



New York State Point-of-Sale Summit Recap

On October 21, the Center for Public Health and Tobacco Policy (CPHTP) held a Point-of-Sale (POS) Summit in Albany, New York. The event featured prominent experts from across the U.S. and Canada on issues related to tobacco sales and marketing at retail establishments. Attendees of the event, primarily New York State Tobacco Control Program contractors, New York Department of Health staff, and other tobacco control advocates, received practical information from legal experts, academics, and experienced practitioners on combating POS tobacco marketing and reducing tobacco retailer density.

After brief introductions from Micah Berman, Director of the CPHTP, and Jeff Willett, Director of the New York State Tobacco Control Program, the day began with a panel on POS legal issues. The first presenter on the panel was Dr. Jess Alderman from the School of Public Health and Health Professions at the University of Buffalo, SUNY. Dr. Alderman educated the audience on First Amendment commercial speech law as applied to tobacco product display restrictions. Tom Merrill from the New York City Department of Health and Mental Hygiene provided information on two ongoing lawsuits against New York City. One involves a regulation requiring tobacco retailers to display graphic health warnings, and the other involves a law restricting the sale of flavored tobacco products. Finally, David Schaibley from the Tobacco Control Legal Consortium in St.

Paul, Minnesota discussed the new law granting the U.S. Food and Drug Administration the authority to regulate tobacco products and the ongoing lawsuit challenging parts of the law.



From left: Tom Merrill, David Schaibley, Jess Alderman

Following the legal panel, the audience heard from two tobacco control advocates who have had much success limiting POS tobacco product displays and tobacco retailer density. Alyonik Hrushow from the San Francisco Department of Public Health spoke about the successful efforts in San Francisco to prohibit sales of tobacco products in pharmacies. Cynthia Callard from Physicians for a Smoke-Free Canada spoke about the experience of Canadian provinces enacting laws that prohibit tobacco product displays in retail environments.

After lunch, Dr. Kurt Ribisl from the School of Global Public Health at the University of

North Carolina at Chapel Hill highlighted research studies about the importance of POS issues to tobacco control efforts and the dramatic impact of POS advertising and promotion on youth. Dr. Ribisl discussed tobacco industry documents demonstrating the importance of POS advertising and product displays to maintaining profits, and he provided data on the increase in tobacco industry expenditures at the POS. Additionally, he explained how tobacco companies use contractual agreements to induce retailers to display their products and advertisements in prominent locations.

Rounding out the event, La Tanisha Wright from the National African American Tobacco Prevention Network gave a detailed account of how tobacco companies market to African Americans. She spoke of her own experiences working to manage contracts with retailers for Brown & Williamson. She provided insights on how the tobacco companies have extensively researched the African American community in order to target their marketing. She also gave a thorough overview of how tobacco company contracts are designed.

Feedback about the speaker presentations was overwhelmingly positive, and we would like to thank each and every one of the speakers and attendees for making the Point-of-Sale Summit such a success!

Inside this issue:

- New Study Analyzes Societal Cost of Smoking by State** 2
- NYC Plans to Prohibit Smoking in Parks and Public Beaches** 2
- Tobacco Industry Behind Ad Campaign Against Australian Plain Packaging Law** 3
- Scottish Law Restricting Tobacco Product Displays Upheld** 3
- Update: San Francisco Now Prohibits Tobacco Sales in All Stores with Pharmacies** 4

Center Hosts Presentation on Hot Topics in Tobacco Control

On October 7, the Center for Public Health and Tobacco Policy (CPHTP) hosted a presentation entitled *Hot Topics in Tobacco Control* in the Cherry Room at New England Law | Boston. Micah Berman, Director of the CPHTP, gave a brief overview of the CPHTP's recent work on tobacco product display restrictions and tobacco retailer licensing. D.J. Wilson, Tobacco Control Director of the Massachusetts Municipal Association and a graduate of New England Law, gave a concise summary of the history of tobacco control laws in the Boston area and shared his experiences working to pass laws prohibiting tobacco sales at pharmacies. Christopher Banthin, Senior Staff Attorney at the Public Health Advocacy Institute at Northeastern University School of Law, spoke of his efforts to help public housing authorities in Massachusetts adopt smoke-free policies.

The event was an excellent opportunity for New England Law | Boston students and faculty to learn more about the work of the CPHTP and to hear how public interest attorneys are using the law to help reduce tobacco use. We look forward to similar events to share the work of the CPHTP with the New England Law | Boston community.

New Study Analyzes Societal Cost of Smoking by State

The American Lung Association recently released a study that calculates the ultimate societal cost of smoking for each state as well as for the country as a whole. The study serves as a warning to states that cuts to tobacco prevention programs will have long-term consequences. Conducted by Penn State University, the study used a societal prospective to analyze the benefits of tobacco cessation on workplace productivity, medical costs, and premature deaths. It also factored in the cost of cessation, including the direct cost of counseling, medication, nicotine replacement, as well as the indirect cost of lost taxes on cigarettes from reduced smoking rates.

The State of New York has just over three million smokers, including visitors. Smoking costs New York over \$20 billion per year in lost productivity and health costs. Cigarettes cost an average of \$7.89 per pack in New York, but the total cost to society is much higher. Each pack leads to \$18.97 in

productivity losses, mostly from premature death, but also from lost workplace productivity. Each pack also produces an additional \$17.28 in medical expenses, including nursing care, medication, ambulatory care, and hospital care.

A full course of treatment and counseling with Varenicline, one of the most effective medications for tobacco cessation, costs \$440, and is effective in one-fourth of cases. Even so, this treatment provides a net savings of over \$300 million a year for the state and offers a benefit of almost three dollars for every dollar spent.

A recent article in the [North New Jersey News](#) illustrates the costs to society in a concrete manner. The smoking rate for Medicaid recipients is 60% higher than for the general public, and Medicaid costs are paid directly by taxpayers. Medicaid recipients are sometimes dissuaded from seeking treatment for tobacco addiction by a system that requires co-pays and referrals.

This is an important time to look at such data, as so many states are considering cutting tobacco prevention programs or have already done so. For example, New Jersey is cutting its tobacco prevention funding from \$7 million to zero and New York recently cut its highly acclaimed smoking prevention program by \$25 million, almost a fourth of the budget. Only one state, North Dakota, funds its cessation program to the full amount recommended by the Centers for Disease Control. These cuts in prevention programs are correlated with the stalled nationwide smoking rate. Two-thirds of smokers would like to quit, but it often takes several quit attempts to do so and it is important that resources be available to help. This study demonstrates that smoking cessation is an investment in our future, and one that pays for itself in the long run.

[To read more about the study, please click here.](#)

NYC Plans to Prohibit Smoking in Parks and Public Beaches

On September 15, 2010, New York City Mayor Michael Bloomberg and various city council members announced a plan to expand New York City's Smoke Free Air Act to prohibit smoking at parks and public beaches. The measure would be one of the most ambitious outdoor smoke-free efforts in the nation, as it would affect over 1,700 city parks, 29,000 acres of parkland, and over 14 miles of city beaches. The proposal would also prohibit smoking on public boardwalks, marinas, and pedestrian plazas. This means smoking would not be allowed in such popular tourist attractions as the Coney Island boardwalk, Central Park, Times Square, and the theater district. Proponents of the measure aim to significantly reduce the levels of secondhand smoke, improve outdoor air quality, and reduce cigarette litter. Sponsors of the measure also hope

that it will persuade some smokers to quit altogether.

Mayor Bloomberg cited recent studies showing that a person sitting within three feet of a smoker outdoors can be exposed to levels of secondhand smoke similar to levels caused by indoor smoking. In addition, 57% of New York residents have elevated levels of cotinine, a byproduct of nicotine that is used as an indicator of how much tobacco smoke an individual is exposed to. "The science is clear," said the Mayor. "Prolonged exposure to secondhand smoke – whether you're indoors or out – hurts your health. Today, we're doing something about it."

The proposed law would place the city's parks department in charge of enforce-



ment. It would have the power to cite violators with quality-of-life summonses, a ticket issued for minor offenses like panhandling or public urination. However, the proposal must be reviewed in public hearings before it can be adopted by the City Council. Additionally, certain provisions still need finalizing, including the amount of the fine, which is expected to be approximately \$50.

Tobacco Industry Behind Ad Campaign Against Australian Plain Packaging Law

Last April, the Australian government announced plans to implement a requirement that all cigarettes be sold in plain packaging by July 2012. The plain brown paper packages would carry full color graphic health warnings, and would note the cigarette brand in standardized, small black type. The plan is designed to reduce the appeal of cigarettes by eliminating cleverly designed, full color packaging meant to attract consumers and entice young people to begin using tobacco. The packaging plan is the first of its kind in the world and poses a major threat to tobacco company sales and profits.

Television ads against plain packaging began appearing on Australian television claiming plain packaging “won’t work so why do it.” Ostensibly, these ads were on behalf of the Alliance of Australian Retailers. However the ads failed to disclose that tobacco giant Philip Morris provided the funding behind the campaign.

Helen Keleher, president of the Public Health Association of Australia, said the ads are a “back door way of advertising [cigarettes on television]” which is unlawful

in Australia. According to documents leaked to The Sydney Morning Herald, nearly \$9.5 million dollars will have been spent on the campaign as of the end of September 2010.

Tobacco makers are expected to directly challenge the new regulations as a violation of international intellectual property laws. A spokesman for Imperial Tobacco said plain packaging would “infringe the intellectual property rights in which Imperial and its shareholders have invested.”

The Institute of Public Affairs (IPA), a privately funded Australian think tank, said that a plain packaging law could open the government to liability. The IPA claims the new regulations could make the Australian government liable for compensation claims of approximately \$3 billion a year. The IPA based its assertion on information received under freedom of information requests from Intellectual Property Australia, a government agency which administers patents and trademarks law. In the documents, government employees discussed the potential for liability under free trade agreements and intellectual property laws.

The Australian government said the IPA statements were erroneous, and that the released documents showed only that the government had carefully considered all of the potential legal issues. It remained confident that its plan was legal and would not result in liability to the tobacco companies.

Public health group Action on Smoking and Health revealed that the IPA is partially funded by tobacco companies and frequently issues positions consistent with the tobacco industry’s interests.

Whether plain packaging breaches international trade regulations for World Trade Organization (WTO) members under the Trade-Related Aspects of Intellectual Property (TRIPS) has yet to be determined. However, countries that wish to implement plain tobacco packaging may rely on a study published by the Melbourne Law School entitled *Australia’s Move to the Plain Packaging of Cigarettes and its WTO Compatibility*. It concludes, “[c]oncerns about plain packaging violating the TRIPS agreement should not prevent WTO members from placing plain packaging firmly on the public health agenda.”

Scottish Law Restricting Tobacco Product Displays Upheld

The Government of Scotland successfully thwarted the first legal challenge to the retail cigarette display and vending machine ban enacted by the Scottish Parliament in January of 2010. Barring successful challenges on other grounds, the bans are set to go into effect in 2011 and will eliminate visible cigarette displays in all tobacco retailers by 2013.

Imperial Tobacco, Ltd., which holds a 58% market share of all tobacco sales in Great Britain, brought a judicial review that sought nullification of the law because it was outside the area within which the Scottish Parliament is authorized to legislate. The Scottish Parliament was established in 1998 by an act of the United Kingdom (UK) Parliament. The lawsuit claimed that only the UK

Parliament can enact legislation concerning freedom of trade.

The ruling upholding the new law was handed down from Scotland’s highest civil court, the Court of Sessions, by Lord Bracadale. The Court concluded that the “purpose of . . . the Act was to reduce smoking of tobacco among children and young persons and thereby improve public health in the long term,” and that health-related laws were within the jurisdiction of the Scottish Parliament.

Though this first hurdle to the law has been cleared, Imperial and its vending machine subsidiary, Sinclair Collis, are set to file a separate challenge to the vending machine ban. In addition, Imperial is likely to chal-

lenge forthcoming Scottish government regulations detailing the precise rules for retail cigarette displays. Imperial is also challenging a similar display ban in the United Kingdom, which is scheduled to go into effect in 2011.

Scottish Health Secretary Niola Sturgeon said, “[b]anning the display of tobacco products in shops will help to discourage a future generation of smokers.” Currently 15,000 children start smoking in Scotland each year.

Imperial reported profits of over \$1.5 billion dollars in April, 2010. The legal challenges by tobacco companies to such laws demonstrate that the laws are a significant threat to tobacco company earnings.

Update: San Francisco Now Prohibits Tobacco Sales in All Stores with Pharmacies

In October 2008, San Francisco enacted an ordinance prohibiting the sale of tobacco at pharmacies, except those located in big box stores and grocery stores such as Safeway and Costco. The ordinance was enacted in order to restrict pharmacies, which are in the business of promoting overall health, from selling harmful tobacco products.

Walgreens responded by filing a lawsuit challenging the ordinance's validity, claiming that allowing the exception for big box stores and grocery stores violated equal protection clauses of the state and federal constitutions. Under the Equal Protection Clause, it is unlawful for a state to deny "to any person

within its jurisdiction the equal protection of the laws." In June 2010, the First District Court of Appeal agreed with Walgreens that it had a potentially valid argument and that it should be permitted to proceed with its claim. The Court of Appeals hinted that if Walgreens was ultimately successful at trial, the city would either have to bar the enforcement of the ordinance or eliminate the exceptions.

The San Francisco Board of Supervisors swiftly reacted to the Court's ruling. In September, by a 7-3 vote, the board approved a measure to expand the city's ban on tobacco sales at stores with pharmacies to

include grocery stores and big box stores. While it was returned without the mayor's signature, the bill became effective nevertheless.

Enactment of this new ordinance is a huge win for public health advocates. It also sends a strong message to other communities that such measures are feasible. As Alyonik Hrushow of the San Francisco Department of Public Health discussed at the POS Summit, other cities can avoid San Francisco's legal headache by ensuring that their pharmacy ordinances do not contain exceptions and apply equally to all pharmacies.

CPHTP's Point-of-Sale Technical Reports Now Online

- [Tobacco Product Display Bans \(PDF\)](#)
- [Tobacco Retail Licensing \(PDF\)](#)

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The Center for Public Health and Tobacco Policy (Center) is a new resource for the New York tobacco control community. The Center is funded by the New York State Department of Health and will be working with the New York State Tobacco Control Program and its contractors to develop and support policy initiatives that will reduce tobacco-related morbidity and mortality in New York.

The Center is located at New England Law | Boston and is project of the Center for Law and Social Responsibility. The Center is also affiliated with the Tobacco Control Legal Consortium.

The Center will work with tobacco control advocates in New York to support the adoption of evidence-based policies that reduce the availability of tobacco products, protect non-smokers from secondhand smoke, and minimize tobacco advertising and promotion.

Please Note: The Center is funded to provide assistance to the New York State Tobacco Control Program and its contractors. At this time, the Center is unable to provide assistance to individuals or groups who are not funded by the New York State Tobacco Control Program.