NON-TAX PRICING STRATEGIES FOR TOBACCO AND VAPOR PRODUCTS IN NEW YORK STATE

Frequently Asked Questions

Keeping the price of commercial tobacco[1] and vapor products (hereinafter "tobacco products") high is important because access to cheap tobacco products increases their use, particularly among price-sensitive users like young adults and minors. The tobacco industry uses pricing strategies, such as discounts and multi-pack offers, to discourage current tobacco users from quitting, to entice new customers to purchase their products, and to reduce the effectiveness of tobacco tax increases. The tobacco industry uses sophisticated research to apply these strategies to specific products in particular geographic locations and to target certain groups of people.

This fact sheet focuses on non-tax pricing strategies in New York State, meaning price-related policies that complement tobacco taxes. These policies can be carried out at the state level and may be feasible at the local level. The fact sheet answers questions about minimum price and minimum package size laws, prohibitions on price discounting and multi-pack offers, prevention and reduction of smuggling, mitigation fees, and tobacco retailer licensing fees at the state and local levels.

Q: How do minimum price laws apply to different types of tobacco products?

A: Minimum price laws typically establish the minimum retail price charged to the consumer by requiring that a minimum percentage markup be added to the wholesale price of a tobacco product.[2] Minimum price laws can vary widely depending on the type of tobacco product regulated. For example, cigarettes in New York State are subject to a minimum price law formula that marks up the price of cigarettes along the supply chain from the manufacturer to the retailer.[3] In 2022, the least expensive pack of 20 cigarettes permitted to be sold to consumers in New York State was $11.21.[4] In contrast, in New York State there is no minimum price law for vapor products or other tobacco products.[5]

Q: What products are subject to minimum package size laws?

A: Minimum package size laws require that regulated products be sold in a minimum quantity. Cigarettes are sold in packs of no fewer than 20 cigarettes nationwide because of a federal minimum package size law.[6] New York State also sets a minimum package size of 0.6 oz. for roll-your-own tobacco.[7] Cigarette rolling papers, wrapping leaves, and tubes must be sold in a package containing no fewer than 20 of each item.[8] New York State does not require any other tobacco products to be sold in minimum package sizes. At the local level, in 2021 there were 259 communities in the U.S. with a minimum package size policy for little cigars popular with youth.[9] New York City is the only local government in New York State that regulates the package size of little cigars.[10] Nationally, these policies have been enacted by local governments of various sizes concerned about youth access to cheap tobacco products. In general, minimum package size policies may be more feasible to enforce in communities that require a local tobacco retailer license. The current lack of comprehensive state-level minimum price laws across tobacco product categories, combined with a lack of minimum package size policies for other tobacco and vapor products, means that the tobacco industry can still manipulate package size and price to make cheap tobacco products available to price-sensitive consumers in New York State.

Q: Do minimum price laws and minimum package size laws actually reduce the consumption of tobacco products?

A: Well-crafted minimum price laws and minimum package size laws can work together with tobacco taxes to increase tobacco prices. A review of the effectiveness of these policies in North America found strong evidence that tobacco price increases reduce the consumption of tobacco products among the general population, and that these policies are even more effective at

reducing tobacco use by youth, young adults, and people with low socioeconomic status.[11] Due to their potential effectiveness, the tobacco industry has sought to weaken minimum price laws through lobbying campaigns and litigation.[12] In 2001, the tobacco company Lorillard sued the New York State Department of Taxation and Finance (NYS Tax Department) to challenge an interpretation of New York's minimum price law that prohibited the use of manufacturer promotions to reduce retail cigarette prices.[13] While the lawsuit was pending, the tobacco industry lobbied legislatures in other states with minimum price laws to prevent what one tobacco company referred to as "a 'New York-Style' promotional crisis" that would limit its ability to manipulate prices.[14] Ultimately, Lorillard's lawsuit against New York State was unsuccessful.[15]

Q: Can tobacco retailers discount tobacco products and use promotions to get around tobacco taxes and minimum price laws?

A: In states and localities that do not effectively regulate their use, price promotions like coupons and multi-pack price promotions (e.g., buy one, get one free offers) can be used to undermine tobacco taxes and minimum price laws. In 2020, New York State enacted a comprehensive policy that prohibits tobacco retailers from accepting and redeeming any "price reduction instrument" for tobacco and vapor products.[16] Price reduction instruments are broadly defined to include any: "coupon, voucher, rebate, card, paper, note, form, statement, ticket, image, or other issue, whether in paper, digital, or any other form, used for commercial purposes to receive an article, product, service, or accommodation without charge or at a discounted price."[17] The policy applies to a wide variety of tobacco products.[18] For vapor products, the policy applies to vape liquids and gels and devices that contain vape liquid, but it does not apply to vape devices and components of vape devices that do not contain vape liquid or gel.[19] This means that tobacco retailers can offer and accept price reduction instruments for vaping devices so long as they are sold separately from vape liquid or gel.

Q: What can be done to combat smuggling of tobacco products from low tobacco tax states into New York State?

A: Due to its relatively high tobacco taxes, New York State is disproportionately impacted by the illicit tobacco trade.[20] The most common form of illicit tobacco trade in the U.S. is bootlegging. Bootlegging is defined as the "legal purchase of cigarettes [and other tobacco products] in one jurisdiction and consumption or resale in another jurisdiction without payment of applicable taxes."[21] Bootlegging undermines tobacco control efforts by reducing tax revenue and making less

expensive tobacco products more readily available. The Centers for Disease Control and Prevention recommends that states use a three-pronged approach to combat the illicit tobacco trade: (1) licensing, (2) product markings, and (3) enforcement.[22] Licensing at the state and local level of all stages of the tobacco product supply chain allows for inspections and enforcement that can deter illicit tobacco products from entering the supply chain in the first place and detect illegal activity.[23] In New York State, tobacco retailer licensing is predominantly carried out at the state level. In 2020, just seven local communities in the state required a local license to sell tobacco products.[24] Tobacco product markings typically consist of a tax stamp. New York State uses relatively low-tech tax stamps and only requires tax stamps on cigarettes.[25] High-tech tax stamps that integrate tamper proofing, special inks, holograms, and encrypted tracking information have been found to be effective at deterring sales of illicit tobacco products.[26] The NYS Tax Department enforces the tobacco tax laws in collaboration with other state and federal law enforcement agencies. It has intercepted untaxed tobacco products being sold via convenience stores, grocery stores, and smoke shops throughout New York State.[27]

Tobacco-Free Western New York's Kick Butts Collaborative poster

Q: Are the costs associated with tobacco product waste included in the retail price of tobacco products?

A: Tobacco product waste (e.g., cigarette butts, e-cigarette cartridges, vape pods) is toxic, unsightly, pervasive, and expensive to manage. The cost of tobacco product waste is not included in the retail price of tobacco products sold in New York State. Costs of tobacco product waste include the cost of litter management, collection, and abatement efforts. For example, volunteers in the Village of Hamburg, New York, collect cigarette butts weekly, post signage, and have sought to obtain 20 ash receptacles for local businesses and ash cups to attach to village trash cans.[28] The Village groundskeeper estimates that the most frequently used cigarette butt receptacle collects 300 butts every 30 days.[29] That is a total of 3,600 cigarette butts each year in just one receptacle. One approach to capture the true cost of tobacco product waste is to impose a mitigation fee for tobacco waste.[30] To avoid being considered a tax, a mitigation fee must be set at a level reasonably designed to correspond to the public costs of disposal, public educa-

tion, signage, and administration of the self-funding program.[31] For example, the City and County of San Francisco, California, imposes a Cigarette Litter Abatement Fee of $1.25 per pack of cigarettes to be paid by the tobacco retailer.[32] Mitigation fees also can indirectly increase tobacco product prices. Administering a mitigation fee may be more cost-effective for larger counties and municipalities as opposed to small local governments, since tobacco product waste costs are generally proportional to population size.[33]

Q: Can tobacco retailer licensing fees be used as a non-tax pricing strategy?

A: Tobacco retailer licensing fees are a part of tobacco retailers' cost of doing business that impacts the prices they can charge for the tobacco products they sell. To avoid being considered a tax, the licensing fee has to reflect the cost to the government of oversight and enforcement of the license granted.[34] For example, in 2022 it cost $300 to renew an annual tobacco retailer license for one retail location with the NYS Tax Department.[35] State and local governments of all sizes that license tobacco retailers can ensure that they are not subsidizing the cost of tobacco products by carefully setting their tobacco retailer licensing fees at a rate that accurately captures the costs of administering the tobacco retailer license issued.[36]

Contact us for assistance! If you're working on New York State commercial tobacco control issues and need assistance, contact the Public Health Law Center at (651) 290-7506 or publichealthlawcenter@mitchellhamline.edu.

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Endnotes

1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. In comparison, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit https://keepitsacred.itcmi.org/. When the word "tobacco" is used throughout this document, a commercial context is implied and intended.

2 *See* Hillary R. DeLong et al., Inst. for Health Res. & Pol'y, U. of Ill. at Chicago, Tobacco Product Pricing Laws: A State-by-State Analysis, 2015 17 (2016), https://tobacconomics.org/research/tobacco-product-pricing-laws-a-state-by-state-analysis-2015. Another approach used by some states and localities is to set a minimum price floor for tobacco products.

3 N.Y. Tax Law § 471(1).

4 N.Y. State Dep't of Tax'n & Fin., Publication 509, Minimum Wholesale and Retail Cigarette Prices (Oct. 2022), https://www.tax.ny.gov/pdf/publications/cigarette/pub509.pdf (New York City also has tobacco tax authority and has higher minimum cigarette prices).

5 Vapor products are subject to a 20 percent supplemental sales tax in New York State. N.Y. Tax Law § 1181.

6 21 C.F.R. § 1140.16(b).

7 N.Y. Pub. Health Law § 1399-gg(2).

8 *Id.*

9 Jessica L King Jensen et al., ***A Synthesis of Local Cigar Pack Policies in the U.S.***, 28 Preventive Med. Rep. 101865 (2022).

10 *Id.*

11 Pearl Bader et al., ***Effects of Tobacco Taxation and Pricing on Smoking Behavior in High Risk Populations: A Knowledge Synthesis***, 8 Int. J. Environ. Res. Pub. Health 4418 (2011).

12 Dorie E. Apollonio & Stanton Glantz, ***Tobacco Manufacturer Lobbying to Undercut Minimum Price Laws: An Analysis of Internal Industry Documents***, 29 Tobacco Control e10 (2020).

13 *Id.*

14 *Id.*

15 *Id.*

16 N.Y. Pub. Health Law § 1399-bb.

17 N.Y. Pub. Health Law § 1399-aa(14). The New York State Department of Health has interpreted N.Y. PUB. HEALTH LAW § 1399-bb to include "multipack price promotions." N.Y. State Dept. of Health, ***N.Y.S. Tobacco Control Laws*** (Nov. 2022), https://www.health.ny.gov/prevention/tobacco_control/current_policies.htm.

18 N.Y. Pub. Health Law § 1399-aa(5) (defining "tobacco products" as "one or more cigarettes or cigars, bidis, chewing tobacco, powdered tobacco, nicotine water or any other tobacco products.")

19 N.Y. Pub. Health Law § 1399-aa(17).

20 Peter Reuter et al., Understanding the U.S. Illicit Tobacco Market: Characteristics, Policy Context, and Lessons from International Experiences 49 (2015), https://nap.nationalacademies.org/catalog/19016/understanding-the-us-illicit-tobacco-market-characteristics-policy-context-and.

21 *Id.* at 33.

22 Frank J. Chaloupka et al., Preventing and Reducing Illicit Tobacco Trade in the United States 28 (2015), https://www.cdc.gov/tobacco/stateandcommunity/pdfs/illicit-trade-report-508.pdf.

23 *Id.* at 28-29.

24 Pub. Health & Tobacco Pol'y Ctr., Ways & Means: Point of Sale Policy: New York Communities Taking Action (2020), https://tobaccopolicycenter.org/documents/posProgress.pdf.

25 Chaloupka et al., *supra* note 21, at 30.

26 *Id.* at 30-32.

27 Press Release, N.Y. State Dep't of Tax'n & Fin., ***500 Cartons of Untaxed Cigarettes Seized After Traffic Stop in Erie County: Driver faces two felony charges plus fines up to $600 per carton*** (June 5, 2019), https://www.wnypapers.com/news/article/current/2019/06/06/137428/500-cartons-of-untaxed-cigarettes-seized-after-traffic-stop-in-erie-county; Press Release, N.Y. State Dep't of Tax'n & Fin., ***Untaxed Cigarettes Seized Following Series of Enforcement Inspections in Troy: Investigators make an arrest and suspend ability to sell cigarettes and tobacco*** (Dec. 06, 2019), https://apps.cio.ny.gov/apps/mediacontact/public/view.cfm?parm=947FF55F-AC2B-DC7B-86654CD02320E5FB&backButton (seizures occurred at two supermarkets); Press Release, N.Y. State Dep't of Tax'n & Fin., ***Search Warrants Net Two Arrests Plus Large Amounts of Untaxed Tobacco and Cannabis: Four locations in the Capital Region and Hudson Valley searched in ongoing investigation*** (Aug. 22, 2022), https://www.tax.ny.gov/press/rel/2022/rollownwarrant082222.htm (untaxed cigarettes were located in four smoke shops).

28 Breanna Fuss, ***Western NY Group Is Kicking Butt, One Cigarette Butt at a Time***, Spectrum News 1, Nov. 18, 2021, https://spectrumlocalnews.com/nys/buffalo/news/2021/11/18/hamburg-butt-kickers-cleaning-up-cigarette-waste-and-share-enviornmental-impact.

29 *Id.*

30 Tobacco Control Legal Consortium, ***Policy Tools for Minimizing Public Health and Environmental Effects of Cigarette Waste*** (2013), https://publichealthlawcenter.org/sites/default/files/tclc-guide-cigarette-waste-2013.pdf; ***see also*** Public Health Law Center, ***Tobacco Product Waste: Frequently Asked Questions*** (2020), https://www.publichealthlawcenter.org/sites/default/files/resources/Tobacco-Product-Waste-CA-FAQ.pdf.

31 John E Schneider et al., ***Tobacco Litter Costs and Public Policy: A Framework and Methodology for Considering the Use of Fees to Offset Abatement Costs***, 20 Tobacco Control i36 (2011), https://tobaccocontrol.bmj.com/content/tobaccocontrol/20/Suppl_1/i36.full.pdf.

32 Treasurer & Tax Collector, City & County of San Francisco, Cigarette Litter Abatement Fee (CIG), https://sftreasurer.org/business/taxes-fees/cigarette-litter-abatement-fee-cig (last visited Jan. 31, 2023, 2022).

33 John E. Schneider et al., ***Online Simulation Model to Estimate the Total Costs of Tobacco Product Waste in Large U.S. Cities,*** 17 Int. J. Environ. Res. Public Health 4705 (2020).

34 ChangeLab Solutions, ***Tobacco Retailer Licensing Playbook*** 16 (2015), https://www.changelabsolutions.org/sites/default/files/TRL_Playbook_FINAL_20150511.pdf.

35 N.Y. State Dep't of Tax'n & Fin., ***Cigarette and Tobacco Products Tax: Filing Requirements and License and Registration Renewal*** (2022), https://www.tax.ny.gov/bus/cig/existing-business.htm.

36 ***See*** Public Health Law Center, ***Tobacco Retail Licensing Calculator***, https://www.publichealthlawcenter.org/resources/tobacco-retail-licensing-calculator.