PUBLIC HEALTH POLICY CHANGE

Policy Options for Restricting Tobacco Sampling and Couponing

Feb. 7, 2012

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Today’s Agenda

• Tobacco Sampling and Couponing (Maggie Mahoney)
• Industry Tactics – Personalized Marketing (Betsy Brock)
• The Legal Landscape – Federal Activities & Local Opportunities (Kerry Malloy Snyder)
• The California Experience – Successful Efforts to Close Loopholes (Leslie Zellers)
• Q&A (moderated by Maggie Mahoney)
Tobacco Control Legal Consortium

The legal network for tobacco control.
Tobacco Sampling and Couponing

Why do we care?

- Use of tobacco products and cost
- Industry strategies to circumvent other policy interventions
Tobacco Marketing: Getting Personal

Betsy Brock, MPH

Association for Nonsmokers-Minnesota

www.ansrmn.org
Tobacco Marketing: Current Trends

- Personalized, one-on-one, communication through a variety of mediums:
  - Web
  - Email
  - Smart phone
  - Mail

- Emphasis on building a relationship with a consumer.
Relationship Marketing

• Retaining an existing customer is cheaper than attracting a new one.
• Long-time customers are less likely to switch brands and are less price sensitive.
• Long-time customers are more likely to engage in “word of mouth” marketing.
• And…
• One-on-one marketing strategies are:
  – Harder to justify regulating.
  – Partially shield the industry from claims that they are targeting kids.

“We see this as marketing for a new era, where product brand communication is primarily based on one-to-one permission marketing to adult smokers, in much more focused, narrower channels, with tight standards for age verification.”

--British American Tobacco Website, 2012
Advertising and Promotion Expenditures: Cigarettes

- 2008 Total Dollars: $9.94 billion
  - Direct mail: $90 million
  - Website: $13.2 million
  - Coupons: $360 million
Advertising and Promotion Expenditures: Smokeless

- 2008 Total Dollars: $547.9 million
  - Direct mail: $7.6 million
  - Website: $2.1 million
  - Coupons: $29.5 million
Brand Websites

• All of the biggest tobacco brands have websites
Nothing about our cigarettes or packaging, including color, should be interpreted to mean that any cigarette is safer than any other cigarette. Nothing about our cigarettes will help you quit smoking.

SURGEON GENERAL’S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
BLACK & MILD COUPONS

SELECT A COUPON

Below are all the coupon offers available to you at this time. Simply check the box of the coupon you wish to print. When you have selected your coupon, click CONTINUE to prepare for printing.

ROYALE
$1.25 OFF ONE 5-PACK

CHECK TO PRINT

ANY VARIETY
$1 OFF ONE 5-PACK

CHECK TO PRINT

CONTINUE >>
Now you can visit BlackandMild.com from your iPhone® or Android™ mobile device. Stop by The Club when you're out & about to enjoy free tunes, special offers and more of all things enjoyable—and the best part is, you're already a member.

Use your iPhone® or Android™ to visit BlackandMild.com/mobile

BlackandMild.com has been designed for iPhone® mobile digital devices and for Android™ mobile digital devices with OS 2.1.8 and higher. Participation requires an iPhone® mobile digital device or an Android™-based mobile device. iPhone® is a registered trademark of Apple Inc. Android™ is a trademark of Google Inc. Use of the Android™ trademark is subject to Google Permissions.
WARNING: This product is not a safe alternative to cigarettes.
Direct Mail Marketing

• Primary vehicle for the distribution of tobacco coupons
Camel Snus coupon mailing.

January, 2012
Can cozy from Camel- with coupons.

December, 2011
Free gift from Black & Mild: Cigar box, ashtray, and Zippo lighter.

May, 2011
Custom phone “skin” from Marlboro.

December, 2011
Skoal coupon mailing.

January, 2012
Tobacco Coupons

• An important tobacco company strategy, which is used to:
  – Manipulate the price of tobacco products
  – Encourage users to try a new product or brand extension
  – Discourage quitting
• Sample of 561 tobacco mailings from 2011
  – 497 (89%) contained coupons
  – 64 (11%) did not contain coupons
  – $5.32: Average value of coupons in a mailing with coupons
  – $0.75-$25: Range of mailing value
    • $25 was distributed as a VISA gift card- is this really a coupon?
    • Top coupon value: $20
Starting price of Camel SNUS as advertised: **$4.04**

- “Get SNUS for $1” manufacturer coupon

= **FINAL PRICE: $1.00**
Starting price of American Spirit cigarettes: $6.16
- $5.00 off manufacturer coupon

= FINAL PRICE: $1.16
Starting price of Camel cigarettes + Camel SNUS: $11.10

- $1.91 off in-store discount on Camel cigarettes

- Free SNUS with any Camel purchase manufacturer coupon

- $2.00 off Camel cigarettes manufacturer coupon

= FINAL PRICE: $3.46
Starting price of Marlboro cigarettes +
4 packs of Snus: $17.08
- $1.00 off in-store discount on Skyline cigarettes
- $1.00 off snus manufacturer coupon
- $1.00 off cigarettes manufacturer coupon

= FINAL PRICE: $5.63
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Policy Options for Restricting Tobacco Sampling and Couponing: The Legal Landscape

Kerry Malloy Snyder, JD
Center for Public Health and Tobacco Policy
February 7, 2012
Disclaimer

This presentation provides educational information and does not constitute and cannot be relied upon as legal advice. The Center for Public Health and Tobacco Policy does not provide legal representation.
Goals for today

- Family Smoking Prevention and Tobacco Control Act (FDA Act)

- Opportunities for state and local regulation of price promotions: use of sampling and discount coupons

- Legal issues
Family Smoking Prevention and Tobacco Control Act: Price Promotion Restrictions

Prohibits:

- Redemption of coupons by mail
- Giveaways of non-tobacco products with purchase of tobacco product
- Distribution of free samples of cigarettes

Restricts free samples of smokeless tobacco products to “qualified adults-only facilities.”

Permits state and local governments to further restrict the sale and distribution of tobacco products.
Family Smoking Prevention and Tobacco Control Act: Gap in Rules

- FDA adopted regulations implementing Act in 2010.

- FDA guidance document states cigars, little cigars and pipe tobacco are not presently subject to the regulations.
Example: Sampling
What’s a Community to Do?

Sampling

- Further restrict locations in which tobacco sampling is permitted
- Prohibit sampling altogether

Coupons

- Prohibit distribution of coupons in public places (with limited exceptions)
- Prohibit redemption of coupons by retailers
Legal Issues to Consider

Preemption

Dormant Commerce Clause

First Amendment
Preemption

FDA Act

FCLAA

State Law
Dormant Commerce Clause

Coupons: Redemption vs. Distribution

Photo from www.trinketsandtrash.org
First Amendment
State and local governments have the authority to restrict or prohibit sampling of non-cigarette tobacco products.

State and local governments have the authority to prohibit the discounting of tobacco products through coupons.

Awareness of legal limitations and careful crafting of regulation language will help communities withstand legal challenges.
Questions?

Contact us:
Center for Public Health and Tobacco Policy

tobacco@nesl.edu
www.tobaccopolicycenter.org

Thank you!
Local Policies to Limit Sampling and Sponsorship – the California Experience

Leslie Zellers, JD

Policy Options for Restricting Tobacco Sampling and Couponing

February 7, 2012
We partner with state and local leaders to improve health in all communities, especially the underserved.

We do this by researching legal and policy questions, drafting policy language, and training community leaders to put these ideas to work.
Our approach to policy

1. Defining the problem
   - Understand existing sampling laws (federal Tobacco Control Act, state laws)
   - Community assessment

2. Legal authority for local laws

3. Creating solid policy – PHLP’s model ordinances

4. The California experience
Cigarettes

Federal law:
Giving away free samples is illegal
Smokeless Tobacco

Federal law:
Free samples OK only in certain locations
Cigars and Little Cigars

Federal and state law and MSA:
Sampling OK
Hookah

Federal and state law and MSA: Sampling OK
Cigarettes & Smokeless Tobacco

State law: “Nominal cost” samples Illegal, too (But not defined)
Cigarettes & Smokeless Tobacco

State law:

 Coupons for free samples also illegal except:

• places with no minors

• with purchase, including in magazines
Local laws

Stricter is OK:

• Prohibit coupons and nominal cost samples

• Cover cigars, hookah, etc.

• Ban all free tobacco samples, even in QAFs
Monitoring

• Know existing law
• Find out where events happening
• Gather data (consistently)
• Find enforcement agency
• Get data to enforcement agencies
Event Observation Form - AOF

Tobacco-Sponsored Bar, Fraternity, Adult-Only Event

Event Information:

Name of Place: __________________________ Date of Visit __/__/__
Address: ____________________________ City: __________________________
Time monitored ___am/pm to ___am/pm
Please list 3 words to describe the place (e.g., western, urban, gay, pierced, etc.)

If sampling is within 2 blocks of any premise directed to under 18-years-old (e.g., school, club) what is the name of premise?

Was the premise in use during sampling? Yes__ No__

Estimated attendance at time of observation:

Total number of people:
- Age: <18% 10-20% 21-24% 25-30% 30+%%
- Gender: Male% Female%
- Ethnicity: ___% Black ___% Hisp ___% Asian ___% Other___%

Was proof of age checked anywhere for all people who might be under 21 years of age? Yes___ No___

Describe where it was done:

Describe what was done:

Tobacco Promotion Information:

Was there a tobacco promotion or sponsored event? Yes__ No__

If Yes, what tobacco brand or company?

Was there signage for a tobacco-sponsored event? Yes__ No__

Other tobacco-related marketing in the bar or entrance to facility

<table>
<thead>
<tr>
<th>Check all present</th>
<th>Brand or Company</th>
<th>Where located</th>
<th>Describe</th>
<th>Have photos (P) or item (C)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Marketing staff</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Contest</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Patron's address collected</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other (e.g., entertainment, video games, etc.)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Additional Comments:

Thank you!!

Confidential: __________________________
Observer's Name: __________________________

ID#: __________________________
E-mail: __________________________
Legal authority

“Police power”

The power of government to...

• Promote the public health, morals, or safety, and the general well-being of the community

• Enact and enforce laws for the promotion of the general welfare

• Very broad in California
Legal authority - Preemption

• FCLAA
  – Amended by Tobacco Control Act
  – Some courts have struck down sampling laws as preempted by FCLAA
  – California: upheld state sampling law against FCLAA challenge

• State law
Model California Ordinance
Regulating Tobacco
Product Sampling
(with Annotations)

Updated October 2009
(Originally issued August 2007)

Developed by the Technical Assistance Legal Center (TALC),
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Defining “Coupon”
Defining “Tobacco Products”
(c) “Nonsale Distribution” means to give, within the jurisdictional limits of the [city / county], a Tobacco Product or Coupon at no cost or at Nominal Cost to a Person who is not a Tobacco Seller.
(a) No Tobacco Seller nor any agent or employee of a Tobacco Seller shall engage in the Nonsale Distribution of any Tobacco Product or Coupon in any Public Place.

(b) No Person, motivated by an economic or a business purpose, shall knowingly permit the Nonsale Distribution of any Tobacco Product or Coupon: (1) anywhere in any Public Place under the legal or de facto control of the Person; or (2) through any agent or employee of the Person. This provision shall not apply to Coupons incidentally distributed in connection with a printed or electronic publication, such as, for example, magazines, newspapers, and websites, so long as that Person’s distribution of a publication containing Coupons is not primarily motivated by an economic or a business purpose to distribute Coupons.
No Coupon Redemption
Tobacco Retailer Licensing as Enforcement Mechanism

Model California Ordinance Requiring a Tobacco Retailer License
(with Annotations)

Revised June 2008
(Originally issued September 1998)
CHICO, CA

- Redwood National Forest
- Mt. Shasta
- Lake Shasta
- Napa Valley (2½ hours)
- Lake Tahoe
- Sacramento
- San Francisco (3 hours)

Ashland, Oregon (3½ hours)
Chapter 9.18

NONSALE DISTRIBUTION OF SMOKELESS TOBACCO OR CIGARETTES

Section:
9.18.010 Authority.
9.18.020 Definitions.
9.18.030 Distribution of Smokeless Tobacco or Cigarettes - Prohibited.
9.18.040 Violation.

9.18.010 Authority.
This chapter is adopted pursuant to the authority set forth in California Health and Safety Code (H&SC) section 118950 which permits cities to regulate the distribution of smokeless tobacco or cigarette samples within their boundaries in a more restrictive manner than such section. This chapter shall govern to the extent that there is any inconsistency between it and H&SC section 118950.

9.18.020 Definitions.
As used in this chapter, the following words and phrases have the meanings set forth in this section:
A. “Nonsale distribution” means to give smokeless tobacco or cigarettes to the general public at no cost, or at nominal cost, or to give coupons, coupon offers, or rebate offers for smokeless tobacco or cigarettes to the general public at no cost or at
Chapter 9.18

NONSale DISTRIBUTION OF SMOKELESS TOBACCO OR CIGARETTES

Section 9.18.030 Nonsale Distribution of Smokeless Tobacco or Cigarettes - Prohibited.
It is unlawful for any person, agent, or employee of a person in the business of selling or distributing smokeless tobacco or cigarettes from engaging in the nonsale distribution of any smokeless tobacco or cigarettes to any person within the boundaries of the city.
California Sampling Laws

53 LOCAL ORDINANCES
5 COUNTIES
48 CITIES

Analyzed sampling activity in California, in cities with and without local ordinances
47 local sampling ordinances in October 2008

Only 7 cities had any tobacco-industry events that may have involved any outreach to consumers
Resources

What Tobacco Products Are Covered by the 2009 FDA Law?

Most portions of the 2009 FDA Law apply to specifically, cigarettes, cigarette tobacco, and cigars. The chart on the next page lists the six restrictions on tobacco products which the FDA can issue regulations on under the 2009 FDA Law.

Other Products

Some products do not fit squarely within the definition of tobacco products for which the FDA has regulations, including little cigars, e-cigarettes, flavored cigars, component parts such as “blunt wraps,” and certain types of tobacco retail packaging.

Little Cigars vs. Cigarettes

Little cigars—products that meet the definition of tobacco products but are similar in size to a cigarette—are not regulated by the FDA. The FDA considers the little cigar to be a component part of the cigarette, so they fall under the definition of cigarettes. However, the FDA has not yet issued regulations on little cigars.

Flavored Wrapping Papers and Blunt Wraps

The FDA’s definition of tobacco products includes flavored wrapping papers (also known as “blunt wraps”), which are paper rolls that are not typically used for smoking tobacco products. According to the FDA, blunt wraps are not considered tobacco products because they do not contain tobacco.

E-cigarettes

E-cigarettes are battery-powered devices that heat tobacco or other liquid to produce a smoke-like vapor. The vapor is inhaled by the user, who then exhales it. E-cigarettes are not considered tobacco products because they do not contain tobacco.

Prohibiting Tobacco Sampling

A local ordinance limiting tobacco product sampling can prohibit the free or low-cost distribution of tobacco products or coupons at events such as rodeos or “bar nights” sponsored by tobacco companies. Smoking in public places has been prohibited in many localities, and some states have also prohibited the sale of tobacco products to minors.

Sampling: How does the Tobacco Control Act affect local ordinances in California?

Current Limits on Sampling

The distribution of free tobacco products is already prohibited in many public places by California law.* The Master Settlement Agreement,* and the Smokeless Tobacco Master Settlement Agreement—or those restrictions include exceptions for some adult-only locations, such as bars and tanning salons—do not cover tobacco-related products sold in public places, such as rodeos. The Tobacco Control Act is stricter. As of June 22, 2010, free samples of cigarettes are completely banned, and free samples of smokeless tobacco products are limited.**

Closing the Loopholes

The Tobacco Control Act expressly grants state and local governments the right to enact measures that are more restrictive than those in the federal law. Local governments have the power to completely ban the free or low-cost distribution of all tobacco products anywhere in their jurisdictions, including at locations that are exempt from the federal law. TALC has a model sampling ordinance to help communities create their own local law.

TALC’s Model California Ordinance Regulating Tobacco Product Sampling

TALC has developed a helpful Tobacco-Sampling Ordinance Checklist to accompany the ordinance. The checklist outlines the range of policy options communities must consider when designing their own sampling ordinance to help a community think through each possible option.

You can download both the model ordinance and the checklist from TALC’s website at www.talcnet.org/tobacco-control. TALC staff attorneys are also available to consult with individual communities to help them customize a sampling ordinance and ensure its effectiveness. Additional resources for a new sampling ordinance are available at www.bucktoobacco.org/policies/index.html.

For years, tobacco companies have been distributing free samples of tobacco products in a process known as “sampling,” particularly targeting young people in an effort to lure new customers. The Family Smoking Prevention and Tobacco Control Act, commonly referred to as the Tobacco Control Act, created new restrictions on sampling, but it does not completely eliminate sampling of smokeless tobacco.

Local governments can supplement the federal Tobacco Control Act with more restrictive policies that completely ban the free or low-cost distribution of all tobacco products in their communities.* This fact sheet explains what types of sampling the federal law prevents, and where, and it also outlines what communities can do to further restrict tobacco giveaways.

This document is one of a series of TALCs on Tobacco Law Notes addressing issues around the Family Smoking Prevention and Tobacco Control Act. All of the TALC Law Notes are available at www.talcnet.org/tobacco-control.

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For more information contact Jane Draper, 714-553-1884 | www.talcnet.org/tobacco-control

Footnotes:

* The “expansion of the Tobacco Control Act that prohibits sampling applies to ‘any product made or derived from tobacco,’ which would include cigars, little cigars, and hookah, among other products. However, the FDA has issued a ‘Draft Guidance for Industry’ which states that its regulations currently apply only to cigarettes and smokeless tobacco.” Therefore, the FDA is not currently enforcing the Tobacco Control Act’s limits on the sampling of cigars, little cigars, and hookah.

** The Center for Tobacco Policy and Organizing (TCP) is a national coalition of effective tobacco control policy campaigns. In addition to providing resources, TCP also offers strategic planning tools and assistance to community leaders. To learn more about the Center for Tobacco Policy and Organizing, visit www.centerfortobaccocontrol.org.
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The primary purpose of this training is to address legal and policy options to improve public health. There is no intent to reflect a view on specific legislation. PHLP incorporates objective non-partisan analysis, study, and research in all our work.

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Questions &
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www.phlpnet.org/tobaccoquestions
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Q&A Session

- Type Questions in Webex
- Moderator Will Direct Questions to Speakers

Questions after today’s presentation? Contact us at:

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Public Health Policy Change: Creating a Culture of Wellness through Worksite Policy Change

Tuesday, February 21st at 12:00 p.m – 1:30 p.m. Central Time

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