CURRENT TRENDS IN “ROLL-YOUR-OWN” TOBACCO REGULATION

October 2, 2012
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Current Trends in “Roll-Your-Own” Tobacco Regulation

• Overview of RYO legislation – Thomas Carr
• Remaining gaps in taxation – Ann Boonn
• The Massachusetts experience – Cheryl Sbarra
• Q&A
RYO Cigarette Machines: the Problem & Federal/State Action So Far to Solve It

Thomas Carr
Director, National Policy

American Lung Association
Large RYO cigarette machine
Tabletop RYO machine
How RYO machines work

• Customer buys loose tobacco and rolling tubes.
  – Usually pipe tobacco.
• Customer “rents” machine.
  – Employees don’t touch the machine (except when it malfunctions)
• Customer pours tobacco into a hopper on the machine.
How RYO machines work (cont.)

• Customer inserts paper tubes in another part of the machine.

• Customer follows prompts on machine’s computer interface.
  – Similar to an ATM machine.
  – Adjusts “coarseness” of finished cigarettes.
  – When done, customer hits “start”.

AMERICAN LUNG ASSOCIATION®
Fighting for Air
How RYO machines work (cont.)

• Machine rumbles and whirs, and after a few seconds begins to spit out single cigarettes into a plastic box.
• Customer removes finished cigarettes from the box and puts them into a box, bag or carton.
RYO Machine in Action
Finished Product from RYO Machine
The Problem: RYO Cigarette Machines

- RYO cigarette machines started appearing after increases in federal tobacco taxes in 2009.

  Increases made taxes on small cigars and roll-your-own tobacco equal to cigarette tax

  But left federal taxes on large cigars and pipe tobacco at lower level
The Problem: RYO Cigarette Machines

• Tobacco manufacturers re-labeled roll-your-own tobacco as pipe tobacco

• Ohio company called RYO Filling Station started making and marketing cigarette rolling machines; may be other companies as well
The Problem: RYO Cigarette Machines

• Result = Pipe tobacco sales exploded – 240,000 lbs./month in Jan. 2009 to over 3 million lbs./month by Sept. 2011

RYO Cigarette Machines – Bad for Public Health

• Avoids high cigarette taxes – pipe tobacco usually taxed lower at state level too
• Relative ease of use and speed to create pack or carton of cigarettes
• Evades other regulations on cigarettes – warning labels, fire safety laws, etc.
RYO Cigarette Machines – States Respond

• Legislation introduced in a number of states in 2011 and 2012

• Several states tried to handle administratively – CT, WV, WI & often got sued

• Some cities/states sued retailers – NH & NYC
RYO Cigarette Machines – State Legislation

• Essentially 3 types of state legislation that have passed, mostly in 2012:
  - Completely prohibit RYO machines – AR, VT
  - Require stores with RYO machines to be cigarette manufacturers – VA, WY
  - Place additional regulations on stores with RYO machines – ID, WA
Map of State Laws on RYO Cigarette Machines

- Designate stores with RYO machines manufacturers (4)
- Regulate RYO Cigarette Machines (5)
- Prohibit RYO Cigarette Machines (3)

DC – No law
RYO Cigarette Machines – Federal Response

• In 2010, U.S. Dept. of Treasury Alcohol & Tobacco Tax & Trade Bureau (TTB) issued a rule that establishments with RYO machines are manufacturers.

• Sued by company that makes RYO machines; court ruled in 2010 that TTB couldn’t enforce rules. 😞
RYO Cigarette Machines – Federal Legislation

• In March 2012, HR 4134 introduced in House.
• Also in March 2012, amendment added to Surface Transportation bill (S. 1813) that would make stores with RYO machines manufacturers.
• Bill was passed by Congress and signed into law by President Obama in July 2012.
RYO Cigarette Machines – Federal Legislation

• Legislation caused 6th Circuit U.S. Court of Appeals to lift injunction against TTB on August, 20, 2012

Concluding Points

• State and federal legislation making stores with RYO machines manufacturers largely pushed by big tobacco companies and retailers
  - Caused advocacy organizations like Lung Association and Campaign to remain neutral

• Anecdotal evidence that many stores have shut machines down rather than comply with federal law.
However, still important work to do to prevent RYO Machine Issue in the future!
Contact Information

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Tax Equalization for Roll-Your-Own and Pipe Tobacco

Ann Boonn, Associate Director, Research
aboonn@tobaccofreekids.org, (202) 296-5469

October 2, 2012
Roll-Your-Own Tobacco vs. “Pipe Tobacco”
Ensuring Tax Equalization

- Tax rates
- Cigarette definition
How Much Loose Tobacco in a Cigarette?

1 cigarette = 0.0325 oz. loose tobacco

Federal Excise Tax Rates

<table>
<thead>
<tr>
<th></th>
<th>Rate per pound</th>
<th>Rate per 1 cigarette (0.0325 oz)</th>
<th>Rate per 20-pack cigarettes (0.65 oz)</th>
</tr>
</thead>
<tbody>
<tr>
<td>RYO Tobacco</td>
<td>$24.78</td>
<td>5.03¢</td>
<td>$1.01</td>
</tr>
<tr>
<td>Pipe Tobacco</td>
<td>$2.8311</td>
<td>0.57¢</td>
<td>$0.115</td>
</tr>
</tbody>
</table>
112th CONGRESS
2nd Session

S. 3081

To amend the Internal Revenue Code of 1986 to provide tax rate parity among all tobacco products, and for other purposes.

IN THE SENATE OF THE UNITED STATES
MAY 10, 2012

Mr. ENHART (for himself, Mr. LAUTENBERG, and Mr. HRIEMMENTHAL) introduced the following bill, which was read twice and referred to the Committee on Finance.

A BILL

To amend the Internal Revenue Code of 1986 to provide tax rate parity among all tobacco products, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Tobacco Tax Equity Act of 2012”.

SEC. 2. ESTABLISHING EXCISE TAX EQUITY AMONG ALL TOBACCO PRODUCT TAX RATES.

(a) Tax Parity for Pipe Tobacco and Roll-Your-Own Tobacco—Section 5701(f) of the Internal
August 3, 2012

Mr. Matthew L. Myers
President
Campaign for Tobacco-Free Kids
1400 Eye Street, N.W.
Suite 1200
Washington, DC 20005

Dear Mr. Myers:

I am writing in response to your recent letter regarding the marketing of products labeled “pipe tobacco” as roll-your-own (RYO) tobacco. In your letter, you urge FDA to determine that such products are “misbranded” within the meaning of section 903(a) of the Food, Drug, and Cosmetic Act (FD&C Act), as amended by the Family Smoking Prevention and Tobacco Control Act.

We agree that marketing or sale of products labeled as “pipe tobacco” for consumers to use as cigarette tobacco may misbrand a product under section 903(a) of the FD&C Act. FDA is aware of retail establishments selling products labeled “pipe tobacco” to consumers for use as RYO cigarette tobacco and has begun taking action against them. In addition, FDA is currently examining the facts and evaluating all available options for regulatory and enforcement action under the FD&C Act.

Further, as you are aware, tobacco products that do not meet one of the statutory definitions for cigarette, cigarette tobacco, smokeless tobacco, or roll-your-own tobacco are not currently subject to FDA’s regulatory authority in Chapter IX of the FD&C Act. However, the FD&C Act permits FDA to issue regulations deeming other categories of tobacco products to be subject to Chapter IX.

In the Department of Health and Human Services’ Semiannual Regulatory Agenda, FDA specified its intention to propose a rule that would deem other tobacco products meeting the statutory definition of “tobacco product,” found at section 201(o) of the FD&C Act, to be subject to Chapter IX of the FD&C Act.

FDA is currently enforcing the effective provisions in the FD&C Act and the agency’s implementing regulations. For example, FDA conducts routine monitoring surveillance of tobacco marketing and advertising activities of regulated entities, conducts inspections of tobacco product manufacturers and retailers, evaluates regulatory submissions and consumer/public complaints, and
Questions/Resources

Factsheets:
http://www.tobaccofreekids.org/facts_issues/fact_sheets/policies/tax/us_state_local/

Specific Questions:
Ann Boonn
aboonn@tobaccofreekids.org
(202) 296-5469
Commercial RYO Policies in Massachusetts and Emerging Issues

CHERYL SBARRA
SENIOR STAFF ATTORNEY
MASSACHUSETTS ASSOCIATION OF HEALTH BOARDS
OCTOBER 2, 2011
State Action

- Governor’s proposed budget for FY 13:
  - Increased excise tax on other tobacco products, including roll-your-own to reflect the previous and new cigarette excise increases.
  - Required annual permits for retailers with RYO machines of $25,000 for high volume machines and $5000 for low volume machines with high penalties for failing to obtain permit.
    - Heard that this fee was “nothing”
  - Didn’t pass.

- Attorney General
  - Met with Dept. of Public Health about RYO machines.
  - Encouraged local action
Potential State Action

- **Administrative:**
  - Enforce state cigarette excise tax laws.
    - Require any existing RYO retailer to pay appropriate state excise tax for manufactured cigarettes.
  - Permit RYO retailers as state manufacturers.
    - Does the federal “manufacturer” designation control?
  - Enforce NPM law.
    - Require any existing RYO retailers to pay into escrow fund.

- **Legislative:**
  - Tax parity.
  - Ban commercial RYO machines completely.
Local Massachusetts Strategies

- 351 local Boards of Health with legal authority to enact and enforce local public health regulations.
- More than 186 municipalities have a Board of Health Tobacco Control Program.
- Entire state covered by a Partnership (coalition).
- Notification to all RYO retailers about TTB actions and Governor’s proposed budget.
  - Warning that they were purchasing the machines “at their own risk.”
Local Massachusetts Strategies

- Encouraged municipalities that had no commercial RYO machines to prohibit them.
  - Arkansas model.

- Encouraged municipalities with machines to require that the machines be behind the counter, accessible to employees only.
  - Politically too hard to ban them at this point.
  - Intent was to eventually have RYO retailers designated as state manufacturers.
Public Health Problems with RYO Machines

- Cheap cigarettes undercut science-based public health pricing strategy.
  - High excise taxes increase adult quit attempts.
  - High prices deter youth smoking.
- Cheap cigarettes promote purchases.
  - Negative health impact.
  - Increased healthcare costs.
- Plain old public health nuisance.
  - Not rocket science – unsanitary.
  - No gloves, loose tobacco on floor put back into machine, loose tobacco scooped up and put into hopper.
- Not covered by Sanitary Code.
  - Unlike salad bars, self-service coffee, etc.
Proposed Regulation

Statement of Purpose:

“Whereas commercial Roll-Your-Own (RYO) machines located in retail stores enable retailers to sell cigarettes without paying the excise taxes that are imposed on conventionally manufactured cigarettes. High excise taxes encourage adult smokers to quit and high prices deter youth from starting. Inexpensive cigarettes, like those produced from RYO machines, promote the use of tobacco, resulting in a negative health impact on public health and increased health care costs, and severely undercut the evidence-based public health benefit of imposing high excise taxes on tobacco.”
Proposed Regulation

• Footnotes in support of Statement of Purpose:
  - *The Impact of Price on Youth Tobacco Use*, Smoking and Tobacco Control Monograph 14:
    - Full citations in document.

• Definition of commercial RYO machine:
  - “A mechanical device, by whatever manufacturer made and by whatever name known, located in a business or used for sale or distribution of tobacco *that is designed to roll and wrap tobacco into products.*”
  - This was the Governor’s language. Federal language is more comprehensive.
Federal Definition

- 26 U.S.C. 5702(d): “Manufacturer of tobacco products” means any person who manufactures cigars, cigarettes, smokeless tobacco, pipe tobacco, or roll-your-own tobacco...

- “Such term shall include any person who for commercial purposes makes available for consumer use (including such consumer’s personal use) a machine capable of making cigarettes... or other tobacco products.

- “A person who sells a machine directly to a consumer at retail for a consumer’s personal home use is not making a machine available for commercial purposes if such machine is not used at a retail premises...”
Includes the following products:

- [http://www.freshchoicetobacco.com/img/Powermatic.jpg](http://www.freshchoicetobacco.com/img/Powermatic.jpg) (Hawaii’s experience)
Proposed Regulation

- All commercial Roll-Your-Own machines are prohibited.
  - All commercial Roll-Your-Own machines must be placed out of the reach of all consumers, and in a location accessible only to store personnel. *(alternative language).*

- Why do this locally?
  - Stronger control of enforcement control if law is a local law.
  - Who knows what might happen on the federal level in the future.
  - Whac-A-Mole
    - Constantly responding to tobacco industry tactics
    - Between vending machine, self-service displays and commercial RYO bans, we feel we have covered all future tobacco industry “invention”.
How Will They (attempt to) Get Around This?
MYO Smokers Club (MA, CT)

- www.anthonymarino36077104.wildapricot.org/
- “Our members enjoy **smoking in moderation** and abhor the thought of inhaling the 455 additives, chemicals and flavoring found in manufactured cigarettes.”
- “Make new friends, enjoy a great smoke and have fun . . . Features coffees and soft drinks.”
- Non-profit corporation.
- Members provided free use of scales, electric rolling machines, electric **“non-commercial cigarette injection machines”**.
- Members buy the tobacco.
How Will They (attempt to) Get Around This?
Non-Profit “Section” of Store

“Compassion Centers”
- RYO machine housed in separate area of a store that acts as a non-profit section.
- Money made from machine used to pay rent, utilities and other operating costs.
- Remaining funds donated to charity.
- Retailer would make money from other items sold in other areas of the store.
Legal Problems with this Approach

- To which “charitable” category to these clubs belong?
  - Determined by state law.
  - Massachusetts G.L. Chapter 180, Sec. 4:
    - Civic, educational, charitable, benevolent or religious purpose;
    - Establishing or maintaining libraries
    - For supporting any missionary enterprise
    - For promoting temperance or morality; [“moderation”??]
    - For fostering, encouraging or engaging in athletic exercises or yachting;
    - For the establishment and maintenance of places for reading rooms . . .

- Membership is not selective.
  - Not “private” in any way. Many cases on this subject.
How Will They (attempt to) Get Around This?

- Small machines are not commercial RYO machines.
  - Hawaii’s experience.
- YES THEY ARE!!
  - “Such term shall include any person who for commercial purposes makes available for consumer use (including such consumer’s personal . . . use) a machine capable of making cigarettes . . . or other tobacco products.”
  - Size doesn’t matter.
TTB Is Aware of Both of These Strategies

- Questions??

- Contact Information:
  - Cheryl Sbarra
  - Senior Staff Attorney
  - Massachusetts Association of Health Boards
  - sbarra@mahb.org
Questions Now?
• Q&A panel on your screen

Questions Later?
• publichealthlawcenter.org
• publichealthlaw@wmitchell.edu
• 651-290-7506
Next Webinar in the Series

Pressing the FDA on Menthol

Tuesday, November 13, 2012
12 – 1:30 p.m. (CST)

*NOTE: There will be no mid-October obesity-related webinar.

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