



Policy Approaches to Restricting Tobacco Product Coupons and Retail Value-Added Promotions

Introduction

The price of tobacco products directly affects the level of consumption. For example, when cigarettes cost less, people smoke more. The availability of cheap tobacco products increases rates of tobacco use, particularly among young adults and minors, who are especially price-sensitive. Conversely, higher tobacco prices lead to reduced smoking initiation among youth, reduced consumption among current smokers, and an increase in both quit attempts and sustained cessation.



The tobacco industry is well aware of the impact that pricing has on consumption and uses a variety of innovative strategies to discourage current tobacco users from quitting and to entice new customers to purchase their products. These strategies include coupons, multi-pack offers, and promotional payments to retailers and wholesalers. The tobacco industry uses sophisticated research to apply these strategies to specific products in particular geographic locations, and among targeted groups of people.

For these reasons, several state and local governments are considering, or already pursuing ways to affect the price of tobacco in addition to tobacco taxes. While some of these pricing strategies are still new and relatively untested, states have broad legal authority to regulate the sale and distribution of tobacco products in their jurisdictions. Many localities also have this authority. If carefully drafted to focus on pricing and certain retailer conduct at the point of sale, and on transactions within a specific jurisdiction, laws regulating tobacco product pricing will generally be defensible if challenged by the tobacco industry.

This publication starts with a brief overview of tobacco industry price discounting and its impact on consumption. Part II describes two price-related regulatory tools that state and local governments might consider: restricting the redemption of tobacco coupons and regulating retail value-added promotions. Part III briefly addresses legal considerations related to these options, including the authority of state and local governments and likely constitutional questions. Finally, Part IV provides examples of select legislation and regulations restricting tobacco coupons and retail value-added promotions, and provides comments on the relative benefits and limitations of each approach.

Part I: Overview of Tobacco Industry Price Discounting

The tobacco industry manipulates the prices of its products by applying price discounting strategies at the point of sale (generally any place at which a consumer accesses tobacco products). These strategies can include discount coupons, multi-pack offers, and undisclosed payments and rebates to wholesalers and retailers. Through these pricing strategies, the industry seeks to offset price increases caused by tobacco tax increases and keep their products affordable and attractive to all of its customers, but especially to younger smokers who are typically the most price-sensitive consumers.

In 1998, the industry and forty-six states entered into the Master Settlement Agreement (“MSA”), which resulted in financial payments to each state for tobacco-related health costs as well as a prohibition of certain types of tobacco marketing initiatives. As a result of the MSA, the industry substantially shifted its marketing and promotional strategies to the point-of-sale environment because this area was left largely unregulated by the MSA’s prohibitions on advertising and marketing. Tobacco industry spending on price-related marketing at the point of sale has increased substantially over the past fifteen years. Although tobacco industry promotional spending at the point of sale has decreased since its peak in 2003, “per pack promotional spending remains more than doubled since the MSA, with cigarette marketing increasingly dominated by spending on price-reducing promotions.”¹

Tobacco companies spend more money on price discounts than on any other form of tobacco promotion. According to the Federal Trade Commission, in 2008, the industry spent approximately \$7.17 billion on incentive payments to cigarette retailers and wholesalers to reduce the price of cigarettes to consumers (these payments are often referred to as buy-downs and off-invoice discounts).² In addition, tobacco companies spent approximately \$360 million on coupons,³ and approximately \$732.8 million on retail value-added promotions (such as buy-one-get-one free offers).⁴ In sum, the tobacco industry spent more than \$8.25 billion in 2008 on strategies to reduce the price of its products at the point of sale, and this accounted for more than 80% of the industry’s overall marketing expenditures.⁵

Not only does the industry spend a vast amount of money on price-discounting strategies, it carefully targets its price promotions in certain geographic areas and at select demographic groups. Tobacco industry documents show that the industry has used direct mail coupons, point of sale coupons, and “buy some get some” promotions to target their marketing geographically, by brand or by user profile.⁶ In particular, the industry has used coupons in an effort to counteract the decrease in smoking rates predicted to result from local, state and federal excise tax increases.⁷ Discount coupons and multi-pack offers have also been calibrated to target certain groups of tobacco users, particularly those that are most price-sensitive, which can contribute to health inequities. For example, discount and multi-pack coupons have been found to be “particularly appealing” to women, youth, and minorities.⁸

The industry’s focus on price discounting at the point of sale is particularly problematic because evidence suggests that youth and young adult smokers are especially susceptible to advertising and price promotion in the retail environment.⁹ Research indicates that the use of promotional offers has generally been the highest and has generated the greatest impact when directed at the

most price-sensitive demographic—the youngest smokers.¹⁰ Indeed, the U.S. Surgeon General has concluded: “[T]he industry’s extensive use of price-reducing promotions has led to higher rates of tobacco use among young people than would have occurred in the absence of these promotions.”¹¹

Part II: Overview of Select Policy Options

The tobacco industry maintains a sophisticated multi-pronged strategy to reduce the price of its products. This guide will focus on two pricing strategies that can dramatically lower the price of tobacco products, especially when they are used in combination:¹² (1) restricting the redemption of coupons for free or discounted tobacco products and (2) restricting retail value-added promotions.

Coupon Restrictions

Tobacco coupons can take a number of forms, such as coupons affixed to packs of certain brands, directly mailed to certain consumers, and available via download from the Internet or smartphone applications. As stated above, coupons are often targeted to specific geographic areas (for example in low socio-economic neighborhoods) or to particular demographic groups (such as youth or minorities). 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.¹³

Before considering options for regulating tobacco price, one should review federal, state and local efforts designed to impact price. For example, the federal Family Smoking Prevention and Tobacco Control Act of 2009 (the “Tobacco Control Act”) granted the U.S. Food and Drug Administration (the “FDA”) the authority to regulate the manufacturing, distribution and marketing of tobacco products. While the Tobacco Control Act makes redemption of coupons for tobacco products by mail illegal,¹⁴ it does not address the use of coupons in the retail setting. Currently, most state laws are relatively limited in this area and only prohibit the *distribution* of coupons for “free or nominal cost” tobacco products, without addressing the *redemption* of coupons for discounted tobacco products.

One option for restricting coupons is to limit coupon *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 and cover most public places or places within a certain distance of schools, but contain exemptions allowing for coupon distribution in bars and other adult-only venues.

In addition to restricting the distribution of coupons, governments can regulate the *redemption* of coupons. Such a law 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. (As discussed below Providence, Rhode Island enacted a law in early 2012 which prohibits licensed retailers from

redeeming coupons for tobacco products.) 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 may allow local communities to prohibit the redemption of coupons that reduce the price of cigarettes below the statutory minimum price.

Laws restricting the retail redemption of coupons would be likely to have a more direct effect on the price of tobacco products and, given the correlation between price and consumption, such laws would therefore be likely to have a more significant public health impact than current coupon distribution laws. 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.

Restrictions on 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, significant spending by the tobacco industry on retail value-added offers involving bonus non-cigarette tobacco products with the purchase of cigarettes¹⁵ suggests that the industry is using cross-promotions as a way to promote new smokeless tobacco products and encourage dual use.¹⁶

The Tobacco Control Act does not regulate retail value-added offers involving free cigarettes or other tobacco products with the purchase of other tobacco products. At this time, with the exception of Massachusetts (which prohibits sales involving bonus packs of cigarettes through its minimum price law¹⁷), most state laws do not address retail value-added promotions. To date, Providence, Rhode Island, is the only locality that has directly prohibited multi-pack offers that result in sales below the listed or non-discounted price.

As with coupon restrictions, limiting retail value-added promotions may be a promising strategy for state and local governments to maintain higher prices for tobacco products and to close loopholes under existing law. Although few jurisdictions have exercised the option of prohibiting retail value-added promotions, the Tobacco Control Act expressly preserves the authority of state and local governments to regulate the sale or distribution of tobacco products,¹⁸ allowing such entities to adopt laws regarding pricing and the sale of discounted tobacco products.

State governments and many local governments could restrict multi-pack discounts like buy-one-get-one free offers and offers of free tobacco products with the purchase of another type of tobacco product. Restricting retail value-added promotions could be accomplished through (1) a stand-alone law, imposed as a condition on a tobacco retailer license, or (2) 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.

As discussed in Section III, states and localities should consult with legal counsel before drafting policies that restrict the redemption of coupons and prohibit certain retail value-added promotions because the tobacco industry and its partners will likely challenge those policies. It is essential that laws are drafted in a very precise manner in order to withstand any legal challenges.

Part III: Legal Considerations

State and local governments have historically had broad authority to regulate the pricing of tobacco products, and the Tobacco Control Act explicitly preserves the right of state and local governments to enact price-related restrictions. There are some important legal considerations to keep in mind, however, when drafting price-related legislation, such as whether the jurisdiction in question has the legal authority to adopt the particular regulation, and if so, whether any federal statute or constitutional provision limits that authority. Below is a very brief discussion of some of the legal issues that are likely to be raised in lawsuits challenging these two types of pricing restrictions.

State and Local Authority to Regulate Tobacco Product Pricing

State governments generally have the authority to make laws “necessary and proper to preserve the public security, order, health, morality and justice”¹⁹ under the rights reserved to the States by the Tenth Amendment.²⁰ Enacting tobacco pricing statutes and ordinances would be within the power of state and many local governments as part of their role of protecting their citizens’ health and welfare. A legal consideration that may interfere with a state or local government’s authority is known as “preemption.”

Preemption is the principle derived from the Supremacy Clause of the U.S. Constitution²¹ that “a federal law can supersede or supplant any inconsistent state law or regulation.”²² In other words, in some instances, federal laws can prohibit state or local governments from passing laws on a specific topic. A federal law can explicitly preempt state or local activity or a court may find that a federal law preempts state or local activity because Congress either intended to be the sole regulator in a particular area of law or it is impossible for the federal and state or local law to operate in concert with each other. There are similar preemption principles that may apply at the state level which prohibit local governments from adopting certain regulations. When developing laws, state and local governments should carefully review related federal statutes to ensure that their efforts will not be preempted by those statutes.

Two federal statutes that the tobacco industry often argues preempt state and local tobacco control efforts are the Tobacco Control Act and the Federal Cigarette Labeling and Advertising Act. It is important to have a basic understanding of both statutes prior to enacting laws that regulate tobacco product pricing.

Family Smoking Prevention & Tobacco Control Act

As discussed above, the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) of 2009 gave the FDA the authority to regulate tobacco products. This expansive law specified activities that can only be done by the FDA, areas in which states and localities can also act, and some activities that states and localities—but not the federal government—can undertake. For example, the Act specifically establishes areas where the federal law preempts any state or local law:

No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different from, or in addition to, any requirement under the provisions of this chapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.²³

The law also defined areas over which states and localities have authority to act:

Except as provided ... [above], nothing in this chapter, or rules promulgated under this chapter, shall be construed to limit the authority of ... a State or political subdivision of a State ... to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this chapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products.²⁴

As clearly stated in this second provision, states and localities have the authority, under federal law, to regulate the sale and distribution of tobacco products. To help counter arguments that a price-related law is anything other than a sales or distribution requirement, states or localities acting in this area should consistently refer to any coupon or retail value-added approaches accurately, by describing them as what they are—a pricing or sales regulation.

Federal Cigarette Labeling and Advertising Act

The Federal Cigarette Labeling and Advertising Act (FCLAA) was enacted in 1967 and mandated the health warnings that appear on cigarette packaging and in advertising.²⁵ Included in the Act is the following express preemptive language:

(b) State Regulations. No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.²⁶

FCLAA was amended by the Tobacco Control Act to allow states and localities to regulate the time, place, and manner of cigarette advertisements or promotions, but not the content of those advertisements or promotions.²⁷

So, while the Tobacco Control Act, as discussed above, has expressly preserved state and local authority to regulate tobacco advertising and promotion, FCLAA continues to restrict some state and local regulations in this area as related to cigarettes. Although pricing-related regulations are not advertising or promotional restrictions, state and local governments should anticipate such challenges and should take care to refer to these laws accurately—as sales restrictions. Challenges should not only be anticipated under FCLAA, but also on First Amendment grounds.

First Amendment

Included under the protection of speech afforded by the First Amendment is protection for “commercial speech.” Commercial speech has been defined by the Supreme Court as “expression related solely to the economic interests of the speaker and its audience.”²⁸ Although commercial speech historically has not been not protected to the same extent as other forms of speech, state and local governments need to be mindful of the First Amendment’s commercial speech protections when pursuing tobacco control activities.

Because a pricing or sales law focuses on conduct rather than speech, courts should find that a pricing restriction is not prohibited under the First Amendment. However, due to the complicated nature of First Amendment commercial speech doctrine, state and local governments should consult an attorney before undertaking any initiatives that could potentially implicate First Amendment issues.

Commerce Clause

Another argument that may be raised in opposition to state or local efforts to control the distribution or redemption of tobacco product coupons or to regulate the pricing of tobacco products is that the proposed regulation violates the “dormant Commerce Clause.” The dormant Commerce Clause, in essence, seeks to protect interstate commerce. Because neither a law focusing on the redemption of coupons nor a law restricting value-added promotions in one specific jurisdiction would restrict trade across state lines,²⁹ the dormant Commerce Clause should not pose a barrier to these types of laws. However, state and local governments should still anticipate legal challenges arguing that pricing restrictions within a state or locality affect interstate commerce disproportionately to any local public health benefit.

Part IV: Select Legislation and Policies

Below are some examples of legislation and regulations restricting the distribution and redemption of tobacco product coupons and the honoring of retail value-added promotions, with comments about their relative benefits, limitations, and potential legal considerations. If you consider adapting any language from these policies, be sure to confirm that the provision in question is practical in your jurisdiction.

Please note that the Consortium does not endorse or recommend any of the following policy approaches. These select examples are included simply to illustrate how various jurisdictions have approached restricting tobacco couponing and other price discounting strategies.

1. State Laws and Local Ordinances Prohibiting Coupon Distribution

Example 1A: California

Cal. Health & Safety Code § 118950(b)-(c)(1)

(b) It is unlawful for any person, agent, or employee of a person in the business of selling or distributing smokeless tobacco or cigarettes to engage 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, gift certificates, gift cards, or other similar 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, gift certificates, gift cards, or other similar 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.

COMMENT: The law applies to cigarettes and smokeless tobacco; it does not impact other tobacco products such as cigars. It restricts the distribution of cigarette and smokeless tobacco coupons for free or nominal cost in certain places.

BENEFITS: The inclusion of both outdoor and indoor public places as well as private property open to the public significantly extends the number of restricted locales. Additionally, the definition of “nonsale distribution” covers a wide range of pricing mechanisms employed by the industry, including coupons and rebates. The law also expressly states that it is not preemptive, allowing localities to enact strict regulations. § 118950 (e).

LIMITATIONS: Instead of prohibiting all price discounting, the law restricts coupons and other pricing mechanisms only if their use results in a free or nominally priced product. This still allows tobacco products to be sold for some discounted price as long as it is not free or nominal cost. The law also explicitly exempts places where minors are not present (§§ 118950 (f) and (g)) as well as certain value-added promotions; the broad “tobacco products” language makes it likely that free cigarettes and smokeless tobacco are expressly permitted as part of buy-one-get-one free offers. Furthermore, limiting restricted entities to persons, agents, or employees of persons in the business of selling/distributing these products may mean the law fails to cover other individuals, such as club promoters, who may engage in nonsale distribution.

LEGAL CONSIDERATIONS: The focus on distribution of these instruments may result in First Amendment challenges, especially with prohibition of coupon and rebate offers, which may

be construed as speech. However, because the law makes nominal or no-cost coupons and rebates illegal, offers for these illegal transactions are not protected by the First Amendment.

Distribution restrictions may also invoke dormant Commerce Clause challenges if regional or national promotions are affected by the law. **TESTED IN COURT:** In the case of *People v. R.J. Reynolds Tobacco Company*, the tobacco industry challenged this law as preempted by FCLAA, which prohibits any state from enacting requirements or prohibitions based on smoking and health with respect to the advertising or promotion of cigarettes. It argued the distribution of coupons was promotional in nature. The California Supreme Court disagreed and concluded that the law fell squarely within the state's authority to regulate the distribution of tobacco products and thus was *not* preempted by FCLAA.

Example 1B: Hawaii

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.

...

(e) As used in this section:

“Distribute” means to pass out to members of the general public free of charge for the exclusive purpose of promoting a product.

COMMENT: This law addresses all tobacco products, not just cigarettes. It restricts the distribution of tobacco product coupons for free in certain places.

BENEFITS: This law avoids a loophole for individuals not directly in the business of selling or distributing tobacco products by referencing any person. It also places an emphasis on youth who are especially susceptible to tobacco addiction by prohibiting distribution anywhere (with two exceptions described below) near schools.

LIMITATIONS: Other provisions of the law state that it does not apply to places where (1) tobacco products are sold or (2) minors are prohibited (§ 328J 17 (c)(2)). Additionally, the law is limited to outdoor public spaces; distribution appears to be permitted in indoor venues and publically accessible private property except within the prohibited distances from schools. The scope of the law may also be limited by the exclusive reference to coupons, drawing into question its impact on other methods such as rebates and gift certificates. Furthermore, it is unclear whether the law prohibits coupons for discounted products in addition to prohibiting coupons for free tobacco products.

LEGAL CONSIDERATIONS: The focus on coupons redeemable for tobacco products may limit First Amendment challenges by emphasizing the restriction on instruments intended as part of an economic transaction while still permitting non-redeemable promotional materials. The dormant Commerce Clause may be implicated by regional or national promotional campaigns.

Example 1C: Cook County, Illinois

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.

COMMENT: The law applies to all tobacco products, not just cigarettes. It restricts the distribution of tobacco product coupons for free or nominal cost in certain places. Additionally, it is placed within the county's local tobacco licensing scheme.

BENEFITS: Tying the coupon restriction to the local tobacco licensing regulations provides for stronger penalties such as license suspension and/or revocation. It also ensures that the restriction will be enforced through existing tobacco licensing compliance/enforcement mechanisms which could result in more effective enforcement overall. The law also includes both indoor and outdoor public spaces. Additionally, the law's prohibited distance from areas frequented by children is expanded beyond schools to include child care, recreational, and other educational facilities.

LIMITATIONS: The law does not define "coupon," making it unclear whether other price reduction methods such as rebates and gift certificates are restricted. It is also unclear whether coupons redeemable for discount cost (other than for free/nominal cost) are prohibited. The law allows coupons to be redeemed for low prices above nominal cost.

LEGAL CONSIDERATIONS: The focus on coupons redeemable for tobacco products may limit First Amendment challenges by emphasizing the restriction on instruments intended as part of an economic transaction while still permitting non-redeemable promotional materials. The dormant Commerce Clause may be implicated by regional or national promotional campaigns.

2. Local Ordinances Prohibiting the Retail Redemption of Coupons and Multi-pack Offers

Example 2A: Providence, Rhode Island

Providence Ord. § 14-303

No person who holds a license issued under this article, or any employee or agent of same, shall:

- (1) accept or redeem, offer to accept or redeem, or cause or hire any person to accept or redeem or offer to accept or redeem any coupon that provides any tobacco products without charge or for less than the listed or non-discounted price; or
- (2) accept or redeem, offer to accept or redeem, or cause or hire any person to accept or redeem or offer to accept or redeem any coupon that provides any cigarettes without charge or for less than the listed or non-discounted price; or
- (3) sell tobacco products to consumers through any multi-pack discounts (e.g., “buy-two-get-one-free”) or otherwise provide or distribute to consumers any tobacco products without charge or for less than the listed or non-discounted price in exchange for the purchase of any other tobacco product; or
- (4) sell cigarettes to consumers through any multi-pack discounts (e.g., “buy-two-get-one-free”) or otherwise provide or distribute to consumers any cigarette without charge or for less than the listed or non-discounted price in exchange for the purchase of any other cigarette.

COMMENT: This law addresses all tobacco products. It prohibits both (1) the redemption of tobacco product coupons that result in tobacco product sales for free or less than the listed/non-discounted price and (2) the sale of tobacco products through multi-pack offers or other price discounting methods that result in tobacco product sales for less than the listed/non-discounted price in exchange for the purchase of other tobacco products (e.g. buy-one-get-one free offers). Additionally, it is placed within the city’s local tobacco licensing scheme.

BENEFITS: Tying the pricing restrictions to a licensing scheme can aid enforcement of the regulation by establishing license suspension or revocation in addition to fines as a potential penalty for violations. It also provides an existing mechanism for conducting compliance inspections. The law’s definition of “coupon” is broad, including any instrument that allows a consumer to obtain tobacco products for free or at a discounted price, addressing the many mechanisms and various labels the industry uses for price reduction. “Listed or non-discounted price” is defined to mean any price on the packaging or related display/advertising of the product, whichever is higher, plus applicable taxes. Such wording restricts sales to one available price and eliminates the industry’s ability to target select price-sensitive demographics. Finally, separating restrictions for both (1) the redemption of coupons from multi-pack offers and (2) the provisions related to multi-pack cigarettes and other tobacco products, allows for the possibility that if either section is struck down due as being preempted by FCLAA, only the offending provision would be severed and the non-offending ones would remain in effect.

LIMITATIONS: The law does not prevent the sale of cigarettes or tobacco products for less than the listed/non discounted price via other price discounting methods occurring up the chain of distribution, such as buy-downs, master-type programs, and off-invoice discounts.

LEGAL CONSIDERATIONS: Dormant Commerce Clause challenges to this law are unlikely because the prohibited economic activity is confined to a single city, thus squarely limited within the state; consumers are free to redeem coupons elsewhere. This not only avoids economic harm to other states, but may provide an economic benefit. Although not immune to First Amendment challenges, such arguments are less likely to be successful because the industry remains free to distribute coupons.

TESTED IN COURT

The Providence ordinance was recently the subject of legal proceedings. The tobacco industry challenged the pricing provisions of the ordinance on several grounds, but its primary claims were that its restrictions on the redemption of coupons and sales involving multi-pack discounts are preempted by federal law and violate the First Amendment.

1) Federal Preemption by FCLAA

- **Challenge:** The ordinance violates the FCLAA preemption clause, which prohibits states and localities from imposing any “requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes.”³⁰ The tobacco industry argued that the offering, acceptance, and redemption of coupons and other price discounts are “advertising or promotion” and thus preempted by FCLAA. The tobacco industry also argued that the Providence ordinance restricts the communication of pricing information to consumers based on the **content** of that communication.
- **Response:** The City of Providence argued that its price restrictions are not preempted by FCLAA since the ordinance is not concerned with the communication of tobacco product information (i.e., the **content** of that communication) but only the sale or distribution of tobacco products. Furthermore, the Tobacco Control Act amended FCLAA to allow states and localities to restrict the “time, place, and manner” of cigarette advertising and promotion. Thus, if the ordinance does regulate cigarette promotion, it does so only with regard to the **manner** of tobacco price discounting.

2) First Amendment

- **Challenge:** The ordinance unconstitutionally limits the tobacco industry’s ability to communicate pricing information to its consumers. The tobacco industry argued that communicating information about a product’s price is protected commercial speech.
- **Response:** The City of Providence argued that the ordinance does not prohibit the tobacco industry from communicating information with consumers. The ordinance regulates only commercial activity (i.e., the sale and distribution of tobacco products), not commercial speech. The law’s restrictions are limited to the types of economic

transactions that licensees in the state are allowed to engage in. It does not otherwise prevent tobacco companies from communicating truthful information about their products and their prices.

LITIGATION UPDATE

On December 10, 2012, the United States District Court for the District of Rhode Island ruled generally in favor of the City of Providence and did not agree with the arguments advanced by the plaintiffs—the National Association of Tobacco Outlets, Inc., Cigar Association of American, Inc., Lorillard Tobacco Company, R.J. Reynolds Tobacco Company, American Snuff Company, Philip Morris USA Inc., and others. According to Judge Mary M. Lisi, Chief United States District Judge, regarding the allegation that the city ordinance infringed on the industry’s First Amendment rights, the industry failed “to establish that the practice of reducing the price of cigarettes and tobacco products through coupons and multi-pack discounts is subject to constitutional protection.”³¹

In responding to the argument that the city ordinances are preempted by FCLAA, Judge Lisi held:

Section 14-303 imposes no additional requirement on labeling or advertising of cigarettes or the content of other promotional materials, including coupons or special pricing offers. . . . Section 14-303 does not . . . preclude the Plaintiffs from disseminating the coupons within the City, whether for promotional purposes or otherwise; instead it only prohibits the redemption of coupons. . . . Section 14-303 does not regulate the information provided on cigarette packaging, it only prohibits the sale of cigarettes through multi-pack discounts or the distribution of cigarettes for less than the listed price in exchange for the purchase of other cigarettes.³²

On September 30, 2013, the U.S. Court of Appeals for the First Circuit unanimously affirmed the district court’s ruling.³³ It held that the pricing ordinance did not violate the First Amendment because the regulation of prices does not concern the regulation of inherently expressive conduct. It also held that, assuming that discounting practices are promotional activities, the Providence ordinance simply regulates the manner of those activities – behavior allowed by FCLAA.

3. Regulations on Coupon Redemption or Multi-Pack Sales If Violation of Minimum Price Law Would Result

Example 3A: Massachusetts

Massachusetts Department of Revenue Directive 03-14: Cigarette Manufacturer Coupon Programs

This directive addresses certain practices whereby manufacturers of cigarettes offer promotional coupons for redemption that result in a price reduction to consumers. The rules set out in this Directive are intended to clarify those types of promotional coupon programs that the Department of Revenue (Department) will allow to be applied in calculating the base cost of cigarettes when determining the presumptive minimum cost/price of cigarettes. The Department is responsible for administering the cigarette excise and enforcing fair minimum pricing rules under G. L. c. 64C and the regulations promulgated thereunder.

- (1) A manufacturer's coupon presented by a consumer to a retailer at the time of sale is permitted in Massachusetts so long as it does not reduce the retail sales price of cigarettes below the applicable presumptive minimum cost pursuant G. L. c. 64C and 830 CMR 64C.14.1. A coupon presented to a retailer that reduces the price to the customer below the presumptive minimum price is not allowed.
- (2) A manufacturer's coupon issued to a consumer who has previously purchased a package or carton of cigarettes is permissible if the coupon is redeemed directly by the manufacturer with either cash or goods because such a redemption does not affect either the wholesaler's or retailer's presumptive minimum cost. G. L. c. 64C and 830 CMR 64C.14.1.
- (3) A coupon issued to a retailer by a manufacturer prior to the time of sale to a consumer is not permitted in Massachusetts if the coupon reduces the retail sales price of cigarettes below the applicable presumptive minimum cost of the retailer pursuant to G. L. c. 64C, Directive 02-2 and 830 CMR 64C.14.1. A similar coupon presented to a retailer that does not reduce the price to the customer below the presumptive minimum price may be allowed depending upon the facts and circumstances of the coupon or other promotional program if the program is not in violation of any other requirement found in G. L. c. 64C, Directive 92-4, Directive 02-2 and 830 CMR 64C.14.1.

COMMENT: This directive applies only to cigarettes; it does not address other tobacco products. It prohibits the redemption of cigarette coupons that would reduce the retail sales price of cigarettes below the statutory minimum price. Thus, the directive allows cigarette coupon discounting down to the statutory minimum price.

BENEFITS: This method of regulation (i.e., through a state executive/administrative agency) may be most useful for jurisdictions in which local authority to regulate tobacco pricing is

unclear, perhaps because of preemption by a state's tobacco tax structure or its minimum price law.

LIMITATIONS: Because the directive allows cigarette coupon discounting to the statutory minimum price, the industry may still have significant room to target price-sensitive demographic groups using coupons and other price-reduction strategies. The directive also explicitly limits coupons to “manufacturer’s coupons,” which is unnecessary and could result in questions of the directive’s applicability if the source of the coupon is an entity other than a manufacturer (i.e., wholesaler, holding company, etc.). The directive specifically permits other price reduction mechanisms, such as rebates and coupons, redeemed directly by the manufacturer (e.g., by mail). However, the implementation of the Tobacco Control Act since the directive was issued makes mail redemption an inaccessible method of obtaining such a rebate. The directive does not address value-added promotions outside the context of rebate-type coupons provided as part of or after a sale of cigarettes; it is unclear whether such coupons could be provided with similar sales of tobacco or non-tobacco products.

LEGAL CONSIDERATIONS: Tying coupon redemption restrictions to a minimum price law might help frame the restrictions as being “pure” economic regulations, and less susceptible to federal preemption or First Amendment challenges. However, the directive’s scope is controlled by the types of products addressed in the minimum price law, and thus limited to cigarettes. The directive’s force is dependent on the enforcement provisions of the minimum price law. The selective prohibition on coupon redemption depending on the final purchase price also decreases the likelihood of successful First Amendment challenges because the industry’s ability to distribute materials is not affected. Dormant Commerce Clause challenges are similarly less likely because the restrictions are limited to economic transactions occurring within a single state. Further, the law does not prohibit the industry from disseminating coupons within the State of Massachusetts; it merely provides that such coupons will not be allowed if their application results in a retail sales price below the statutory minimum price.

Example 3B: Saugus, Massachusetts

Saugus Board of Health Regulation Restricting the Sale and Use of Tobacco Products & Nicotine Delivery Products

(H) Free Distribution and Coupon Redemption

No person shall distribute, or cause to be distributed, any free samples of tobacco products or nicotine delivery products. No means, instruments or devices that allow for the redemption of tobacco products for free or at a reduced price below the minimum retail price determined by the Massachusetts Department of Revenue shall be accepted by any permittee.

COMMENT: This regulation applies to all tobacco products. It prohibits the redemption of tobacco product coupons that would result in a sale below the state's minimum retail price.

BENEFITS: This is an example of a local regulation used to strengthen state law as it is tied to both the state minimum price law and the locality's tobacco permitting structure. It allows the community to proscribe its own penalties for violations, including escalating fines and permit suspension, in addition to those remedies available under the minimum price law. This may be a good option for local communities in Massachusetts because the state courts there have ruled that local boards of health have broad authority under general police powers to regulate tobacco in order to protect public health.

LIMITATIONS: While the regulation extends its restrictions to include non-tobacco-based products such as e-cigarettes, to the extent that the state minimum price law only addresses cigarettes, there is no statutory minimum price to guide impermissible discounting for other tobacco products. Inclusion of this language allows for coverage without additional local action if state statutory minimum prices are introduced for additional products.

LEGAL CONSIDERATIONS: The division of distribution language for free samples and redemption language for coupons may limit potential legal challenges. Tying coupon redemption restrictions to a minimum price law might help frame the restrictions as being "pure" economic regulations, and less susceptible to First Amendment challenges. Additionally, the Tobacco Control Act generally prohibits free samples at the federal level and expressly permits state and local governments to further restrict samples. The restriction on coupon redemption is strictly confined to a single locale within the state and doesn't prevent tobacco manufacturers from distributing any materials so a dormant Commerce Clause challenge is not likely.

Example 3C: Massachusetts Minimum Price Law

Mass. Gen. Laws. Ch. 64C § 13(e)

In all advertisements, offers for sale or sales involving two or more items at a combined price, and in all advertisements, offers for sale or sales involving the giving of any concession of any kind whatsoever (whether it be coupons or otherwise), the retailer's or wholesaler's selling price shall not be below the "cost to the retailer" or the "cost to the wholesaler," respectively, of all articles, products, commodities and concessions included in such transactions.

COMMENT: This law applies only to cigarettes; it does not address other tobacco products. It prohibits sales of bonus packs of cigarettes by requiring that each item included in a combination sale meet the statutory minimum price.

BENEFITS: This law restricts retail value-added promotions involving bonus packs of cigarettes. It also covers a wide range of price discounting methods that the tobacco industry uses, including coupons and other retail value-added promotions like "buy-one-get-one free" offers.

LIMITATIONS: Because this law is contained within the state's cigarette minimum price law, it only prohibits multi-pack offers of cigarettes if they result in sales below the statutory minimum price. As such, it may not address cross-promotions that add free non-cigarette tobacco products to packs of cigarettes. The absence of a clause declaring that this law does not preempt stricter local regulations makes it unclear whether an opportunity exists for localities to regulate cigarette retail value-added promotions under this provision.

LEGAL CONSIDERATIONS: The restriction on advertised prices could be seen as preempted by FCLAA, which only allows states to regulate the time, place and manner—but not the content—of cigarette advertising and promotion. The restrictions on advertising and permissible offers may also invoke First Amendment challenges. However, the law makes selling below cost as part of a combined transaction illegal, and advertising an illegal activity is not a protected activity under the First Amendment.

Conclusion

With restrictions imposed upon the tobacco products in many venues, the tobacco industry has turned to the retail environment as the primary arena in which to entice consumers to buy its products and to counter the effects of tax increases. Coupons and price promotions are used by the industry to make its products affordable, and are often targeted to communities that are especially price sensitive.

States and localities have options to address the efforts of the industry. States – and localities to the extent allowed under state law – retain the authority to regulate the sale and distribution of tobacco products under the Family Smoking Prevention and Tobacco Control Act. Any regulations considered by states and localities need to be carefully drafted to withstand challenges that will likely be brought by the tobacco industry. The industry may claim that any legislation or regulation is preempted by existing federal law or that the proposed regulation is an unconstitutional infringement on commercial speech or on interstate commerce. States and localities should review the experience that other jurisdictions have had with coupon and price regulation in advance of preparing their own local laws to identify language and strategies that have withstood legal challenges, and need to work with a local attorney to identify an approach most suitable for the jurisdiction.

Users of this document should be aware that funding sources may have different requirements governing the appropriate use of those funds. Under U.S. law, no federal funds are permitted to be used for lobbying or to influence directly or indirectly, specific pieces of legislation at the federal, state or local levels. Organizations should consult appropriate legal counsel to ensure compliance with all rules, regulations and restrictions of any funding sources.

Last Updated: October 2013

End Notes

¹ Frank Chaloupka, *Why is Tobacco Price Manipulation a Problem?*, in TOBACCO RETAIL PRICE MANIPULATION POLICY STRATEGY SUMMIT PROCEEDINGS 3, 5 (May 29-30, 2008), available at <http://www.cdph.ca.gov/programs/tobacco/documents/ctcpricestrategysummit2009.pdf>.

² FED. TRADE COMM’N, FEDERAL TRADE COMMISSION CIGARETTE REPORT FOR 2007 AND 2008, at 5 (2011), available at <http://www.ftc.gov/os/2011/07/110729cigarettereport.pdf>.

³ *Id.* at 6.

⁴ *Id.*

⁵ MICAH BERMAN & KERRY MALLOY SNYDER, CTR. FOR PUB. HEALTH & TOBACCO POLICY, TOBACCO PRICE PROMOTION: POLICY RESPONSES TO INDUSTRY PRICE MANIPULATION 4-5 (2011), available at <http://www.tobaccopolicycenter.org/documents/Final%20Report%20with%20covers%2010.28.11.pdf>.

⁶ *Id.* at 6; 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>.

⁷ BERMAN, *supra* note 6, at 5 (see dialogue box, “In the Industry’s Own Words ...”); MIURA, *supra* note 6, at 2.

⁸ Victoria M. White et al., *Cigarette Promotional Offers: Who Takes Advantage?*, 30 AM. J. PREVENTATIVE MED. 225, 228 (2006) (reporting that 35 percent of smokers used promotional offers every time they saw one, and that such offers were particularly utilized by young smokers, women, and African-American smokers).

⁹ Brett R. Loomis et al., *The Association of Retail Promotions for Cigarettes with the Master Settlement Agreement, Tobacco Control Programmes and Cigarette Excise Taxes*, 15 TOBACCO CONTROL 458, 461-62 (2006); CAMPAIGN FOR TOBACCO-FREE KIDS, TOBACCO MARKETING THAT REACHES KIDS: POINT OF PURCHASE ADVERTISING AND PROMOTIONS 2-3 (2012), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0075.pdf>; see also U.S. DEP’T OF HEALTH AND HUMAN SERV.’S, PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 545 (2012) [hereinafter 2012 Surgeon General’s Report], available at <http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf>.

¹⁰ 2012 Surgeon General’s Report, *supra* note 9, at 528; see also White, *supra* note 8, at 228.

¹¹ 2012 Surgeon General’s Report, *supra* note 9, at 530.

¹² When discount coupons and buy-one-get-one free offers are combined with in-store discounts, they can reduce the price paid to *one-third* of the original retail price. See CAMPAIGN FOR TOBACCO-FREE KIDS, DEADLY ALLIANCE: HOW BIG TOBACCO AND CONVENIENCE STORES PARTNER TO MARKET TOBACCO PRODUCTS AND FIGHT LIFE-SAVING POLICIES 30 (2012) (example at app. B.), available at http://www.tobaccofreekids.org/content/what_we_do/industry_watch/store_report/deadlyalliance_full_report.pdf.

¹³ BERMAN, *supra* note 5, at 7.

¹⁴ 21 U.S.C. § 301 et seq (West 2013); Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents, 75 Fed. Reg. 13225-03, 13225, 13231 (Mar. 19, 2010) (codified at 21 C.F.R. § 1140.16 (West 2013)).

¹⁵ FED. TRADE COMM’N, *supra* note 2, at 6 and tbl.2D.

¹⁶ BERMAN, *supra* note 5, 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).

¹⁷ MASS. GEN. LAWS ANN. ch. 64C § 13(e) (West 2013).

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

¹⁹ BLACK'S LAW DICTIONARY 1276 (9th ed. 2009).

²⁰ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

²¹ U.S. CONST. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”).

²² BLACK'S LAW DICTIONARY 1297 (9th ed. 2009).

²³ 21 U.S.C. § 387p(a)(2)(A) (West 2013).

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

²⁵ 15 U.S.C. §§ 1331-41 (West 2013).

²⁶ 15 U.S.C. § 1334(b) (West 2013).

²⁷ 15 U.S.C. § 1334(c) (West 2013).

²⁸ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980).

²⁹ *Dept. of Revenue of Kentucky v. Davis*, 553 U.S. 328, 338-39 (2008) (in applying a dormant Commerce Clause analysis, courts will determine:

whether a challenged law discriminates against interstate commerce. A discriminatory law is “virtually *per se* invalid”, and will only survive if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. ... Absent discrimination for the forbidden purpose, the law will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.

(internal quotations and citations omitted).

³⁰ 15 U.S.C. § 1334(b) (West 2013).

³¹ *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, C.A. No. 12-96-ML, 2012 WL 6128707, at *5 (D. R.I. Dec. 10, 2012).

³² *Id.* at *11.

³³ *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, No. 13-1053, --- F.3d ----, 2013 WL 5422308 (C.A.1 R.I. Sept. 30, 2013).