



Tobacco Price Promotion: Local Regulation of Discount Coupons and Certain Value-Added Sales

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Introduction

The price of tobacco products has a significant impact on tobacco consumption. The evidence clearly shows that people smoke less when cigarette prices rise. The tobacco industry is well aware of the inverse relationship between price and the consumption of its products and has invested billions of dollars into strategies to manipulate tobacco product prices to their advantage. These strategies range from simple discount coupons to intricate contracts with tobacco retailers and wholesalers. All of these price manipulation strategies serve to make tobacco products more attractive to new customers (i.e., youth) and existing price-sensitive consumers.

State and local governments seeking to reduce tobacco use can also use the connection between tobacco prices and tobacco use to improve the health of their citizens. State and local policies can limit or prohibit price manipulation strategies used by the tobacco industry, or they can seek to more directly increase the price of tobacco products. The imposition of high taxes on tobacco products has been one of the most successful tobacco control strategies. New York State, in particular, has used this method to its advantage by imposing the highest excise tax in the nation on cigarettes (\$4.35 per pack in 2012). Moreover, the state has been working to curtail the sale of untaxed cigarettes by Native American retailers. New York has also imposed a minimum price on cigarettes through its Cigarette Marketing Standards Act, which prohibits certain cigarette discounts.

This report intends to focus on combating two strategies used by the tobacco industry to manipulate prices— discount coupons and

value-added sales (e.g., multi-pack discounts). It contains a brief discussion of the relationship between price and tobacco consumption, existing price regulation in New York State, and industry use of coupons and value-added sales to reduce the price of cigarettes and other tobacco products. A model policy that can be adapted to suit the needs of a particular jurisdiction is included at the end of this report to assist local policymakers in crafting their own laws. This incremental price regulation, when incorporated into a comprehensive tobacco control program, can be a powerful tool for local governments seeking to reduce tobacco use in their communities.

I. Relationship Between Price and Tobacco Consumption

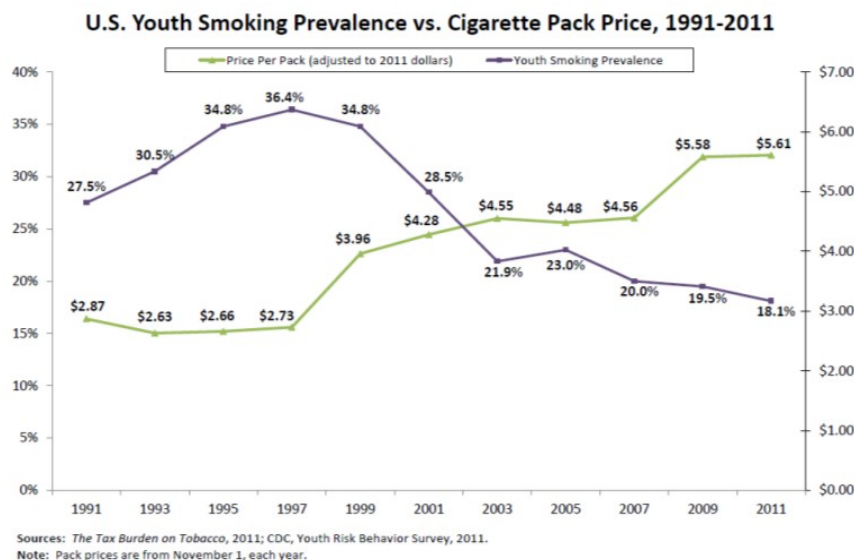
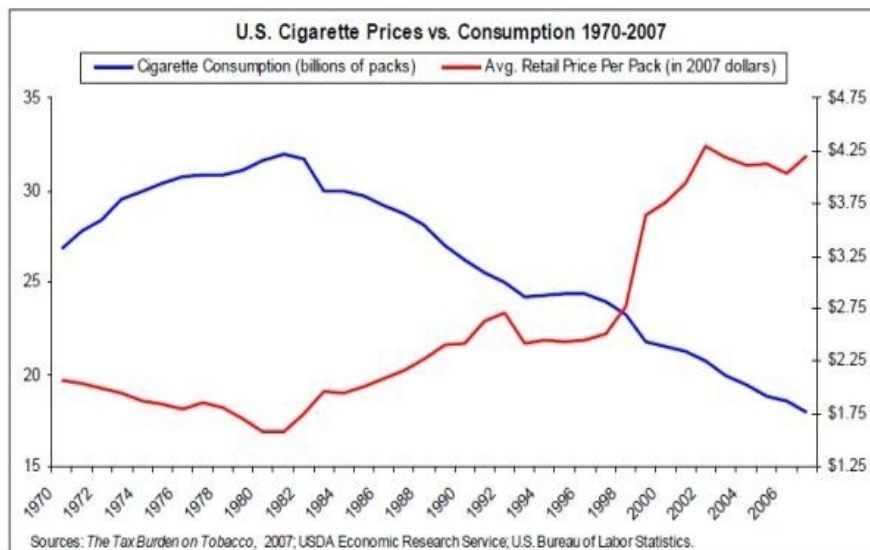
Numerous studies demonstrate an inverse relationship between the price of tobacco products and tobacco consumption.¹ Increasing the price of cigarettes prevents young people from initiating smoking and, despite the addictiveness of nicotine, reduces the number of cigarettes consumed by people who smoke, and increases cessation.² In fact, studies show that a 10% increase in the price of cigarettes causes a 3-5% decrease in purchases among adult consumers (and youth may be even more price-sensitive).³ Given this predictable result, price regulation of tobacco products is an essential policy intervention to reduce tobacco consumption and improve public health.

Increasing the price of tobacco products is not as straightforward a proposition as one might think. The tried- and-true method for

increasing the price of tobacco products is the imposition of excise taxes (at the federal, state and local levels). However, because tobacco companies are attuned to the relationship between price and consumption, the industry has developed creative strategies to undermine the impact of those taxes.⁴ These strategies range from offering consumers coupons and multi-pack discounts to implementing complex contractual agreements with wholesalers and

retailers.⁵ The industry has aggressively and successfully used these strategies to reduce the price consumers pay for tobacco products at the point-of-sale, thereby boosting industry efforts to recruit “replacement smokers”⁶ (i.e., youth) and retain current customers despite rising taxes.⁷

The tobacco industry has prioritized price-discounting strategies in its marketing practices. In 2010, the most recent year for



Campaign for Tobacco Free Kids, *Raising Cigarette Taxes Reduces Smoking, Especially Among Kids (and the Cigarette Companies Know It)*

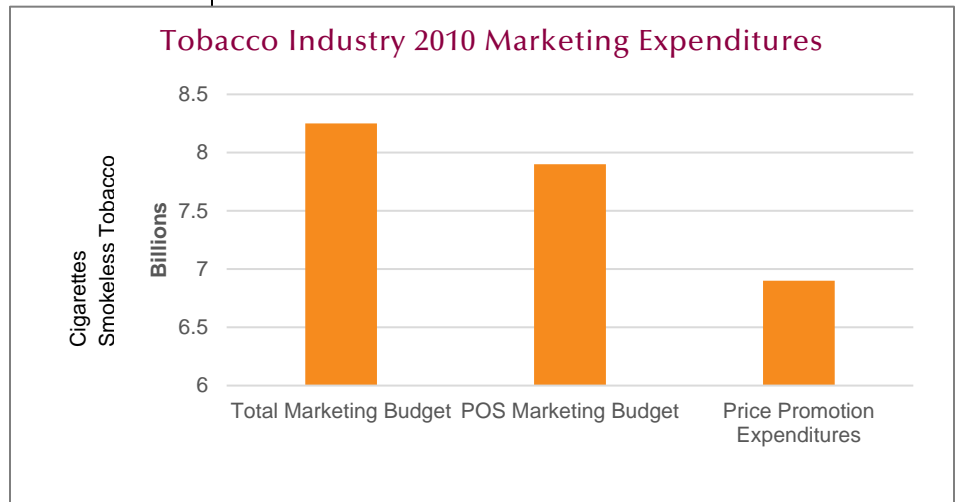
which data is available, tobacco companies spent more than \$6.72 billion on price discounting strategies for cigarettes.⁸ This accounted for more than 83% of the industry's overall marketing expenditures for cigarettes. Add to that more than \$173 million spent on price discounting strategies for smokeless tobacco products⁹ (39% of those products), and it is abundantly clear that the industry understands the value of reducing the prices of its products for consumers at the point-of-sale.

Price discounts are appealing to several distinct groups of tobacco users. Studies demonstrate that price appealing to young price-sensitive smokers."¹⁰ Price promotions are associated with youth progression from experimentation with cigarettes to regular smoking.¹¹ (In fact, making price discounts available to young people could be important for brand survival since brand preference appears to be solidified early in a person's smoking career.¹² Other populations that have been identified as price-sensitive are women and African Americans.¹³ Industry documents suggest that price-discounting strategies were designed with these specific populations in mind—and the evidence shows they have indeed been successful in increasing consumption among these groups.¹⁴

Existing Pricing Policies in New York State

New York State has imposed a high excise tax on cigarettes (the highest in the nation at

\$4.35 per pack¹⁵), and has addressed some of the discount mechanisms intended to undermine the effect of that tax through its Cigarette Marketing Standards Act



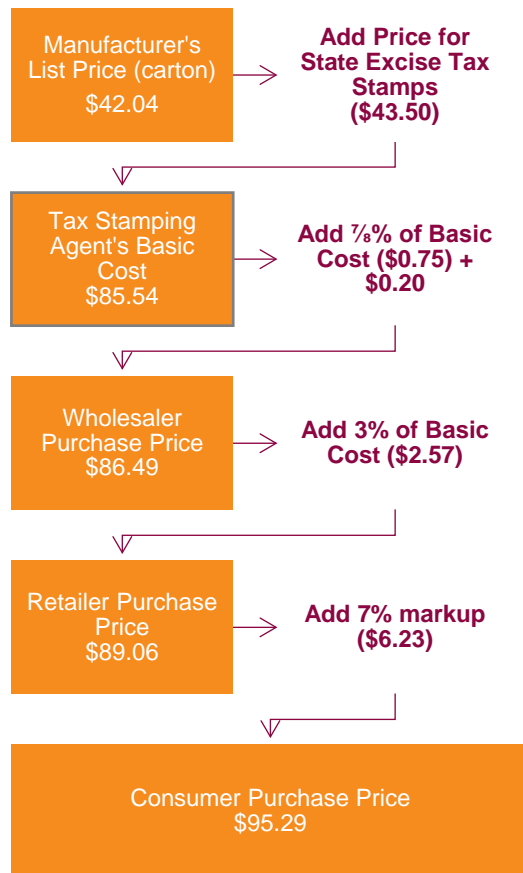
(CMSA).¹⁶ The CMSA establishes a minimum price for the sale of cigarettes, which is derived from a formula based on the invoice price (or “list price”) of the cigarettes purchased from the manufacturer.¹⁷ The law requires a minimum markup to be added at each level in the distribution chain (tax stamping agent to wholesaler to retailer).¹⁸

For example, if the list price for a carton of cigarettes is \$42.04, the agent’s “basic cost” will be \$85.54 (outside of New York City); that is, the list cost plus the cost for excise tax stamps purchased by the agent.¹⁹ The agent must sell that carton of cigarettes to a retailer for no less than \$89.06, and the retailer must sell it to a consumer for no less than \$95.29.²⁰

Additionally, the law prohibits the use of certain retailer or wholesaler price discounts (such as “buy-downs” and “master-type” programs)²¹ to factor into the formula (i.e., to reduce the minimum required price).²² Thus, the law prevents some methods employed by

tobacco companies to undermine the high state cigarette tax in New York.

N.Y. Minimum Price Law at Work



While the CMSA addresses some of the price-discounting strategies used by the industry, it may not be ultimately successful at maintaining high prices on tobacco products. For instance, the minimum markup required by the statute is less than the average free market markup of 18%.²³ Additionally, the law permits the use of various discounting methods, such as coupons and certain value-added sales.²⁴ Finally, the law only applies to cigarettes, and only to those discounts that bring the price below the statutory minimum price (rather than prohibiting all discounts).²⁵ New York State might benefit from directly regulating tobacco price discounting; or, in

the alternative, the State might strengthen its minimum price law by incorporating additional restrictions on price manipulation and increasing its required markup.

II. Coupon and Value-Added Discounts

There are two discount mechanisms likely familiar to the public: discount coupons and value-added sales (e.g., multi-pack discounts). In 2010, the industry spent more than \$314 million on discount coupons and value-added sales for cigarettes and smokeless tobacco products.²⁶ While only a fraction of the industry's spending on price-discounting strategies are spent on coupons and value-added sales, this expenditure nevertheless represents a significant investment by the industry.

Discount coupons and value-added sales are important because tobacco companies can use these strategies to target price-sensitive populations (e.g., individuals self-identified as price-sensitive through surveys or websites, consumers fitting specific demographic profiles or those living in particular geographic locations²⁷). By targeting consumers most likely to base a purchasing decision on price, premium tobacco brands can compete with other brands on price, while preserving their "high-end" image. This is a winning situation for tobacco companies, allowing them to maintain profits on regularly-priced products while both recruiting new, typically brand-conscious replacement smokers and ensuring existing price-sensitive customers maintain current usage rate.²⁸ The tobacco companies dedicate significant resources to planning and implementing strategies to use coupons and value-added sales.²⁹ For example, an internal Philip Morris memo from 1990

The Industry Strategy

“In order to lessen the impact of [a Federal Excise Tax] increase on consumers, PM-USA should...[i]ncrease coupon values and/or raise couponing levels on selected brands in both the full margin and price/value categories.”

--Philip Morris “FET Contingency Strategy” Memo, 1990

“The New Jersey state legislature recently voted to increase tobacco taxes in July, 1990. The attached media plan provides a means of distributing coupons to [Philip Morris] smokers in the state, on an ‘urgent’ timetable, in order to counter any ill effects of that tax increase.”

--Letter from Wanda Johnson, Media Supervisor at Leo Burnett U.S.A. to Sheila Spicehandler, Philip Morris, regarding the “New Jersey Tobacco Tax Plan,” July 11, 1990.

detailed a plan for reducing the impact of a proposed increase in the federal excise tax by increasing value-added sales and coupon values.³⁰ An RJR report from 1984 recommended strategically targeting multi-pack discounts to “younger adults” in “selected sites” (such as convenience stores and military exchanges) to instill brand loyalty as an “investment program.”³¹ It is therefore imperative that state and local communities act in a similarly strategic manner and carefully craft policies that can reduce or eliminate these discounting programs.

Existing regulation of coupons and value-added sales

The redemption of coupons for non- tobacco consumer goods has been regulated by many states.³² For example, about half the states regulate the use of coupons or other discounts in connection with the sale of alcohol.³³ New York prohibits certain sales of alcoholic beverages for a combined or discounted price (e.g., multiple drinks for the

price of one).³⁴ Many states prohibit discounted sales of milk, including sales associated with coupons that would reduce the price below a statutory minimum.³⁵ Massachusetts regulates manufacturer coupons on certain prescription drugs.³⁶

Thus, the regulation of price and discounting of consumer goods is not a new concept, and has a solid foundation in the law. Previous restrictions on the use of coupons and value-added sales of goods can be used as examples for tobacco control programs seeking to curb price manipulation of tobacco products by the industry.

III. Policy Options

State and local governments have a significant opportunity and authority to reduce tobacco use through the regulation of tobacco product prices. Regulations adopted pursuant to the Family Smoking Prevention and Tobacco Control Act (FSPTCA) prohibit the redemption of coupons for tobacco products by mail.³⁷ They do not, however,

address other discounted sales of tobacco products. The FSPTCA does permit state and local governments to adopt laws concerning the “sale, distribution ... advertising and promotion of” tobacco products, including laws that are more stringent than the FSPTCA.³⁸ Therefore, state and local governments have the authority to adopt sales and pricing restrictions on tobacco products.

Communities may adopt broad- reaching policies addressing multiple industry discounting methods. State and local governments seeking to instead take a step-by-step approach to regulation, may initially consider restricting the use of coupons or value-added sales. This may be accomplished through a strong minimum price law that restricts discounted or value-added sales, or a direct regulation of these price- manipulating strategies (as a stand-alone law or as part of a tobacco retail licensing system).

Minimum Price Law

As described above, minimum price laws generally require a minimum markup to the wholesale or retail price of cigarettes. These laws were initially imposed to protect small retailers from the tobacco industry’s predatory business practices (e.g., discriminatory promotions).³⁹ Currently, about half of U.S. states impose some kind of minimum price on cigarettes, though they vary widely in terms of the required markups and whether they permit discounts to factor into the minimum price calculation.

New York’s CMSA is considered to be a “strong” minimum price law as compared to those in other states.⁴⁰ Notwithstanding this designation, it may be ultimately ineffective in keeping tobacco prices high, in part

because it permits some discounting practices used by tobacco companies. The state legislature could amend the CMSA to restrict a wider range of discounts, thereby closing a loophole exploited by the tobacco industry.

An example of a stronger statewide approach is provided by Massachusetts’ minimum cigarette price law.⁴¹ The Massachusetts law states, in part:

“In all advertisements, offers for sale or sales involving two or more items at a combined price, and in all advertisements, offers for sale or sales involving the giving of any concession of any kind whatsoever (whether it be coupons or otherwise), the retailer’s or wholesaler’s selling price shall not be below the ‘cost to the retailer’ or the ‘cost to the wholesaler’, respectively, of all articles, products, commodities and concessions included in such transactions.”⁴²

Massachusetts also requires a minimum markup of 25%, which is higher than the above-mentioned free market markup of 18% for cigarettes.⁴³

While the CMSA contains similar language to that quoted above,⁴⁴ the difference is that the Massachusetts Department of Revenue has interpreted this language to preclude any discount or promotion that brings the retail price of cigarettes below the statutory minimum.⁴⁵ This means that, in addition to restricting industry-sponsored buy-down and master- type programs employed by the tobacco industry, this law prohibits the use of coupons or other rebates (e.g., multipack discounts) that reduce the cost paid by consumers for cigarettes (below the statutory minimum).⁴⁶

The advantage of amending the state law is that loopholes may be closed to affect the prices of cigarettes statewide. The drawbacks, however, are that the minimum price law only applies to sales of cigarettes (not to other tobacco products) and any restriction on discounts applies only when the discounted price falls below the statutory minimum. Moreover, since manufacturers control the “list” price upon which the minimum price calculation is based, this approach may be less effective than a more direct regulation of discounted sales.

Direct regulation of discount coupons and value-added promotions

A restriction on the use of discount coupons and value-added sales could be achieved directly, outside a minimum price system, by either including it within a retail licensing system or adopting it as a stand-alone law.



Such a regulation may be adopted at the state or local level. The model ordinance found at the end of this report is designed as a stand-alone local ordinance, and can be modified to suit the needs of the jurisdiction implementing it. Further, the language may be incorporated into a new or existing retailer licensing system to prevent retailers from either redeeming discount coupons or

providing value-added discounts. Using a stand-alone law (or conditioning a retail license) may provide more flexibility for local governments, and could be applied to all tobacco products, not just cigarettes. As compared to amending a minimum price law, a stand-alone law may be more effective because it would prohibit certain price discounts, even if the discounted price complies with the minimum price law.

IV. Model Ordinance

The model ordinance (found in Appendix A) is designed for use by local governments in New York. It was developed by incorporating elements of other models and proposals and is intended to regulate the redemption of discount coupons and value-added sales of tobacco products.

The model ordinance is written flexibly so that it can be enacted by a county or a municipality (city, town, or village). It is a model and thus intended to be modified or tailored to fit the particular needs of a community and is designed for enactment by a local legislative body, such as a city council.

Section One: Findings

The first section of the model ordinance contains “findings” that express the reasons for the government’s decision to enact such a law. This section is important because courts reviewing the law may look to the findings to see if the government had sufficient reasons and justifications for adopting such a measure. The findings should focus on explaining why the price of tobacco products is a legitimate public health concern, and why the proposed law is necessary to address it.

Some courts have expressed a preference for localized findings, including facts about how the proposed law will address the problem at the local level, as opposed to generalized statements about the issue. Some of the figures in the findings have been left blank, so that they can be filled in with local information. It is advisable to add other localized findings that are compelling to the implementing community. Additional supporting information and exhibits can also be introduced at government hearings where the ordinance is considered. This information can then be referenced in the findings.

Section Two: Definitions

The second section defines the terms that are used in the model ordinance. It is possible to use existing definitions (such as those found in other local or state laws), but for purposes of the model we wanted to be clear about what was meant by each term, some of which should be noted:

- “Department” has been left to be determined by those considering the model. It should be defined to be the entity chosen to enforce the law. This entity should be specified (e.g., a municipal department, rather than the municipality itself), and discussions with that government agency should occur well before the ordinance is introduced to ensure the enforcing agency’s support. The Department should be a health-oriented department since this is a public health measure.
- “Listed or Non-Discounted Price” is the regular price at which Cigarettes or a Tobacco Product are sold in a particular store, prior to the application of discounts associated with coupons or value- added sales.

- “Retail Price” is the price actually paid by the consumer for Cigarettes or a Tobacco Product.
- “Tobacco Product” has been defined to include all tobacco products except Cigarettes and those products approved as cessation devices by the FDA (e.g., Nicorette gum or Nicoderm CQ patches). Cigarettes have been defined separately (consistent with the definition used in the Federal Cigarette Labeling and Advertising Act or FCLAA).

Section Three: Sales Restrictions

Section Three serves as the substance of the ordinance. This section prohibits tobacco retailers from redeeming discount coupons or engaging in value- added sales of cigarettes or other tobacco products (sales that include one or more of those products at a discounted price). It provides separate clauses that affect the sale of cigarettes versus that of other tobacco products. In the unlikely event that a court determines that the regulation of these types of discounted cigarette sales are preempted by the FCLAA, such separation may provide an easy means to sever the impermissible clauses from the permissible ones. (See the next section for more information about the FCLAA).

Sections Four and Five: Enforcement and Penalties

These sections provide for the enforcement of the ordinance and the imposition of penalties for tobacco sales made in violation of the ordinance. Section Four provides the enforcement agency with the authority to adopt more detailed rules or guidelines to assist with the enforcement of the ordinance. Additionally, it permits the government or

other members of the community (such as a tobacco retailer whose business is harmed by the discounted sales of another) to initiate legal action against a retailer who violates the law.

Section Five sets out civil penalties ranging from \$250 to \$1000 that may be imposed for each sale made in violation of the ordinance. Additionally, a Tobacco Retailer found to violate the ordinance may be subject to the suspension or revocation of any license or permit issued by the government to the Tobacco Retailer.

Sections Six and Seven: Severability and Effective Date

The final two sections of the model ordinance are technical provisions included in many laws. The first is a severability provision, which provides that if any portion of the law is struck down by a court, the remaining portions remain valid. This is an important provision to include, because without such a provision, a court decision invalidating even one part of the law could potentially nullify the entire ordinance.

Section Seven provides that the law will go into effect 90 days after adoption. This phase-in period allows tobacco retailers plenty of time to ensure that they are able to comply with the requirements of the new law, and it provides the government with sufficient time to plan for inspections and enforcement.

Questions or concerns about the model ordinance can be addressed to the Public Health and Tobacco Policy Center at info@tobaccopolicycenter.org. The model is provided for educational purposes, and neither it nor this report should be relied upon as legal advice. For legal advice,

readers should consult a lawyer in their state.



V. Legal Considerations

Tobacco companies often use litigation (or the threat of litigation) to thwart the implementation of regulations that may harm their bottom line. Governments that plan to enact a restriction on discounted sales of tobacco products through the use of coupons and value-added deals should be aware that tobacco companies may file a legal challenge to the law, asserting (among other claims) that the law is unconstitutional or preempted by federal law. The industry's primary argument will likely be that the law restricts commercial speech protected by the First Amendment of the United States Constitution. Additionally, the industry will likely allege that the law seeks to regulate the content of cigarette promotions in violation of the FCLAA. Finally, the industry may challenge the law as preempted by New York State law. This section will address pertinent court decisions and pending litigation to illustrate the potential challenges to—and the government's authority to enact—these regulations.

First Amendment

Tobacco companies may challenge a regulation of discount coupon redemption and value-added sales under the First Amendment of the U.S. Constitution. They will likely argue that the regulation impermissibly restricts their ability to communicate with adult consumers about their products. Ostensibly, these discount strategies may convey information about a brand or product in addition to reducing the price of that product. A carefully crafted law that regulates only the sales transaction, rather than any protected speech associated therewith, should be able to withstand such a challenge.

The First Amendment of the U.S. Constitution protects commercial speech (that is, speech made in connection with an economic activity) that conveys truthful information regarding lawful activity.⁴⁷ Importantly, the model ordinance is a sales restriction—it prohibits the sale of tobacco products at a discount when that discount is accomplished through a value-added sale or coupon. There is no restriction on communication—tobacco companies may distribute coupons and other communications to adult consumers. Thus, the First Amendment should not impose a barrier to a regulation of discount coupon redemption and value-added sales.

Notwithstanding this distinction, a government seeking to regulate discount sales of tobacco products should be prepared to defend the law against assertions that it restricts tobacco companies' protected speech. A court's determination of the level of scrutiny required

to analyze the law may ultimately govern the outcome. As a regulation of a commercial transaction with no implication on expression or speech, the court will likely allow the

government the most leeway and apply a "rational basis" review.⁴⁸ Nevertheless, it is important for local governments to be aware of the other levels of scrutiny that might be applied.

[T]he First Amendment should not impose a barrier to a regulation of discount coupon redemption and value-added sales.

Incidental effect on speech

Should a court determine that a pricing regulation places an incidental burden on commercial speech, the court would apply the *O'Brien* test. This test comes from *U.S. v. O'Brien*, in which the U.S. Supreme Court held that a "sufficiently important governmental interest in regulating ... nonspeech ... can justify incidental limitations on First Amendment freedoms."⁴⁹ Under this test, a government regulation will be upheld if (1) it is within the power of the government to adopt; (2) it furthers an important or substantial government interest; (3) the government interest is unrelated to the suppression of free speech; and (4) the incidental restrictions on free speech are no greater than necessary to further the government interest.⁵⁰

A pricing ordinance based on the model would likely pass the *O'Brien* test. First, the government has the authority to regulate commercial activity.⁵¹ Second, the regulation of industry manipulation of tobacco product prices furthers the substantial government interest in reducing tobacco use, particularly by youth.⁵² Third, this interest in protecting public health and reducing tobacco use is unrelated to the suppression of protected

commercial speech. Fourth, any restriction on speech associated with these discounted sales is incidental; distribution of information about the tobacco products affected is still permitted, merely the discounted sale is not. Thus, any law based on the model should be upheld under this test.

Direct restriction on speech

In the unlikely event that a court finds that a law based on the model directly restricts commercial speech, the law could be subject to the *Central Hudson* test. This is a more stringent test and requires the party challenging the law to show that the speech being restricted is neither false nor misleading, nor does it promote an unlawful activity.⁵³ If a court finds that commercial speech is directly restricted by the law, the government must then demonstrate that it has a substantial interest it seeks to address through the law; the law directly advances the interest asserted; and the law is narrowly tailored to fit the government's goal.⁵⁴

In this instance, the industry would argue that its message about a discounted price is restricted by the law. For purposes of this discussion we will assume the industry can overcome the first hurdle—to demonstrate its message on the coupon is truthful.⁵⁵

Nevertheless, the ordinance would likely survive the remaining test.

As above, the government should have no trouble articulating a substantial interest in protecting the public health by reducing tobacco use. The ordinance in question directly advances that interest by preventing price discounting, and thereby reducing the use of tobacco products. Since the evidence clearly shows that higher prices reduce the use of tobacco products, a New York community can directly advance its public

health interest by closing a loophole in the law and preventing certain price discounting. Finally, the law is narrowly tailored to fit the goal of reducing tobacco use and protecting public health—it poses no restriction on advertising or promotion of tobacco products, but rather is narrowly focused on the sale of the products. Thus, any law based on the model should withstand the court's scrutiny under the *Central Hudson* test.

The Federal Cigarette Labeling and Advertising Act

The industry may also challenge a restriction on discounted sales of tobacco products as being preempted (or prohibited) by the FCLAA. Specifically, the industry will argue that such a regulation affects the content of cigarette promotions in violation of the law.

The FCLAA is the law which requires cigarette packages to display warning labels.⁵⁶ For decades this law prohibited state and local governments from adopting any regulation of the advertising or promotion of cigarettes. Recently, however, this preemption language was amended by the Family Smoking Prevention and Tobacco Control Act (FSPTCA).⁵⁷ The FCLAA now permits states and localities greater regulatory authority over cigarette promotion and advertising. Specifically, the law now permits a state or local government to “enact statutes and promulgate regulations, based on smoking and health...imposing specific bans or restrictions on the time, place, and manner, *but not content*, of the advertising or promotion of any cigarettes.”⁵⁸

Challenges to the model ordinance based on the FCLAA preemption should not prevail. First, a law which prohibits the discount sales of tobacco products is a sales

restriction. Such a regulation is specifically permissible under the FSPTCA: FSPTCA expressly preserves the right of state and local governments to adopt laws regulating “the sale, distribution, possession, exposure to, access to, advertising and promotion” of tobacco products.⁵⁹ A law restricting value-added sales or redemption of coupons for tobacco products regulates the sales transaction between a retailer and a consumer; thus, it solidly falls within the authority of state and local governments.

Second, even if such a law were interpreted to restrict the promotion of cigarettes, it would be a regulation of the “time, place [or] manner of promotion” (permissible under the FCLAA) – not a regulation of the “content” of any promotion (preempted by the FCLAA). Specifically, the law would be a regulation of sales at the time and location of the sale. Moreover, it is a permissible regulation of the manner of promotion— that is, it is a regulation of specific discounting methods (the use of a coupon or value-added sale). Nothing in the model ordinance restricts the content of any advertisement or promotion of cigarettes—tobacco companies (and retailers) are still permitted to communicate lawful prices and any other information to adult consumers.

In sum, a local regulation restricting tobacco retailers from redeeming tobacco product coupons and prohibiting certain tobacco product discounts is likely permissible under the FCLAA. These types of restrictions may permissibly impact the “time, place [or] manner” of cigarette promotion, but in no way interfere with their “content.”⁶⁰

Commerce Clause

The Commerce Clause gives Congress the authority to regulate commercial activity

between the states.⁶¹ Because only the federal government is able to regulate interstate commerce, it follows that state and local governments may not interfere with this role by unduly burdening commerce between the states; this doctrine is known as the Dormant Commerce Clause.⁶² If a local law prohibiting the redemption of coupons or value-added sales was challenged as overly burdensome under the Dormant Commerce Clause, a court would examine whether the law’s benefits outweigh any burdens it places on interstate commerce.⁶³

A law prohibiting the sale of multiple packages of tobacco products at a single combined price may impact sales of products that are physically packaged together (e.g., wrapped together in cellophane with “Buy two get one free” affixed to the package). In such a circumstance, the manufacturer might argue that it would be “burdened” with separate packaging requirements for different states or localities. To determine whether that burden violates the Commerce Clause, a court would apply a balancing test sometimes referred to as the *Pike* test.⁶⁴ Specifically, the court would examine whether the law (1) is nondiscriminatory (to out-of-state interests); (2) advances a legitimate local interest; (3) affects interstate commerce only incidentally; and (4) protects local interests that outweigh the burden imposed on commerce.⁶⁵ A carefully crafted law that restricts local businesses from engaging in certain sales transactions is unlikely to be construed as favoring local business over out-of-state business. Such a law would advance the legitimate interest of reducing tobacco sales to price-sensitive consumers (including youth), and would only incidentally affect interstate commerce (e.g., the packaging)—tobacco companies routinely individually package their products.

Finally, the local public health interest in reducing tobacco use, particularly among youth, should outweigh the “burden” of a restricted packaging system placed on tobacco manufacturers (particularly when a permissible alternative is readily available and in use). Thus, a court is unlikely to find the law violates the Commerce Clause.

The model law would similarly survive this test when applied to discount coupons. It is common practice for tobacco companies and others to distribute coupons nationally despite some coupons being invalid in some jurisdictions. Thus manufacturers routinely include cautions such as “void where prohibited” or “void in State X” on coupons and other written materials. Accordingly, it should not be deemed overly burdensome to prohibit the redemption of coupons for tobacco products.



State Preemption

By virtue of the New York Constitution and state law, local governments in New York have the authority to enact laws and adopt

regulations to protect and promote the health, safety, morals and general welfare of their residents⁶⁶ (a broad category in which the model ordinance is certainly included). This includes the authority to regulate commercial activities. In fact, local governments in New York have regulated prices of certain products in the past, and those regulations have been upheld by the courts.⁶⁷ Moreover, the New York Court of Appeals has specifically recognized that local governments in New York may impose price regulations on tobacco products for protecting public health under the police power granted to them by the State.⁶⁸

There are some limits on local regulatory authority, however. Specifically, New York State law may preempt, or prohibit, local regulation of certain activities. Preemption of local law by state law can occur by one of two ways in New York: (1) field preemption or (2) conflict preemption.⁶⁹ Field preemption occurs when the state demonstrates an intent to regulate an entire subject matter, precluding all local regulation of the same subject.⁷⁰ Field preemption can result from the legislature’s specific declaration of its intent to preempt local action on a particular subject (“express preemption”) or can be implied from the legislature’s declaration of state policy supporting a particular law (“policy preemption”) or the adoption of a detailed and comprehensive “regulatory scheme” in a particular field which demonstrates an intent to preempt local law (“implied preemption”).⁷¹ Conflict preemption, on the other hand, occurs when the local law is inconsistent with state law (i.e., takes away or impedes a benefit *specifically* granted by state law).⁷²

Field Preemption

The tobacco industry may argue that New York State has preempted the field of retail cigarette discounts under the Adolescent Tobacco Use Prevention Act (ATUPA) or the Cigarette Marketing Standards Act (CMSA). These laws contain no general preemption clause of this subject matter,⁷³ so a challenge is unlikely to be made based on a theory of “express preemption.” Thus, a court will be left to determine whether these laws imply an intent by the State to regulate the field of retail cigarette discounts, through either a declaration of policy or a comprehensive and detailed regulatory scheme.

A challenge alleging “policy preemption” should be unsuccessful. Since there is no policy declaration affecting retail tobacco discounts within ATUPA, the only analysis remaining is that of the policy addressed by the CMSA. The policy rationale expressed by the New York Legislature when it enacted the CMSA does not suggest the Act preempts all local regulation of retail cigarette discounts. Rather, the policy statements evidence the Legislature’s concern about predatory pricing practices by cigarette dealers. Specifically, the policy rationale stated:

“[I]t is necessary to regulate and control the sales price of cigarettes within the state at the wholesale and retail levels for the purpose of stabilizing the cigarette industry in New York state. The legislature finds that predatory pricing by cigarette dealers from states surrounding New York has contributed to the destruction of the price structure in New York state. Those dealers, who are protected in their home states by cigarette sales price laws similar to

that contained in this act, have had an unfair advantage over New York cigarette dealers. This act is enacted by the legislature to prevent the movement of the cigarette distribution industry outside of New York, with the loss of jobs attendant to such a move and to prevent the sale of untaxed cigarettes and the evasion of state and local cigarette and sales taxes.”⁷⁴

Based on this declaration, it is clear that the legislature enacted the CMSA to address the State’s concern over predatory business practices and, in particular, predatory pricing from out-of-state dealers.⁷⁵ The courts have interpreted the law as regulating cigarette prices from the top of the distribution chain (tax stamping agent) to the bottom (retailer), so that one segment is not injured in order for another segment to profit.⁷⁶ There is no indication that the legislature required statewide uniformity for prices paid by consumers for cigarettes—only that fair competition be preserved among those in the business of selling cigarettes.⁷⁷

Moreover, the law has been interpreted to prohibit only those price promotions that clearly have the potential to impact competition (such as “buy-downs” and “master-type” programs) while having no effect on others (such as discount coupons).⁷⁸

The model ordinance does not regulate predatory business practices, nor is it concerned with competition among cigarette retailers. Rather, it is strictly concerned with cigarette discounts offered to consumers at retail and their effect on public health. The policy statements supporting enactment of the CMSA are absent any mention of regulating all cigarette retail price discounts or improving public health.⁷⁹ Accordingly, a

challenge based on policy preemption should fail.

Similarly, a challenge based on “implied preemption” should be unsuccessful. Neither ATUPA nor the CMSA constitutes a sufficiently detailed and comprehensive regulatory scheme which would imply an intent by the State to “occupy the field” of retail tobacco discounts. ATUPA has been determined by the courts to specifically permit more restrictive local regulation of tobacco sales in general.⁸⁰ While the CMSA has no similar case law history, an examination of legal precedent concerning other state statutes highlights weaknesses in this argument.

For example, unlike the State’s “comprehensive and detailed” statutory scheme for regulating alcohol,⁸¹ the CMSA should have no general preemptive effect on the local regulation of retail cigarette discounts. The New York Legislature gave the state alcohol regulations their own section of the New York code, included an express statement of preemption, and provided a detailed regulatory scheme that included the creation of local alcohol control boards to implement state law.⁸² By contrast, the CMSA is included as a part of the New York tax code and focuses on anti-competitive business practices (including the requirement of anticompetitive intent in the clause detailing punishments for violations of the law⁸³), rather than public health.⁸⁴ Thus, a challenge alleging implied preemption of the model ordinance should not survive judicial scrutiny.

Conflict Preemption

To determine whether the model ordinance conflicts with the CMSA, a court would determine whether the model prohibits a

benefit or right the CMSA *explicitly* allows.⁸⁵ As the New York courts have phrased it, the question is whether there is a “head on collision between the ordinance as it is applied and a state statute.”⁸⁶ A local law which only incidentally infringes on a state law will not be preempted.⁸⁷ The model ordinance should survive such an assessment.

Tobacco manufacturers or retailers might argue that the CMSA specifically permits multipack discounts and cross promotions, preempting any local regulation that prohibits such sales. This argument has little merit. The CMSA does not explicitly grant retailers the right to engage in combination sales or discounts. Rather, the law simply imposes an obligation on those engaged in the business of selling cigarettes to ensure those cigarettes are offered for sale at a price at or above the minimum required by the statute.⁸⁸ The fact that both the state law and the model ordinance “seek to regulate the same subject matter does not in and of itself give rise to an express conflict.”⁸⁹ A retailer may comply with both the CMSA and the model ordinance and, thus, there is no “head on collision” between the two. The model should therefore survive a challenge based on the theory of conflict preemption.

Litigation in Action: NATO v. Providence

In January 2012, Providence, Rhode Island adopted a local law prohibiting the redemption of coupons and value-added sales of tobacco products.⁹⁰ On February 13, 2012, the National Association of Tobacco Outlets (NATO) and the major tobacco manufacturers challenged the law, in part, as a restriction on lawful communication with their adult customers about the price of their

products in violation of the First Amendment.⁹¹ Specifically, they argued that the law restricts their ability to communicate an “offer to sell a product at a specified discount and urge consumers to purchase the discounted product.”⁹² The plaintiffs also challenged the city’s ordinance on the grounds that it is a regulation of the of the *content* of cigarette promotion, in violation of the FCLAA.⁹³

On December 10, 2012, the U.S. District Court for the District of Rhode Island upheld the city ordinance.⁹⁴

Specifically, the court held that the law does not violate the U.S. Constitution nor is it preempted by the FCLAA. In reaching this decision, the court looked to the plain language of the ordinance and found that tobacco companies may distribute discount coupons—with whatever lawful communication they wanted to include—within the city limits; however, tobacco retailers within the city may not sell tobacco products at a discount in connection with those coupons.⁹⁵ Accordingly, the court ruled the activity prohibited by the price ordinance is not subject to First Amendment protection.

The court also reviewed Plaintiffs claims that the ordinance is preempted by the FCLAA as a wholesale attack on promotion.⁹⁶ The court disagreed, finding the price ordinance is a proper regulation of the time, place, and manner of cigarette promotion in the City of Providence.⁹⁷ In other words, the court found the ordinance regulates the manner in which these products are sold; specifically, it prohibits the application of discounts through coupons or multi-pack offers.

The Court dismissed the federal claims, as well as the state claims, brought by the plaintiffs. As of the publication of this report, the plaintiffs have appealed the decision to the U.S. Court of Appeals for the First

Circuit.⁹⁸ While this case is not binding on courts in New York, it does provide support for these types of tobacco regulations and bolsters communities’ efforts to reduce youth tobacco use.

VI. Implementation and Enforcement

Because tobacco control policies often give rise to tensions between competing interests, it is important for any jurisdiction considering tobacco control laws to have a well-defined strategy to implement and enforce them. Importantly, a local government must address which agency will be responsible for enforcing a price regulation, and how that enforcement will take place.

Adoption and Implementation

In New York, a restriction on discounted sales of tobacco products could be enacted at the county level, or by a city, village or town.⁹⁹ The process by which a pricing regulation is adopted will depend on the type of government enacting the law and the specific rules of the local government body.

Regardless of the level of government involved, a public hearing should occur before the law is approved. This provides the public with an opportunity to comment on the proposed law. This is also an opportunity for tobacco control advocates to provide research and data—including local data—demonstrating the importance of implementing regulations on tobacco prices to reduce tobacco consumption and, in turn, protect public health. While the concerns of retailers, manufacturers and consumers should not be dismissed, advocates should

keep the focus on health and the law's objective of decreasing tobacco use in the community, especially through protecting youth from becoming regular users of these addictive and deadly products.

Once the public hearings have taken place and the measure has been approved, there should be a period of time, as specified in the law, between enactment and enforcement of the law. The Public Health and Tobacco Policy Center's model ordinance suggests 90 days between enactment of the law and the beginning of enforcement. This delay between enactment and enforcement provides time to educate retailers about the new law.

Enforcement

If the law is enacted at the county level, the county health department should be in charge of enforcing the sales regulation. If the law is enacted by a different local government, the local health agency or other agency which conducts health inspections should be responsible for the enforcement of the new law. To conserve resources and reduce additional costs, consider whether the enforcement agency can collaborate with other agencies or combine the price regulation inspections with other mandatory inspections. For example, explore whether inspections could be combined with ATUPA compliance inspections.

The enforcement agency should begin working on retailer education immediately after the law is enacted. A list of the retailers who will be affected by the sales restriction can be compiled from registration or licensing records. The agency should create and distribute to all retailers informational resources such as a pamphlet or webpage, describing what is and is not permissible

under the new law. The resources should also include the reasons behind the sales restriction in order to put the regulation in the proper health context. Retailers should be invited to contact the enforcement agency for more information on compliance with the law, and the enforcement agency should be prepared to answer questions and to assist retailers with compliance.

Conclusion

The evidence is undeniable—there is a clear correlation between the price of tobacco products and smoking rates; raising prices on tobacco products reduces use. The tobacco industry knows this and uses price-discounting strategies to undermine tobacco control efforts, attract new customers (i.e., youth), frustrate cessation efforts and generally maintain their current customers. Some of these strategies are targeted at vulnerable and price-sensitive consumers who are disproportionately burdened by the consequences of tobacco use. Policymakers can and should respond by adopting price regulations to reduce tobacco use.

New York State has been a leader in adopting strong tobacco control policies—but the industry has developed creative ways to undermine those policies. Communities in New York can counteract these industry strategies by incorporating price regulation of tobacco products into their tobacco control programs. While a comprehensive restriction on price-discounting methods used by tobacco companies would be most effective, incremental steps like a restriction on discounted sales of tobacco products through the use of coupons and value-added sales can serve as a starting point to decrease tobacco consumption, thereby improving public health.

Citations

- ¹ U.S. DEP'T OF HEALTH & HUMAN SERVS., SURGEON GENERAL'S REPORT: REDUCING TOBACCO USE, 322-37 (2000) [hereinafter 2000 SURGEON GENERAL'S REPORT]; see also, F.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 *Tax, Price and Cigarette 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 *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[hereinafter TOBACCO PRICE PROMOTION].
- ² FRANK CHALOUPKA, TOBACCO CONTROL LESSONS LEARNED: THE IMPACT OF STATE AND LOCAL POLICIES, 11-12 (ImpacTEEN 2010) (Research Paper Series No. 38); Michael Tynan et al., *Impact of Cigarette Minimum Price Laws on the Retail Price of Cigarettes in the USA*, TOBACCO CONTROL ONLINE FIRST August 3, 2012, at 1, <http://tobaccocontrol.bmj.com/content/early/2012/08/02/tobaccocontrol-2012-050554.full?sid=b9777b11-00b0-4055-9abb-0cdcbbab1b6c>.
- ³ 2000 SURGEON GENERAL'S REPORT, *supra* note 1, at 337; U U.S. DEP'T OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL, 528, 530, 699 (2012) [hereinafter 2012 SURGEON GENERAL'S REPORT]; *Tax, Price and Cigarette Smoking*, *supra* note 1, at i64 (estimating a 2.5-5 percent decrease).
- ⁴ See 2012 SURGEON GENERAL'S REPORT *supra* note 3, 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 527-28.
- ⁵ For additional information about price manipulation strategies employed by tobacco companies, see TOBACCO PRICE PROMOTION, *supra* note 1, at 1-7.
- ⁶ R.J. REYNOLDS, CAMEL Y&R ORIENTATION, 1989, bates no. 507241613-1838 at 507241617 ([Younger Adult Smokers] are the only source of replacement smokers[:]) Less than one-third of smokers start after age 18. Only 5% of smokers start after age 24."); see also R.J. REYNOLDS, YOUNGER ADULT SMOKERS: STRATEGIES AND OPPORTUNITIES, bates no. 503049069-503049072 at 503049069 (describing the "renewal market" as stemming "almost entirely from 18-year-old smokers" and acknowledging that the "brand loyalty of the 18-year-old smoker far outweighs [sic] any tendency to switch with age.")
- ⁷ See John P. Pierce et al., *Tobacco Industry Price-Subsidizing Promotions May Overcome the Downward Pressure of Higher Prices on Initiation of Regular Smoking*, 14 HEALTH ECON. 1061, 1067-69 (2005).
- ⁸ FED. TRADE COMM'N, CIGARETTE REPORT FOR 2009 AND 2010, tbl. 2D (2012) [hereinafter FED. TRADE COMM'N, CIGARETTE REPORT]. Total includes expenditures on the following reporting categories: Price Discounts; Coupons; and Retail Value-Added Bonus Cigarettes. *Id.*
- ⁹ See FED. TRADE COMM'N, SMOKELESS TOBACCO REPORT FOR 2009 AND 2010, tbl. 3G (2012) [hereinafter FED. TRADE COMM'N, SMOKELESS TOBACCO REPORT]. Total includes expenditures on the following reporting categories: Price Discounts; Coupons; and Retail-value-added – Bonus Smokeless Tobacco Product. *Id.* "Price discounts" was the largest single category of marketing and promotional expenditures in 2010. See *id.*
- ¹⁰ Sandy J. Slater et al., *The Impact of Retail Cigarette Marketing Practices on Youth Smoking Uptake*, 161 ARCH. PED. & ADOLESCENT MED., 440, 444 (2007); see also Pierce, *supra* note 7, at 1061; and Victoria M. White et al., *Cigarette Promotional Offers: Who Takes Advantage?*, 30 AM. J. PREV. MED., 228, 228, 230 (2006).
- ¹¹ Slater et al., *supra* note 10, at 444.

¹² See White et al., *supra* note 10, at 228-29; see also 2012 SURGEON GENERAL'S REPORT, *supra* note 3, at 516 (discussing youth brand loyalty); DIANE S. BURROWS, YOUNGER ADULT SMOKERS: STRATEGIES AND OPPORTUNITIES, FEBRUARY 29, 1984, at 1, bates no. 501928462-501928550, available at <http://legacy.library.ucsf.edu/tid/fet29d00> (proposing targeting multi-pack discounts to younger adults (age 18-24) because the demographic represents "renewal of market" and their brand loyalty "far outweighs any tendency to switch with age")

¹³ See White, *supra* note 10, at 228.

¹⁴ *Id.* at 228-230 ("[O]ur results strongly suggest that the tobacco industry is successfully reaching the intended price-sensitive groups with its promotional offers.").

¹⁵ See N.Y. TAX LAW §471(1) (McKinney 2012).

¹⁶ See generally N.Y. TAX LAW §§483-89. (McKinney 2012); N.Y. DEP'T TAX'N & FIN., TSB-M-00(2)M, CIGARETTE MANUFACTURERS' PROMOTIONAL PROGRAMS AND THE CIGARETTE MARKETING STANDARDS ACT, (2000), available at http://www.tax.ny.gov/pdf/memos/cigarette/m00_2m.pdf [hereinafter CIGARETTE MANUFACTURERS' PROMOTIONAL PROGRAMS AND THE CMSA].

¹⁷ N.Y. DEP'T TAX'N & FIN., PUBLICATION 509, MINIMUM WHOLESALE AND RETAIL CIGARETTE PRICES (Dec. 2012), available at <http://www.tax.ny.gov/pdf/publications/cigarette/pub509.pdf> [hereinafter MINIMUM WHOLESALE AND RETAIL CIGARETTE PRICES]; see also N.Y. TAX LAW §483 (McKinney 2012).

¹⁸ See N.Y. TAX LAW §483.

¹⁹ MINIMUM WHOLESALE AND RETAIL CIGARETTE PRICES, *supra* note 17.

²⁰ *Id.*

²¹ Buy down programs are agreements between a manufacturer and retailer through which the retailer is paid a rebate for sales of a particular brand of cigarettes. CIGARETTE MANUFACTURERS' PROMOTIONAL PROGRAMS AND THE CMSA, *supra* note 16. A master-type program or wholesale pricing agreement is a program administered by a wholesaler and sponsored by a manufacturer, through which a wholesaler agrees to pay a retailer a rebate for the sale of particular brands of cigarettes (and is later reimbursed by the manufacturer). *Id.*

²² *Id.*; see also Lorillard Tobacco Co. v. Roth, 756 N.Y.S.2d 108, 114 (2003) (upholding the interpretation of the N.Y. Department of Taxation & Finance on the minimum price law as applied to buy-downs and master-type programs); see also N.Y. TAX LAW §485(a)(2) (McKinney 2012).

²³ Tynan, *supra* note 2, at 6; N.Y. TAX LAW §483 (McKinney 2012) (markups ranging from 5% of basic cost to 7% of basic cost plus cost of agent doing business with retail dealer).

²⁴ Under the CMSA, combination sales involving cigarettes may not be made below the total cost of the retail or wholesale dealer. In other words, multi-pack discounts of cigarettes may occur so long as the combined price is at or above the statutory minimum for each cigarette pack. Additionally, a cross promotion (e.g., sale of cigarette pack plus a discounted smokeless product) could be lawful, so long as the combined price is not lower than the retailer's cost for the smokeless product plus the statutory minimum for the cigarette pack. See N.Y. TAX LAW §485(a)(b) (McKinney 2012).

²⁵ See generally CIGARETTE MANUFACTURERS' PROMOTIONAL PROGRAMS AND THE CMSA, *supra* note 16.

²⁶ FED. TRADE COMM'N, CIGARETTE REPORT, *supra* note 8, at 8, tbl. 2D; FED. TRADE COMM'N, SMOKELESS TOBACCO REPORT, *supra* note 9. This figure includes the Coupons, Retail Value-Added—Bonus Smokeless Tobacco Product and Retail Value-Added – Bonus Cigarettes reporting categories. For purposes of this report, "value-added sales" also includes cross-promotions (e.g., free tin of snus with purchase of pack of cigarettes), though data relevant to expenditures on these types of promotions has not been reported separately in the FDA reports on cigarettes or smokeless tobacco and, therefore, expenditures for these promotions is not included in the totals.

²⁷ For example, there is evidence that the cigarette companies target specific states prior to the implementation of an increased tax. See e.g. MEMORANDUM FROM WANDA JOHNSON, MEDIA SUPERVISOR AT LEO BURNETT U.S.A. TO SHEILA SPICEHANDLER, PHILIP MORRIS, bates no. 2060295219-2060295220, available at <http://legacy.library.ucsf.edu/tid/fwg62e00> (describing media plan to distribute coupons to "counter any ill effects" of an impending cigarette excise tax increase in New Jersey. The plan was based on a similar plan executed in California in 1988 before that state's tax increase became effective.). Moreover, tobacco companies frequently collect personal information from smokers, including addresses and demographic information which can be used for marketing purposes; see NATIONAL CANCER INSTITUTE,

THE ROLE OF THE MEDIA IN PROMOTING AND REDUCING TOBACCO USE, at 145 (2009) (describing how individuals are placed on direct mail lists through internet, survey and other means), *available at* http://cancercontrol.cancer.gov/tcrb/monographs/19/m19_5.pdf.

²⁸ See Pierce, *supra* note 7, at 1068-69; see also PRICE GAP STRATEGY, RETAIL REPRESENTATIVE TRAINING GUIDE, bates no. 517051354-517051357, *available at* <http://legacy.library.ucsf.edu/tid/esy66d00> (detailing defensive discount strategy for R.J. Reynolds' premium brands to compete with generic brands) [hereinafter Price Gap Strategy].

²⁹ See, e.g., MEMORANDUM FROM R.J. REYNOLDS TOBACCO CO. TO RM'S/MSM'S (Sept. 25, 1995) bates no. 514259866-514259869, *available at* <http://legacy.library.ucsf.edu/tid/out66d00> (detailing a test of a particular coupon strategy); see also PRICE GAP STRATEGY, *supra* note 26.

³⁰ FET CONTINGENCY STRATEGY, bates no. 2048979975-2048979979, *available at* <http://legacy.library.ucsf.edu/tid/jpc12a00> (forecasting a decline of 5.0 to 5.4 percent in industry sales volume).

³¹ BURROWS, *supra* note 12, at 35.

³² Many state and local jurisdictions also regulate the distribution of coupons. See, e.g., N.Y. PUB. HEALTH LAW §1399-bb(1)(b) (McKinney 2012); CAL. HEALTH & SAFETY CODE §118950(b) and (c)(1) (West 2012).

³³ E.g., 235 ILL. COMP. STAT. 5/6-28(c) (2012); 204 MASS. CODE REGS. 4.03(1)(c) (2012); MINN. STAT. §340A.5071 (2012) (prohibiting coupons); S.C. CODE ANN. §61-6-1560 (2012) (permitting "premiums, coupons, or stamps redeemable by mail"); and TEX. ALCO. BEV. CODE ANN. §102.07(d) (2011) (prohibiting the use of rebates and coupons).

³⁴ N.Y. ALCO. BEV. CONT. §117-a(1)(c) (McKinney 2012).

³⁵ E.g., IDAHO CODE ANN. §37-1003b (West 2012); MASS. GEN. LAWS ch. 94A, §14 (2012); MO. ANN. STAT. §46.440 (West 2012); and R.I. GEN. LAWS ANN. §6-13-2.1 (West 2012).

³⁶ MASS. GEN. LAWS ch. 175H, §3(b)(2) (prohibiting coupons and other discounts on drugs for which there is an AB rated generic equivalent).

³⁷ See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1781, 1796- 97 (2009); 21 CFR §1140.16(c)(2)(i) (2013).

³⁸ 123 Stat. at 1823.

³⁹ E C Feighery et al., *How do Minimum Cigarette Price Laws Affect Cigarette Prices at the Retail Level?* 14 TOBACCO CONTROL 80, 80 (2005).

⁴⁰ See Tynan *supra* note 2 at 1; see also Ribisl et al., CENTERS FOR DISEASE CONTROL AND PREVENTION, *State Cigarette Minimum Price Laws – United States 2009*, 59 MORBIDITY AND MORTALITY WEEKLY REPORT 389, 391 tbl. 2, (2010), *available at* <http://www.cdc.gov/mmwr/PDF/wk/mm5913.pdf>.

⁴¹ MASS. GEN. LAWS ch. 64C §§1-39. While this statute is more comprehensive in terms of the discounts it restricts, it has been found to be ineffective at maintaining a high price on cigarettes, likely due to effective enforcement.

⁴² MASS. GEN. LAWS ch. 64C §13(e).

⁴³ MASS. GEN. LAWS ch.64C §13(b) ("Cost to retailer" is presumed to be 25% of the invoice or replacement cost of the cigarettes to the retailer, unless proof of lesser or higher cost is provided); see Tynan *supra* note 2 at 6.

⁴⁴ N.Y. TAX LAW §485 (McKinney 2012).

⁴⁵ See MASS. DEP'T OF REVENUE, DIRECTIVE 03-14: CIGARETTE MANUFACTURER COUPON PROGRAMS (2003), *available at* <http://www.mass.gov/dor/businesses/help-and-resources/legal-library/directives/directives-by-decade/2000-2009-directives/directive-03-14-cigarette-manufacturer-coupon.html>.

⁴⁶ See *id.* This prohibition does not include coupons redeemable directly by the manufacturers to consumers.

⁴⁷ Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 561, 564 (1980).

⁴⁸ Typically, business regulations are analyzed using the lowest level of scrutiny—that is, rational basis review. "Rational basis" review requires the party challenging a law to demonstrate that the law has no rational relationship to a legitimate government purpose. See *Armour v. City of Indianapolis, Ind.*, 132 S.Ct. 2073, 2080 (2012).

⁴⁹ *United States v. O'Brien*, 391 U.S. 367, 376 (1968)

⁵⁰ *Id.* at 377.

⁵¹ *Nebbia v. New York*, 291 U.S. 502, 524 (1934) (reiterating the authority of state and local governments “to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States.” (quoting *Thurlow v. Massachusetts*, 46 U.S. 504, 583 (1847))).

⁵² See *Lorillard v. Reilly*, 533 U.S. 525, 555 (2001) (recognizing that tobacco companies did not “contest[] the importance of the State’s interest in preventing the use of tobacco products by minors”); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995) (recognizing the government has “a significant interest in protecting the health, safety and welfare of its citizens”). See also *supra* notes 1-3 and accompanying text.

⁵³ See *Central Hudson*, 447 U.S. at 557, 563-64.

⁵⁴ *Id.* at 566.

⁵⁵ Such a message would arguably be false and promote an unlawful activity, because discounted sales associated with the redemption of coupons or through a value-added deal would be unlawful under the ordinance.

⁵⁶ Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat 282 (codified as amended at 15 U.S.C. §§ 1331-1341 (2010)).

⁵⁷ 15 U.S.C. §1334 (2012).

⁵⁸ *Id.* (emphasis added).

⁵⁹ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1823 (2009).

⁶⁰ It is important to note that, even if a court were to determine that such a regulation did affect the content of a promotion, the FCLAA pertains only to cigarette promotions. Thus, a pricing regulation of other tobacco products would not be preempted.

⁶¹ U.S. CONST. art. I, §8.

⁶² See, e.g., *Granholm v. Heald*, 544 U.S. 460 (2005); *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

⁶³ *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

⁶⁴ *Id.* at 142 (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).

⁶⁵ *Id.*

⁶⁶ See N.Y. CONST., art. IX, § 2(c) (granting local governments in New York State the authority to regulate with respect to the “safety, health and well-being” of their residents, so long as local laws do not conflict with state laws).

⁶⁷ See, e.g., *People v. Lewis*, 58 N.Y.S.2d 223, 225, 227 (1945).

⁶⁸ *People v. Cook*, 312 N.E.2d 452, 454-56 (N.Y. 1974). In a challenge by a tobacco retailer to a New York City law which taxed cigarettes based on tar and nicotine content, the court found that the New York State Constitution and New York state law granted authority to local governments to adopt local laws relating to the health of its citizens. *Id.* Where a local law has been enacted in relation to the promotion of the public health, there are only two limitations: (1) the law must not be inconsistent with constitutional or other general law; and (2) exercise of police power to enact the law must not be prohibited by the Legislature. *Id.* at 455. The court found that the New York City law was properly related to health and not inconsistent with existing law. *Id.* Moreover, according to the court’s opinion, “[p]rice regulation is just another form of regulation to be gauged by its relation to the common weal.” *Id.* at 456.

⁶⁹ *Woodbury Heights Estates Water Co. v. Village of Woodbury*, 943 N.Y.S.2d 385, 389 (N.Y. Sup. Ct. 2012).

⁷⁰ See *id.*

⁷¹ See *Consol. Edison Co. of N.Y. v. Town of Red Hook*, 456 N.E.2d 487, 490 (N.Y. 1983); *id.* at 389-90.

⁷² *Woodbury*, 943 N.Y.S.2d at 389.

⁷³ ATUPA was enacted with a narrow preemption clause found to prohibit the local regulation of the “distribution of tobacco products without charge” and the distribution of coupons redeemable for free tobacco products. 2002 N.Y. Op. Atty. Gen. (Inf.) 1060 (N.Y.A.G.), 2002 N.Y. Op. Atty. Gen. No. 15, 2002 WL 31630484; Regulation of Tobacco Products: Distribution to Minors, ch. 799, § 6, 1992 N.Y. Laws 4203

(1992) (amending N.Y PUBLIC HEALTH LAW §1399-bb); see *Vatore v. Comm’r of Consumer Affairs*, 634 N.E.2d 958, 960-61 (N.Y. 1994). Since the model ordinance regulates only the *redemption* of coupons and discounted sales of tobacco products, it does not fall within the specific subject preempted by ATUPA.

⁷⁴ An Act to Amend the Tax Law, in Relation to Establishing Cigarette Marketing Standards, ch. 897, § 1, 1985 N.Y. Laws 3365 (1985) (emphasis added).

⁷⁵ *Lorillard Tobacco Co. v. Roth*, 786 N.E.2d 7, 8 (N.Y. 2003).

⁷⁶ See *id.* at 13.

⁷⁷ See *id.*; see also *Cohen v. Bd of Appeals of Village of Saddle Rock*, 795 N.E.2d 619, 622 (N.Y. 2003) (finding that need for statewide uniformity in a subject area may imply intent to preempt local regulation); *Cf. Jancyn Mfg. Corp. v. Suffolk County*, 518 N.E.2d 903, 906-07 (N.Y. 1987) (noting that declaration explaining the public policy to prevent pollution of water resources through use of sewage system cleaners is not so expansive as to preempt local regulation of the same).

⁷⁸ *Lorillard*, 786 N.E.2d at 13; *Cf. Jancyn*, 518 N.E.2d at 906-07 (holding that policy of environmental law is directed at eliminating only *certain* toxic chemicals from polluting water, rather than all potentially toxic chemicals, thus no preemption of local regulation).

⁷⁹ See An Act to Amend the Tax Law, in Relation to Establishing Cigarette Marketing Standards, ch. 897, § 1, 1985 N.Y. Laws 3365 (1985).

⁸⁰ See *Vatore v. Comm’r of Consumer Affairs*, 634 N.E.2d 958, 960-61 (N.Y. 1994). (save for a very narrow preemption provision which applies to local regulation of the distribution of free tobacco products); see also *Amicus Curiae Brief of the State of New York, Vatore v. Comm’r of Consumer Affairs of City of New York*, 634 N.E.2d 958 (N.Y. 1994) (1994-0090), 1993 WL 13032793, at *9-11 (arguing in favor of a finding that local regulation of tobacco sales should be permitted under ATUPA).

⁸¹ *People v. De Jesus*, 430 N.E.2d 1260, 1262 (N.Y. 1981).

⁸² See N.Y. ALCO. BEV. CONT. LAW §§2 et seq. (McKinney 2013) (the article creating local alcohol control boards has since been repealed and the law now affords localities certain limited options for adopting their own policies); *Cf. Jancyn*, 518 N.E.2d at 907 (noting that a scheme was not so comprehensive and detailed to imply preemption where state environmental law vested environmental commissioner with power to restrict toxic chemicals not explicitly prohibited by state law, but power was not exclusive and law did not establish local boards with similar control); see also *Village of Lacona v. State Dept. of Agr. and Markets*, 858 N.Y.S.2d 833, 835 (App. Div. 2008) (finding implied preemption where law granted commissioner of environment and conservation exclusive jurisdiction over pesticides and expressly permitted cooperation with local agencies to secure “uniformity of regulations”); *Woodbury*, 943 N.Y.S.2d at 389-90 (“Evidence of the intent to preempt is provided by the *complete and detailed nature* of the state scheme.”) (emphasis added); *Matter of Chwick v. Mulvey*, 915 N.Y.S.2d 578, 586 (App. Div. 2010) (noting that similar to Alcoholic Beverage Control Law, firearms licensing law is sufficiently detailed, including delegation of investigation powers to counties, detailed information for license form, differentiating between types of licenses, etc., to be evidence of an intent to preempt the field of firearm possession).

⁸³ N.Y. TAX LAW §484 (McKinney 2013).

⁸⁴ *Id.* at §§483-489.

⁸⁵ See *Sunrise Check Cashing and Payroll Services, Inc. v. Town of Hempstead*, 933 N.Y.S.2d 388, 395 (App. Div. 2011); see also *N.Y.C. Health & Hosp. Corp. v. Council of City of N.Y.*, 752 N.Y.S.2d 665, 672 (App. Div. 2003) (holding that where state explicitly gave hospital corporation “complete autonomy” over personnel decisions, local law restricting that decision was subject to conflict preemption); see also *Woodbury*, 943 N.Y.S.2d at 389 (noting that conflict preemption only applies if a local law affects a right or benefit expressly given by state law).

⁸⁶ *Chwick*, 915 N.Y.S.2d at 584 (quoting *Matter of Lansdown Entm’t Corp. v. N.Y.C. Dept. of Consumer Affairs*, 543 N.E.2d 725 (N.Y. 1989)).

⁸⁷ *DJL Rest. Corp. v. N.Y.C.*, 749 N.E.2d 186, 191 (N.Y. 2001); *Woodbury*, 943 N.Y.S.2d at 389; Matthew J. Canavan, et al., *Power of Local Governments to Adopt and Amend Local Laws*, 25 N.Y. Jur. 2d Counties, Etc. §121 (updated February 2013).

⁸⁸ N.Y. TAX LAW §485(b) (McKinney 2013) (“In all advertisements, offers for sale or sales involving two or more items, at least one of which items is cigarettes, at a combined price, ...the...retail dealer’s...combined

selling price shall not be below the...cost of the retail dealer...of the total costs of all articles, products, commodities, gifts and concessions included in such transactions.”).

⁸⁹ *Jancyn*, 518 N.E.2d at 906 .

⁹⁰ PROVIDENCE, R.I. CODE OF ORD. §14-303.

⁹¹ Complaint at 3, 15-16, Nat’l Ass’n of Tobacco Outlets (NATO) v. City of Providence, R.I., 2012 WL 6128707 (D.R.I. February 13, 2012) (CA12-96ML). Plaintiffs also challenged the law under Rhode Island law; because those claims are inapplicable to New York, this report does not include a discussion of those claims.

⁹² Reply Memorandum in Support of Plaintiffs’ Joint Motions for Summary Judgment, a Permanent Injunction, and a Preliminary Injunction, and in Opposition to Defendants’ Cross-Motion for Summary Judgment at 6, *NATO*, 2012 WL 6128707 (D.R.I. July 16, 2012) (CA12-96ML).

⁹³ Complaint at 4, 20-21, *NATO* 2012 WL 6128707.

⁹⁴ *NATO*, 2012 WL 6128707, at *17.

⁹⁵ *NATO*, 2012 WL 6128707, at *7.

⁹⁶ See Reply Memorandum in Support of Plaintiffs’ Joint Motions for Summary Judgment, a Permanent Injunction, and a Preliminary Injunction, and in Opposition to Defendants’ Cross-Motion for Summary Judgment at 25-26, *NATO*, 2012 WL 6128707.

⁹⁷ *NATO*, 2012 WL 6128707, at *11.

⁹⁸ See Tobacco Companies Ask 1st Circuit to Review City’s Ban on Coupons, Flavored Items, THOMSON REUTERS, 28 No. 11 Westlaw Journal Tobacco Industry 1 (February 8, 2013); see also Katie Mulvaney, Tobacco Companies to Appeal Ruling Allowing Providence to Restrict Discount Tobacco Sales, THE PROVIDENCE JOURNAL, January 15, 2013, <http://news.providencejournal.com/breaking-news/2013/01/tobacco-companies-to-appeal-ruling-allowing-providence-to-restrict-discount.html>.

⁹⁹ See N.Y. MUN. HOME RULE LAW §10(1)(ii)(a)(12) (McKinney 2012) (“Every local government...shall have power to adopt and amend local laws...relating to...[t]he government, protection, order, conduct, safety, health, and well-being of persons or property therein. This provision shall include but not be limited to the power to adopt local laws providing for the regulation or licensing of occupations or businesses....”).

Appendix A: Model Ordinance

Model New York Ordinance Prohibiting the Redemption of Discount Coupons and Value-Added Sales for Cigarettes and Other Tobacco Products

Section 1: Findings

The **[Common Council]** of **[City]** hereby finds and declares that:

Tobacco use is the foremost preventable cause of premature death in the United States, causing over 400,000 deaths in the United States each year;¹

More than XXX high school age youth and XXX adults in **[City]** currently smoke, and smoking kills approximately XXX adults in **[City]** each year;

The availability of inexpensive tobacco products leads to an increase in the number of smokers, particularly among younger populations;²

Higher tobacco prices lead to a reduction in tobacco use, even when accounting for the addictive properties of nicotine;³

A ten percent increase in the price of cigarettes causes a three to five percent decrease in purchases, on average;⁴

Consider Who Will Adopt the Law

Consider who will adopt the law and tailor the findings to support adoption of the law in that jurisdiction.

Communities can add more **localized facts** into the findings and can add other findings compelling to the community. It is also important to introduce supporting materials into the record during common council hearings. Those materials can be referenced in the findings.

¹ CTRS. FOR DISEASE CONTROL & PREVENTION, *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000–2004*, 57-45 MORBIDITY AND MORTALITY WEEKLY REPORT 1221, 1226–8 (2008).

² See Michelle Leverett et al., *Tobacco Use: The Impact of Prices*, 30 J.L. MED. & ETHICS 88, 89 (2002); Frank Chaloupka, *Tobacco Control Lessons Learned: The Impact of State and Local Policies*, 14 (ImpacTEEN, Research Paper Series No. 38, 2010); see also Frank J. Chaloupka *Macro-social Influences: The Effects of Prices and Tobacco-Control Policies on the Demand for Tobacco Products*, 1 Nic. & TOB. RSCH s105, s106 (Supp. 1, 1999).

³ Frank Chaloupka, *Tobacco Control Lessons Learned: The Impact of State and Local Policies*, 11 (ImpacTEEN, Research Paper Series No. 38, 2010).

⁴ See U.S. DEP'T OF HEALTH & HUMAN SERV., REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL 331 (2000) [hereinafter SURGEON GENERAL'S REPORT]. See also, *id.* at 323; and see F.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, i64 (Supp. 1 2002) (estimating a 2.5-5 percent decrease).

Higher tobacco prices lead to reduced smoking initiation among youth, reduced consumption among current smokers, and an increase in cessation with fewer relapses among former smokers;⁵

Price increases have a greater effect on youth, with one study concluding that smoking rates among teens were three times more responsive to price increases in comparison to adult smoking rates;⁶

A ten percent price increase reduces smoking prevalence among youth by nearly seven percent, reduces average cigarette consumption among young smokers by over six percent, cuts the probability of starting to smoke by about three percent, reduces initiating daily smoking by nearly nine percent, and reduces heavy daily smoking by over ten percent;⁷

In response to increasing tobacco product prices, generally resulting from the imposition of excise taxes on tobacco products, tobacco companies often employ aggressive price discounting strategies at the point-of-sale to undermine the effect of higher prices on consumers, especially youth and other price sensitive consumers;⁸

While New York State law presently restricts the distribution of free tobacco products and coupons for tobacco products, it does not restrict the redemption of coupons or the discounted sale of tobacco products;⁹

The [Common Council] seeks to reduce adolescent tobacco use and the public health consequences of tobacco use without prohibiting the sale of tobacco products to adult consumers; and

New York Regulations

New York State law prohibits local laws regulating the distribution of free tobacco products and coupons; however, it does not regulate the redemption of coupons, and state law permits local governments broad authority to regulate in the interest of public health within their jurisdiction.

⁵ See U.S. DEP'T OF HEALTH & HUMAN SERV., REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL 326-33, 337 (2000); and see F.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, i64 (Supp. 1 2002).

⁶ Michelle Leverett et al., *Tobacco Use: The Impact of Prices*, 30 J.L.MED. & ETHICS 88, 89 (2002); Frank Chaloupka, *Tobacco Control Lessons Learned: The Impact of State and Local Policies*, 13-14 (ImpacTEEN, Research Paper Series No. 38, 2010); see U.S. DEP'T OF HEALTH & HUMAN SERV., REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL 329, 334, 337, and 359 (2000); see also Frank J. Chaloupka *Macro-social Influences: The Effects of Prices and Tobacco-Control Policies on the Demand for Tobacco Products*, 1 NIC. & TOB. RSCH s105, s106 (Supp. 1, 1999). Cf. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776, 1778 (2009) (findings recognize that children tend to be more price sensitive than adults).

⁷ Frank Chaloupka, *Why is Tobacco Price Manipulation a Problem?* in TOBACCO RETAIL PRICE MANIPULATION POLICY STRATEGY SUMMIT PROCEEDINGS, 3, 4 (Cal. Dep't of Pub. Health, Cal. Tobacco Control Program, 2008).

⁸ See F.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 (Supp. 1 2002).

⁹ See N.Y. PUB. HEALTH LAW §1399-bb.

The purpose of this ordinance is to further the strong governmental interest in protecting the health of its citizens by prohibiting discount coupon redemption and the use of other price promotions that discount the purchase price of tobacco products.

Section 2: Definitions

CIGARETTE means (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in (1).

COUPON means any card, paper, note, form, statement, ticket, voucher, image or other article, whether in paper, digital or any other format, distributed for commercial purposes to be later surrendered, displayed, or scanned by the bearer so as to receive an item without charge or at a discount.

DEPARTMENT means the [Department of XXXX].

LISTED OR NON-DISCOUNTED PRICE means the higher of the price listed for Cigarettes or a Tobacco Product on its package or the price listed on any related shelving, posting, advertising or display at the place where the Cigarettes or Tobacco Products are sold or offered for sale plus all applicable taxes if such taxes are not included in the stated price, and before the application of any discounts or Coupons.

RETAIL PRICE means the price actually paid by the consumer for Cigarettes or a Tobacco Product.

TOBACCO PRODUCT means any manufactured product made or derived from tobacco that is intended for human consumption, whether chewed, smoked, absorbed, dissolved, inhaled, snorted, sniffed or ingested by any other means including but not limited to cigars, pipe tobacco, snuff, chewing tobacco, dipping tobacco, bidis, snus, dissolvable tobacco products, and electronic cigarette cartridges, whether packaged or not. This term also applies to or any component, or part of a tobacco product. However, "Tobacco Product" does not include (1) Cigarettes as defined in this section or (2) any product that has been approved by the U.S. Food and Drug Administration, pursuant to its authority over drugs and devices, for sale as a tobacco use cessation product or for other medical purposes and that is being marketed and sold solely for that approved purpose.

TOBACCO RETAILER means any business that sells or offers for sale any Tobacco Product or Cigarette to individuals for personal consumption.

Department

This will be the entity responsible for implementing and enforcing the law. Depending on the locality, this could be the Health Department, Department, the Department of Code Enforcement or another similar department. We recommend it be a health-oriented department, if possible, since this is a public health ordinance.

Section 3: Sales Restrictions

No Tobacco Retailer, or any employee or agent of same, shall:

(A) Accept or redeem, or cause or hire any person to accept or redeem, any Coupon that reduces the Retail Price of Cigarettes below the Listed or Non- Discounted Price;

(B) Accept or redeem, or cause or hire any person to accept or redeem, any Coupon that reduces the Retail Price for any Tobacco Product below the Listed or Non-Discounted Price;

(C) Accept or redeem, or cause or hire any person to accept or redeem, any Coupon that permits the sale of Cigarettes to consumers through multi-pack discounts (e.g., the sale of three packages for less than the combined price of each package), or otherwise allow, or cause or hire any person to allow, consumers to purchase any Cigarette or combination of Cigarettes and other Tobacco Products for less than sum of the Listed or Non-Discounted Price for each product; or

(D) Accept or redeem, or cause or hire any person to accept or redeem, any Coupon that permits the sale of any Tobacco Product to consumers through any multi-pack discounts (e.g., the sale of three packages for less than the combined price of each package), or otherwise allow, or cause or hire any person to allow, consumers to purchase any Tobacco Product or any combination of Tobacco Products for less than the sum of the Listed or Non- Discounted Price for each product

Sales Restrictions

Subsection (C) applies to discounted sales of Cigarettes or cross-promotions involving the sale of Cigarettes and another Tobacco Product.

Subsection (D) applies to discounted sales of Tobacco Products only (i.e., sales that do not involve Cigarettes).

Section 4: Enforcement

(A) The Department or its authorized designee(s) shall enforce the provisions of this Chapter. The Department may issue and amend rules, regulations, standards, guidelines, or conditions to implement and enforce this Chapter.

(B) In addition to the remedies provided by the provisions of this Chapter, the Department or any other person aggrieved by the failure of a Tobacco Retailer to comply with the provisions of this Chapter, including but not limited to any other Tobacco Retailer located in [City], may seek injunctive relief against the violator to enforce the provisions of this Chapter and prevent future violations.

(C) In any action brought pursuant to this Chapter, the Department or other person who initiates such an action shall, if the prevailing party, be entitled to recover reasonable attorneys' fees and costs involved in bringing the action, plus interest.

Enforcement

Enforcement of this ordinance may be further specified through rules or other regulations devised by the Department after adoption of this ordinance.

Enforcement may be carried out by persons in the community who are harmed by the violation (e.g., a customer or other retailer). Such a person may seek injunctive relief in court and, if the person is successful, may obtain reimbursement for legal costs associated with the case.

Section 5: Penalties

(A) Any Tobacco Retailer found to be in violation of this Chapter shall be liable for a civil penalty of not more than \$250 for the first violation, not more than \$500 for the second violation within a two-year period, and not more than \$1000 for the third and each subsequent violation within a two- year period. Each sale in violation of this Chapter shall be considered a separate and distinct violation.

(B) In addition to the fines established by this Section, violation of this Chapter by a Tobacco Retailer may result in the suspension or revocation of any [City] permit or license issued to the Tobacco Retailer.

(C) All civil penalties and fines recovered by under this Chapter shall be paid to the Department for use in enforcing this Chapter and other city laws relating to Cigarettes and Tobacco Products

Penalties

Penalties may be tailored to reflect penalties for violations of other similar local laws.

Section 6: Severability

The provisions of this Chapter are declared to be severable, and if any section of this Chapter is held to be invalid, such invalidity shall not affect the other provisions of this Chapter that can be given effect without the invalidated provision.

Section 7: Effective Date

The effective date of this ordinance shall be thirty (30) days from the date of its enactment.

Effective Date

The Effective Date should be set at a time that gives the Department and retailers enough time to prepare for the new law. The time period between enactment of the law and the effective date should, however, be no longer than necessary.



Providing legal expertise to support policies benefiting the public health.

The Public Health and Tobacco Policy Center is a legal research Center within the Public Health Advocacy Institute. Our shared goal is to support and enhance a commitment to public health in individuals and institutes who shape public policy through law. We are committed to research in public health law, public health policy development; to legal technical assistance; and to collaborative work at the intersection of law and public health. Our current areas of work include tobacco control and childhood obesity and chronic disease prevention. We are housed in Northeastern University School of Law.

What we do

Research & Information Services

- provide the latest news on tobacco and public health law and policy through our legal and policy reports, fact sheets, quarterly newsletters, and website

Policy Development & Technical Assistance

- respond to specific law and policy questions from the New York State Tobacco Control Program and its community coalitions and contractors, including those arising from their educational outreach to public health officials and policymakers
- work with the New York State Cancer Prevention Program to design policies to prevent cancer
- assist local governments and state legislators in their development of initiatives to reduce tobacco use
- develop model ordinances for local communities and model policies for businesses and school districts

Education & Outreach

- participate in conferences for government employees, attorneys, and advocates regarding critical initiatives and legal developments in tobacco and public health policy
- conduct smaller workshops, trainings webinars, and presentations focused on particular policy areas
- impact the development of tobacco law through *amicus curiae* ("friend of the court") briefs in important litigation

Find us online

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The Center's website provides information about recent tobacco news and case law, New York tobacco-related laws, and more. Current project pages include: tobacco-free outdoor areas; tobacco product taxation; smoke-free multiunit housing; and retail environment policies. The website also provides convenient access to reports, model policies, fact sheets, and newsletters released by the Center.

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The Center is funded to support the New York State Tobacco Control Program, the New York State Cancer Prevention Program and community coalitions and educators. The Center also assists local governments and other entities as part of contractor-submitted requests. If we can help with a tobacco-related legal or policy issue, please contact us.

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