



# Ways & Means

Oh Snap! Countering Tobacco Industry  
Opposition to Local Tobacco Controls

November 2016. All rights reserved. Public Health and Tobacco Policy Center.

## Public Health and Tobacco Policy Center

Contact:

Public Health Advocacy Institute  
at Northeastern University School of Law  
360 Huntington Ave, 117CU  
Boston, MA 02115  
Phone: 617-373-8494  
[tobacco@tobaccopolicycenter.org](mailto:tobacco@tobaccopolicycenter.org)

The Public Health and Tobacco Policy Center is a resource for the New York Department of Health. It is funded by the New York State Department of Health and works with the New York State Tobacco Control Program, the New York Cancer Prevention Program, as well as the programs' contractors and partners to develop and support policy initiatives that will reduce the incidence of cancer and tobacco-related morbidity and mortality.

**This work provides educational materials and research support for policy initiatives. The legal information provided does not constitute and cannot be relied upon as legal advice.**

## Industry Opposition to Local Tobacco Ordinances

Tobacco companies—like other business corporations—are charged with maximizing their profits.<sup>1</sup> Tobacco companies' bottom lines' are directly threatened by public policies discouraging the sales and use of their deadly product, and tobacco companies are taking an increasingly active role in opposing these policies. The tobacco industry is engaging retailers and others to join its fight against local policies intended to diminish the current status of tobacco products and tobacco use as highly visible, accessible, affordable, and seemingly common and necessary.

The tobacco industry generally employs a “no-holds-barred” approach to opposing tobacco control policies—demonstrated by their vigorous opposition to regulation of tobacco use and sales. Tobacco companies' opposition to public health policy interventions is both explicit and covert.<sup>2</sup> Tobacco companies have a record of successfully distorting public opinion and undermining sound policy with financial donations to public officials and community organizations, widespread advertising campaigns that misrepresent health risks of tobacco use, and by encouraging adoption of ineffective laws in place of evidence-based interventions.<sup>3</sup> As part of their strategy to influence policy, industry tactics also include the creation of “front groups” that act as grassroots coalitions, but are in fact linked to the tobacco industry and may be organized by and/or beholden to the industry's agenda of profit at the expense of health. These groups, such as retail trade organizations, restaurant associations, and smokers' alliances, often adopt tobacco industry approaches and contort context in order to appeal to values of liberty, individual choice, and anti-government sentiment.<sup>4</sup>

Armed with a better understanding of how marketing drives tobacco use—and bolstered by the Family Smoking Prevention and Tobacco Control Act of 2009 which explicitly authorizes local tobacco regulation—local governments are increasingly seeking to fulfill their obligation to promote public health by reducing the influence of the tobacco industry on community residents. This goal translates to a focus on transforming the retail environment, where tobacco companies spend the vast majority of their marketing budget. Local ordinances—a critical component of comprehensive tobacco control programs—may limit industry's impact by regulating the sale of tobacco products (including who can sell what products, where they can sell them, and at what price). To combat effective policy interventions, the tobacco industry is once again coordinating with allies in the retail sector to oppose rational and effective regulation.

## National Association of Tobacco Outlets

The National Association of Tobacco Outlets (NATO) is a national trade association comprising tobacco retailers, manufacturers, and wholesalers. NATO seeks to influence public policy by, among other things, advocating for the defeat of legislation that would effectively reduce tobacco use.<sup>5</sup> Importantly, NATO markets itself as an organization advocating on behalf of small businesses—namely, retailers. But NATO has deep ties to the tobacco industry. Specifically, R.J. Reynolds provided initial funding for NATO’s inception in 2001, and tobacco industry executives continue to serve on NATO’s board of directors.<sup>6</sup>

*“NATO is an excellent and important partner on public-policy issues,” says David Sutton, a spokesman for Altria Group, Inc., a tobacco manufacturer. “NATO’s dedication to supporting retailers makes the organization very effective in advocating on issues related to the trade.”<sup>7</sup>*

NATO is increasingly active, particularly on the East Coast and California<sup>8</sup>—areas in which innovative evidence-based tobacco regulations are progressing most—in opposing local tobacco ordinances, under the guise of protecting retailer interests. In July of 2016, the organization launched a new website in collaboration with Swedish Match, a manufacturer of smokeless tobacco and joint venture partner of industry giant Philip Morris International. The website ([www.tobaccoordinances.info](http://www.tobaccoordinances.info)) ostensibly provides resources to assist retailers in advocating against proposed tobacco control measures.<sup>9</sup> The website identifies “facts” to be used to persuade elected officials to oppose local tobacco control laws—particularly effective sales regulations about which the tobacco industry is most fearful. NATO talking points are typically centered on emotional pleas regarding unfounded economic harm.

NATO is not the only retail association focusing on tobacco issues. Others include the Coalition for Responsible Retailing (CRR) (of which NATO is a member) and the New York Association of Convenience Stores (NYACS). These associations further obscure the role of tobacco companies and manufacturers in opposing public health policy. Like NATO, these organizations promote self-serving, ineffective policies framed to shift responsibility away from industry, and simultaneously threaten litigation in an effort to intimidate local governments that are weighing effective public health policies.<sup>10</sup> This is part of an industry-wide strategy to dissuade local policymakers from implementing tobacco controls.<sup>11</sup>

This compilation of fact sheets focuses on NATO’s claims about effective public health policy interventions, and aims to equip public health advocates to refute NATO’s misinformation.

# Table of Contents

The Public Health and Tobacco Policy Center has drafted counterarguments to claims presented by NATO in their online slide presentation “**The Cause and Effect of Local Tobacco Ordinances**” and related fact sheets, as follows:

NATO Advocacy	Policy Center Facts	Description	Page
7 Negative Outcomes of Local Ordinances	The Industry that Cried Wolf: Countering Industry Opposition to Effective Public Health Interventions	This resource debunks 7 myths about the effects of local tobacco ordinances, and describes 7 benefits of implementing common-sense retail tobacco restrictions. Tobacco companies claim that local ordinances result in severe economic hardship for retailers and the community. Public health advocates know that sales regulations are likely to reduce overall tobacco use over time and are unlikely to negatively affect the retail sector in the long run.	1
Flavor Bans Do More Harm Than Good	Flavored Tobacco: Countering Industry Opposition to Effective Public Health Interventions	Tobacco companies claim that flavor restrictions don’t prevent youth smoking and harm retailers. Public health advocates know that flavor restrictions are effective and unlikely to affect retailers’ profits.	5
Prohibition on the Sale of Flavored Tobacco Products			
Prohibition of Redeeming Tobacco Product Coupons by Retailers	Product Price: Countering Industry Opposition to Effective Public Health Interventions	This resource counters NATO’s four resources similarly arguing against sales restrictions that affect product price. Tobacco companies claim that imposing taxes and restricting coupon redemption or other discounts impermissibly restricts commercial speech and is ineffective. They claim that these methods will hurt retailers. Public health advocates know that sales regulations are permissible, effective and necessary regulations with minimal effects on the retail sector.	11
Prohibition of Promotionally Priced Tobacco Products			
Restrictions on Single Cigars & Cigar Package Size			
Local Cigarette & Tobacco Taxes			
Tobacco Product Display Bans in Retail Stores	Product Display and Promotion: Countering Industry Opposition to Effective Public Health Interventions	Tobacco companies claim that product display restrictions are impermissible, ineffective and burdensome to retailers. Public health advocates know that commercial speech protections are not unlimited; tobacco “power walls” influence youth and permissible display restrictions don’t harm retailers at all.	17
Raising the Legal Age to Purchase Tobacco Products	Tobacco 21: Countering Industry Opposition to Effective Public Health Interventions	Tobacco companies emphasize that youth rely on social sources (young adult peers) for tobacco, but fail to mention that social sources are aged 18-21, or acknowledge tobacco industry’s role in recruiting youth. Tobacco 21 is an effective policy to prevent youth smoking, and policy justifications go beyond retailer compliance with youth access restrictions.	21
What is a social source?			
Alternative Solutions to Local Issues Ordinances	Tobacco Industry “Solutions” Are Ineffective	This resource debunks tobacco companies’ proposed “solutions” and presents effectiveness of local ordinances as a component of comprehensive tobacco control. Tobacco companies focus on individual and retailer education and ignore their own role in recruiting adolescent tobacco users. Public health advocates know education alone is not enough to control tobacco use; the responsibility squarely rests on changing industry practices.	24

November 2016. All rights reserved. Public Health and Tobacco Policy Center

*Disclaimer: This work provides educational materials and research support for policy initiatives. The legal information provided does not constitute and cannot be relied upon as legal advice.*

<sup>1</sup> Dodge v. Ford Motor Co, 170 N.W. 668, 684 (1919), (finding "a business corporation is organized and carried on primarily for the profit of the stockholders"); eBay Domestic Holdings Inc. v. Newmark, 16 A.3d 1, 25-26, 34 (2010), (holding corporate directors are bound by "fiduciary duties and standards" which include "acting to promote the value of the corporation for the benefit of its stockholders").

<sup>2</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS, THE HEALTH CONSEQUENCES OF SMOKING--50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 33, 773, 802 (2014).

<sup>3</sup> Y. Saloojee & E. Dagli, *Tobacco industry tactics for resisting public policy on health*, 78 BULL. WORLD HEALTH ORGAN. 902 (2000).

<sup>4</sup> Katherine E. Smith, Emily Savell & Anna B. Gilmore, *What is known about tobacco industry efforts to influence tobacco tax? A systematic review of empirical studies*, 22 TOB. CONTROL 144, 144 (2013); Dorie E. Apollonio & Lisa A. Bero, *The creation of industry front groups: the tobacco industry and "get government off our back,"* 97 AM. J. PUBLIC HEALTH 419, 419 (2007).

<sup>5</sup> THE CTR FOR TOBACCO POLICY & ORGANIZING, THE NATIONAL ASSOCIATION OF TOBACCO OUTLETS (NATO) AND LOCAL ORDINANCES RELATED TO TOBACCO RETAILERS (June 15, 2015), *available at* <http://center4tobaccopolicy.org/wp-content/uploads/2013/09/NATO-June-2015.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> Melissa Vonder Haar, *NATO Brings Unity Amid Volatility*, CSP MAGAZINE (September 2016), *available at* <http://www.cspdailynews.com/print/csp-magazine/article/nato-brings-unity-amid-volatility?page=0%2C0>

<sup>8</sup> *Id.*

<sup>9</sup> Thomas A. Briant, *New T.O.T.A.L. Website Focuses on Local Tobacco Restrictions*, CSP DAILY NEWS, August 2, 2016, <http://www.cspdailynews.com/category-news/tobacco/articles/new-total-website-focuses-local-tobacco-restrictions> (last visited Aug 4, 2016).

<sup>10</sup> *E.g.*, Letter from Noel J. Francisco to Elizabeth S. Dunn et al., September 26, 2016, (on file with author); *E.g.* Letter from Stephen Ryan et al. to Whitman Board of Health, Re: Comments and Recommendations on Tobacco Regulations, January 30, 2015, (on file with author);

<sup>11</sup> Much like Big Tobacco's notoriously successful marketing campaigns, NATO's and like organizations' strategy for opposing public health measures is based on research and repeatedly proven effective. Indeed, these front groups help spin tobacco companies' narrative of "policy dystopia," framing public health policies as ineffective, counterproductive, or associated with unanticipated costs, contrary to the actual evidence. Their activities fall under a technique termed "amplification," which includes wide dissemination of industry-sponsored information, including misleading or confounding claims. Through coalition management, tobacco companies recruit allies in related sectors to "provide alternative and more credible platforms" for their arguments. Selda Ulucanlar, Gary J. Fooks & Anna B. Gilmore, *The Policy Dystopia Model: An Interpretive Analysis of Tobacco Industry Political Activity*, 13 PLOS MED e1002125, 13 (2016).

## The Industry that Cried Wolf: Countering Industry Opposition to Effective Public Health Interventions

The Surgeon General has concluded that tobacco marketing causes youth tobacco use, and studies show that tobacco retail marketing undermines quit attempts by current users.<sup>1</sup> Evidence shows that local ordinances—a critical component of comprehensive tobacco control programs—can be effective tools that prevent youth smoking and help adults who are trying to quit.<sup>2</sup> Yet tobacco companies and their allies want free rein to market their deadly products in your neighborhood. Here are ways to counter tobacco companies’ unsubstantiated claims of general policy ineffectiveness and economic doom brought by local tobacco control ordinances.

### Myths: 7 Negative Outcomes of Local Ordinances<sup>3</sup>

### Facts: Countering Industry Opposition to Effective Public Health Ordinances

<p><i>“Loss of profit and taxes from tobacco, gas, snacks and beverages to neighboring towns”</i></p>	<p>Tobacco sales regulations that reduce the availability of tobacco products are likely to reduce overall tobacco use over time, rather than shift sales to other vendors.<sup>4</sup> The long-term interest in preventing tobacco-related disease in the community far outweighs any potential short-term disruption to retail. Moreover, retailers regularly adapt to changes in the marketplace and will substitute tobacco retail space and sales with other profitable inventory.</p>
<p><i>“Devastating economic consequences to local businesses and retailers”</i></p>	<p>Tobacco companies’ default prediction of economic hardship following implementation of a tobacco control regulation has been <b>consistently proven false</b>.<sup>5</sup> Smoke-free laws have not economically harmed the airline, restaurant, or bar industries,<sup>6</sup> beaches or parks; local pharmacy sales restrictions have not harmed drug stores’ bottom lines;<sup>7</sup> nor have sales restrictions based on purchase price<sup>8</sup> or consumer age driven retailers to close up shop.<sup>9</sup> Yet tobacco companies continue to cry wolf, provoking emotional responses over exaggerated predictions of profit loss and harm to businesses. Moreover, local governments are charged with governing in the interest of public health, which considers <b>all aspects of local economic viability</b>,<sup>10</sup> not just certain short-term sales losses (and tobacco use is an undisputed drag on the economy due to the high costs of health care and productivity losses).<sup>11</sup></p>
<p><i>“Job loss and reduced hours for convenience store employees”</i></p>	<p>Contrary to tobacco companies’ claims, research has found that a reduction in smoking rates would be unlikely to affect overall retail employment.<sup>12</sup> In reality, the reduction in tobacco sales will likely be gradual and retailers can over time adjust inventory by replacing tobacco with other profitable products.<sup>13</sup> Local tobacco sales regulations are designed to <b>reduce tobacco use</b>. Claims that tobacco sales regulations will cause layoffs are reminiscent of industry exaggeration in the face of indoor smoking restrictions, which did not hurt restaurant employment.<sup>14</sup></p>
<p><i>“Shift in sales from community retailers to the internet”</i></p>	<p>Concern over consumers switching to other sources of tobacco products is a further misleading justification for inaction. Federal and state delivery laws essentially block online purchases of cigarettes.<sup>15</sup> In contrast to retail purchases, online transactions are not likely to be impulsive tobacco purchases triggered by retail marketing, nor are they conducted in a public</p>

	venue, which normalizes purchase and use. Moreover, local sales restrictions are effective because they <b>reduce the presence of tobacco marketing</b> —and consequently, reduce the market for tobacco products. Marketing is especially prevalent in socioeconomically vulnerable communities and is shown to be a significant cause of youth tobacco use. <sup>16</sup> Therefore, local sales restrictions not only reduce long-term tobacco prevalence, but also <b>improve health equity</b> .
<i>“Rise in black market activity related to prohibited or highly taxed tobacco products”</i>	Tobacco companies regularly overstate estimates of illicit cigarette purchases to exaggerate the economic impact of tobacco product sales regulations. <sup>17</sup> While significant tax hikes may translate to some consumers turning to illicit sources of tobacco products, research indicates that the overall use of both legal and illicit cigarettes is falling. <sup>18</sup>
<i>“Unnecessary altercations between police and civilians”</i>	Tobacco companies <b>cannot substantiate the claim</b> that local ordinances increase local crime rates or the number of altercations between police and civilians. <sup>19</sup> There is no reported increase in frivolous policing linked to an increase of local tobacco control laws. Tobacco control laws and their enforcement are permissible, effective, and necessary to prevent a worsening of the public health problem of youth tobacco use. <sup>20</sup>
<i>“Minimal reduction in the rate of youth tobacco usage because most youth don't purchase tobacco in convenience stores”</i>	The Surgeon General has concluded tobacco marketing (95 percent of which appears in the retail environment) causes youth tobacco use. <sup>21</sup> Further, the Surgeon General supports comprehensive tobacco control—including local ordinances that regulate tobacco sales and <b>reduce youth exposure to retail tobacco marketing</b> —as a legitimate, necessary, and <b>effective</b> way to prevent youth tobacco use. <sup>22</sup> Tobacco companies focus on retailer compliance to deflect responsibility for their pervasive, youth-appealing marketing and the role it plays in youth tobacco use; yet <b>it is the marketing rather than the source of tobacco products</b> that currently factors so heavily in youth initiation and continued tobacco use.

## 7 Evidence-Based Outcomes of Local Tobacco Ordinances

By encouraging local policymakers to do nothing in the absence of jurisdiction over every type of tobacco sale in every possible location, tobacco companies engage them in a “perfect solution fallacy” that mistakenly ignores the logical benefits of implementing evidence-based policy. These significant benefits of local tobacco ordinances include:

1. Local tobacco sales regulations that reduce exposure to retail tobacco marketing reduce tobacco initiation by **youth**.<sup>23</sup>
2. Local tobacco sales regulations that reduce exposure to retail tobacco marketing are likely to reduce impulse purchases by adult smokers and support their efforts to quit.<sup>24</sup>
3. Local tobacco sales regulations can level the playing field and reduce the unequal impact of tobacco industry marketing on vulnerable populations.<sup>25</sup>
4. Local tobacco control regulations that effectively reduce tobacco use will reduce healthcare costs associated with tobacco-related disease. (Of the \$10.4 billion in tobacco-related health care costs in New York, taxpayers annually cover \$6.62 billion through Medicaid).<sup>26</sup>
5. Local public health interventions that reduce tobacco use will help reduce employee productivity losses to businesses (annually \$7.33 billion in New York).<sup>27</sup>
6. Local tobacco use restrictions will reduce exposure to secondhand smoke, which significantly impacts the health of nonsmokers, causing illnesses such as asthma, stroke, lung cancer, and coronary heart disease.<sup>28</sup>
7. Local tobacco sales regulations will reduce the impact of tobacco marketing and the perceived normalcy or popularity of tobacco use in the community, creating a healthier environment for all.<sup>29</sup>

For more resources on specific tobacco control policies and model ordinances, visit [www.tobaccopolicycenter.org](http://www.tobaccopolicycenter.org).

November 2016. All rights reserved. Public Health and Tobacco Policy Center

*Disclaimer: This work provides educational materials and research support for policy initiatives. The legal information provided does not constitute and cannot be relied upon as legal advice.*

<sup>1</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE OF THE SURGEON GENERAL, PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 8, 487, 508 (2012) [hereinafter 2012 SURGEON GENERAL REPORT]; OBJ Carter, BW Mills & RJ Donovan, *The effect of retail cigarette pack displays on unplanned purchases: results from immediate postpurchase interviews*, 18 TOB. CONTROL 218, 220 (2009) (finding retail tobacco marketing plays a significant role in "increasing unplanned...purchases of cigarettes" and many smokers thought the removal of displays would make it easier for them to quit); Ellen C. Feighery et al., *Cigarette advertising and promotional strategies in retail outlets: results of a statewide survey in California*, 10 TOB. CONTROL 184, 184 (2001); Melanie Wakefield, Daniella Germain & Lisa Henriksen, *The effect of retail cigarette pack displays on impulse purchase*, 103 ADDICT. ABINGDON ENGL. 322, 325 (2008).

<sup>2</sup> Anna Pulakka et al., *Association Between Distance From Home to Tobacco Outlet and Smoking Cessation and Relapse*, 176 JAMA INTERN. MED. 1515, 1512 (October 2016) (reporting that increasing the distance from the home to the nearest retailer may increase cessation); Jennifer Cantrell et al., *The impact of the tobacco retail outlet environment on adult cessation and differences by neighborhood poverty*, 110 ADDICTION 152, 152 (2015) (finding a negative association between tobacco retail density and both smoking abstinence and pro-cessation attitudes).

<sup>3</sup> NAT'L ASSOC OF TOBACCO OUTLETS, 7 NEGATIVE OUTCOMES OF LOCAL ORDINANCES, available at <http://www.tobaccoordinances.info/> (last visited Aug 5, 2016) (suggesting industry/retailer arguments against unspecified local tobacco ordinances, but inferred from online context to include point-of-sale policies (such as display restrictions, package size restrictions, and flavor restrictions) and ordinances that raise the minimum legal age for purchasing tobacco products).

<sup>4</sup> Reducing the availability of tobacco products increases the time and expense to obtain the products, which has been shown to be an effective deterrent leading to lower overall tobacco use. John E. Schneider et al., *Tobacco Outlet Density and Demographics at the Tract Level of Analysis in Iowa: Implications for Environmentally Based Prevention Initiatives*, 6 PREV. SCI. 319, 319 (2005).

<sup>5</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL 580 (2006) [hereinafter 2006 SURGEON GENERAL REPORT]; COUNTERTOBACCO, Rebutting Economic Arguments Against POS, <http://countertobacco.org/resources-tools/evidence-summaries/rebutting-economic-arguments-against-pos/> (last visited Aug 17, 2016).

<sup>6</sup> Laura Cornelsen et al., *Systematic review and meta-analysis of the economic impact of smoking bans in restaurants and bars*, 109 ADDICT. ABINGDON ENGL. 720, 720 (2014); CAMPAIGN FOR TOBACCO FREE KIDS, SMOKE-FREE LAWS DO NOT HARM BUSINESS AT RESTAURANTS AND BARS, available at <https://www.tobaccofreekids.org/research/factsheets/pdf/0144.pdf> (2014); CAMPAIGN FOR TOBACCO FREE KIDS, SMOKE-FREE LAWS ARE GOOD FOR BUSINESS! (summarizing studies from 2006 to 2010), available at [https://www.tobaccofreekids.org/content/what\\_we\\_do/state\\_local\\_issues/smokefree/Business.pdf](https://www.tobaccofreekids.org/content/what_we_do/state_local_issues/smokefree/Business.pdf).

<sup>7</sup> See KS Hudmon, *Tobacco sales in pharmacies: time to quit*, 15 TOB. CONTROL 35, 37 (2006) (reporting no pharmacy closures in Ontario following pharmacy sales ban and predicting limited profit impact); see also *id.* at 37 (studies show that pharmacy tobacco sales restrictions have no effect on retail economy or on consumers' decision to shop at pharmacies).

<sup>8</sup> Jidong Huang & Frank J. Chaloupka, *The economic impact of state cigarette taxes and smoke-free air policies on convenience stores*, 22 TOB. CONTROL 91, 91 (2013); COUNTERTOBACCO, *supra* note 5.

<sup>9</sup> See Jonathan P. Winickoff et al., *Retail impact of raising tobacco sales age to 21 years*, 104 AM. J. PUBLIC HEALTH e18, e20 (2014) (while high school smoking rate declined by 47 percent in 4 years following tobacco minimum sales age increase to 21, no retailers went out of business as of 2014).

<sup>10</sup> LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 92 (2nd ed. 2008) (defining "police power" as "The inherent authority of the state...to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general welfare of the people. To achieve these communal benefits, the state retains the power to restrict, within federal and state constitutional limits, private interests--including...liberty, as well as economic interests.")



- <sup>11</sup> CAMPAIGN FOR TOBACCO-FREE KIDS, *The Toll of Tobacco in New York* (2016), [https://www.tobaccofreekids.org/facts\\_issues/toll\\_us/new\\_york](https://www.tobaccofreekids.org/facts_issues/toll_us/new_york) (last visited Aug 17, 2016) (reporting \$7.33 billion annually in productivity losses and \$10.39 billion in annual health care costs directly attributable to tobacco use in New York State).
- <sup>12</sup> Kurt M. Ribisl et al., *Falling cigarette consumption in the U.S. and the impact upon tobacco retailer employment*, in *AFTER TOBACCO: WHAT WOULD HAPPEN IF AMERICANS STOPPED SMOKING?* (Peter S. Bearman & Kathryn M. Neckerman, eds. 2011).
- <sup>13</sup> See Press Release, Nat'l Assoc of Convenience Stores, *Convenience Store Sales Topped \$700 Billion in 2012* (2013), [http://www.nacsonline.com/Media/Press\\_Releases/2013/Pages/PR041013.aspx](http://www.nacsonline.com/Media/Press_Releases/2013/Pages/PR041013.aspx) (last visited Aug 25, 2016) (reporting that tobacco products contribute only 21 percent of gross profits despite accounting for more than 40 percent of in-store sales in convenience stores).
- <sup>14</sup> Cornelsen et al., *supra* note 6, at 720.
- <sup>15</sup> Prevent All Cigarette Trafficking Act of 2009, 111 Pub. L. 154, §3, 124 Stat. 1087 (2010) (prohibiting commercial carriers to deliver cigarettes to U.S. postal addresses); N.Y. PUBLIC HEALTH LAW § 1399-II (restricting shipment of cigarettes into New York State).
- <sup>16</sup> 2012 SURGEON GENERAL REPORT, *supra* note 1, at 602 (concluding that “evidence is sufficient to conclude that there is a causal relationship between advertising and promotional efforts of the tobacco companies and the initiation and progression of tobacco use among young people.”); U.S. DEP’T OF HEALTH AND HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING--50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 716* (2014) (reporting that 68.9 of adult smokers were interested in quitting in 2010) [hereinafter 2014 SURGEON GENERAL REPORT].
- <sup>17</sup> Michal Stoklosa, *Is the illicit cigarette market really growing? The tobacco industry’s misleading math trick*, 25 *TOBACCO CONTROL* 360, 360 (2016).
- <sup>18</sup> *Id.* at 360.
- <sup>19</sup> If anything, there may be an association between strong enforcement of tobacco ordinances with lower crime rates. In a review of local crime rates in 29 counties, those that had higher enforcement of tobacco control had lower local crime, perhaps due to lower illicit drug use rates, which could be affected by a perceived protection of youth interests through enforcement of retailer compliance with minimum legal age laws. Leonard A. Jason et al., *The relationship between youth tobacco control enforcement and crime rates in a Midwestern county*, 14 *AM. J. HEALTH PROMOT.* 229, 229-230 (2000).
- <sup>20</sup> 2012 SURGEON GENERAL REPORT, *supra* note 1, at 437; William C. Livingood, Lynn D. Woodhouse & Peter Wludyka, *Implementation of Possession Laws and the Social Ecology of Tobacco Control*, 36 *HEALTH EDUC. BEHAV.* 214, 214 (2009); Leonard A. Jason et al., *Cracking Down on Youth Tobacco May Influence Drug Use*, 38 *J. COMMUNITY PSYCHOL.* 1, 12 (2010).
- <sup>21</sup> 2012 SURGEON GENERAL REPORT, *supra* note 1, at 508.
- <sup>22</sup> *Id.* at i; BRIAN KING, TERRY PECHACEK & PETER MARIOLIS, *BEST PRACTICES FOR COMPREHENSIVE TOBACCO CONTROL PROGRAMS* 10 (2014), (reporting that states with higher investments in comprehensive tobacco control programs have seen more rapid declines in the prevalence of youth smoking), *available at* [http://www.cdc.gov/tobacco/stateandcommunity/best\\_practices/pdfs/2014/comprehensive.pdf](http://www.cdc.gov/tobacco/stateandcommunity/best_practices/pdfs/2014/comprehensive.pdf) (last visited Sep. 12, 2016).
- <sup>23</sup> 2012 SURGEON GENERAL REPORT, *supra* note 1, at 545.
- <sup>24</sup> Wakefield, Germain, and Henriksen, *supra* note 1; Cantrell et al., *supra* note 2 (reporting “Tobacco retail outlets may influence cessation by decreasing the time and resources needed to obtain cigarettes, encouraging impulse purchases, increasing environmental cues to smoke and normalizing tobacco use.”)
- <sup>25</sup> Joseph G. L. Lee et al., *A Systematic Review of Neighborhood Disparities in Point-of-Sale Tobacco Marketing*, 105 *AM. J. PUBLIC HEALTH* e8, e8 (2015) (finding that retail marketing may contribute to disparities in tobacco use); 2014 SURGEON GENERAL REPORT, *supra* note 16, at 851–852; Lisa Henriksen et al., *Effects on Youth of Exposure to Retail Tobacco Advertising*, 32 *J. APPL. SOC. PSYCHOL.* 1771, 1771 (2002).
- <sup>26</sup> CAMPAIGN FOR TOBACCO-FREE KIDS, *The Toll of Tobacco in New York*, *supra* note 11.
- <sup>27</sup> *Id.*
- <sup>28</sup> 2006 SURGEON GENERAL REPORT, *supra* note 5; 2014 SURGEON GENERAL REPORT, *supra* note 16.
- <sup>29</sup> 2012 SURGEON GENERAL REPORT, *supra* note 1, at 437–439.

## Flavored Tobacco: Countering Industry Opposition to Common-Sense Regulation

Tobacco companies have a vested interest in keeping flavored tobacco products on the shelves of the stores in your neighborhood. Characterizing flavors not only increase the general appeal of tobacco products, but also provide an avenue for marketing the products to youth.<sup>1</sup> Characterizing flavors, including menthol, in combustible and smokeless tobacco products mask the harshness of tobacco and have historically been marketed as “starter” products aimed at new users—who are overwhelmingly youth.<sup>2</sup> Unsurprisingly, youth tobacco users often begin with flavored products and, overall, use flavored products at high rates.<sup>3</sup> Here are ways to counter tobacco companies’ claims opposing local ordinances regulating flavored tobacco products—arguments disguised as protecting retailer interests.

### Tobacco Industry Claims...<sup>4</sup>

**A. Flavor restrictions are ineffective in reducing youth tobacco use and they harm local businesses.**

“By adults seeking out other sources for their flavored tobacco products, the purpose of a flavored tobacco ban, namely reducing tobacco usage, is undermined since flavored tobacco products are readily available on-line or in adjacent cities and states.”

### Public Health Advocates Know...

**Flavor restrictions benefit public health and there is no evidence they result in economic harm to retailers.**

Tobacco companies package and market flavored tobacco products in ways that appeal to youth.<sup>5</sup> Restricting where flavored tobacco products are sold reduces youth exposure to flavored product marketing, thereby reducing the likelihood they will seek out or try the products.<sup>6</sup> In fact, New York City’s restriction on flavored product sales resulted in not only a reduction in youth flavored product use, but also a decline in youth “ever trying” *any* tobacco product.<sup>7</sup> Preventing youth use of these products is especially critical given evidence that flavored products are more addictive and harder to quit, particularly for youth.<sup>8</sup>

The value of a local flavored product sales restriction is effective even when flavored products are available elsewhere. Restricting sales to fewer retailers increases the time and expense for all consumers to obtain the products, factors that are effective deterrents to tobacco use.<sup>9</sup> Restrictions on flavored tobacco sales also particularly benefit youth: the high rates of youth use of flavored combustible tobacco products<sup>10</sup> declines with age.<sup>11</sup>

Concern over consumers’ switching to retailers in neighboring towns or online to buy flavored tobacco is a further misleading justification for inaction: First, federal and state laws essentially block online purchases of cigarettes.<sup>12</sup> Second, by implementing sales restrictions, communities send a strong message that they do not accept tobacco use as a normal, routine activity.

“A reduction in sales of legal flavored tobacco products may also result in retailers laying off employees due to sales declines. This places an unnecessary and undue economic burden on retailers by government dictating what products can be sold in the local marketplace.”

Prohibiting the sale of flavored tobacco products is a legitimate and necessary public health intervention which properly balances the community’s interests in promoting public health along with economic viability. Marketing of flavored products attracts youth. Additionally, the characterizing flavors mask the harsh taste of tobacco, making flavored products a more attractive starter product,<sup>13</sup> while adding more harmful toxins to an already deadly product.<sup>14</sup> There is no safe or approved use of tobacco products nor a “right” to sell or use them at any age.<sup>15</sup>

The **tobacco industry consistently cries wolf** in the name of the small businesses through which they sell and market their products. For example, cigarette tax increases have not hurt retailers in the past, despite tobacco companies’ predictions that retailers would suffer economic devastation.<sup>16</sup> Local tobacco sales regulations are designed to reduce tobacco use, and studies have found that these efforts do not result in economic harm to the retail industry.<sup>17</sup> Moreover, local governments are charged with governing in the interest of public health, which considers **all aspects of the local economy and long-term sustainability**,<sup>18</sup> not just certain short-term sales losses (and tobacco use is an undisputed drag on the economy due to the high costs of health care and productivity losses).<sup>19</sup>

#### **B. Flavor restrictions are impermissible.**

“A flavored tobacco ban disrupts the free marketplace by interfering with normal transactions between legitimate, responsible retailers and adult consumers desiring to purchase legal tobacco products.”

#### **Flavor restrictions are permissible under federal and state law, and they are an effective, recommended way to prevent adolescents from starting to smoke.**

Prohibiting the sale of flavored tobacco products is a legitimate and necessary public health intervention. The marketplace exists as a regulated environment—meaning that the law determines what constitutes a legal transaction. For example, in New York, tobacco products may only be sold by registered retailers to adult consumers,<sup>20</sup> and alcoholic beverages may only be sold by licensed retailers to consumers over age 21.<sup>21</sup> Further, the sale of certain harmful products is prohibited altogether in some jurisdictions; these dangerous products include flavored tobacco,<sup>22</sup> cars without seatbelts,<sup>23</sup> certain pesticides,<sup>24</sup> and food storage containers manufactured with certain chemicals.<sup>25</sup> Restricting the sale of an inherently deadly product is a reasonable and effective policy intervention to reduce the harm caused by that product.

<p>“The First Amendment to the U.S. Constitution protects free speech, including commercial speech such as product advertising and labeling. A ban on the sale of flavored tobacco products violates the First Amendment because manufacturers and retailers cannot exercise their right to describe the taste or aroma of tobacco products through product packaging and adult consumers are denied the ability to receive information on flavored tobacco products.”</p>	<p>Tobacco companies argued but failed to convince the courts that selling flavored tobacco products is protected by the First Amendment. In fact, a federal court has upheld a local restriction on sales of flavored tobacco in the face of the Industry’s First Amendment claims, deciding that the sales restriction is just that: a <i>sales</i> or economic regulation and therefore not protected by the First Amendment.<sup>26</sup> In fact, restrictions on sales of flavored tobacco products currently exist in numerous U.S. jurisdictions.<sup>27</sup> Such regulations do not restrict tobacco companies or retailers from communicating truthful product information to consumers. The tobacco industry continues to misrepresent the current status of the law in an effort to scare local government officials from adopting effective tobacco regulation.</p>
<p>“The federal ‘Family Smoking Prevention and Tobacco Control Act’ enacted in 2009 banned the sale of certain flavored cigarettes, and also precluded local and state governments from adopting a tobacco product standard that is different from or in addition to the federal law. Since a local or state ban on the sale of other flavored tobacco products goes beyond the scope of the 2009 federal law, a local or state government is not allowed to adopt such a law.”</p>	<p>Tobacco companies tried and failed to convince the courts that flavored <i>sales</i> restrictions establish a <i>tobacco product standard</i>—which only the FDA can do. In fact, federal courts have upheld local restrictions on flavored tobacco sales, finding the sales restriction is just that: a <i>sales</i> or economic regulation (which local governments have the authority to adopt) and not a product standard (which local governments are not allowed to impose).<sup>28</sup> As such, state and local governments are permitted to restrict the sale of flavored tobacco products.<sup>29</sup> The tobacco industry continues to misrepresent the current status of the law in an effort to scare local government officials from adopting effective tobacco regulation.</p>
<p>“The Food and Drug Administration’s Center for Tobacco Products recently issued new regulations on cigars, pipe tobacco and e-cigarettes and did not extend the flavor ban on cigarettes to these other tobacco products.”</p>	<p>Federal law permits state and local governments to implement tobacco sales regulations that are stricter than federal regulations.<sup>30</sup> Notably, the FDA, recognizing the risks posed by flavored tobacco products, has announced its intent to propose product standards prohibiting the manufacture of flavored tobacco products (other than cigarettes)<sup>31</sup> and supports more restrictive local sales regulation. Federal and state policy change is a slow process and not tailored to meet local needs. Local policy implementation, on the other hand, is a deliberative but faster and more nimble process and may be used to address the specific needs of a community.</p>

November 2016. All rights reserved. Public Health and Tobacco Policy Center

*Disclaimer: This work provides educational materials and research support for policy initiatives. The legal information provided does not constitute and cannot be relied upon as legal advice.*

- 
- <sup>1</sup> See Memo to Brown & Williamson, Marketing Innovations, Youth Cigarette - New Concepts (September 1972), Bates No. 170042014 (“It’s a well known fact that teenagers like sweet products. Honey might be considered”); R.J. Reynolds Inter-office Memorandum, May 9, 1974, Bates No. 511244297-4298 (“make a cigarette which is obviously youth oriented. This could involve cigarette name, blend, flavor and marketing technique... for example, a flavor which would be candy-like but give the satisfaction of a cigarette.”); see also G. Connolly, *The marketing of nicotine addiction by one oral snuff manufacturer*, 4 TOBACCO CONTROL 73, 74-76 (1995) (describing company’s plan to begin users with flavored smokeless product, and gradually ‘promote’ them to the full-nicotine, tobacco flavored brand.); Shannon Farley & Michael Johns, *New York City flavoured tobacco product sales ban evaluation*, TOBACCO CONTROL ONLINE FIRST 1, 1 (February 12, 2016) (industry docs reveal product promotion is intentionally targeted at adolescents and young adults, despite the MSA); See Bridget Ambrose et al., *Flavored Tobacco Product Use among US Youth Aged 12-17 years, 2013-2014*, 314 J. AM. MED. ASSOC. 1871, 1871 (2015) (using PATH data, finding nearly 80 percent of current tobacco users use flavored products, and the majority of ever-users reported first product used was flavored); Catherine G. Corey et al., *Flavored Tobacco Product Use Among Middle and High School Students—United States, 2014*, 64 MORBIDITY AND MORTALITY WEEKLY REPORT 1066, 1066 (October 2, 2015) (using NYTS data, finding 70 percent of current tobacco users using at least one flavored product); Andrew Hyland, Presidential Symposium: Highlighted Findings From Wave 1 of the Population Assessment of Tobacco and Health (PATH) Study (2016), Presentation at 2016 SRNT Annual Meeting (Mar 3, 2016) (finding two-thirds of youth e-cigarette use is flavored, over 80 percent youth e-cigarette users report “flavor” as a reason to use e-cigarette and youths’ most commonly expressed product preference is for flavored e-cigarettes.) The data from the PATH study may be obtained at <http://doi.org/10.3886/ICPSR36231.v6>); see U.S. Food & Drug Admin, Flavored Tobacco Product Fact Sheet (May 5, 2016), <http://www.fda.gov/TobaccoProducts/Labeling/ProductsIngredientsComponents/ucm183198.htm>; see also U.S. FOOD & DRUG ADMIN., FLAVORED TOBACCO PRODUCTS: WHAT YOU NEED TO KNOW, available at <http://www.fda.gov/downloads/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/UCM183262.pdf>
- <sup>2</sup> See Memo to Brown & Williamson, *supra* note 1; R.J. Reynolds Inter-office Memorandum, *supra* note 1; see also G. Connolly, *supra* note 1; Shannon Farley & Michael Johns, *supra* note 1.
- <sup>3</sup> See Bridget Ambrose et al., *supra* note 1; Catherine G. Corey et al., *supra* note 1.
- <sup>4</sup> The source for all statements in the left-hand column is NAT’L ASSOC’N OF TOBACCO OUTLETS, PROHIBITION ON THE SALE OF FLAVORED TOBACCO PRODUCTS, available at <http://www.tobaccoordinances.info/> (last visited Aug 5, 2016).
- <sup>5</sup> See, e.g., Ganna Kostygina, et al., *Tobacco industry use of flavours to recruit new users of little cigars and cigarillos*, TOBACCO CONTROL ONLINE FIRST 1, 6 (2014) (concluding tobacco companies engaged in a calculated effort to blur the line between little cigars and used flavors to facilitate their appeal by masking harsh tobacco properties and increase products’ attractiveness to younger users. Marketing for one brand included link to social media page thus circumventing youth restrictions for website access.).
- <sup>6</sup> See U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF THE SURGEON GENERAL, PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 8, 487, 508 (2012) [hereinafter 2012 SURGEON GENERAL REPORT]; See Monica L. Adams et al., *Exploration of the Link Between Tobacco Retailers in School Neighborhoods and Smoking*, 83 J. SCH. HEALTH 112, 116 (2013) (“A high density of tobacco retailers in areas frequented by youth may implicitly increase their perception of access. Students who perceive that tobacco is easy to obtain by youth may also believe that it is condoned or sanctioned by their community and peers... advertising and tobacco promotions influence youth normative beliefs about the acceptability of tobacco.”); Andrew Hyland et al., *Tobacco Outlet Density and Demographics in Erie County NY*, 93 AM. J. PUB. HEALTH 1075, 1075 (2003); N. Andrew Peterson et al., *Tobacco Outlet Density, Cigarette Smoking Prevalence, and Demographics at the County Level of Analysis*, 40 SUBSTANCE USE & MISUSE 1627, 1630 (2005).
- <sup>7</sup> Shannon Farley & Michael Johns, *supra* note 1, at 1.

<sup>8</sup> FOOD & DRUG ADMINISTRATION, PRELIMINARY SCIENTIFIC EVALUATION OF THE POSSIBLE PUBLIC HEALTH EFFECTS OF MENTHOL VERSUS NON-MENTHOL CIGARETTES. (2013), <http://www.fda.gov/downloads/UCM361598.pdf> (last visited Sept 14, 2016); Jonathan Foulds et al., Do smokers of menthol cigarettes find it harder to quit smoking?, 12 Suppl 2 NICOTINE & TOBACCO RESEARCH S102, S102 (2010); Farley & Johns, *supra* note 1, at 1 (noting that studies have documented stronger tobacco dependence among menthol-smoking adolescents than among non-menthol smokers); Olivia Wackowski & Cristine D. Delnevo, *Menthol cigarettes and indicators of tobacco dependence among adolescents*, 32 ADDICTIVE BEHAVIORS 1964, 1968-1969 (2007) (finding menthol cigarettes may be more addictive than regular cigarettes among young smokers).

<sup>9</sup> John E. Schneider et al., *Tobacco Outlet Density and Demographics at the Tract Level of Analysis in Iowa: Implications for Environmentally Based Prevention Initiatives*, 6 PREVENTION SCIENCE 319, 322 (2005).

<sup>10</sup> See Bridget Ambrose et al., *Flavored Tobacco Product Use among US Youth Aged 12-17 years, 2013-2014*, 314 J. AM. MED. ASSOC. 1871, 1871 (2015) (using PATH data, finding nearly 80 percent of current tobacco users use flavored products, and the majority of ever-users reported first product used was flavored); Catherine G. Corey et al., *supra* note 1; Hyland, *supra* note 1.

<sup>11</sup> Bridget Ambrose et al., *Flavored Tobacco Product Use Among US Youth Aged 12-17 years, 2013-2014*, 314 J. AM. MED. ASSOC. 1871, 1871 (2015) (using PATH data, finding the majority of ever-users of tobacco reported first product used was flavored); Shari Feirman, *Flavored Tobacco Products in the United States: A Systematic Review Assessing Use and Attitudes*, 18 NICOTINE & TOBACCO RESEARCH 739, 745 (2006) (finding young age significantly associated with nonmenthol flavored tobacco use as compared to older age); Farley and Johns, *supra* note 1, at 1 (noting that adolescents who smoke cigarettes are significantly more likely to smoke menthols compared to adults); Sarah M. Klein et al., *Use of flavored cigarettes among older adolescent and adult smokers: United States, 2004--2005*, 10 NICOTINE & TOBACCO RESEARCH 1209, 1209 (2008) (finding that only 6.7 percent of adult smokers over the age of 25 use flavored products, as compared to nearly a quarter of younger smokers).

<sup>12</sup> Internet sales of cigarettes and cigars are essentially prohibited by federal law, and New York law restricts the shipment of cigarettes into the state, rendering significant internet purchases unfeasible. Prevent All Cigarette Trafficking Act of 2009, 111 Pub. L. 154, §3, 124 Stat. 1087 (prohibiting commercial carriers to deliver cigarettes to U.S. postal addresses); N.Y. PUBLIC HEALTH LAW § 1399-II (restricting shipment of cigarettes into New York).

<sup>13</sup> James C. Hersey et al., *Are Menthol Cigarettes a Starter Product for Youth?*, 8 NICOTINE & TOBACCO RESEARCH 403, 410 (2006)

<sup>14</sup> Campaign for Tobacco Free Kids, *Big Tobacco's Guinea Pigs: How an unregulated industry experiments on America's kids and consumers*, I (2008) (explaining that flavors such as cocoa and licorice produce carcinogens when burned), *available at* [http://www.tobaccofreekids.org/what\\_we\\_do/industry\\_watch/new\\_products\\_report/](http://www.tobaccofreekids.org/what_we_do/industry_watch/new_products_report/) (last visited Sept 12, 2016).

<sup>15</sup> See *generally* SAMANTHA K. GRAFF, TOBACCO CONTROL LEGAL CONSORTIUM, THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE 1-2 (2008); see also CounterTobacco, "Rebutting Industry Arguments against POS," *available at* <http://countertobacco.org/resources-tools/evidence-summaries/rebutting-economic-arguments-against-pos/> (last visited Aug 9, 2016).

<sup>16</sup> Jidong Huang & Frank J. Chaloupka, *The economic impact of state cigarette taxes and smoke-free air policies on convenience stores*, 22 TOB. CONTROL 91, 91 (2013); see also COUNTERTOBACCO, *Rebutting Economic Arguments against POS*, <http://countertobacco.org/resources-tools/evidence-summaries/rebutting-economic-arguments-against-pos/> (last visited Aug 17, 2016) (finding cigarette tax increases have not hurt retailers in the past, despite industry's forecasts to the contrary).

<sup>17</sup> Kurt M. Ribisl et al., *Falling cigarette consumption in the U.S. and the impact upon tobacco retailer employment*, in AFTER TOBACCO: WHAT WOULD HAPPEN IF AMERICANS STOPPED SMOKING? (Peter S. Bearman & Kathryn M. Neckerman, eds. 2011); George Thomson et al., *Evidence and arguments on tobacco retail displays: marketing an addictive drug to children?*, 121 N. Z. MED. J. 87, 87 (2008); Huang and Chaloupka, *supra* note 16.

<sup>18</sup> LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 92 (2nd ed. 2008) (defining "police power" as "The inherent authority of the state...to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general welfare of the people. To achieve these communal benefits, the state retains the power to restrict, within federal and state constitutional limits, private interests--including...liberty, as well as economic interests.")

<sup>19</sup> Campaign for Tobacco-Free Kids, *The Toll of Tobacco in New York* (2016), [https://www.tobaccofreekids.org/facts\\_issues/toll\\_us/new\\_york](https://www.tobaccofreekids.org/facts_issues/toll_us/new_york) (last visited Aug 17, 2016) (reporting \$7.33 billion annually in productivity losses and \$10.39 billion in annual health care costs directly attributable to tobacco use in New York State).

<sup>20</sup> N.Y. TAX LAW § 480-a(1) (McKinney 2016).

- 
- <sup>21</sup> N.Y. PENAL LAW § 400.00(12) and (16) (requiring licenses to purchase/possess or sell firearms) (McKinney 2016).
- <sup>22</sup> *E.g.*, N.Y. CITY, N.Y. ADMIN. CODE § 17-715 (2016).
- <sup>23</sup> *E.g.*, N.Y. VEHICLE & TRAFFIC LAW § 383 (McKinney 2016).
- <sup>24</sup> *E.g.*, N.Y. ENVIRON. CONSERV. LAW § 33-1301(1) (McKinney 2016) (restricting sale of unregistered, mislabeled or improperly contained pesticides).
- <sup>25</sup> *E.g.*, N.Y. CONSERV. LAW § 37-0505 (McKinney 2016) (prohibiting sale of bottles and other baby products that contain Bisphenol A).
- <sup>26</sup> Nat'l Assoc'n of Tobacco Outlets, Inc., et al. v. City of Providence, et al., 2012 WL 6128707, \*7-\*8 (December 10, 2012). The court found fault with the City's definition of "characterizing flavor," but the finding had no bearing on the court's decision concerning the inapplicability of the First Amendment to the sales restriction. *Id.*
- <sup>27</sup> *E.g.*, N.Y. CITY, N.Y. ADMIN. CODE § 17-715 (2016) (restricting flavored tobacco product sales, except menthol and e-cigarettes, to tobacco businesses); SANTA CLARA CNTY, CALIF. LOCAL LAW ch.. XXIII (2016) (restricting flavored tobacco product sales, except menthol and e-cigarettes, to tobacco businesses); PROVIDENCE, RI CODE OF ORDS. § 14-309 (2016) (restricting flavored tobacco product sales, except menthol products, to tobacco businesses); MINNEAPOLIS, MINN. CODE § 281.45(f) (2016) (restricting flavored tobacco product sales, except menthol products, to tobacco businesses); CHICAGO, ILL. ORD. § 4-64-180(b) (2016) (restricting flavored tobacco product sales near schools); BERKELEY, CALIF. ORD § 9.80.035 (2016) (restricting flavored tobacco product sales near schools).
- <sup>28</sup> U.S. Smokeless Tobacco Mfg. Co., LLC et al. v. City of New York, 703 F.Supp.2d 329, 344-345 (S.D.N.Y. 2010) (*aff'd* by U.S. Smokeless Tobacco Mfg Col, LLC et al. v. City of New York, 708 F.3d 428, 434-435 (2<sup>nd</sup> Cir. 2013)); Independent Gas & Serv. Stations Assoc'n v. City of Chicago/Quick Pick Food Mart v. City of Chicago, 112 F.Supp.3d 749, 752-754 (N.D. Ill. 2015); Nat'l Assoc. of Tobacco Outlets, Inc., et al. v. City of Providence, et al., 2012 WL 6128707, \*11-\*13 (D. Rhode Island 2012); PUBLIC HEALTH LAW CENTER, REGULATING FLAVORED TOBACCO PRODUCTS, *available at* <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-regflavoredtobaccoprods-2014.pdf>, 4 (last visited Aug 9, 2016).
- <sup>29</sup> U.S. Smokeless Tobacco Mfg. Co., LLC et al. 703 F.Supp.2d at 344-345.
- <sup>30</sup> 21 U.S.C. § 387p (2016).
- <sup>31</sup> See Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, 81 Fed. Reg. 28973, 29055 (May 10, 2016) (to be codified at 21 C.F.R. pts. 1100, 1140 & 1143) (responding to comment 216).

## Product Price: Countering Industry Opposition to Effective Public Health Interventions

The price of tobacco products significantly impacts tobacco use; as prices increase, use decreases.<sup>1</sup> The tobacco industry knows this and makes every effort to reduce the price of tobacco products in your neighborhood. Discount prices drive the progression of youth smoking from experimentation to regular use, and undermines quit attempts by all users.<sup>2</sup> Importantly, tobacco price promotions particularly affect populations critical to tobacco companies' survival, such as youth and low-income consumers.<sup>3</sup> Therefore, the industry routinely opposes rational and effective public health policies, including tobacco excise taxes, sales regulations, and minimum package size requirements. Here are ways to counter tobacco companies' claims, which are often disguised as protecting retailer interests:

### Tobacco Industry Claims...

#### A. Coupons and price promotions are protected speech and may not be regulated.

"A promotional price sales ban violates the First Amendment to the U.S. Constitution that protects free speech, and which the U.S. Supreme Court has ruled includes commercial speech in the form of communicating truthful product price information to consumers."<sup>4</sup>

"Under the First Amendment, manufacturers and retailers have a protected interest and a right in communicating price information about tobacco products through the use of coupons, which lower the price of a tobacco product to adult consumers and prohibiting the acceptance of coupons is unconstitutional."<sup>5</sup>

"Manufacturers and retailers have a protected interest or a right in communicating truthful price information about tobacco products through the use of promotionally priced products and consumers have an expectation of being provided accurate and legal price information."<sup>6</sup>

"Prohibiting the ability to sell promotionally priced tobacco products prevents the communication of product price information by manufacturers and retailers to consumers, making a promotional price ban unlawful and unconstitutional."<sup>7</sup>

### Public Health Advocates Know...

#### Restrictions on the redemption of coupons and price promotions are sales regulations that do not affect protected speech.

Tobacco companies have tried and failed to convince the courts that the First Amendment protects sales of discounted tobacco products.<sup>8</sup> In fact, **federal courts have upheld local restrictions on the use of price promotions**—including those that prohibit the redemption of discount coupons and multi-pack discounts. In those cases, the courts decided such restrictions are *sales* or economic regulations, rather than regulation of speech. Therefore, the First Amendment does not apply to price promotion regulations<sup>9</sup> because they do not restrict tobacco companies or retailers from communicating truthful information about product price to consumers.<sup>10</sup> The **tobacco industry continues to misrepresent the current status of the law** in an effort to scare local government officials from adopting effective tobacco regulation.

**B. Restricting coupons and price promotions harms local businesses and is ineffective.**

“A coupon redemption ban would result in lost sales by retailers since consumers would be prevented from using a price reduction incentive to purchase tobacco products.”<sup>11</sup>

“A promotion price ban [sic] would result in lost sales by retailers since consumers would seek out other sources of promotionally priced tobacco products, including traveling to nearby towns and cities where no such ban exists.”<sup>12</sup>

**Keeping tobacco product prices high is proven to reduce tobacco use, which is a critical public priority.**

Tobacco companies’ default prediction that economic hardship will follow a tobacco control regulation has been **consistently proven false**.<sup>13</sup> Smoke-free air laws have not economically harmed the airline, restaurant, or bar industries, beaches or parks;<sup>14</sup> local pharmacy sales restrictions have not harmed drug stores’ bottom lines;<sup>15</sup> nor have sales restrictions based on purchase price<sup>16</sup> or consumer age driven retailers to close up shop.<sup>17</sup> Concern over consumers’ simply switching to a retailer in a neighboring town to buy flavored tobacco is a further misleading justification for inaction.<sup>18</sup> Retailers routinely adjust the products they sell based on what’s profitable; if cigarette sales fall, retailers will replace them with something else. Finally, local governments are charged with governing in the interest of public health, which considers **all aspects of the local economy and long term sustainability**,<sup>19</sup> not just certain short-term sales losses (and tobacco use is an undisputed drag on the economy, posing high costs to healthcare and productivity).<sup>20</sup>

“A ban on redeeming coupons has nothing to do with reducing underage tobacco use because state and federal laws already prohibit the sale of tobacco products to underage individuals at any price. For this reason, a coupon ban only impacts retailers and those adults who are of legal age to purchase and use tobacco products.”<sup>21</sup>

The Surgeon General has concluded that tobacco industry marketing (which includes coupons and other price promotions) causes youth tobacco use.<sup>22</sup> Underage purchasing is not the only factor in youth initiation or prolonged tobacco use; tobacco companies focus on retailer compliance with the law to deflect responsibility for their marketing and the role it plays in youth tobacco use. By way of example, tobacco companies offer more price promotions and greater discounts on brands popular with youth through cash incentives offered to retailers in neighborhoods with high proportions of youth.<sup>23</sup> In short, comprehensive tobacco control—including local ordinances that regulate tobacco sales and **reduce youth exposure to retail tobacco marketing**—is a reasonable, necessary, and effective way to prevent youth tobacco use.<sup>24</sup>

**C. State and local packaging size and price requirements are ineffective tobacco regulation and impermissible.**

“Banning the sale of certain categories of cigars with package size restrictions and minimum pricing is both discriminating and arbitrary.”<sup>25</sup>

**Package size and price requirements are effective and permissible tobacco regulations.**

The availability of low-cost cigars sold in small quantities and often in kid-friendly flavors are especially attractive and available to youth and other price-sensitive populations.<sup>26</sup> Minimum package and price requirements for cigars have successfully been implemented in several jurisdictions to reduce youth tobacco use.<sup>27</sup> Tobacco companies manipulate package size and prices because they know that higher tobacco prices reduce product use.<sup>28</sup> Imposing package size and price regulations is a reasonable and effective way to prevent the industry from using this strategy to keep consumers hooked on their deadly products.



“The Federal Cigarette Labeling and Advertising Act does not allow local and state governments to adopt any ‘requirement or prohibition based on smoking and health...with respect to the advertising or promotion of any cigarettes.’ 15. U.S.C. § 1334. Federal courts have held that “promotion” includes the announcement and offering of price discounts and, for this reason, cities and states are precluded from adopting a promotion price ban on cigarettes.”<sup>29</sup>

#### **D. State and local tobacco taxes harm local businesses.**

“A local cigarette and tobacco tax is one of the most anti-retail actions that a local government can impose because it will cause local residents to drive to a nearby town or the next county to purchase their tobacco products to avoid the local tax.”<sup>32</sup>

“With tobacco stores dependent on tobacco sales for virtually all of their profits and convenience stores relying on tobacco sales for nearly 40% of in-store sales, the downturn in cigarette and tobacco sales will translate into employee layoffs and possible store closures.”<sup>35</sup>

Tobacco companies have tried and failed to convince the courts that federal law prohibits state and local regulation of tobacco product price promotions. In fact, in two recent cases federal courts have concluded that prohibitions on the redemption of coupons and other price promotions is permitted under federal law.<sup>30</sup> The Family Smoking Prevention and Tobacco Control Act changed the Federal Cigarette Labeling and Advertising Act and clearly permits state and local governments to regulate tobacco sales and promotion, including regulations based on “smoking and health.”<sup>31</sup> Yet the **tobacco industry continues to misrepresent the current status of the law** in an effort to scare local government officials from adopting effective tobacco regulation.

#### **Taxes are a critical public health measure that reduce demand for tobacco products, and they don’t necessarily harm local businesses.**

Cigarette **taxes are a legitimate and necessary public health intervention.** Higher prices from tobacco excise taxes reduce tobacco use particularly among kids.<sup>33</sup> The availability of cheaper cigarettes in another location does not undermine this effect. In fact, greater travel distance has been shown to be an effective deterrent to tobacco use,<sup>34</sup> thereby preventing tobacco-related disease and deaths.

Actually, studies have found that a reduction in smoking (and consequent reduction in tobacco purchases) would be unlikely to affect overall retail employment.<sup>36</sup> Furthermore, the number of tobacco retail outlets has grown during the implementation of tax increases, so stores are unlikely to close because of tobacco taxes.<sup>37</sup> Regardless, sales restrictions lead to gradual changes in purchases, not immediate tobacco use reduction; allowing retailers to adjust inventory to reflect consumers’ changing preferences. Moreover, protecting retailer profits at the expense of the public’s health is not a reason to avoid regulation.

November 2016. All rights reserved. Public Health and Tobacco Policy Center

*Disclaimer: This publication is provided for only educational purposes and is not to be construed as a legal opinion or as a substitute for obtaining legal advice from an attorney. Additionally, the statements are not intended to reflect a view on specific legislation.*

<sup>1</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL, 322-37 (2000) [hereinafter 2000 SURGEON GENERAL'S REPORT]; see also, Frank J. Chaloupka et al. *Tax, Price and Cigarette Smoking: Evidence from the Tobacco Documents and Implications for Tobacco Company Marketing Strategies*, 11 TOBACCO CONTROL i62, i63-i64 (2002) [hereinafter Chaloupka, *Tax, Price and Smoking*]; Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, 20 TOBACCO CONTROL 235, 235-36 tbl. 1 (2010) [hereinafter Chaloupka, *Effectiveness of Tax and Price Policies*]. For more information about the relationship between price and tobacco consumption, see CENTER FOR PUBLIC HEALTH & TOBACCO POLICY, TOBACCO PRICE PROMOTION: POLICY RESPONSES TO INDUSTRY PRICE MANIPULATION 2-7, available at <http://www.tobaccopolicycenter.org/documents/Price%20Promotion%20Overview%20FINAL.pdf>.

<sup>2</sup> The tobacco industry's marketing budget reveals its heavy reliance on saturating the marketing with discounted tobacco products: tobacco companies designated nearly 87 percent (that is, \$8.21 billion) of their impressive \$9.45 billion 2013 marketing budget to reducing the price consumers pay for tobacco products. FED. TRADE COMM'N, CIGARETTE REPORT FOR 2013 (2016); FED. TRADE COMM'N, SMOKELESS TOBACCO REPORT FOR 2013 (2016). Tobacco Industry consists of the five largest cigarette manufacturers and five major smokeless tobacco companies. Cigarette manufacturers' price promotion expenditures comprise "Price Discounts," "Coupons," and "Retail-value-added – Bonus Cigarette" as defined in the report. Smokeless tobacco manufacturers' price promotion expenditures comprise "Price Discounts," "Coupons," and "Retail-value-added – Bonus Smokeless Tobacco Product" as defined in the report.

<sup>3</sup> Victoria M. White et al., *Cigarette Promotional Offers: Who Takes Advantage?*, 30 AM. J. PREV. MED. 225, 228 (2006); see also, e.g., Cati G. Brown-Johnson et al., *Tobacco Industry Marketing to Low Socioeconomic Status Women in the USA*, TOBACCO CONTROL ONLINE FIRST 1 (Jan. 21, 2014) (describing history of industry targeted marketing to women, particularly African-Americans and those of low-socioeconomic status).

<sup>4</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, PROHIBITION OF PROMOTIONALLY PRICED TOBACCO PRODUCTS, available at <http://www.tobaccoordinances.info/> (last visited Aug 5, 2016) [hereinafter PROMOTIONALLY PRICED].

<sup>5</sup> NAT'L ASSOC OF TOBACCO OUTLETS, PROHIBITION OF REDEEMING TOBACCO PRODUCT COUPONS BY RETAILERS, available at <http://www.tobaccoordinances.info/> (last visited Aug 5, 2016) [hereinafter REDEEMING COUPONS].

<sup>6</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, PROMOTIONALLY PRICED, *supra* note 4.

<sup>7</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, PROMOTIONALLY PRICED, *supra* note 4.

<sup>8</sup> Nat'l Assoc. of Tobacco Outlets v. City of New York, 27 F. Supp.3d 415, 423 (2014); Nat'l Assoc. of Tobacco Outlets v. City of Providence, 2012 WL 6128707 at \*4-\*7 (2012), *aff'd by* Nat'l Assoc. of Tobacco outlets v. City of Providence, 731 F.3d 71 (1st Cir. 2013).

<sup>9</sup> *Id.* at \*4-\*7

<sup>10</sup> See Nat'l Assoc. of Tobacco Outlets v. City of New York, 27 F. Supp.3d, at 422.

<sup>11</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, REDEEMING COUPONS, *supra* note 5.

<sup>12</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, PROMOTIONALLY PRICED, *supra* note 4.

<sup>13</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL 580 (2006); COUNTERTOBACCO, Rebutting Economic Arguments against POS, <http://countertobacco.org/resources-tools/evidence-summaries/rebutting-economic-arguments-against-pos/> (last visited Aug 17, 2016).

<sup>14</sup> CAMPAIGN FOR TOBACCO FREE KIDS, SMOKE-FREE LAWS DO NOT HARM BUSINESS AT RESTAURANTS AND BARS (2014) (summarizing evidence assessing economic impact of smoke-free laws).

<sup>15</sup> See KS Hudmon, *Tobacco sales in pharmacies: time to quit*, 15 TOB. CONTROL 35–38, 37 (2006) (reporting no pharmacy closures in Ontario following pharmacy sales ban and predicting limited profit impact); see also *Id.* at 37 (studies show that pharmacy tobacco sales restrictions have no effect on retail economy or on consumers' decision to shop at pharmacies).

<sup>16</sup> Jidong Huang & Frank J. Chaloupka, *The economic impact of state cigarette taxes and smoke-free air policies on convenience stores*, 22 TOB. CONTROL 91, 94-95 (2013); CounterTobacco, *supra* note 13.



- <sup>17</sup> See Jonathan P. Winickoff et al., *Retail impact of raising tobacco sales age to 21 years*, 104 AM. J. PUBLIC HEALTH e18, e20 (2014) (while high school smoking rate declined by 47 percent in 4 years following tobacco minimum sales age increase to 21, no retailers went out of business as of 2014).
- <sup>18</sup> See 2000 SURGEON GENERAL'S REPORT, *supra* note 1 (identifying relationship between price and consumption); Chaloupka et al., *Effectiveness of Tax and Price Policies*, *supra* note 1, at 235, 237 (reviewing evidence and concluding tax and pricing policies are effective in reducing tobacco use). Note that, increasing the distance necessary to obtain tobacco products increases the cost to obtain the products, which has been shown to be an effective deterrent leading to lower overall tobacco use. John E. Schneider et al., *Tobacco Outlet Density and Demographics at the Tract Level of Analysis in Iowa: Implications for Environmentally Based Prevention Initiatives*, 6 PREV. SCI. 319, 322 (2005).
- <sup>19</sup> LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 92 (2nd ed. 2008) (defining "police power" as "The inherent authority of the state...to enact laws and promulgate regulations to protect, preserve, and promote the health, safety, morals, and general welfare of the people. To achieve these communal benefits, the state retains the power to restrict, within federal and state constitutional limits, private interests--including...liberty, as well as economic interests.")
- <sup>20</sup> CAMPAIGN FOR TOBACCO-FREE KIDS, *The Toll of Tobacco in New York* (2016), [https://www.tobaccofreekids.org/facts\\_issues/toll\\_us/new\\_york](https://www.tobaccofreekids.org/facts_issues/toll_us/new_york) (last visited Aug 17, 2016) (reporting \$7.33 billion annually in productivity losses and \$10.39 billion in annual health care costs directly attributable to tobacco use in New York State).
- <sup>21</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, REDEEMING COUPONS, *supra* note 5.
- <sup>22</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE OF THE SURGEON GENERAL, PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 508 (2012) [hereinafter 2012 SURGEON GENERAL'S REPORT].
- <sup>23</sup> Suzan Burton et al., *Marketing Cigarettes when All Else Is Unavailable: Evidence of Discounting in Price-Sensitive Neighbourhoods*, 23 TOBACCO CONTROL e24, e27 (2013); see 2012 SURGEON GENERAL'S REPORT, *supra* note 19, at 436-437 (identifying evidence of lower prices in retailers near schools).
- <sup>24</sup> *Id.* at i; BRIAN KING, TERRY PECHACEK & PETER MARIOLIS, BEST PRACTICES FOR COMPREHENSIVE TOBACCO CONTROL PROGRAMS 10 (2014), *available at* [http://www.cdc.gov/tobacco/stateandcommunity/best\\_practices/pdfs/2014/comprehensive.pdf](http://www.cdc.gov/tobacco/stateandcommunity/best_practices/pdfs/2014/comprehensive.pdf).
- <sup>25</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, RESTRICTIONS ON SINGLE CIGARS AND CIGAR PACKAGE SIZE, *available at* <http://www.tobaccoordinances.info/> (last visited Aug 5, 2016).
- <sup>26</sup> Jessica M. Rath et al., *Correlates of current menthol cigarette and flavored other tobacco product use among U.S. young adults*, 62 ADDICT. BEHAV. 35, 36 (2016); Andrea Villanti et al., *Flavored Tobacco Product Use Among U.S. Young Adults*, 44 AM. J. PREV. MED. 388, 39 (2013); CHANGELAB SOLUTIONS, LIMITING "TEEN-FRIENDLY" CIGARS: WHAT COMMUNITIES CAN DO, 1 (2012), *available at* [http://www.changelabsolutions.org/sites/default/files/Limiting\\_Teen-Friendly\\_Cigars\\_FINAL\\_20120119-Updated-branding.pdf](http://www.changelabsolutions.org/sites/default/files/Limiting_Teen-Friendly_Cigars_FINAL_20120119-Updated-branding.pdf); Campaign for Tobacco-Free Kids, *Sweet, Cheap and Colorful—No Wonder Kids Are Smoking Cigars* (June 13, 2014), [http://www.tobaccofreekids.org/tobacco\\_unfiltered/post/2014\\_06\\_13\\_cigars](http://www.tobaccofreekids.org/tobacco_unfiltered/post/2014_06_13_cigars).
- <sup>27</sup> See, e.g., N. Y. CITY, N.Y. ADMIN. CODE § 17-704 (2016) (imposing minimum price and package requirements for cigar sales); BOSTON, MA, PUB. HEALTH COMM'N, A REGULATION LIMITING TOBACCO AND NICOTINE ACCESS BY YOUTH, § III (2016) (imposing minimum price and package requirements for cigar sales at certain retailers); BLOOMINGTON, MINN. CODE § 14.439(c) (2016) (imposing minimum price and package requirements for cigar sales); WASHINGTON D.C. CODE § 7-1721.06 (2016) (prohibiting sale of single cigars at certain retailers).
- <sup>28</sup> 2012 SURGEON GENERAL'S REPORT, *supra* note 22, at 526-27 ("When retail prices rise following tax increases, companies engage in a variety of price-related marketing efforts that appear to be aimed at softening the impact of the increased prices."). Studies also show that price promotions are targeted to states with strong tobacco control policies other than taxes to offset the effect of those policies. *Id.* at 527-528.).
- <sup>29</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, PROMOTIONALLY PRICED, *supra* note 4.
- <sup>30</sup> Nat'l Assoc'n of Tobacco Outlets v. City of New York, 27 F.Supp.3d at 424-426; Nat'l Assoc'n of Tobacco Outlets v. City of Providence, 731 F.3d at 79-81.
- <sup>31</sup> 15 U.S.C. §1334(c) (2016).
- <sup>32</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, LOCAL CIGARETTE AND TOBACCO TAXES, *available at* <http://www.tobaccoordinances.info/> (last visited Aug 5, 2016).

<sup>33</sup> Hana Ross et al., *Do Cigarette Prices Motivate Smokers to Quit? New Evidence from the ITC Survey*, 106 ADDICTION 609, 609 (2010); INSTITUTE OF MEDICINE, ENDING THE TOBACCO PROBLEM: BLUEPRINT FOR THE NATION, 182 (2007) (“Recent studies with microlevel data have found that higher cigarette prices increase the probability that a current adult smoker will make an attempt to quit (Levy et al. 2005) and that a young adult smoker will stop smoking (Tauras 2004b).”); Priti Bandi et al., *Cigarette Affordability in the United States*, 15 NICOTINE & TOBACCO RESEARCH 1484, 1484 (2013); Michelle Leverett et al., *Tobacco Use: The Impact of Prices*, 30 J. L. MED.& ETHICS 88, 89 (2002); Frank J. Chaloupka & Rosalie Liccardo Pacula, *The Impact of Price on Youth Tobacco Use*, in U.S. DEP’T OF HEALTH & HUMAN SERVS., CHANGING ADOLESCENT SMOKING PREVALENCE: WHERE IT IS AND WHY, SMOKING AND TOBACCO CONTROL MONOGRAPH NO. 14 (2001); Tauras, J, et al., *Effects of Price and Access Laws on Teenage Smoking Initiation: A National Longitudinal Analysis*, NAT’L BUREAU OF ECON. RESEARCH, NBER WORKING PAPER SERIES 20-21 (June 2001), available at <http://www.nber.org/papers/w8331.pdf> (last visited August 25, 2016).

<sup>34</sup> Schneider et al., *supra* note 18 at 322.

<sup>35</sup> NAT’L ASSOC’N OF TOBACCO OUTLETS, LOCAL CIGARETTE AND TOBACCO TAXES, available at <http://www.tobaccoordinances.info/> (last visited Aug 5, 2016).

<sup>36</sup> Kurt M. Ribisl et al., *Falling cigarette consumption in the U.S. and the impact upon tobacco retailer employment*, in AFTER TOBACCO: WHAT WOULD HAPPEN IF AMERICANS STOPPED SMOKING? (Peter S. Bearman & Kathryn M. Neckerman eds., 2011); see generally COUNTERTOBACCO, *supra* note 13.

<sup>37</sup> Huang and Chaloupka, *supra* note 16; see generally CounterTobacco, *supra* note 13.

## Product Display and Promotion: Countering Industry Opposition to Effective Public Health Interventions

The Surgeon General has concluded that tobacco marketing causes youth tobacco use.<sup>1</sup> Retail tobacco marketing and promotion strategies, including tobacco “power walls” (large displays of packages at the register), have a significant impact on youth perceptions of tobacco availability and popularity, and have been linked to increased odds of smoking initiation.<sup>2</sup> The tobacco industry spent \$9.45 billion on retail tobacco marketing in 2013,<sup>3</sup> part of which pays incentives to retailers to prominently display and otherwise market their products. These product displays serve to recruit new users (overwhelmingly youth)<sup>4</sup> and trigger impulse purchases from addicted users.<sup>5</sup> Here are ways to counter tobacco companies’ unfounded claims about restrictions on this pervasive form of marketing:

### Tobacco Industry Claims...<sup>6</sup>

### Public Health Advocates Know...

#### **A. Product displays don’t lead youth to experiment with tobacco.**

#### **The Surgeon General has concluded that tobacco marketing, including retail marketing, causes youth tobacco use.<sup>7</sup>**

“There is no credible evidence that displaying tobacco products in a retail store causes underage youth to use tobacco products or that banning displays will reduce underage tobacco use.”

Marketing within the retail environment is a particularly effective recruitment tactic: Evidence shows that tobacco retail marketing increases the likelihood that adolescents will start smoking and thwarts quit attempts by current users.<sup>8</sup> Product displays in particular affect youth perceptions of cigarette availability and brand recall—factors that are associated with tobacco use initiation.<sup>9</sup>

Studies demonstrate that youth are less likely to try to purchase tobacco when tobacco product displays are removed.<sup>10</sup> In fact, youth smoking rates have declined following implementation of retail product display and marketing restrictions in Canada and elsewhere.<sup>11</sup>

Comprehensive tobacco control—including local ordinances that reduce youth exposure to retail tobacco marketing—is a legitimate, necessary, and effective way to prevent youth tobacco use.

#### **B. Local restrictions on product displays are impermissible.**

#### **State and local governments are expressly permitted to regulate tobacco product promotion.**

“The U.S. Supreme Court has ruled that the Federal Cigarette Labeling and Advertising Act does not allow the adoption of any ‘requirement or prohibition based on smoking and health’ that is ‘with respect to the advertising or promotion of cigarettes.’ 15 U.S.C. § 1334.”

The Family Smoking Prevention and Tobacco Control Act amended the Federal Cigarette Labeling and Advertising Act and expressly permits state and local governments to regulate tobacco sales and promotion, **including regulations based on “smoking and health.”**<sup>12</sup> **The tobacco industry continues to misrepresent the current status of the law** to scare local government officials from adopting effective tobacco regulation.

<p><b>C. Commercial tobacco marketing enjoys unrestricted constitutional protections.</b></p>	<p><b>Commercial speech protection is limited,<sup>13</sup> and certain government restriction on speech is permissible.</b></p>
<p>“A tobacco display ban violates the First Amendment to the U.S. Constitution that protects free speech, and which the U.S. Supreme Court has ruled includes commercial speech in the form of product advertising and product packaging.”</p> <p>“Manufacturers and retailers have a protected interest in communicating information about tobacco products through the use of store displays, including the message that the products are for sale, and adult customers have an interest in seeing tobacco products and receiving that product information.”</p>	<p>State and local governments have a substantial interest in regulating tobacco product marketing and are allowed to implement a carefully crafted marketing restriction that will directly advance public health.<sup>14</sup> Reducing exposure to tobacco product marketing, particularly youth exposure, is an important and effective public health intervention. The Industry likes to claim that any regulation that reduces its ability to market anywhere and everywhere violates the First Amendment. This is simply not true, and the courts have not decided whether a product display restriction would do so.</p>
<p><b>D. Product display restrictions are costly and burdensome to retailers.</b></p>	<p><b>Compliance with product display restrictions is inexpensive and costs are often covered by the tobacco industry rather than retailers.</b></p>
<p>“A display ban would be costly for retailers, especially small family-owned stores, due to the cost of purchasing new storage cabinets with opaque doors, remodeling the space under store counters to accommodate special storage cabinets, or moving all tobacco products into a storage room.”</p>	<p>A display restriction does not have to require special equipment or even the way in which a retailer complies with a requirement to remove tobacco products from sight. Instead, retailers may comply with inexpensive changes to their stores (e.g., by covering tobacco products with a curtain or screen).</p> <p>Industry regularly inflates the potential costs associated with public health policies. For example, the costs of product display compliance in Ireland were only 0.03 percent of Industry estimates.</p> <p>Tobacco companies are concerned with profiting from the sale of tobacco products and can easily cover costs associated with the display and marketing of their products. In fact, Industry has a record of assisting retailers comply with regulations, including display restrictions. For example, tobacco companies paid for the display conversion in most convenience stores in Ireland.<sup>15</sup></p>

November 2016. All rights reserved. Public Health and Tobacco Policy Center

*Disclaimer: This work provides educational materials and research support for policy initiatives. The legal information provided does not constitute and cannot be relied upon as legal advice.*

<sup>1</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS, OFFICE OF THE SURGEON GENERAL, PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 508 [hereinafter 2012 SURGEON GENERAL REPORT].

<sup>2</sup> J. Paynter et al., *Point of sale tobacco displays and smoking among 14–15 year olds in New Zealand: a cross-sectional study*, 18 TOBACCO CONTROL 268, 272 (2009)

<sup>3</sup> FED. TRADE COMM'N, CIGARETTE REPORT FOR 2013 (2016); FED. TRADE COMM'N, SMOKELESS TOBACCO REPORT FOR 2013 (2016). Cigarette manufacturers' retail or "Point of Sale" expenditures comprise expenditures on "Coupons," "Point of Sale," "Price Discounts," "Promotional Allowances – Retailers," "Promotional Allowances – Wholesalers," "Retail Value Added – Bonus Cigarettes" and "Retail Value Added – Non-Cigarette Bonus" as defined in the Cigarette Report for 2013. Smokeless tobacco manufacturers' "Point of Sale" expenditures are comprised of expenditures on "Coupons," "Point of Sale," "Price Discounts," "Promotional Allowances – Retailers," "Promotional Allowances – Wholesalers," "Retail Value Added – Bonus Smokeless Tobacco Product" and "Retail Value Added – Non-Smokeless Tobacco Bonus" as defined in the Smokeless Tobacco Report for 2013.

<sup>4</sup> 2012 SURGEON GENERAL REPORT, *supra* note 1, at 165.

<sup>5</sup> *Id.* at 8, 487, 508; OBJ Carter et al., *The effect of retail cigarette pack displays on unplanned purchases: results from immediate postpurchase interviews*, 18 TOBACCO CONTROL 218, 220 (2009); Ellen C. Feighery et al., *Cigarette advertising and promotional strategies in retail outlets: results of a statewide survey in California*, 10 TOBACCO CONTROL 184, 184 (2001); Melanie Wakefield et al., *The effect of retail cigarette pack displays on impulse purchase*, 103 ADDICTION (ABINGDON, ENGLAND) 322, 325 (2008).

<sup>6</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, TOBACCO PRODUCT DISPLAY BANS IN RETAIL STORES, *available at* <http://www.tobaccoordinances.info/> (last visited Aug 5, 2016).

<sup>7</sup> 2012 SURGEON GENERAL REPORT, *supra* note 1, at 508.

<sup>8</sup> *Id.* at 8, 487, 508; Carter et al., *supra* note 5; Feighery et al., *supra* note 5; Wakefield et al., *supra* note 5.

<sup>9</sup> See Melanie Wakefield et al., *An Experimental Study of Effects on Schoolchildren of Exposure to Point of sale Cigarette Advertising and Pack Displays*, 21 HEALTH EDUC. RES. 338, 338-339 (2006) ("[t]he presence of cigarette displays at the point of sale, even in the absence of cigarette advertising, has adverse effects on students' perceptions about ease of access to cigarettes and brand recall, both factors that increase the risk of taking up smoking"); Paynter et al., *supra* note 2, at 272 (finding that the more often a 14-15 year old is exposed to cigarette displays, the more likely he or she is to smoke).

<sup>10</sup> Sally Dunlop, et al., *Out of Sight and Out of Mind? Evaluating the Impact of Point-of-Sale Tobacco Display Bans on Smoking-Related Beliefs and Behaviors in a Sample of Australian Adolescents and Young Adults*, 17 NICOTINE & TOBACCO RESEARCH 761, (2015) (finding decreased brand awareness and overestimation of peer smoking among youth following implementation of display ban in Australia); Annice E. Kim et al., *Influence of Tobacco Displays and Ads on Youth: A Virtual Store Experiment*, 131 PEDIATRICS e88, e92 (2013) (finding enclosing tobacco product displays significantly lowers the likelihood that youth will try to purchase tobacco); William G. Shadel et al., *Hiding the Tobacco Power Wall Reduces Cigarette Smoking Risk in Adolescents: Using an Experimental Convenience Store to Assess Tobacco Regulatory Options at the Retail Point-of-Sale*, TOBACCO CONTROL ONLINE FIRST, 1, 5 (Nov. 23, 2015); *see also id.* at 1 (summarizing existing evidence that removing tobacco product displays from retail point of sale reduces impulse purchases and youth perceptions of ease of access and peer tobacco use (factors in youth tobacco use)); *cf.* Annice E. Kim, et al., *Influence of Point-of-Sale Tobacco Displays and Graphic Health Warning Signs on Adults: Evidence from a Virtual Store Experimental Study*, 107 AM. J. PUB. HEALTH 888, 890, 893 (finding decreased urges to smoke and purchase attempts by adults when tobacco product displays covered/not visible).

---

<sup>11</sup> See e.g., SWEDISH COUNCIL FOR INFORMATION ON ALCOHOL AND OTHER DRUGS, THE 2011 ESPAD REPORT: SUBSTANCE USE AMONG STUDENTS IN 36 EUROPEAN COUNTRIES, 123 (2011), Table C2, *available at* [http://www.espad.org/Uploads/ESPAD\\_reports/2011/The\\_2011\\_ESPAD\\_Report\\_FULL\\_2012\\_10\\_29.pdf](http://www.espad.org/Uploads/ESPAD_reports/2011/The_2011_ESPAD_Report_FULL_2012_10_29.pdf) (finding decrease in youth smoking rates in Iceland); The European School Survey Project on Alcohol and Other Drugs, Keyresult Generator, (finding significant drop in tobacco use among 15-16 year olds in Iceland following display restriction implementation), <http://www.espad.org/en/Keyresult-Generator/> (last visited Oct. 10, 2013); JESSICA REID ET AL., PROPEL CENTRE FOR POPULATION HEALTH IMPACT, TOBACCO USE IN CANADA: PATTERNS AND TRENDS 2013 EDITION IV, 79 (2013), (finding youth smoking rates declining after implementation of display restriction), *available at* [http://www.tobaccoreport.ca/2013/TobaccoUseinCanada\\_2013.pdf](http://www.tobaccoreport.ca/2013/TobaccoUseinCanada_2013.pdf) see also Ann McNeill et al., *Evaluation of the removal of point-of-sale tobacco displays in Ireland*, 20 TOBACCO CONTROL 137, 141 (2011) (reporting that 1 in 5 smokers found it easier to quit because of the display ban); ACTION ON SMOKING AND HEALTH, INDUSTRY CLAIMS ABOUT POINT OF SALE DISPLAY BANS – WHERE ARE THEY NOW?, *available at* [http://ash.org.uk/files/documents/ASH\\_833.pdf](http://ash.org.uk/files/documents/ASH_833.pdf), 1(2012) (last visited Aug 10, 2016).

<sup>12</sup> 15 U.S.C. §1334(c) (2016).

<sup>13</sup> See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (“In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible.”)

<sup>14</sup> *Central Hudson Gas & Electric Corporation v. Public Serv. Comm’n of New York*, 447 U.S. 557, 563-566 (1980), (outlining four prong test for permissible commercial speech restrictions).

<sup>15</sup> ACTION ON SMOKING AND HEALTH, INDUSTRY CLAIMS ABOUT POINT OF SALE DISPLAY BANS—WHERE ARE THEY NOW?, *available at* [http://ash.org.uk/files/documents/ASH\\_833.pdf](http://ash.org.uk/files/documents/ASH_833.pdf) (March 2012).

## Tobacco 21: Countering Industry Opposition to Effective Public Health Interventions

Raising the minimum legal age (MLA) for the sale of tobacco products provides substantial public health benefits by delaying or even preventing youth initiation of smoking. Adolescent and young adult brains are still developing in ways that make them more susceptible to the rewarding effects and cognitive harms of (and addiction to) nicotine. Raising the MLA to 21 reduces this significant health risk by limiting young adult access to tobacco products, and impeding youths' most common source of tobacco products: their young adult friends, or "social sources." Yet tobacco companies and their allies have a vested interest in addicting a new generation of "replacement" smokers as long-term users quit or die from tobacco's effects. Here are ways to counter tobacco companies' arguments against raising the MLA, which are often disguised as protecting retailer interests.

### Tobacco Industry Claims...

**A. Raising the MLA is unnecessary because retailers overwhelmingly comply with the existing MLA.**

"Raising the legal age is unnecessary because according to tobacco retailer compliance inspection statistics from FDA, retailers have achieved significantly high passing rates when an underage youth decoy has attempted to purchase tobacco products. Specifically...retailers successfully pass compliance checks and do not sell tobacco to an underage person more than 95% of the time."<sup>1</sup>

**B. Raising the MLA is unnecessary because youth obtain tobacco from social sources.**

"Raising the legal age to 21 to purchase tobacco products will not solve the problem of reducing underage youth access to tobacco product products. This is the case because recently released initial findings of the long-term Population Assessment of Tobacco and

### Public Health Advocates Know...

**Raising the MLA is effective in preventing youth from experimenting with tobacco and becoming addicted users in the long term.**

Tobacco companies model their business around attracting youth to use their products,<sup>2</sup> regardless of how youth actually get the products. This is why youth tobacco use remains a serious public health problem **despite high retailer compliance** with minimum sales age laws. The great majority of smokers begin before the age of 18, and frequently transition from experimentation to addiction between the ages of 18 and 21.<sup>3</sup> Rather than trying to purchase tobacco from retailers, youth often rely on **social sources**—most of whom are **between the ages of 18-21**.<sup>4</sup> The Institute of Medicine (IOM) has concluded that raising the MLA will remove this critical source of tobacco, thereby delaying or preventing smoking initiation—and starting later means fewer addicted, long-term smokers.<sup>5</sup>

Further, the **public health benefits of Tobacco 21 (T21) policies go beyond the issue of access to tobacco products**. Widespread implementation of T21 will curb tobacco marketing that targets young adults. Marketing will have to shift to the legal, older demographic, and thus be less attractive to minors, who commonly seek to emulate young adults (ages 18-21).<sup>6</sup>

**Raising the MLA curtails youth access to tobacco products, whether that access is through a retailer or social source.**

Social sources are the result, not just a cause, of youth tobacco use—and reducing social sources of tobacco is a legitimate reason to increase the MLA. When youth cannot get tobacco directly from retailers complying with youth access laws, they rely on social sources, 90 percent of whom are under 21 years old.<sup>8</sup> The IOM and others have concluded that raising the MLA will

<p>Health (PATH) study sponsored by the [FDA] confirm that a significant majority of underage youth relies on social sources for cigarettes and other tobacco products. Generally, social sources include adult-aged older siblings, friends, parents and even strangers.”<sup>7</sup></p>	<p>effectively remove this critical source of tobacco thereby delaying (or preventing) smoking initiation—and starting later means fewer addicted, long-term smokers.<sup>9</sup> Further, communities that have passed Tobacco 21 ordinances realize a greater decline in youth smoking (under 18) than communities that have not.<sup>10</sup></p>
<p>“In order to reduce underage tobacco usage, social sources must be educated on the importance of not supplying tobacco to youth.”<sup>11</sup></p>	<p>Tobacco companies <b>commonly and disingenuously tout community education strategies</b> in lieu of policy solutions that would interfere with their ability to market their addictive and deadly products. Focusing on education of individuals rather than the impact of industry marketing is a thinly veiled attempt to deflect responsibility for the industry’s successful recruitment of youth “replacement” tobacco users through its marketing tactics.<sup>12</sup></p> <p>The Surgeon General has concluded that tobacco marketing causes youth tobacco use;<sup>13</sup> and the younger one starts to use, the more addicted one becomes and the longer one typically uses tobacco products.<sup>14</sup> Education campaigns are an important component of comprehensive tobacco control but are not sufficient by themselves to prevent and reduce youth tobacco use. Local tobacco regulations are necessary to combat Industry marketing campaigns and are included in national recommendations for comprehensive tobacco control.<sup>15</sup></p>
<p><b>C. Raising the MLA restricts personal liberty and individual choice.</b></p>	<p><b>There is no “right” to sell or use tobacco products at any age<sup>16</sup> and addiction, not a sales restriction, deprives individuals of choice.</b></p>
<p>“Raising the legal age to purchase tobacco will deprive legal-age adults from deciding for themselves what legal products they choose to purchase and use. Personal liberty and freedom are being restricted... Young adults have the liberty to vote, serve in the military, take out loans to pay for college tuition, get married and divorced, buy lottery tickets, and are required to purchase health insurance. Most importantly, 18, 19 and 20 year olds have the right to make decisions about themselves, including the right to refuse lifesaving medical decisions.”<sup>17</sup></p>	<p>Scientific evidence does not support the sale of highly addictive products to 18-year-olds: The brain continues to develop until age 25, particularly in ways that affect impulsivity, addiction, and decision-making.<sup>18</sup> In fact, nicotine addiction (which can develop at low levels of exposure, well before established daily smoking<sup>19</sup>) causes three out of four young smokers to continue smoking into adulthood, even if they intended to quit after a few years.<sup>20</sup> Truly, it is the tobacco industry that deprives users of their “liberty” by recruiting adolescents to use their addictive and deadly products.</p> <p>Notably, Tobacco 21 policies have broad public support, including that of the majority of smokers.<sup>21</sup></p>

November 2016. All rights reserved. Public Health and Tobacco Policy Center

*Disclaimer: This work provides educational materials and research support for policy initiatives. The legal information provided does not constitute and cannot be relied upon as legal advice.*

<sup>1</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, RAISING THE LEGAL AGE TO PURCHASE TOBACCO PRODUCTS, *available at* <http://www.tobaccoordinances.info/> (last visited Aug 5, 2016).

<sup>2</sup> Diane S. Burrows, R. J. Reynolds Tobacco Company, *Young Adult Smokers: Strategies and Opportunities 2* (1984), *available at* <http://rjrtdocs.com/> (acknowledging that at the time only 31 percent of smokers begin after the age of 18, and concluding that “younger adults are the only source of replacement smokers...If younger adults turn away from smoking, the industry must decline, just as a population which does not give birth will eventually dwindle.”); *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 2748 (D.D.C. 2006) (concluding “[f]rom the 1950s to the present [the tobacco industry has] intentionally marketed to young people under the age of twenty-one in order to recruit ‘replacement smokers’ to ensure the economic future of the tobacco industry.”); U.S. DEP'T OF HEALTH & HUMAN SERVS, OFFICE OF THE SURGEON GENERAL, PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 165 (2012) [hereinafter 2012 SURGEON GENERAL REPORT].

<sup>3</sup> CAMPAIGN FOR TOBACCO FREE KIDS, INCREASING THE MINIMUM LEGAL SALE AGE FOR TOBACCO PRODUCTS TO 21, 1 (2015).

<sup>4</sup> *Id.*

<sup>5</sup> Jonathan P. Winickoff et al., *Retail impact of raising tobacco sales age to 21 years*, 104 AM. J. PUBLIC HEALTH e18, e18 (2014); COMMITTEE ON THE PUBLIC HEALTH IMPLICATIONS OF RAISING THE MINIMUM AGE FOR PURCHASING TOBACCO PRODUCTS, BOARD ON POPULATION HEALTH AND PUBLIC HEALTH PRACTICE & INSTITUTE OF MEDICINE, PUBLIC HEALTH IMPLICATIONS OF RAISING THE MINIMUM AGE OF LEGAL ACCESS TO TOBACCO PRODUCTS 2–21 (Richard J. Bonnie, Kathleen Stratton, & Leslie Y. Kwan eds., 2015) [hereinafter IOM REPORT], *available at* <http://www.nap.edu/catalog/18997> (last visited Jul 28, 2016); Brian A. King et al., *Attitudes Toward Raising the Minimum Age of Sale for Tobacco Among U.S. Adults*, 49 AM. J. PREV. MED. 583, 583 (2015).

<sup>6</sup> GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS, 120 (1994), *available at* <http://www.nap.edu/catalog/4757> (last visited Aug 31, 2016).

<sup>7</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, *supra* note 1.

<sup>8</sup> CAMPAIGN FOR TOBACCO FREE KIDS, *supra* note 3, at 1.

<sup>9</sup> *See supra* note 5.

<sup>10</sup> Shari Kessel Schneider et al., *Community reductions in youth smoking after raising the minimum tobacco sales age to 21*, 25 TOB. CONTROL 355, 355 (2016).

<sup>11</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, WHAT IS A SOCIAL SOURCE?, *available at* [www.tobaccoordinances.info/](http://www.tobaccoordinances.info/) (last visited Aug 5, 2016).

<sup>12</sup> Tushar Singh et al., *Tobacco Use among Middle and High School Students — United States, 2011–2015*, 65 MORB. MORTAL. WKLY. REP. 361, 363 (2016) (reporting that 4.7 million middle and high school students were current tobacco users in 2015); Kurt M. Ribisl, *Social sources of cigarettes for youth: broadening the research base*, 12 TOB. CONTROL 115, 115 (2003) (explaining that “tobacco companies and retailer organisations appear to welcome this shift [to social] sources because it deflects attention from tobacco companies marketing to youth or stores from profiting by selling cigarettes to youth”).

<sup>13</sup> 2012 SURGEON GENERAL REPORT, *supra* note 2, at 602 (concluding “[t]he evidence is sufficient to conclude that there is a causal relationship between advertising and promotional efforts of the tobacco companies and the initiation and progression of tobacco use among young people.”)

<sup>14</sup> IOM REPORT, *supra* note 5 at 54, 113.

<sup>15</sup> BRIAN KING, TERRY PECHACEK & PETER MARIOLIS, BEST PRACTICES FOR COMPREHENSIVE TOBACCO CONTROL PROGRAMS (2014), *available at* [www.cdc.gov/tobacco/stateandcommunity/best\\_practices](http://www.cdc.gov/tobacco/stateandcommunity/best_practices).

<sup>16</sup> *See generally* SAMANTHA K. GRAFF, TOBACCO CONTROL LEGAL CONSORTIUM, THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE 1-2 (2008); *see also* CounterTobacco, *Rebutting Industry Arguments against POS*, *available at* <http://countertobacco.org/resources-tools/evidence-summaries/rebutting-economic-arguments-against-pos/> (last visited Aug 9, 2016).

<sup>17</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, *supra* note 1.

<sup>18</sup> IOM REPORT, *supra* note 5, at 72; Winickoff et al., *supra* note 5, at e18.

<sup>19</sup> IOM REPORT, *supra* note 5 at 2–20.

<sup>20</sup> CAMPAIGN FOR TOBACCO FREE KIDS, INCREASING THE MINIMUM LEGAL SALE AGE FOR TOBACCO PRODUCTS TO 21, 2 (2015) (citing 2012 SURGEON GENERAL'S REPORT).

<sup>21</sup> King et al., *supra* note 5 at 583; Jonathan P. Winickoff et al., *Public support for raising the age of sale for tobacco to 21 in the United States*, 25 TOB. CONTROL 284, 286 (2016).



## Tobacco Industry “Solutions” Are Ineffective

The Surgeon General has concluded that tobacco marketing causes youth tobacco use and research shows tobacco retail marketing undermines quit attempts by current users.<sup>1</sup> Tobacco companies and their allies oppose rational and effective public policies that interfere with the industry’s strategy to recruit new users to its unreasonably dangerous and deadly products.<sup>2</sup> Specifically, tobacco companies and their allies oppose local policy solutions that have been shown to effectively curb tobacco use and instead promote “alternative solutions” that deflect industry responsibility for peddling an addictive, inherently deadly product and place the burden of resisting powerful marketing on individuals. Here are ways to counter tobacco companies’ promotion of “alternative”—and ineffective—policy solutions.

### “Alternative Solutions”<sup>3</sup>

### Countering Industry Opposition to Effective Policy Solutions

A. Education	<b>Education alone is not sufficient to reduce tobacco use. Local governments must reduce exposure to powerful industry marketing proven to cause youth initiation.</b>
“Educate communities on the role of...tobacco consumption”	Educational campaigns are one part of comprehensive tobacco control programs, but are not sufficient on their own to prevent and reduce youth tobacco use. <sup>4</sup> <b>Local tobacco regulations are necessary</b> to combat industry marketing campaigns and are recommended for comprehensive tobacco control. <sup>5</sup> The Surgeon General has concluded that <b>tobacco marketing causes youth tobacco use</b> ; <sup>6</sup> and the younger a person starts to use tobacco, the more addicted that person becomes and the longer he or she typically uses tobacco products. <sup>7</sup> Tobacco companies <b>often disingenuously promote community education strategies</b> in lieu of policy solutions that would interfere with their ability to market their addictive and deadly products. Focusing on education rather than the impact of industry marketing is a thinly veiled attempt to deflect responsibility for Industry’s successful recruitment of young tobacco users.
“Increase community awareness about youth tobacco usage”	
“Fund programs to educate youth on tobacco prevention”	
B. Retailer Compliance	<b>Retailer compliance does not reduce youth interest in tobacco products. Rather, reducing exposure to tobacco marketing will achieve reduced youth interest and product appeal.</b>
“Post ‘We don’t sell to minors’ signage in convenience stores”	Tobacco companies focus on the issue of retailer compliance with regulations to distract from the fact that the Surgeon General has concluded that tobacco marketing actually causes youth tobacco use. Youth tobacco use remains a serious public health problem <b>despite high retailer compliance</b> with minimum legal sales age laws, because the tobacco industry modeled their business around recruiting new tobacco users to replace those who quit or die from the products’ effects. <sup>8</sup> The great majority of these “replacement” users are youth. <sup>9</sup> Where there is high compliance with the law, youth rely on social sources. <sup>10</sup> Comprehensive tobacco control—including local ordinances that <b>reduce youth exposure to retail tobacco marketing and access to tobacco products</b> —is a reasonable, necessary, and <b>effective</b> way to prevent youth tobacco use. <sup>11</sup>
“Ensure all stores are checking ID”	
“Increase dialogue between police, community leaders, and retailers”	
“Work with problem properties to find solutions”	

Tobacco companies know that “demand for cigarettes by underage youth” is caused by industry marketing tactics and cannot be reduced through Industry-proposed “methods like parental communication regarding smoking, school-based tobacco use prevention programs, and media campaigns.” Local governments also know this—and that’s why they are increasingly implementing evidence-based, high-impact local ordinances to regulate tobacco sales and reduce youth exposure to tobacco marketing.

For more resources on specific policies and model ordinances, visit [www.tobaccopolicycenter.org](http://www.tobaccopolicycenter.org).

November 2016. All rights reserved. Public Health and Tobacco Policy Center

*Disclaimer: This work provides educational materials and research support for policy initiatives. The legal information provided does not constitute and cannot be relied upon as legal advice.*

<sup>1</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS, OFFICE OF THE SURGEON GENERAL, PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 8, 487, 508 (2012) [hereinafter 2012 SURGEON GENERAL REPORT; OBJ Carter, BW Mills & RJ Donovan, *The effect of retail cigarette pack displays on unplanned purchases: results from immediate postpurchase interviews*, 18 TOB. CONTROL 218, 220 (2009); Ellen C. Feighery et al., *Cigarette advertising and promotional strategies in retail outlets: results of a statewide survey in California*, 10 TOB. CONTROL, 184, 184 (2001); Melanie Wakefield, Daniella Germain & Lisa Henriksen, *The effect of retail cigarette pack displays on impulse purchase*, 103 ADDICT. ABINGDON ENGL. 322, 325 (2008).

<sup>2</sup> BRIAN KING, TERRY PECHACEK & PETER MARIOLIS, BEST PRACTICES FOR COMPREHENSIVE TOBACCO CONTROL PROGRAMS 19 (2014) (reporting that one-third of youth experimentation can be attributed to tobacco industry's aggressive marketing and advertising practices), *available at* [http://www.cdc.gov/tobacco/stateandcommunity/best\\_practices/pdfs/2014/comprehensive.pdf](http://www.cdc.gov/tobacco/stateandcommunity/best_practices/pdfs/2014/comprehensive.pdf).

<sup>3</sup> NAT'L ASSOC'N OF TOBACCO OUTLETS, ALTERNATIVE SOLUTIONS TO LOCAL ISSUES ORDINANCES (suggesting industry/retailer arguments against unspecified local tobacco ordinances, but inferred from online context to include point-of-sale policies (such as display restrictions, package size restrictions, and flavor restrictions) and ordinances that raise the minimum legal age for purchasing tobacco products), *available at* <http://www.tobaccoordinances.info/> (last visited Aug 5, 2016).

<sup>4</sup> L. F. Stead & T. Lancaster, *A systematic review of interventions for preventing tobacco sales to minors*, 9 TOB. CONTROL 169, 169 (2000) (concluding that multi-component interventions and/or enforcement were more successful than retailer education alone at achieving compliance and preventing tobacco sales to youth).

<sup>5</sup> KING, PECHACEK, AND MARIOLIS, *supra* note 2.

<sup>6</sup> 2012 SURGEON GENERAL REPORT, *supra* note 1, at 602 (concluding that “[t]he evidence is sufficient to conclude that there is a causal relationship between advertising and promotional efforts of the tobacco companies and the initiation and progression of tobacco use among young people.”).

<sup>7</sup> Jonathan P. Winickoff et al., *Retail impact of raising tobacco sales age to 21 years*, 104 AM. J. PUBLIC HEALTH e18, e18 (2014); COMMITTEE ON THE PUBLIC HEALTH IMPLICATIONS OF RAISING THE MINIMUM AGE FOR PURCHASING TOBACCO PRODUCTS, BOARD ON POPULATION HEALTH AND PUBLIC HEALTH PRACTICE & INSTITUTE OF MEDICINE, PUBLIC HEALTH IMPLICATIONS OF RAISING THE MINIMUM AGE OF LEGAL ACCESS TO TOBACCO PRODUCTS 2–21 (Richard J. Bonnie, Kathleen Stratton, & Leslie Y. Kwan eds., 2015) [hereinafter IOM REPORT], *available at* <http://www.nap.edu/catalog/18997> (last visited Jul 28, 2016); Brian A. King et al., *Attitudes Toward Raising the Minimum Age of Sale for Tobacco Among U.S. Adults*, 49 AM. J. PREV. MED. 583, 583 (2015).

<sup>8</sup> DIANE S. BURROWS, R. J. REYNOLDS TOBACCO COMPANY, YOUNG ADULT SMOKERS: STRATEGIES AND OPPORTUNITIES 2 (1984) (discussing youth smoking, acknowledging that at the time only 31 percent of smokers begin after the age of 18, and concluding, therefore, that “younger adults are the only source of replacement smokers...If younger adults turn away from smoking, the Industry must decline, just as a population which does not give birth will eventually dwindle.”), *available at* <http://tobaccodocuments.org/rjr/508783540-3629.html>; U.S. v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 2748 (D.D.C. 2006) (concluding “[f]rom the 1950s to the present [the tobacco industry has] intentionally marketed to young people under the age of twenty-one in order to recruit ‘replacement smokers’ to ensure the economic future of the tobacco industry.”)

<sup>9</sup> 2012 SURGEON GENERAL REPORT, *supra* note 1 at 165..

<sup>10</sup> CAMPAIGN FOR TOBACCO FREE KIDS, INCREASING THE MINIMUM LEGAL SALE AGE FOR TOBACCO PRODUCTS TO 21, 1 (2015).

<sup>11</sup> 2012 SURGEON GENERAL'S REPORT, *supra* note 1, at i, 528; KING, PECHACEK, AND MARIOLIS, *supra* note 2, at 6, 9.

