



Death on a Discount: Regulating Tobacco Product Pricing

Introduction

The price of tobacco products directly affects the level of consumption. For example, the availability of cheap tobacco products increases rates of tobacco use, particularly among young adults and minors, who tend to be price-sensitive. The tobacco industry uses a variety of innovative pricing strategies to discourage current tobacco users from quitting, to entice new customers to purchase their products, and to reduce the effectiveness of tobacco tax increases. These strategies include popular discounting schemes, such as cents- or dollar-off promotions, multi-pack offers (e.g., two-for-one deals), and other price-related incentives (e.g., buy-some-get-some-free offers). Many of these retail value-added promotions are advertised and used at the point of sale or made available through coupons. The tobacco industry uses sophisticated research to apply these strategies to specific products in particular geographic locations, and to target certain groups of people.



This publication provides a brief overview of policy approaches for addressing tobacco product discounting schemes – specifically tobacco product coupons and value-added promotions such as multi-pack offers.¹ Given the tobacco industry's extensive use of price discounting schemes and strong evidence that price has a significant impact on overall tobacco use and youth initiation, a growing number of state and local communities are considering pricing policies, in addition to taxation, as part of comprehensive tobacco control programs.² Although some pricing strategies are relatively untested, states and many localities have broad legal authority to regulate the sale and distribution of tobacco products in their jurisdictions. If regulations are carefully drafted to focus on tobacco product pricing, retailer conduct at the point of sale, and transactions within a specific jurisdiction, these pricing laws are likely to be upheld, even if they are challenged by the tobacco industry.³

Tobacco Product Coupons

Consumers receive tobacco product coupons in several ways. For example, they can be affixed to packs of certain brands, sent by direct mail, or made available via download from the Internet or smartphone applications. Coupons are often targeted to specific geographic areas (such as low socio-economic neighborhoods)⁴ or to particular demographic groups (such as youth or minorities). Studies have found, for instance, that price promotions for menthol cigarettes are more prevalent in neighborhoods with high concentrations of African American youth.⁵

Coupons are also attractive price reduction strategies for the tobacco industry because they allow premium brands to maintain their image as a higher-end product, while competing with generic brands on price.⁶

One way to restrict coupons is to limit their *distribution*. Historically, this has been the most common approach taken by state and local governments. The extent of current state and local coupon distribution laws vary, but they generally are very narrow in scope. For instance, some states only prohibit tobacco coupon distribution to minors. Other states' laws restrict coupon distribution more generally within a certain distance of schools, but contain exemptions allowing for coupon distribution in bars and other adult-only venues. Because restricting the distribution of coupons could have Commerce Clause and First Amendment implications, state and local governments should take care to consult an attorney before they pursue this approach.

Another way for governments to restrict coupons is to regulate their *redemption*. Such laws could prohibit tobacco retailers from redeeming coupons that discount the price of cigarettes and other tobacco products, and could make compliance with such a restriction a condition of the jurisdiction's retail tobacco licensing scheme. In January 2012, the city of Providence, Rhode Island passed the first law to prohibit licensed retailers from redeeming coupons and multi-pack offers for tobacco products.⁷ The law amends the city's tobacco retailer licensing ordinance, and punishes violators by fines or revocation of the tobacco retail license.⁸ A group of tobacco retailers, cigar manufacturers and tobacco product manufacturers challenged the ordinance in court, alleging among other things that it was preempted by federal law.⁹ The district court dismissed the tobacco industry's motion and upheld the ordinance;¹⁰ the tobacco industry appealed the decision; and the appellate court affirmed the lower court's ruling that the pricing ordinance was not preempted by federal law.¹¹ The pricing ordinance took effect January 3, 2013.

If local communities are concerned that they lack the authority to directly regulate price discounting, they may want to explore opportunities to enforce existing state minimum price laws. For example, a state's minimum price law might allow local communities to prohibit the redemption of coupons that reduce the price of cigarettes below the statutory minimum price.

Laws restricting or prohibiting the retail redemption of coupons would be more likely to affect the price of tobacco products than coupon distribution laws and, given the correlation between price and consumption, would also be more likely to have a significant public health impact. Because a coupon redemption law is limited to regulating only one aspect of a sales transaction at the local level, it may minimize the legal challenges posed by other approaches, such as an expansive state or local restriction on coupon distribution.

Retail Value-Added Promotions

Retail value-added promotions typically take the form of multi-pack offers, which involve the sale of multiple packages for a single combined price (e.g., "buy-one-get-one free" offers), and cross-promotions, which involve a bonus tobacco product with the purchase of another type of tobacco product (e.g., "buy a pack of cigarettes and get a free tin of snus"). Such bundling can dramatically reduce the price of each item, particularly when multi-pack offers are combined

with discount coupons in a single transaction. Moreover, the tobacco industry's significant spending on retail value-added offers of bonus non-cigarette tobacco products with cigarette purchases¹² suggests that it is using cross-promotions as a way to promote smokeless tobacco products and encourage dual use.¹³

The federal Family Smoking Prevention and Tobacco Control Act of 2009 does not regulate retail value-added offers involving free cigarettes or other tobacco products with the purchase of other tobacco products. Nevertheless, the federal law expressly preserves the authority of state and local governments to regulate the sale or distribution of tobacco products,¹⁴ allowing such entities to adopt laws regarding pricing and the sale of discounted tobacco products. At this time, with the exception of Massachusetts (which prohibits sales involving bonus packs of cigarettes through its minimum price law¹⁵), most state laws do not address retail value-added promotions. To date, Providence and New York City are the only localities that have directly prohibited multi-pack offers that result in sales below the listed or non-discounted price. Note: New York City's 2013 tobacco sales law also set the minimum price for cigarettes and 20-pack little cigars at \$10.50.¹⁶

As with coupon restrictions, limiting retail value-added promotions, such as multi-pack discounts, could be a promising way for state and local governments to maintain higher prices for tobacco products and to close loopholes under existing law. Restricting value-added promotions could be accomplished in several ways: (1) through a stand-alone law, (2) imposed as a condition on a tobacco retailer license, or (3) included as an element of a state's minimum price law. For instance, states with minimum price laws could prohibit sales involving bonus packs of cigarettes by requiring that each item included in a combination sale meet the statutory minimum price. States and many localities could also, directly or via a minimum price law, prohibit cross-promotions that add free non-cigarette tobacco products (e.g., smokeless tobacco) with the purchase of packs of cigarettes.

Conclusion

Because pricing policies may face legal challenges, states and local communities should have strong legal support in the pre-planning stages and all other phases of policy development. Local attorneys and tobacco control attorneys, including the staff at the Tobacco Control Legal Consortium, can help ensure that a jurisdiction has the legal authority to adopt a particular regulation and if so, whether any federal statute or constitutional provision limits that authority. They can also provide examples of implemented policies, share policy options and help design, enact and implement legally sound, effective and evidence-based laws.¹⁷ Also, if the policy is challenged in court, tobacco control lawyers can help provide litigation support.

Other Helpful Resources

The Tobacco Control Legal Consortium has several resources on its [website](#) that cover tobacco pricing issues, including [Pricing Policy: A Tobacco Control Guide](#) (2014), [Regulating Price Discounting in Providence, Rhode Island](#) (2013), [Regulatory Options for Little Cigars](#) (2013), [Regulating Tobacco Product Pricing: Guidelines for State and Local Governments](#) (2010), [Price-Related Promotions for Tobacco Products: An Introduction to Key Terms & Concepts](#)

(2011), and publications on tobacco taxation. Other resources include CounterTobacco.org's webpage, [*Raising Tobacco Prices Through Non-Tax Approaches*](#), which contains several resources on tobacco pricing policies and the Center for Public Health & Tobacco Policy at New England Law | Boston's [*Tobacco Price Promotion: Local Regulation of Discount Coupons and Certain Value-Added Sales*](#) (2013).

Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at publichealthlawcenter@wmitchell.edu with any questions about the information included in this fact sheet.

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Notes

¹ The information contained in this document is not intended to constitute or replace legal advice.

² See Center for Public Health Systems Science et al., *Pricing Policy: A Tobacco Control Guide 2* (2014), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-pricing-policy-WashU-2014.pdf>.

³ See Tobacco Control Legal Consortium, [*Regulating Tobacco Product Pricing: Guidelines for State and Local Governments*](#) 4-7 (2010), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-pricing-2010.pdf> (describing legal questions that state and local governments should consider to ensure that pricing laws will withstand legal challenges).

⁴ Marlo Miura, Tobacco Control Legal Consortium, *Regulating Tobacco Product Pricing: Guidelines for State and Local Governments 2* (2010), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-pricing-2010.pdf>.

⁵ Lisa Henricksen et al., *Targeted Advertising, Promotion, and Price for Menthol Cigarettes in California High School Neighborhoods*, 14 NICOTINE & TOBACCO RESEARCH, 116-121 (2012).

⁶ Micah Berman & Kerry Malloy Snyder, Ctr. for Pub. Health & Tobacco Policy, *Tobacco Price Promotion: Policy Responses to Industry Price Manipulation* 7(2011), <http://www.tobaccopolicycenter.org/documents/Tobacco%20Price%20Promotion%20Complete%20Report.pdf>.

⁷ Providence Ord. § 14-303 (2012), <http://providenceri.com/efile/2037>.

⁸ See *id.*

⁹ See Tobacco Control Legal Consortium, *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence* (2013) (providing an overview of the litigation), <http://publichealthlawcenter.org/content/national-association-of-tobacco-outlets-inc-v-city-of-providence>.

¹⁰ *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013).

¹¹ See, e.g., Center for Public Health Systems Science et al., *Regulating Price Discounting in Providence, RI: Innovative Point-of-Sale Policies: Case Study #1* (2013),

<http://publichealthlawcenter.org/sites/default/files/resources/SCTC-case-study-Providence-pricing-2013.pdf>.

¹² FED. TRADE COMM’N, FEDERAL TRADE COMMISSION CIGARETTE REPORT FOR 2012, at 2 and tbl.2A (2015), <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-cigarette-report-2012/150327-2012cigaretterpt.pdf>

¹³ Berman, *supra* note 6, at 11. For more information about the trend of dual use, see Scott L. Tomar et al., *Patterns of Dual Use of Cigarettes and Smokeless Tobacco Among U.S. Males: Findings From National Surveys*, 19 TOBACCO CONTROL 104,107 (2010).

¹⁴ 21 U.S.C. § 387p(a)(1) (West 2013).

¹⁵ MASS. GEN. LAWS ANN. ch. 64C § 13(e) (West 2013).

¹⁶ NEW YORK, N.Y., ORDINANCE NO. 1021-2013 (2013) (signed into law on November 19, 2013). *See also* New York City, *New Law Regulating Tobacco Sales in New York City Retail Stores* (2014), <http://www.nyc.gov/html/doh/downloads/pdf/smoke/ts-faq.pdf>

¹⁷ *See, e.g., Regulating Price Discounting in Providence, RI, supra* note 11, at 11, 14.