



Tobacco Coupon Regulations and Sampling Restrictions

The Tobacco Control Legal Consortium has created this series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures.¹ For more details about these policy considerations, please contact the Consortium.

Overview

Pricing strategies are an effective way to combat tobacco use. Because tobacco prices have a significant effect on initiation and consumption, communities may want to consider strategies that maintain or raise the price of tobacco products. The most common way to accomplish this goal is through raising state cigarette excise taxes. However, non-tax price-related policy interventions also may have a significant public health impact. Such pricing strategies include laws and regulations establishing minimum prices, restricting the use of coupons, prohibiting the distribution of free samples, and limiting price discounts, giveaways, and retail value-added schemes (like “buy-one-get-one” free offers). A full discussion of all these pricing strategies is beyond the scope of this guide, but additional information can be obtained by contacting the Consortium. This guide will focus primarily on two non-tax pricing strategies: (1) coupon regulations, and (2) sampling restrictions.



Regulating the Price of Tobacco Products

In response to rising tobacco taxes, tobacco companies often employ aggressive price discounting strategies to cushion the effect of price increases on consumers. According to the Federal Trade Commission, cigarette manufacturers spent \$12.5 billion on marketing and promotional expenditures in 2006 alone, 74% of which was spent to reduce the price of cigarettes at the point of sale.² According to another study, in 2002 alone, the tobacco industry spent \$1.06 billion (or 8.5% of its

total marketing expenditures) on retail value-added programs with bonus cigarettes, like buy-one-get-one free offers.³

The industry's price discounting strategies take many forms. Tobacco coupon schemes typically involve the redemption of a form, proof-of-purchase, or other item in exchange for tobacco products at a discounted price. Sampling may involve distribution of free loose cigarettes or cigars, packages of smokeless or dissolvable tobacco products, or multiple packs for the price of one. Product giveaways typically consist of a branded promotional item that accompanies the purchase of tobacco products.

With the passage of the Family Smoking Prevention and Tobacco Control Act of 2009 (the "FDA law"),⁴ the federal government took significant steps to restrict these types of price discounting activities. Some of the law's provisions include: prohibiting the sale of tobacco products through mail-order coupon redemption; disallowing giveaways of non-tobacco products with the purchase of a tobacco product; prohibiting free samples of cigarettes; and barring samples of smokeless tobacco products in certain settings. Moreover, the FDA law explicitly preserves the right of state and local governments to further restrict the sale and distribution of tobacco products. This provision is important because it enables communities to tailor tobacco control policies to meet local needs, and to close loopholes remaining after passage of the federal law.

Despite the significant progress made by the FDA law, the law fails to address several tobacco pricing-related areas. Strong state and local regulations, such as coupon regulations and sampling restrictions, can work in tandem with state tobacco excise taxes to close these gaps. Such regulations can prevent the distribution of free or deeply discounted tobacco products and effectively counter the tobacco industry's price discounting strategies.

Policy Benefits

The price of tobacco products has a significant impact on the rate of usage: tobacco users are a very price-sensitive population of consumers. Studies show that when tobacco companies, in the face of rising taxes, lower product prices through discounting schemes, it has the effect of encouraging consumption, especially among younger populations and new smokers.⁵ Conversely, ensuring that the price of tobacco products remains high (through taxation, or a combination of different pricing strategies) can reduce consumption by discouraging youth initiation, prompting quit attempts, and reducing average consumption among those who continue to smoke.⁶ Thus, impeding the industry's price-related marketing strategies can be an effective way to combat the tobacco epidemic in this country.

As stated above, the tobacco industry's price discounting strategies can be counteracted in several ways, such as increasing tobacco taxes, establishing minimum prices below which tobacco products cannot be sold, regulating the

distribution or redemption of tobacco coupons, and restricting tobacco sampling and giveaways. Increasing taxes is a proven strategy in curbing tobacco use.⁷ However, tobacco taxes are typically controlled by state governments and can be difficult to change due to political and economic climates. On the other hand, local communities generally have the authority to restrict tobacco coupons, sampling, and giveaways to prevent tobacco companies from artificially lowering prices for consumers.

Local ordinances and regulations can also close some loopholes in the FDA law. For example, the federal law permits the sampling of smokeless tobacco products at certain “qualified adults-only facilities.”⁸ But because the law expressly allows more stringent local regulation, a local government may further restrict sampling to protect the health of the community.

Policy Elements

Coupon Regulations

Besides prohibiting coupon redemption by mail, the FDA law does not restrict the discounting of tobacco products via coupons, rebates, and similar methods. Communities may consider implementing local laws that address the coupon loophole. Tobacco coupons are generally regulated in two ways: (1) restricting the distribution of free or nominal cost coupons (or gifts) that can be redeemed for tobacco products, or (2) prohibiting retailers from redeeming coupons for free or nominal cost products. For the reasons discussed below, it may be easier, from a legal standpoint, to pursue the second option. As a result, it may be the more preferable option for communities to pursue.

Sampling Restrictions

The FDA law also prohibits the distribution of free samples of cigarettes or sales of packs containing fewer than twenty, but allows the distribution of smokeless tobacco samples in “qualified adults-only facilities.”⁹ The definition of such facilities is broad, which presents a challenge and an opportunity for local communities. Two policy options are: (1) to expand the types of facilities where smokeless tobacco sampling is prohibited, or (2) to prohibit the practice altogether. A sampling restriction can also be combined with a coupon regulation, essentially prohibiting the distribution of any tobacco products at low or “nominal” cost.

Other Policy Considerations

Regardless of which coupon or sampling regulations a local government chooses to pursue, it should consider whether they will stand alone or be coupled with a minimum pricing scheme,¹⁰ whether the regulations will distinguish between certain venues (and how those venues are defined, paying close attention to temporary structures and special events), and which enforcement mechanisms are

most appropriate. A law's enforcement section should specify: what constitutes a violation of the law; inspection requirements; the penalties to be imposed for the law's violation; whether violations might be addressed through an administrative process; whether injunctive relief is available to the local government; and any effects that violations might have on existing tobacco retail licenses.

Potential Legal Challenges

While state and local governments might encounter challenges brought on other grounds, two areas in which to expect legal challenges are under the Commerce Clause and the First Amendment.

Commerce Clause

As discussed previously, restricting the use of coupons can be achieved in two ways: (1) by prohibiting the distribution of coupons, or (2) by prohibiting their redemption. A law that bars the redemption of coupons will likely be easier to defend than one that restricts distribution.

Prohibiting coupon distribution can be problematic because it raises a potential issue with the dormant Commerce Clause of the federal constitution.¹¹ Under the dormant Commerce Clause doctrine, states cannot regulate products in ways that unduly burden interstate commerce. In analyzing whether a regulation unduly burdens interstate commerce, courts will look at whether the law's benefits outweigh any burdens it places on interstate commerce, and whether the law favors in-state businesses over out-of-state businesses.¹² In general, a law will be more likely to pass scrutiny under the Commerce Clause when its restrictions are limited to the jurisdiction's geographical boundaries, such as limits imposed on in-state retail establishments.

Prohibiting coupon distribution might be perceived as placing unreasonable burdens on tobacco manufacturers by forcing them to modify a national coupon distribution scheme or otherwise interfering with their advertising practices outside the state. Thus, a law prohibiting the distribution of tobacco coupons might be challenged under the dormant Commerce Clause if it did not allow the coupons to enter the jurisdiction. Conversely, prohibiting retailers within the state from redeeming coupons does not as directly impact out-of-state businesses or interstate commerce.

First Amendment

Tobacco price-related strategies like coupon regulations and sampling restrictions may also be challenged as violating a company's right to commercial speech under the First Amendment. Although a local government implementing pricing strategies should be prepared for such a challenge, it is unlikely to succeed. Under the test used by courts to analyze commercial speech restrictions, prohibitions on coupons

and other discounts would likely be seen as only affecting price and distribution, not protected speech.¹³ A tobacco company is free to distribute coupons and employ other discounting and price promotion strategies to disseminate lawful information about its products, and a local community generally has the authority to restrict the use of such discounts as long as it does so without violating the First Amendment.¹⁴

Select Legislation and Policies

California

One of the more successful examples of a statewide law restricting tobacco coupon distribution and sampling is found in California. California's law prohibits the in-state distribution of free cigarette and smokeless tobacco samples, as well as local distribution of coupons and rebate offers for such products. It prevents retailers and individuals from distributing free samples and coupons in most public places, but does not bar the industry from mailing coupons into the jurisdiction or otherwise employing such price-related marketing schemes. The law has been challenged in court and upheld at the state level.¹⁵ It also expressly permits local governments to pass stricter laws. Despite the strength of the California law in some respects, it contains arguable weaknesses; for instance, it does not apply to places where minors are not present, nor does it prohibit offers of tobacco products in conjunction with other purchases (thereby allowing non-sale distribution of tobacco products in connection with purchases of products like lighters, and permitting buy-one-get-one free offers).

Below are examples of tobacco sampling restriction and coupon regulation approaches used in various state and local jurisdictions. If you consider adapting any language from these policies, take care to ensure the provision in question is practical and legal in your jurisdiction. Please note that the Tobacco Control Legal Consortium does not endorse or recommend any of the following policies. These examples are provided simply to illustrate how various jurisdictions have approached similar issues.

| Locality/State | Ordinance/Statute | Text of Law |
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| <i>SAMPLING RESTRICTIONS</i> | | |
| <i>Geneva, Alabama</i> | Geneva Ord. No. 06-2007-03 § 1010 | No free sample of any tobacco product may be given away on public property. |
| <i>Fall River, Massachusetts</i> | Fall River Ord. § 34.318 | (a) No manufacturer, distributor or retailer may distribute or cause to be distributed any free samples of cigarettes or smokeless tobacco within the city. Manufacturer promotions of multi-pack units that contain tobacco are exempt from this section as long as the individual is required to purchase the unit. (b) No person shall accept from a minor any coupons or vouchers redeemable for tobacco or tobacco products in the city. |

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| <i>Revere, Massachusetts</i> | Revere Ord. § 8.36.060 | To maximize compliance with M.G.L. Chapter 270, Section 6, that prohibits the sale for free distribution of tobacco products to minors, no person or entity shall, without charge, or for free, in or upon any part of the streets, parks, public grounds, public buildings, other public-owned places within the city of Revere, or any business or retail establishment, distribute any products containing tobacco for any purposes whatsoever. Tobacco distribution includes, but is not limited to, bonus in a game, contest, or tournament, or as a promotional event. Exceptions: Sampling in a tobacco smoke shop is allowed only for adults. No free distribution of tobacco products is allowed in smoke shops. |
| <i>Saint Paul, Minnesota</i> | Saint Paul Ord. § 324.08 | No person in the business of selling or promoting tobacco products or agent or employee of such person shall distribute tobacco products free to any person on the sidewalks, pedestrian concourses, pedestrian malls or pedestrian skyway systems within the City of Saint Paul. |
| <i>Minnesota</i> | MINN. STAT. §325F.77 | No person shall distribute promotional samples of tobacco products to the general public free of charge or at nominal cost. Single serving samples of tobacco may be distributed in tobacco stores. |
| <i>Omaha, Nebraska</i> | Omaha Ord. § 12-145 | (b) It shall be a violation of this law for any person or organization to give away, hand out, or otherwise distribute free samples of cigarettes or other tobacco products, or coupons that can be redeemed for free samples of cigarettes or other tobacco products, anywhere within this jurisdiction. |
| <i>New Hampshire</i> | N.H. REV. STAT. § 126-K:5 | No person may distribute or offer to distribute samples of tobacco products in a public place. This prohibition does not apply to areas where minors are denied access; stores where a retailer's license has been issued; and factory sites, construction sites, conventions, trade shows, fairs or motorsport facilities in areas to which minors are denied access. |
| <i>Wisconsin</i> | WIS. STAT. § 134.66 | No manufacturer, distributor, jobber, sub-jobber or retailer, or their employees or agents, may provide cigarettes or tobacco products for nominal or no consideration to any person except in a place where no person younger than 18 years of age is present or permitted to enter unless the person who is younger than 18 years of age is accompanied by a parent or guardian or |

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| | | spouse who has attained the age of 18 years. Providing cigarettes or tobacco products at no or nominal cost to persons under age 18 is also prohibited. |
| <i>Utah</i> | UTAH CODE § 76-10-111 | It is unlawful for a manufacturer, wholesaler, or retailer to give or distribute cigarettes, electronic cigarettes, smokeless tobacco or tobacco products without charge, except to adults at professional conventions where the general public is excluded and to persons of legal age upon their purchase of tobacco products. |
| COUPON REGULATIONS | | |
| <i>California</i> | CAL. HEALTH & SAFETY CODE § 118950 | (b) It is unlawful for any person, agent, or employee of a person in the business of selling or distributing smokeless tobacco or cigarettes from engaging in the nonsale distribution of any smokeless tobacco or cigarettes to any person in any public building, park or playground, or on any public sidewalk, street, or other public grounds, or on any private property that is open to the general public. (c) For purposes of this section: (1) "Nonsale distribution" means to give smokeless tobacco or cigarettes to the general public at no cost, or at nominal cost, or to give coupons, coupon offers, or rebate offers for smokeless tobacco or cigarettes to the general public at no cost or at nominal cost. Distribution of tobacco products, coupons, coupon offers, or rebate offers in connection with the sale of another item, including tobacco products, cigarette lighters, magazines, or newspapers shall not constitute nonsale distribution. |
| <i>Greeley, Colorado</i> | Greeley Ord. § 9.50.020 | (a) No person, including but not limited to tobacco manufacturers, wholesalers, retailers or any agent or employee representing said manufacturers, wholesalers or retailers, shall engage in the nonsale commercial distribution of any cigarette, tobacco product or coupon. (b) No person shall permit the commercial nonsale distribution of any cigarette, tobacco product or coupon: (1) Anywhere in any public place under the legal control of the person; or (2) Through any agent or employee of the person. |
| <i>Hawaii</i> | HAW. REV. STAT. § 328J-17 | (a) It is unlawful for any person to distribute samples of cigarette or tobacco products, or coupons redeemable for cigarette or tobacco products, in or on any public street, sidewalk, or park, or within one thousand feet of any elementary, middle or intermediate, or high school. (b) It is unlawful for any person to distribute cigarette or tobacco promotional materials, or |

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| | | coupons redeemable for cigarette or tobacco promotional materials, within one thousand feet of any elementary, middle or intermediate, or high school. |
| <i>Cook County, Illinois</i> | Cook County Ord. § 54-305(c) | No person shall give away, barter, exchange, distribute or in any way dispense free of charge or at nominal cost any tobacco product samples, and/or any coupon redeemable for any tobacco products, on any public street, alley, sidewalk, or in any public park, ground or playground, or in areas open to the public in any publicly owned or operated building or at any place located within 500 feet of any building or other location used primarily as a school, child care facility, or for the education or recreation of children under 18 years of age. |
| <i>Maryland</i> | MD. CODE CRIM. LAW § 10-107(b)(2) | A person who distributes tobacco products for commercial purposes, including a person licensed under Title 16 of the Business Regulation Article, may not distribute to a minor: (i) a tobacco product; (ii) tobacco paraphernalia; or (iii) a coupon redeemable for a tobacco product. |
| <i>North Branch, Minnesota</i> | North Branch Ord. § 18-133 | (e) No person shall distribute, give away or offer to distribute or give away tobacco products to any person. (j) It shall be a violation of this article for any retail establishment to redeem coupons for any minor for free or discounted tobacco products. It shall be a violation of this article for any retail establishment to redeem coupons for any person by mail order. |
| <i>Texas</i> | TEX. HEALTH & SAFETY CODE § 161.087(a) | A person may not distribute to persons younger than 18 years of age: (1) a free sample of a cigarette or tobacco product; or (2) a coupon or other item that the recipient may use to receive a free or discounted cigarette or tobacco product or a sample cigarette or tobacco product. |

Other Helpful Resources

The Tobacco Control Legal Consortium has a publication that covers [guidelines](#) for state and local governments on the pricing of tobacco products. The [Tobacco Technical Assistance Consortium](#) (TTAC) has a [Pricing Strategies Toolkit](#) that is designed to help tobacco control professionals working on tobacco price control initiatives. The [Technical Assistance Legal Center](#) (TALC) provides a [model ordinance](#) for regulating tobacco sampling. The [U.S. Food and Drug Administration website](#) also has information about other specifics of the new FDA law.

Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at publichealthlaw@wmitchell.edu with any questions about the information included in this guide or to discuss local concerns you may have about implementing such a policy.

Endnotes

- ¹ The information contained in this document is not intended to constitute or replace legal advice.
- ² FED. TRADE COMM'N, CIGARETTE REPORT FOR 2006 (2009), *available at* <http://www.ftc.gov/os/2009/08/090812cigarettereport.pdf>.
- ³ B.R. Loomis et al., *Point of Purchase Cigarette Promotions Before and After the Master Settlement Agreement: Exploring Retail Scanner Data*, 15 TOBACCO CONTROL 140 (2006), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2563558/pdf/140.pdf>.
- ⁴ Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (codified at 21 U.S.C. § 301 *et seq.*), *available at* <http://www.publichealthlawcenter.org/sites/default/files/resources/fda-tobacco-regulation-final-bill.pdf>.
- ⁵ According to a 1994 U.S. Surgeon General's report, the use of coupon promotions makes cigarettes appear more affordable to smokers with limited economic resources, including children. Evidence suggests that coupons also encourage new smokers to smoke more often, thereby entrenching their habit. U.S. DEP'T OF HEALTH & HUMAN SERVICES, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL (1994), *available at* http://www.cdc.gov/tobacco/data_statistics/sgr/1994/index.htm.
- ⁶ U.S. Ctrs. for Disease Control & Prevention, *State Cigarette Excise Taxes--United States, 2009*, 59 MORBIDITY & MORTALITY WEEKLY REPORT 389 (Apr. 9, 2010), *available at* <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5913a2.htm>.
- ⁷ *Id.*
- ⁸ Under the FDA law, smokeless tobacco can be distributed at a "qualified adult-only facility," which must meet the following criteria:
 - (1) A temporary structure creating an enclosed area for the purpose of distributing free samples of smokeless tobacco. The structure should prevent outsiders from being able to see inside. It may not be made of transparent material, except for entrances and exits. Also, some open space at the ground level is permitted for ventilation.
 - (2) The facility must not sell, serve, or distribute alcohol. (This means that bars cannot distribute free smokeless tobacco samples unless they set up a temporary enclosed area outdoors where no alcohol is served.)
 - (3) A law enforcement officer or licensed security guard must check a government-issued ID to ensure that anyone who enters the facility is at least 18 years old.
 - (4) No tobacco advertising may appear on the exterior of the structure, except that a brand name can be used to identify the facility.
 - (5) The facility must not be located adjacent to or immediately across from a space that is used primarily for youth-oriented activities.

21 U.S.C. § 387a-1(a)(2)(G); 21 C.F.R. § 1140.16(d)(2)(iii). The samples permitted to be taken out of such facilities are limited to one package per adult consumer containing no more than 15 grams of smokeless tobacco. However, there is no limit on the use of smokeless tobacco product samples within the facility.

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- ⁹ See *supra* note 8. Because such facilities can be temporary structures like tents and trailers, smokeless tobacco sampling can occur at a variety of events with significant youth attendance, such as rodeos, outdoor concerts, festivals, and street fairs.
- ¹⁰ Minimum price laws prohibit the sale of tobacco products below a certain price (typically the wholesale cost plus an additional amount, representing the retailer's business cost). Roughly half of U.S. states have statutory minimum price laws for cigarettes. U.S. Ctrs. for Disease Control & Prevention, *State Cigarette Minimum Price Laws--United States, 2009*, 59 MORBIDITY & MORTALITY WEEKLY REPORT 389 (Apr. 9, 2010), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5913a2.htm>. In addition, some localities have passed ordinances aimed at preventing deep discounts on tobacco products that contain minimum price requirements. For example, the City of Pendleton, Oregon, passed an ordinance that states in relevant part: "No person [shall] sell or distribute any Tobacco Product for free or below the cost of such products to the sellers or distributors of the products for commercial or promotional purposes, to members of the general public in public places or at public events." Pendleton, Or. Ord. No. 3710 (Nov. 16, 2004). Many minimum price laws specify actual amounts, percentages, or numeric formulas for calculating such a price. Another strategy to achieve the same result would be to prohibit the redemption of coupons for nominal price tobacco products, and then define the term "nominal price." This would essentially codify a minimum price for tobacco products.
- ¹¹ See Kathleen Dachille, Tobacco Control Legal Consortium, *Regulating Tobacco Advertising and Promotion: A "Commerce Clause" Overview for State and Local Governments* 11 (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-regadvertis-2010.pdf>.
- ¹² *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
- ¹³ *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980) (describing the four-part commercial speech test: (1) whether the "communication is neither misleading nor related to unlawful activity," (2) whether the government "assert[s] a substantial interest to be achieved by restrictions on commercial speech," (3) whether the law "directly advance[s] the state interest involved," and (4) whether "the governmental interest could be served as well by a more limited restriction on commercial speech.")
- ¹⁴ *Commonwealth Brands, Inc. v. U.S.*, 678 F.Supp.2d 512, 538 (W.D. Ky. 2010) (holding that the FDA law's prohibition on distribution of free tobacco product samples does not even implicate, let alone violate, the First Amendment, because it "clearly regulates the distribution of a product, not speech – and, even if thought of as a speech restriction, it would seem fully permissible as a restriction on price, i.e., tobacco products cannot be free.")
- ¹⁵ *People v. R.J. Reynolds Tobacco Co.*, 124 P.3d 408 (Cal. 2005) (holding that California's law prohibiting the "non-sale distribution" of tobacco products was not preempted by the Federal Cigarette Labeling and Advertising Act and fell squarely within the state's legal authority to regulate the distribution of tobacco products).

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