. This suspension period will begin 45 days after the Final Determination of such noncompliance.

For any payments owed to Manufacturers for non-compliance, the retailer can either pay the amount owed or offset it from payments a retailer receives from the Manufacturer.

EXAMPLES OF MINOR & MAJOR NON-COMPLIANCE

The Manufacturers are required to hire an audit firm to periodically and randomly visit retail locations to assess compliance with the corrective-statement sign requirements. If the auditors find stores to be out of compliance with the court's order, they will determine whether they think that noncompliance is major or minor. Examples of each type of noncompliance are laid out below.

Examples Of Minor Noncompliance

1. Obstructing any portion of a corrective-statement sign other than the message (Preamble or corrective statement) or icon
2. Placing an on-set corrective-statement sign in a position in the hierarchy that is lower than possible
3. Posting a corrective-statement sign whose message is visible to customers but not in the precise location required
4. Posting a corrective-statement sign in English where it is required to post a corrective-statement sign in Spanish

Examples Of Major Noncompliance

1. Failing to post any corrective-statement sign that it is required to post
2. Posting a corrective-statement sign in a location that results in the message (Preamble or corrective statement) not being visible from the customer's vantage point
3. Obstructing any portion of the message (Preamble or corrective statement) or icon on any corrective-statement sign that it is required to post
4. Defacing or damaging a corrective-statement sign in any way that renders unreadable from the customer's vantage point any portion of the message (Preamble or corrective statement) on any corrective-statement sign that the location is required to post
5. Taking down a corrective-statement sign that it is required to post before expiration of the Full Implementation Period
6. Placing an on-set corrective-statement sign in a position in the hierarchy that is lower than possible, where the location has previously been found noncompliant on this basis via in-person audit
7. Failing to rotate its corrective-statement sign as required, as determined in an in-person audit, unless the retail location has uploaded a photo showing compliance with the rotation requirement within 30 days of the finding of noncompliance
8. Posting a corrective-statement sign in English where it is required to post a corrective-statement sign in Spanish, where the location has previously been found noncompliant on this basis via in-person audit

Retailer Appeal Rights

Retailers can appeal any determination of non-compliance to a working group appointed by the court consisting of the parties to the case along with NACS and NATO. Retailers can challenge whether the store in question was non-compliant at all and/or whether the non-compliance was major or minor. If the working group decision is a tie or the retailer loses the challenge on a major non-compliance issue, the retailer can appeal to a third-party adjudicator and then, in the case of a major non-compliance issue, to Judge Friedman.

Conclusion

The court order will impact all retailers that have contracts with one of the Manufacturers. You should be alert for information from those Manufacturers regarding the corrective-statement signage they are providing and compliance. If a retailer does not want to accept the Manufacturers' changes to the contract to require the posting of a corrective-statement sign, the retailer can terminate the contract pursuant to its terms. And, NACS has developed answers to frequently asked questions, which may be helpful to you and can be found [here](#).