



## Regulating Roll Your Own Tobacco Machines

The Tobacco Control Legal Consortium has created this series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures.<sup>1</sup> For more details about these policy considerations, please contact the Consortium.

### Roll Your Own Tobacco Machines

Roll your own (RYO) tobacco is considered “the fastest growing segment in the cigarette outlet business.”<sup>2</sup> Commercial RYO machines located in retail stores enable RYO retailers to sell cigarette packs and cartons without paying the federal and state excise taxes that are imposed on conventionally manufactured cigarette packs or cartons.<sup>3</sup> Because of this, consumers can purchase cigarette packs and cartons at a fraction of the cost of conventionally manufactured cigarette packs and cartons.<sup>4</sup>



Additionally, RYO retailers do not have to comply with licensing rules mandated for conventional cigarette manufacturers, including paying into a required escrow fund pursuant to the Master Settlement Agreement (MSA).<sup>5</sup>

The machines that are the subject of this document are the large, high volume machines<sup>6</sup> described as being the size of a jukebox.<sup>7</sup> Since 2008, RYO Machine Rental, LLC, located in Cincinnati, Ohio, and the major supplier of RYO machines (known as RYO Filling Stations), has placed approximately 1,700 of these machines in stores in 40 states.<sup>8</sup> Each machine costs more than \$30,000.<sup>9</sup> A customer buys loose tobacco—most often classified as pipe tobacco, for reasons discussed below—and rolling tubes. The customer then “rents” the machine and makes the RYO cigarette by pouring the tobacco into a hopper on the machine and inserting the paper tubes in another part of the machine. The customer follows the directions on the machine’s computer interface, which is similar to an automatic teller machine. These high volume machines can produce 200 cigarettes (a carton) in about 10 minutes,<sup>10</sup> at a fraction of the price of conventional cigarettes. For more background information about RYO machines, as well as their tax

and public health implications, see the Consortium's *Roll Your Own Tobacco: An Overview* fact sheet.

### **Policy Benefits**

High excise taxes encourage adult smokers to quit<sup>11</sup> and deter youth from starting.<sup>12</sup> Cheap cigarettes promote the use of tobacco, resulting in a negative impact on public health and increased health care costs.<sup>13</sup> Providing consumers with inexpensive RYO tobacco in the form of cigarette packs and cartons severely undercuts the evidence-based public health benefit of imposing high excise taxes on tobacco.

Specifically, federal excise taxes on conventionally manufactured cigarettes increased from 39 cents per pack to \$1.01 per pack recently.<sup>14</sup> These taxes, combined with state excise taxes, have greatly increased the price of a pack of cigarettes. Taxes on RYO tobacco have also increased by 2,400%.<sup>15</sup> Pipe tobacco is taxed significantly below other loose tobacco.<sup>16</sup> As a result, many tobacco manufacturers have re-branded RYO as pipe tobacco, and it is the type of tobacco primarily used in RYO machines.<sup>17</sup>

In addition to the tax evasion issue, many governmental entities argue that retailers who give consumers access to RYO machines are effectively tobacco manufacturers and therefore should be subject to the same licensing rules as conventional cigarette makers.<sup>18</sup> If these retailers were licensed in a manner similar to conventional manufacturers, then the same rules would apply with respect to contributing to Master Settlement Agreement (MSA) escrow accounts.<sup>19</sup>

Tax evasion and failure to comply with manufacturing licensing requirements are of concern not only to governmental and public health entities, but also to the cigarette industry. As one tobacco analyst said, "the bottom line is, I don't think this trend is going to go unchallenged next year; I would expect a lot of activity behind this."<sup>20</sup> Conventional cigarette manufacturers see RYO retailers as unfairly competing with their products by offering much less expensive cigarettes.<sup>21</sup> For these reasons, large segments of the tobacco industry may not oppose the public health community's effort to regulate RYO machines.

In July 2012, the new federal transportation reauthorization bill (known as "MAP-21") became law. This bill included a provision that defined store owners who "rent" RYO tobacco machines to customers as tobacco manufacturers.<sup>22</sup> This means that roll-your-own retailers are now required to pay federal license fees and excise taxes, a change that will raise the price of RYO cigarettes and eliminate the tax loophole that allowed retailers to avoid the financial consequences of manufacturing cigarettes on their premises. This provision is likely to have a large national effect on RYO retailers nationwide and may result in many of them going out of business. See the Consortium's [\*The Effect of the Federal Transportation Reauthorization Bill on State and Local Regulation of RYO Retailers\*](#) guide for more details.

## Policy Options

As with all policies, effective regulations of RYO machines or retailers should expressly state the policy rationale, clearly and concisely describe the machines and retailers affected by the policy and the restrictions imposed, and detail the required enforcement measures. Following are some policy options to consider:

- **Designate RYO retailers as manufacturers.** As mentioned above, the federal government has now designated RYO retailers as manufacturers, putting RYO retailers on the same footing as large cigarette manufacturers and eliminating their ability to evade federal licensing fees and conventional cigarette excise taxes. However, state and federal taxation and licensing schemes are legally distinct, so states must still pass their own laws imposing state licensing and tax requirements for manufacturers on RYO retailers. Some states have designated RYO retailers as “manufacturers” of cigarettes.<sup>23</sup> The rationale is that the retailers essentially are operating as manufacturers and therefore must be licensed as manufacturers. This designation would require RYO retailers to apply for a manufacturing license, pay state excise taxes and pay into a state qualified escrow account as non-participating manufacturers pursuant to the MSA.<sup>24</sup> For more information about taxation of tobacco products, see the Consortium’s [Taxation of Tobacco Products: An Introduction to Key Terms & Concepts](#) fact sheet.
- **Prohibit the use of RYO machines.** Arkansas prohibited the use of commercial RYO cigarette machines on the grounds that tax discrepancies between RYO tobacco, pipe tobacco and cigarettes would “hamper the [s]tate’s long-term public health efforts.”<sup>25</sup> Other states, especially those currently without these machines, could do the same.<sup>26</sup> In addition, local governments whose authority is not limited by state laws could restrict these machines on the same grounds. Municipalities currently without these machines are perfectly positioned to adopt such a policy.
- **Require annual permits for retailers with RYO machines.** States can require annual permits for retailers with RYO machines, regardless of whether such retailers are designated as manufacturers. For example, the Governor of Massachusetts’ fiscal year 2013 budget proposes requiring licenses, to be renewed annually, for each RYO machine in a retail store. The fee for the license would be \$25,000 for each high volume machine and \$5,000 for each low volume machine.<sup>27</sup> A retailer operating without a license would face extremely high penalties.<sup>28</sup> Many local governments also could require annual permits for RYO machines, similar to requiring local tobacco control permits or licenses. A local government would need to confirm that state law does not prevent it from enacting such a policy.
- **Regulate RYO machines under self-service access laws.** If a state or local law restricts self-service access to tobacco products to adult-only establishments or completely prohibits self-service access to tobacco products, RYO machines might fall within the definition of the type of “self-service access” that is restricted or prohibited. Self-service access to tobacco products usually refers to a customer’s

ability to get a tobacco product or tobacco product package off the shelf without assistance from a store worker. Self-service access laws require that the tobacco products covered by those laws be kept beyond the reach of all customers.<sup>29</sup>

RYO machines are in an area of a store where they are accessible by customers, who bring the tobacco to the machine and put the tobacco in the machine. The tobacco product is made in the machine. RYO retailers, in order to refute the allegation that they are manufacturers, claim that the customer does all the work and that they are merely “renting” the machine to their customers. If this is the case, then access to the machine could be considered self-service access and regulated or prohibited as such.

A state or local self-service access law that does not apply to RYO machines can be amended to include them. Language currently being considered in Brewster, Massachusetts and in other Massachusetts municipalities defines self-service access to include: “Any display or RYO machine from which customers may select or make a tobacco product or a nicotine delivery product without assistance from an employee or store personnel.”<sup>30</sup>

It is likely that the new federal law will make it easier for states and localities to regulate RYO retailers. If the expanded federal definition makes RYO machines prohibitively expensive or drives RYO retailers out of business, they will be less likely to invest resources in challenging state and local regulations. It remains to be seen how great an impact MAP-21 will have and whether many RYO retailers will close, which could obviate the need for further state efforts to regulate them.

### **Legal Challenges**

State governments have the legal authority to pass public health laws that regulate or prohibit commercial RYO machines.<sup>31</sup> Most local jurisdictions have similar legal authority. There are states that restrict or preempt local governments from exercising certain powers or from passing certain tobacco control laws.<sup>32</sup> If your state does not allow the type of local regulation discussed in this publication, then you could consider pursuing state policy strategies or strategies to restore local control. In a local jurisdiction that lacks authority, you might consider using voluntary strategies to discourage retailers from investing in RYO machines. For example, efforts could be made to inform retailers about pending statewide legislation that would prohibit RYO machines or designate RYO retailers as manufacturers.

Some state and local efforts to regulate RYO retailers have faced legal challenges, while in other cases state and local governments have used litigation themselves as an enforcement strategy. To help prevent legal challenges, make sure that any state or local law is written clearly and succinctly. A person of ordinary intelligence should be able to understand what the law prohibits and permits.<sup>33</sup> Also take care to delineate the rationale for the law. Retailers often challenge state regulations with ambiguous language. For example, if state law does not explicitly include retailers in its definition of “manufacturer,” courts might not apply the tobacco tax law to them. If state laws govern

the process for imposing new taxes, state and local governments may be required to follow them if they cannot convince a court that they are seeking payment of taxes already due. Other cases have focused on whether other tobacco control laws (e.g., fire-safe regulations) apply to RYO retailers.

Below is a sampling of litigation involving RYO retailers and state or local governments. This is not intended to be a comprehensive list of every case, but it does demonstrate several types of legal challenges related to RYO regulation.

Case Name	Summary and Outcome
<b>RYO Machine Rental, LLC. v. U. S. Dep’t of Treasury</b> <sup>34</sup>	A federal court granted a preliminary injunction to a manufacturer and distributor of RYO machines against a Tobacco, Tax and Trade Bureau (TTB) ruling requiring RYO retailers to obtain a permit and pay applicable taxes. This case centered on the TTB’s authority to issue such a ruling, but now that the federal transportation bill has codified a similar requirement, the case is likely moot.
<b>State &amp; City of New York v. BB’s Corner, Inc. et al.</b> <sup>35</sup>	One of several cases brought by the State and City of New York against RYO retailers for avoiding taxes and violating fire safety laws. A federal court found that the defendants were violating both the Contraband Cigarette Trafficking Law and the Cigarette Marketing Standards Act and granted a preliminary injunction.
<b>City of NY v. Island Smokes, LLC</b> <sup>36</sup>	NYC sued a RYO retailer on the basis of tax evasion and violation of tax stamp laws. The retailer agreed to shut down on February 1, 2012 to avoid the prohibitive cost of defending the lawsuit. <sup>37</sup>
<b>Connecticut v. Tracey’s Smoke Shop &amp; Tobacco</b> <sup>38</sup>	The state sought a preliminary injunction against RYO retailer Tracey’s for various violations of state law. Finding that the definition of “manufacturer” under CT laws was “an entity that directly makes cigarettes which the entity intends to be sold in the United States,” the court concluded that Tracey’s acted as a manufacturer when it assisted customers with the machines and offered cartons of machined-rolled cigarettes for sale. However, it declined to issue a broad injunction against using the machines because it was possible for Tracey’s to act in a way that did not make it a manufacturer. It granted an injunction only against allowing employees assisting customers with the machines and advertising or offering for sale cigarettes made on the premises.
<b>RW Petersen, LLC, et. al v. Wisc. Dep’t of Revenue</b> <sup>39</sup>	In September 2011, Wisconsin began imposing manufacturing regulations on RYO retailers. A state court granted a temporary injunction to stop the Department of Revenue’s new policy. The court said the statutory definition was ambiguous and should be construed in favor of the taxpayer under WI law. Because the

	new definition was an interpretation by the department, it had to be promulgated under a specific state rule. In March, the Department filed a motion requesting that the court prohibit pipe tobacco from being used in the machines.
<b>Henne v. Flaherty</b> <sup>40</sup>	A Washington state court issued a preliminary injunction against state legislation that imposed excise taxes on RYO cigarettes. The plaintiffs claimed that the new law violated a state law requiring that two-thirds of the legislature approve any tax increase, while the state claimed that not taxing RYO cigarettes was an evasion of an already existing tax. However, the plaintiffs declined to post a required bond due to the federal transportation bill, the Washington Supreme Court stayed the injunction, and the tax went into effect on July 1, 2012. <sup>41</sup> The lawsuit was dismissed on July 3. <sup>42</sup>
<b>State of NH v. North of the Border Tobacco, LLC</b> <sup>43</sup>	The court ruled that a retailer that fixed and maintained RYO machines, assisted customers with their operation, and provided rolled cigarettes when the machine produced an incomplete batch was a manufacturer under NH law.

The new federal transportation bill provision is likely to affect much federal and state litigation involving RYO retailers. Most cases involving federal law will be resolved or dismissed. RYO retailers may be much less likely to challenge state and local regulations in the wake of the federal legislation, and the federal law might also impact state cases indirectly by encouraging a broader reading of state statutes. Please see the Consortium's [The Effect of the Federal Transportation Reauthorization Bill on State and Local Regulation of RYO Retailers](#) guide for more details.

### Select Legislation and Policies

Below are some examples of RYO regulations and legislation in the United States. If you consider adapting any language from these policies, be sure to confirm that the provision in question is practical in your jurisdiction. Please note that the Consortium does not endorse or recommend any of the following policies. These examples are included simply to illustrate how various jurisdictions have approached these issues.

Policy Type	Jurisdiction	Statute/Regulation/ Directive/Judicial Decision	Select Excerpt
Prohibits RYO machines	Arkansas	Act 836, 2011 Ark. Acts. <sup>44</sup>	"A person licensed . . . [to sell tobacco] . . . shall not possess or otherwise utilize a cigarette rolling machine."

Requires retailers who make cigarette rolling machines available to be certified with the state and comply with requirements regarding location of the machine, restrictions on the sale and manufacture of cigarettes, payment of applicable taxes and quarterly reporting.	Idaho	IDAHO CODE ANN. §§ 39-8420 - 25 (2012) <sup>45</sup>  “Idaho Cigarette Rolling Machine Operator Act”	“Before a cigarette rolling machine operator may be certified by the attorney general, the operator shall certify . . .”
Designates RYO retailers as tobacco product manufacturers and requires them to pay into the state’s escrow fund for tobacco manufacturers that did not participate in the Master Settlement Agreement (MSA)	New Hampshire	<i>State v. North of the Border Tobacco, LLC</i> , 32 A.3d 548, 557 (N.H. 2011).	“[T]he NPM Act was designed to target commercial entities that are directly responsible for making, creating or producing cigarettes and profit from placing them into the stream of commerce for purchase by consumers. . . . Tobacco Haven employees instructed customers [how to use the machine]. . . . Tobacco Haven was a tobacco product manufacturer selling rolled cigarettes to consumers within the meaning of the NPM Act.”
Designates RYO retailers as tobacco product manufacturers and requires them to pay into the state’s non-participating manufacturers escrow fund (MSA) and pay state and local cigarette excise taxes; deems products as constituting a public health nuisance because they are not certified as “fire-safe” as required by NY state law; designates products as injurious to public health	New York	<i>City of New York v. Island Smokes, LLC</i> , No. 11 CIV 8189 (S.D.N.Y. filed Nov. 14, 2011), 2011 WL 6055289 <sup>46</sup>	N/A
Prohibits RYO machines under self-	Massachusetts	Proposed local board of health regulation <sup>47</sup>	Self-service display is “any display or RYO

service access regulation			machine from which customers may select or make a tobacco product or a nicotine delivery product without assistance from an employee or store personnel. . . . All self-service displays of tobacco products and/or nicotine delivery products are prohibited.”
Taxes all RYO tobacco, including pipe tobacco, at the same rate as cigarettes	Massachusetts	Governor Deval Patrick’s proposed budget for FY2013 <sup>48</sup>	“Increase the cigarette excise by 50 cents to \$3.01 per pack, and increase other tobacco taxes (cigars, smokeless, roll-your-own, etc.) to reflect the previous and new cigarette excise increases.” <sup>49</sup>
Prohibits the use or possession of RYO machines for commercial use.	Oklahoma	OKLA. STAT. tit. 68, § 380 (2012) <sup>50</sup>	“. . . the following shall be prohibited: 1. The use or possession of a cigarette rolling vending machine for commercial purposes . . . 2. The sale, resale, distribution, dispensing, or giving away to any other person in this state cigarettes produced by a cigarette rolling vending machine. . . .”
Designates RYO retailers as tobacco product manufacturers and requires them to pay into the state’s escrow fund if they are not participating in the Master Settlement Agreement (MSA).	South Dakota	S.D. CODIFIED LAWS § 10-50-105 (2012) <sup>51</sup>  S.D. CODIFIED LAWS § 10-50B-7 (2012) <sup>52</sup>	“Any person that maintains or provides a machine at any retail establishment that enables any consumer to process at that establishment tobacco or any product that is made or derived from tobacco into a roll or tube is deemed to be a manufacturer of cigarettes.”
Prohibits RYO machines for	Vermont	VT. STAT. ANN. tit. 7, § 1011 (2012) <sup>53</sup>	“A person shall not possess or use a

commercial purposes			cigarette rolling machine for commercial purposes.”
Designates RYO machine operators as tobacco product manufacturers and taxes accordingly.	Wyoming	WYO. STAT. ANN. § 9-4-1211 (2012) <sup>54</sup>	“Any person who maintains at a retail establishment a machine which enables a person to process tobacco, or any product made from tobacco, into a roll or tube shall be deemed a tobacco produce manufacturer and the resulting product shall be deemed a cigarette for the purposes of this section.”

### Other Helpful Resources

The Tobacco Control Legal Consortium’s parent organization, the [Public Health Law Center](#), has a webpage containing information on [tobacco product regulation](#), including federal, state and local regulation. Our site also contains resources providing an overview of issues related to RYO tobacco. Other organizations have information about RYO tobacco and RYO machines, including the [Campaign for Tobacco-Free Kids](#).

### Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at [publichealthlaw@wmitchell.edu](mailto:publichealthlaw@wmitchell.edu) with any questions about the information included in this guide or to discuss specific, local concerns you might have about implementing any of these policies.

*Last Updated: October 2012*

### Notes

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

<sup>2</sup> RYO FILLING STATION, [www.ryofillingstation.com](http://www.ryofillingstation.com) (last visited Feb. 27, 2012).

<sup>3</sup> *Id.* Also, in cases where pipe tobacco is used instead of loose RYO tobacco, retailers can sell manufactured products without paying the higher tax imposed on loose RYO tobacco.

<sup>4</sup> *Id.* For example, in Massachusetts, a single pack of RYO cigarettes costs approximately \$3 (versus approximately \$8 for a conventionally manufactured pack) and a carton of RYO cigarettes sells for approximately \$30 (versus approximately \$80 for a conventionally manufactured pack).

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<sup>5</sup> Manufacturers are obligated by law either to become a participating manufacturer and perform financial obligations pursuant to the Master Settlement Agreement (MSA) entered into with 46 states and five U.S. territories, or remain a non-participating manufacturer (NPM) and pay into a qualified escrow account based on units sold. *State v. North of the Border Tobacco*, 32 A.3d 548 (N.H. 2011).

<sup>6</sup> Michael Holtzman, *Store Owner May Face Hurdles on “Roll Your Own” Cigarette Machine*, HERALD NEWS, Dec. 27, 2011, <http://www.heraldnews.com/news/x1980200878/Store-owner-may-face-hurdles-on-roll-your-own-cigarette-machines>.

<sup>7</sup> Linda Abu-Shalback Zid, *Rolling with the Punches: While Piquing Retailer Interests, RYO Machines Take a Hit from Regulatory Bodies*, CSP, Jan. 2012, at 89, available at [http://www.cspnet.com/sites/default/files/magazine/article/pdf/F3\\_CSP\\_0112.pdf](http://www.cspnet.com/sites/default/files/magazine/article/pdf/F3_CSP_0112.pdf).

<sup>8</sup> Press Release, SAM Mfg., LLC; RYO Mach., LLC, Top Roll-Your-Own Tobacco Companies Ink Exclusive Licensing Deal and Future Legal Cost Sharing Agreement (Nov. 18, 2011), [www.prnewswire.com/news-releases/top-roll-your-own-companies-ink-exclusive-licensing-deal-and-future-legal-cost-sharing-agreement-134134018.html](http://www.prnewswire.com/news-releases/top-roll-your-own-companies-ink-exclusive-licensing-deal-and-future-legal-cost-sharing-agreement-134134018.html).

<sup>9</sup> Holtzman, *supra* note 6.

<sup>10</sup> *Id.*

<sup>11</sup> Kenneth E. Warner, *Smoking and Health Implications of a Change in the Federal Cigarette Excise Tax*, 255 J. AM. MED. ASS'N 1028 (1986).

<sup>12</sup> Frank J. Chaloupka & Rosalie Liccardo Pacula, *The Impact of Price on Youth Tobacco Use*, 14 SMOKING AND TOBACCO CONTROL MONOGRAPHS: CHANGING ADOLESCENT SMOKING PREVALENCE 193 (U.S. Dep't Health and Human Services et al. eds., 2001).

<sup>13</sup> The annual national escrow payments of NPMs are intended to help the settling states improve public health and advance tobacco-related public health measures. *Complaint, City of New York v. Island Smokes, LLC*, No. 11 CIV 8189 (S.D.N.Y. filed Nov. 14, 2011), 2011 WL 6055289.

<sup>14</sup> Children's Health Insurance Reauthorization Act of 2009, tit. vii, § 701(b), 123 Stat. 106 (2009) (codified at 26 U.S.C. § 5701).

<sup>15</sup> *Id.* § 701(g).

<sup>16</sup> Campaign for Tobacco-Free Kids, *The Problem with Roll-Your-Own (RYO) and Other Smoking Tobacco* (2012), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0336.pdf>.

<sup>17</sup> It is estimated that 90 percent of what is being sold as pipe tobacco is actually being used in RYO machines. Pipe tobacco shipments went from 11.5 million pounds in 2009 to 22.4 million pounds in 2010. Traditional RYO tobacco shipments dropped from 11.2 million pounds to 5.8 million pounds; and cigarette shipments dropped from 308.6 billion sticks to 292.7 billion

sticks. U.S. DEP'T OF TREASURY, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, TTB S 5210-12-2010, STATISTICAL REPORT - TOBACCO (2011), *available at* <http://www.ttb.gov/statistics/2010/201012tobacco.pdf>.

<sup>18</sup> Dep't of Treasury, Alcohol and Tobacco Tax and Trade Bureau, *Cigarette-making Machines in Retail Establishments*, TTB.GOV (Sept. 30, 2010), <http://www.ttb.gov/rulings/2010-4rule.pdf> (TTB Ruling 2010-4); *see, e.g., State v. North of the Border Tobacco*, 32 A.3d at 554.

<sup>19</sup> These escrow accounts were intended to capture funds from manufacturers that did not participate in the MSA in order to help states “achieve significant funding for the advancement of public health and the implementation of important tobacco-related public health measures.” *State v. North of the Border Tobacco*, 32 A.3d at 550 (internal quotations omitted).

<sup>20</sup> Abu-Shalback Zid, *supra* note 7, at 92.

<sup>21</sup> RYO suppliers and retailers have countered this argument, suggesting that the approximately 1,700 machines have created about 4,500 jobs. Press Release, SAM Mfg., LLC; RYO Mach., LLC, *supra* note 8.

<sup>22</sup> Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21) of 2012, Pub. L. No. 112-141 (codified as amended in scattered sections of 23 U.S.C.), § 100122.

<sup>23</sup> *See North of the Border Tobacco*, 32 A.3d at 550; Complaint, City of New York v. Island Smokes, LLC, No. 11 CIV 8189 (S.D.N.Y. filed Nov. 14, 2011), 2011 WL 6055289. State Attorneys General in Connecticut, Michigan, and Minnesota have filed complaints against RYO retailers claiming that they are manufacturing cigarettes without a license. A Connecticut Superior Court judge denied the government's motion for a preliminary injunction on February 24, 2012, which would have allowed the state to prohibit the use of RYO machines while the litigation against the RYO retailer was pending. *Connecticut v. Tracey's Smoke Shop and Tobacco, LLC*, CV-11-6024334S, slip op. at 14 (Conn. Super. Ct. Feb. 24, 2012). However, the Court determined that the defendant likely violated the Connecticut Unfair Trade Practices Act by illegally operating as a cigarette manufacturer. *Id.* at 16–26. Other jurisdictions, including West Virginia and Virginia, have legislation pending that would designate RYO retailers as manufacturers.

<sup>24</sup> RYO retailers claim they are not manufacturers; rather they claim to sell the tobacco and the rolls to consumers who make the product and are the manufacturers. Retailers argue that they merely rent the machine to consumers. *North of the Border Tobacco*, 32 A.2d at 554. However, as New York City argued, “[W]hen you go to a salad bar, they sell you a salad, not a salad assembly process. When customers walk out of these stores, they have finished cigarettes and they bought them in those stores. The stores also have signage that calls them a discount cigarettes shop.” [John Del Signore](#), *City Sues To Shut Down Roll-Your-Own Cigarette Shops*, THE GOTHAMIST (Nov. 22, 2011), [www.gothamist.com/2011/11/22/city\\_sues\\_to\\_shut\\_down\\_roll-you-own.php](http://www.gothamist.com/2011/11/22/city_sues_to_shut_down_roll-you-own.php).

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<sup>25</sup> Act 836, 2011 Ark. Acts., *available at* <http://www.arkleg.state.ar.us/assembly/2011/2011R/Acts/Act836.pdf>. The state prohibited the machines before any were located in Arkansas.

<sup>26</sup> It may be politically difficult for states to restrict them once retailers have spent more than \$30,000 for each machine.

<sup>27</sup> The proposal defines high volume machines as those that can make more than 10 cigarettes per minute and low volume machines as those that make less than 10 cigarettes per minute. Office of the Governor, *Outside Section 9, GOVERNOR'S BUDGET FY2013* [http://www.mass.gov/bb/h1/fy13h1/os\\_13/h9.htm](http://www.mass.gov/bb/h1/fy13h1/os_13/h9.htm) (last visited Feb. 27, 2012).

<sup>28</sup> Operating without a high volume license would subject a retailer to a fine of \$410,000 and operating without a low volume license would subject a retailer to a fine of \$100,000. *Id.*

<sup>29</sup> Under federal law, retailers cannot allow self-service access to cigarettes and smokeless tobacco, except in adult-only establishments. 21 C.F.R. 1140.16(c)(2011). Many jurisdictions have adopted similar restrictions or prohibitions that apply to all tobacco products.

<sup>30</sup> For copies of current tobacco control regulation templates, contact Cheryl Sbarra ([sbarra@mahb.org](mailto:sbarra@mahb.org)) or D.J. Wilson ([D.J.Wilson@mma.org](mailto:D.J.Wilson@mma.org)).

<sup>31</sup> *RYO Machine Rental* does not concern a challenge to the government's ability to pass laws related to RYO machines. It challenges whether TTB Ruling No. 2010-4, promulgated by an administrative agency, is actually legislative in nature, and not merely interpretative. *RYO Machine Rental, LLC v. U. S. Dep't of Treasury*, No. 4:10-CV-2462, 2010 WL 5158880 (N.D. Ohio Dec. 14, 2010).

<sup>32</sup> According to the CDC, twenty-seven states preempt local tobacco control in some way, and twenty-two states preempt local youth access restrictions. For a list of states that are preemptive see Michelle Griffin et al., *State Preemption of Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access - United States, 2000 – 2010*, 60 MORBIDITY & MORTALITY WKLY REP. 1124, 1124 (Aug. 6, 2011), *available at* <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6033a2.htm> (published by the Centers for Disease Control and Prevention).

<sup>33</sup> *Grayned v. City of Rockland*, 408 U.S. 104, 108 (1972).

<sup>34</sup> *RYO Machine Rental v. U.S. Dep't of Treasury*, No. 4:10-CV-2462 (N.D. Ohio Dec. 14, 2010).

<sup>35</sup> *State & City of New York v. BB's Corner, Inc. et al.*, 12-CV-1828, slip op. (S.D.N.Y. Jun. 25, 2012)

<sup>36</sup> *City of New York v. Island Smokes*, No. 11-CV-08189.

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<sup>37</sup> New York City Law Dep't, *Press Release: New York City Law Department Announces Consent Decree in Suit Against "Roll-Your-Own" Cigarette Businesses; "Roll-Your-Own" Stores Agree To Shut Down*, Dec. 20, 2011, available at <http://www.nyc.gov/html/law/downloads/pdf/Island%20Smokes%20Consent%20Decree.pdf>.

<sup>38</sup> *Connecticut v. Tracey's Smoke Shop & Tobacco*, CV-11-6024334S.

<sup>39</sup> RW Petersen, LLC, et. al v. Wisc. Dep't of Revenue, 11-CV-4431 (Dane County Cir. Ct. Feb 24, 2012)

<sup>40</sup> *Henne v. Flaherty*, No. 12-2-50512-1 (Wash. Sup. Ct. filed June 14, 2012), available at [http://blog.thenewtribune.com/politics/files/2012/06/Complaint\\_for\\_Declaratory\\_Judgment.pdf](http://blog.thenewtribune.com/politics/files/2012/06/Complaint_for_Declaratory_Judgment.pdf).

<sup>41</sup> Washington State Department of Revenue, *Update: Supreme Court Grants Temporary Stay*, June 29, 2012, <http://dor.wa.gov/Content/AboutUs/newsroom/2012/062912b.aspx>.

<sup>42</sup> Washington State Department of Revenue, *The Roll-Your-Own Cigarette Case Has Been Dismissed*, July 10, 2012, <http://dor.wa.gov/Content/AboutUs/newsroom/2012/071012.aspx>.

<sup>43</sup> *State v. North of the Border Tobacco*, 32 A.3d 548 (2011).

<sup>44</sup> Act 836, 2011 Ark. Acts., available at <http://www.arkleg.state.ar.us/assembly/2011/2011R/Acts/Act836.pdf>.

<sup>45</sup> IDAHO CODE ANN. §§ 39-8420 - 25 (2012), available at <http://www.ag.idaho.gov/tobacco/H0518.pdf>

<sup>46</sup> RYO retailers involved in the litigation agreed to stop operating effective February 1, 2012 in lieu of going to trial on the merits of the City's claims. The City continues to file lawsuits against other RYO retailers when investigators find them. Press Release, *New York City Law Dep't, New York City Law Department Announces Consent Decree in Suit Against "Roll-Your-Own" Cigarette Business* (Dec. 20, 2011), available at <http://www.nyc.gov/html/law/downloads/pdf/Island%20Smokes%20Consent%20Decree.pdf>.

<sup>47</sup> Proposed in a few municipalities in Massachusetts, including Brewster, MA.

<sup>48</sup> Office of the Governor, *Outside Section 9, GOVERNOR'S BUDGET FY2013* [http://www.mass.gov/bb/h1/fy13h1/os\\_13/h9.htm](http://www.mass.gov/bb/h1/fy13h1/os_13/h9.htm) (last visited Feb. 27, 2012).

<sup>49</sup> *Id.*

<sup>50</sup> OKLA. STAT. tit. 68, § 380 (2012), available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=467632>

<sup>51</sup> S.D. CODIFIED LAWS § 10-50-105 (2012), available at <http://legis.state.sd.us/statutes/DisplayStatute.aspx?Statute=10-50-105&Type=Statute>

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<sup>52</sup> S.D. CODIFIED LAWS § 10-50B-7 (2012), *available at*  
<http://legis.state.sd.us/statutes/DisplayStatute.aspx?Statute=10-50B-7&Type=Statute>

<sup>53</sup> VT. STAT. ANN. tit. 7, § 1011 (2012)

<sup>54</sup> WYO. STAT. ANN. § 9-4-1211 (2012), *available at*  
<http://legisweb.state.wy.us/statutes/statutes.aspx?file=titles/Title9/T9CH4.htm>