PUBLIC HEALTH POLICY CHANGE

POLICY OPTIONS FOR COMBATING TOBACCO INDUSTRY PRICE DISCOUNTING
Public Health Policy Change Webinar Series

- Providing substantive public health policy knowledge and legal research in an interactive format
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Today’s Webinar

• **Overview** (Kate Armstrong)

• **Combating Price Discounting for Tobacco Products: Background, Evidence Base, and Introduction to Policy Options** (Kurt Ribisl)

• **Regulating Tobacco Industry Price Manipulation: Options for State and Local Governments** (Kerry Malloy Snyder)

• **Minimum Price Laws: Creating a Strong Public Health Strategy** (Ian McLaughlin)

• **Q&A** (moderated by Kate Armstrong)
The Tobacco Control Legal Consortium

The Legal Network for Tobacco Control:
A national network of attorneys and legal centers dedicated to advancing tobacco control policy.
Tobacco Industry Price Discounting
Combating Price Discounting for Tobacco Products: Background and Strategies

Kurt M. Ribisl, PhD
Public Health Law & Policy Webinar
April 3, 2012
Overview

• Examples and Industry Expenditures
• Impact of Price Discounting
• Cigarette Minimum Price Laws
• *Counter Tobacco* Resources on Price Discounting
Background

PRICE DISCOUNTING & EXPENDITURES
Price Advertising
Price Advertising
2008 Point of Sale Expenditures

<table>
<thead>
<tr>
<th>Category</th>
<th>%</th>
</tr>
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<tbody>
<tr>
<td>Point-of-sale</td>
<td>$163,709,000</td>
</tr>
<tr>
<td>Price discounts</td>
<td>$7,171,092,000</td>
</tr>
<tr>
<td>Promotional Allowances-Retailers</td>
<td>$481,500,000</td>
</tr>
<tr>
<td>Retail-value-added bonus cigarettes</td>
<td>$721,818,000</td>
</tr>
<tr>
<td>Retail-value-added non-cigarette bonus</td>
<td>$10,983,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$8,549,102,000</strong></td>
</tr>
</tbody>
</table>

- 86.0% of the $9.94 billion in expenditures was spent exclusively or predominantly at retail in 2008

This is about $1,000,000.00 per hour

Cigarette Marketing Expenditures Per Pack, Inflation Adjusted: 1975 - 2005

Source: F. Chaloupkha and Federal Trade Commission, 2005
Why price discount?
Why not just drop price?

• Maximize industry profit:
  – Keep prices high, AND
  – Reach price-sensitive smokers who seek out added value

• Classic retail couponing strategy
Model of Cigarette Prices and Consumption

Increase cigarette excise tax → Increase cigarette price → Reduce cigarette consumption
Model of Cigarette Prices and Consumption

Increase cigarette excise tax → Increase cigarette price → Reduce cigarette consumption

Consider the case of the April 1, 2009 61¢ increase in the federal excise tax (FET) to fund SCHIP
Model of Cigarette Prices and Consumption

1. Increase cigarette excise tax
2. Cigarette price unchanged or reduced
3. Cigarette consumption unchanged

Cigarette company buys down*

* A buydown is a price discount triggered when the company reimburses the retailer for lowering the price (e.g., 75 cents off per pack) for a set time.
Research Evidence

PRICE DISCOUNT IMPACT
Ads & Promos Help to Hook New Smokers

ImpacTeen/Monitoring the Future Study (n=17,000 stores)

1. No advertising = ↑ never smoking by 9%
2. No promotions = ↓ established smoking by 13%

Price Subsidies Started Spiking in 1990’s

Price Subsidies = Blunt impact of price hikes
Segmentation & Targeting of Price Sensitive Groups

Figure 1. Consumer-price-index-adjusted cigarette price from 1963 to 1997

Figure 2. Annual rates of initiation of regular smoking for adolescents aged 14–17 years (●) and young adults aged 18–21 years (―) by calendar year

Policy Solution (one of several)

MINIMUM PRICE LAWS
Overview

• **Excise taxes** are first line approach
  – Still the gold standard
  – Feasibility issues”
    • Voter ballots
    • Governor /legislative body anti-S.E.T. hike
    • Can be undercut by price discounting

• How do we restrain cigarette companies from manipulating retail prices and undermining the public health benefits of higher prices?
Cigarette Minimum Price Laws- Markup (Status quo)

Price ($)

Deep Discount | Discount | Value | Premium

Retail = 8% Markup over Wholesale

Minimum Retail Price
Wholesale Price

Counter Tobacco
An Alternative: Flat Rate Minimum Price Laws

![Diagram showing different price categories: Deep Discount, Discount, Value, Premium, with Retail Price and Minimum Flat Rate Retail Price marked.](image-url)
Introducing: Minimum Cigarette Price Law

• Fair Trade Laws in 1940s -1950s
• Retailers can sell at or above that price
• State sets a formula of minimum markups for wholesalers and retailers
• Thus, a minimum price for each list price (i.e., brand)
State Cigarette Minimum Price Laws — United States, 2009

Cigarette price increases reduce the demand for cigarettes and thereby reduce smoking prevalence, cigarette consumption, and youth initiation of smoking (1,2). Excise tax increases are the most effective government intervention to increase the price of cigarettes (1), but cigarette manufacturers use trade discounts, coupons, and other promotions to counteract the effects of these tax increases (3) and appeal to price-sensitive smokers (4). State cigarette minimum price laws, initiated by states in the 1940s and 1950s to protect tobacco retailers from predatory business the minimum retail price to consumers. Allowing trade discounts can partially reduce the price increases from taxes and minimum markups, which leads to a lower minimum price (Table 1).

To conduct this survey, CDC researchers first reviewed eight known cigarette minimum price statutes (6) for Boolean search terms that would identify all other such statutes in a database of current statutes for all 50 states and DC. Identified statutes were then analyzed to determine 1) the minimum percentage markup that must be applied to cigarette prices by
MCPL State Highlights

• 25 states had min price law as of 12/31/09
  – Includes Washington, DC
  – Does not include California
• Median markup wholesale - 4% (range 2.0-6.5%)
• Median markup retail - 8% (range 6.0-25.0%)
  – Caution: This is probably too low to be effective
• 7 states ban price discounts (buydowns) in minimum price computation

Ribisl, Patrick, Eidson, Tynan, & Francis (2010) MMWR
Minimum retail price:
$47.61/carton
$4.77/pack
NY Excludes Buy-downs

Payments made under cigarette manufacturers’ promotional pricing programs... shall not be used to reduce minimum resale prices.
Cigarette prices higher in NY with strong minimum price law

-No diff between 7 “None” & 8 “Minimum” states; NY sig diff. from all others

Note: NY included in Yes Law
Feighery, Ribisl, et al. 2005, Tob Control, 14, 80-85
Caveats

- Need more research re: effectiveness
- Excise taxes allow prevention fund earmark; not MCPL
- Higher margins enrich tobacco industry
- Legal challenges
- Complicated, difficult to enforce
- Workaround = companies can drop list prices; but they lose segmentation & targeting
- Policy must be strong enough:
  - Prohibit coupons, BOGO offers
  - Prohibit buy-downs
Strengths

• Another tool to increase price and cut consumption
• Helps preserve impact of tax hike
• Markups across the board or flat rate wipes out discount brands
• Can be used against contraband cigs if priced below minimum
Resouces

COUNTER TOBACCO.ORG
Operation Minimum Price Compliance

Counter Tobacco Store Audit

Q5. Merchandising
5.1 Self-service of cigarettes?
5.1.1 Brand 1?
5.1.2 Brand 2?
5.1.3 Brand 3?
5.1.4 Other Brands? (please specify)

5.2 Vending machine present?
5.3 Visible cigarettes sold in less than pack of 20 (e.g., "loosies").
5.4 Smokeless tobacco available in less than individual unit?
5.5 Are any packs displayed sideways or endways?
5.6 Is top 50% of pack obscured? (select YES if packs are intentionally obscured)

Q6. Minimum Price
6.1 Is Marlboro Regular priced at $7.81 or more per pack?
6.2 Is American Spirit priced at $8.04 or more per pack?
6.3 Is Newport priced at $7.64 or more per pack?
6.4 Is Newport - Non Menthol priced at $6.50 or more per pack?

Non-Compliant Price
Conclusions

• MCPL is valuable approach to address price manipulation
• Endorsed by Experts at CA Price Manipulation Summit
• Need more innovation by practitioners with careful research on impact

Feighery, Rogers, & Ribisl (2009)
More Info: www.CounterTobacco.org

✓ Raising Tobacco Prices through Non-Tax Approaches
  ○ Minimum Cigarette Price Law
  ○ Mitigation Fee
  ○ Sunshine/Disclosure Law
  ○ Ban Price Discounts

✓ Minimum Price Compliance Activity
Regulating Tobacco Industry Price Manipulation: Options for State and Local Governments

Kerry Malloy Snyder, JD
Senior Staff Attorney
April 3, 2012
The Center is funded by grants from the Departments of Health of New York State and the State of Vermont. We work with the state tobacco control programs, as well as program contractors and partners, to develop and support policy initiatives that reduce tobacco-related morbidity and mortality.
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.

Center for Public Health and Tobacco Policy
Goals for today

- State and local policy options
  - Discount coupon restrictions
  - Restrictions on value-added incentives
  - Minimum pack sizes

- Legal issues
Policy Options for State and Local Governments

Coupons

• Prohibit distribution of coupons in public places (with limited exceptions)
• Prohibit redemption of coupons by retailers

Value-added incentives

• Restrict cross-promotions
• Restrict multi-pack sales

Minimum package size
Policy Option: Coupon Restrictions

Photo from www.trinketsandtrash.org
Policy Option: Value-Added Incentives
Policy Option: Minimum Package Size
Legal Issues to Consider

Preemption

Dormant Commerce Clause

First Amendment
Preemption

FDA Act

FCLAA

State Law
Preemption: FDA Act

Preserves the authority of state and local governments to enact laws relating to the “sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age” that are more stringent than federal law.
Preemption: FCLAA

- Federal Cigarette Labeling and Advertising Act relates to the advertising and promotion of cigarettes.

- Previously, some laws affecting promotion (e.g., restricting the distribution of free samples of cigarettes) were struck down under FCLAA.

- FDA Act amended FCLAA’s preemption provision affecting state and local authority to regulate cigarette promotions.
Preemption: State Law

State law may preempt local law or limit the authority of local communities to adopt regulations in certain areas.
Dormant Commerce Clause

State and local governments may not unduly interfere with interstate business transactions.
First Amendment

Commercial speech vs. conduct
Legal Challenge to Price Regulation

*National Association of Tobacco Outlets et al. v. City of Providence*

Challenges, in part, Providence ordinance prohibiting (1) redemption of coupons for free or discounted tobacco products by retailers; (2) sale of tobacco products through multi-pack discounts.
Legal Challenge to Price Regulation

National Association of Tobacco Outlets et al. v. City of Providence

Claims:
- FCLAA Preemption
- First Amendment violation
- State Law Preemption
Summary

- State and local governments have the authority to adopt pricing regulations for tobacco products.

- 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!
Minimum Price Laws: creating a strong public health strategy

Ian McLaughlin, JD
Senior Staff Attorney
Public Health Law & Policy

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.
Today’s Discussion

• Stronger minimum price laws
  o Improving “markup” laws
  o Setting a “flat rate”
• State or local strategy?
• Implementation and enforcement
• Legal considerations
“Markup” Minimum Price Laws

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+ Average among states, as of December 31, 2009.

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## “Markup” Minimum Price Laws

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*State Cigarette Minimum Price Laws - United States, 2009 (Ribisl, K.M., et al., 2009), MMWR, CDC (2010)*
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$6.46 v. $5.92
Strategies for Markup Laws

✔ What base price to use?

✔ Increase markups to compete with market

✔ Disallow price discounts in equation
A “Flat Rate” Law Instead?

- Can be easier to administer
- Where to set the “price floor”?
- Primarily affects discount brands
Feasible at Local Level?
Feasible at Local Level?

Local Authority
Feasible at Local Level?

State Preemption?
Feasible at Local Level?

Political/Administrative Issues
Implementation and Enforcement

How to ensure compliance?
Implementation – Retailer Education

2012 Cigarettes Minimum Price List

Updated 03/01/2012

This list contains all the Montana Department of Justice approved brands. You may not sell any products that are not listed below. The current list of DOJ approved cigarette brands is available at [http://doi.mt.gov/consumer/tobacco-sales-and-directory/](http://doi.mt.gov/consumer/tobacco-sales-and-directory/)

If you have questions, please contact Nicole Hyatt at (406) 444-0723, 444-7997 by fax, or via e-mail nhyatt@mt.gov

The classification of little cigars as cigarettes affects only the taxation of these products and the youth access laws. Little cigars classified as cigarettes are not required to have a minimum price.

<table>
<thead>
<tr>
<th>FSC Expr Date</th>
<th>Brands</th>
<th>Manufacturer (Mfr)</th>
<th>PM / NPM</th>
<th>Mfr $/Crtn</th>
<th>Whls $/Crtn</th>
<th>Retail $/Crtn</th>
<th>Retail $/Pk</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nov, 2014</td>
<td>Carnival</td>
<td>KT&amp;G Corporation</td>
<td>NPM</td>
<td>$20.20</td>
<td>$39.34</td>
<td>$43.28</td>
<td>$4.33</td>
</tr>
<tr>
<td>Jun, 2014</td>
<td>King Mountain</td>
<td>King Mountain</td>
<td>NPM</td>
<td>$18.50</td>
<td>$37.55</td>
<td>$41.31</td>
<td>$4.14</td>
</tr>
<tr>
<td>Apr, 2012</td>
<td>Native</td>
<td>Native Trading</td>
<td>NPM</td>
<td>$14.10</td>
<td>$32.89</td>
<td>$36.18</td>
<td>$3.62</td>
</tr>
<tr>
<td>Feb, 2014</td>
<td>Signal</td>
<td>Ohserase Manufacturing</td>
<td>NPM</td>
<td>Not Available</td>
<td>Not Available</td>
<td>Not Available</td>
<td>Not Available</td>
</tr>
<tr>
<td>Nov, 2014</td>
<td>Timeless Time</td>
<td>KT&amp;G Corporation</td>
<td>NPM</td>
<td>$16.50</td>
<td>$35.43</td>
<td>$38.98</td>
<td>$3.90</td>
</tr>
<tr>
<td>Jun, 2013</td>
<td>1839</td>
<td>U.S. Flue-Cured Tobacco</td>
<td>PM</td>
<td>$18.95</td>
<td>$38.02</td>
<td>$41.83</td>
<td>$4.19</td>
</tr>
<tr>
<td>May, 2014</td>
<td>Ace</td>
<td>King Maker</td>
<td>PM</td>
<td>$19.89</td>
<td>$39.02</td>
<td>$42.93</td>
<td>$4.30</td>
</tr>
<tr>
<td>Mar, 2012</td>
<td>Alpine</td>
<td>Altria (Philip Morris)</td>
<td>PM</td>
<td>$41.73</td>
<td>$62.11</td>
<td>$68.33</td>
<td>$6.84</td>
</tr>
<tr>
<td>Jun, 2013</td>
<td>Baron American Blend</td>
<td>Farmer's Tobacco Company</td>
<td>PM</td>
<td>$18.15</td>
<td>$37.18</td>
<td>$40.90</td>
<td>$4.09</td>
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implementation & enforcement

Clear language
Collaboration with partners
Enforce through:
  Tax laws?
  Licensing?
Legal Issues

• “Price fixing”? (Antitrust)
Legal Issues

• “Price fixing”? (Antitrust)

• FCLAA & First Amendment
  - Regulating conduct v. expression/promotion
Strategies for Minimum Price

- Create clear, strong language
- Work with enforcement partners
- Evaluate impacts!
The information provided in this seminar is for informational purposes only, and does not constitute legal advice. Public Health Law & Policy does not enter into attorney-client relationships.

The primary purpose of this training is to address strategies 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.
Q&A Session

• Type Questions in WebEx Chat Box
• Moderator Will Direct Questions to Speakers

Questions after today’s presentation?

Email us at:
publichealthlawcenter@wmitchell.edu
Next Webinar in the Series

Addressing Childhood Obesity through School Food Procurement
Tuesday, April 17, 12:00 p.m. – 1:30 p.m. (CST)

Visit www.publichealthlawcenter.org for more information