



Regulatory Options for Snus

Background

As the number of venues that prohibit smoking continues to increase, several noncombustible tobacco products have grown in popularity in the United States, including a smokeless tobacco product called “snus.” Snus (pronounced “snoose”) originated in Sweden and is often referred to as “Swedish snuff,” even though it is more similar to dip or chew tobacco. This fact sheet provides a brief overview of snus, its health risks, gaps in its regulation, and some approaches that state and local governments might consider to control its use, pricing, sale, and marketing.

Product Description

Snus is a spit-free form of moist powder tobacco, which has gone through a fermentation process. Snus is usually prepackaged in small teabag-like pouches (see graphic to the right). The most common way to consume snus is to place it between one’s gum and upper lip for a few minutes to several hours, depending on taste.



Health Risks

Although research is ongoing on the health effects of noncombustible tobacco products such as snus, smokeless tobacco products have been shown to cause oral, pancreatic, and esophageal cancers, precancerous mouth lesions, and dental problems (such as gum recession, dental caries, and bone loss around teeth).¹ Some studies have even shown a potential correlation between snus use and increased preterm birth and colon cancer.²

Also, because snus comes in a variety of sweet fruit and mint flavors,³ it often appeals to youth and may lead to tobacco initiation and nicotine addiction.⁴ According to the 2012 Surgeon General’s report, *Preventing Tobacco Use among Youth and Young Adults*, the use of smokeless tobacco – particularly the dual use of these products and cigarettes – is significantly rising among teens in the U.S.⁵

Regulatory Gaps & Options

Taxation

- Regulatory Gap:** Many state tax laws define tobacco products in a way that potentially excludes snus. For example, laws that limit the definition of “tobacco products” to products that are smoked or chewed would arguably not apply to snus, which does not fall into either of these categories.⁶ If snus is not covered by a state’s tobacco laws, it would not be subject to a tobacco tax. Also, even if a state’s tobacco tax laws do cover snus, the tax rate may be substantially lower than that of more traditional tobacco products.⁷ Snus may be subject to a percentage-of-wholesale-price tax (also known as an *ad valorem* tax), rather than a fixed excise tax, which is often applied to traditional tobacco products and is considerably higher.⁸ Studies have shown a correlation between lower cost tobacco products and greater access to those products by minors.⁹
- Regulatory Option:** The Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act),¹⁰ the federal law granting the Food and Drug Administration (FDA) the authority to regulate tobacco products, expressly preserves the authority of state and local governments to levy taxes on tobacco products.¹¹ Thus, states and localities could broaden or clarify existing definitions of “tobacco products” in their tax laws to ensure that snus is covered and taxed at a comparable rate as traditional tobacco products.

Coupons, Discounts, & Rebates

- Regulatory Gap:** Tobacco manufacturers use coupons and other price-related incentives to make novel tobacco products such as snus more attractive to consumers, particularly young people.¹² Numerous studies have shown that youth are particularly sensitive to increases in the price of tobacco products.¹³ The Surgeon General has concluded that the tobacco industry’s extensive use of price-related marketing practices has led to higher rates of tobacco use among young people than would have occurred in the absence of these practices.¹⁴
- Regulatory Options:** The Tobacco Control Act preserves state and local government authority to regulate the sale and distribution of tobacco products, including their price.¹⁵ Local and state governments could consider restricting or prohibiting the redemption of coupons for snus and similar tobacco products in retail stores, or restricting other tobacco price-related marketing practices, such as price discounts to tobacco retailers and wholesalers, tobacco retailer incentive programs, and retail value-added deals (e.g., buy-one-get-one-free offers).¹⁶

While legal challenges to such policies can be anticipated in light of the tobacco industry’s heavy investment in price-related marketing strategies, a federal district court has recently upheld a local law prohibiting the sale of discounted tobacco products.¹⁷ In early 2012, Providence, Rhode Island enacted an ordinance prohibiting licensed tobacco dealers from selling discounted tobacco products through coupon redemption and multi-

pack offers.¹⁸ Tobacco industry stakeholders challenged the law on First Amendment and federal and state preemption grounds. In December 2012, a federal district court upheld the pricing ordinance, concluding that its prohibition against certain industry price discounting practices did not violate the First Amendment and was not preempted by federal or state law.¹⁹

Although this decision has been appealed, and even if upheld, would not be controlling in all jurisdictions, its promising initial result may help support similar state or local laws to prohibit the deeply discounted sale of emerging tobacco products like snus.

Free Samples

- Regulatory Gap:** Under the Tobacco Control Act, tobacco manufacturers, distributors, and retailers are generally restricted from distributing free samples of “cigarettes, smokeless tobacco or other tobacco products.”²⁰ Snus that consist of moist powdered tobacco would appear to fall under the Tobacco Control Act’s definition of “smokeless tobacco,” which presumably means the restriction on free samples would apply to them.²¹ Under an exception in the Tobacco Control Act, free samples of smokeless tobacco may be distributed in “qualified adult-only facilities” as that term is defined under federal regulations.²² The sample must be limited to one package containing 0.53 ounces of smokeless tobacco or eight individual portions of smokeless tobacco, whichever weighs less.²³ Given the low weight of many snus, this provision could create a significant loophole.²⁴
- Regulatory Options:** Although the Tobacco Control Act allows limited free sampling of smokeless tobacco products, it expressly states that it does not affect the authority of a state or local government to prohibit or further restrict the distribution of free samples of smokeless tobacco.²⁵ State and local governments could prohibit the distribution of free samples of all non-cigarette tobacco products, including snus, in all locations.²⁶

Minimum Pack Size

- Regulatory Gap:** Unlike cigarettes, which are sold in packs of twenty,²⁷ the Tobacco Control Act does not require snus to be sold in any minimum pack size. When snus are sold in smaller quantities, the product price is lower than when the products are sold as part of a pack. As a result, these lower-priced products have a direct appeal to minors.²⁸
- Regulatory Options:** To combat price disparities caused by small packs of snus, and ensure that these products have a price comparable to cigarettes, state and local governments could create a standard minimum pack size for snus sold, thus limiting the sale of snus sold in small quantities.²⁹

Flavoring

- Regulatory Gap:** Another disparity exists in the way flavored snus is regulated versus flavored cigarettes. Under the Tobacco Control Act, tobacco companies are prohibited

from producing cigarettes containing any characterizing flavor other than tobacco or menthol.³⁰ This prohibition is limited to flavored cigarettes, however. Tobacco companies can continue to market snus tobacco which comes in fruit and mint flavors that are clearly intended to appeal to youth.³¹

- **Regulatory Options:** As noted above, the Tobacco Control Act clearly indicates that state and local governments can regulate the sale and distribution of tobacco products.

In 2009, New York City enacted an ordinance prohibiting the sale of flavored non-cigarette tobacco products with a characterizing flavor other than menthol, mint, or wintergreen, except in certain “tobacco bars.”³² Smokeless tobacco companies sued the city, arguing that the ordinance imposed manufacturing standards on their products in conflict with federal law. In 2010, the federal district court for the Southern District of New York ruled in favor of the city, denying the tobacco companies’ request to delay enforcement of the law.³³ The court stated that the Tobacco Control Act gives the federal government exclusive authority over tobacco product manufacturing standards, but preserves state and local authority to regulate the sale and distribution of tobacco products. The court then found that the New York City ordinance was a sales restriction, not a product standard. In 2011, the court affirmed the reasoning of its previous decision and dismissed the complaint.³⁴

In early 2012, Providence, Rhode Island enacted a similar ordinance prohibiting the sale of flavored tobacco products, except in “smoking bars.”³⁵ Several tobacco industry stakeholders sued the city, arguing that the ordinance was preempted by the Tobacco Control Act because it attempted to establish a product standard, and also violated the First Amendment because it limited their ability to describe their products. Like the New York court, the federal district court in Rhode Island concluded that the ordinance was a sales restriction, not a product standard, and thus was not preempted under the Tobacco Control Act.³⁶ The court also concluded that Providence’s ordinance did not limit the plaintiffs’ First Amendment rights, finding that it was simply an economic regulation on the sale of a particular product.³⁷

Although both of these decisions are on appeal and, even if upheld, would not be precedential in all jurisdictions, New York City’s and Providence’s initial successes may help support similar state or local laws to prohibit or significantly restrict the sale of snus.

Youth Access

- **Regulatory Gap:** Under federal law, retailers cannot “sell cigarettes or smokeless tobacco to any person younger than eighteen years of age.”³⁸ Although snus would likely qualify as “smokeless tobacco” under federal law, the FDA has yet to exercise its authority to exercise jurisdiction over these products.³⁹ Also, many state and local youth access laws are unlikely to include snus in that they are limited to products that are chewed or smoked.

- **Regulatory Options:** State and local governments could consider passing stronger, more comprehensive youth access laws to include snus, and also raising the minimum age to purchase such products.⁴⁰

Point-of-Sale Warnings, Marketing Restrictions, & Broad Sales Prohibitions

- **Regulatory Gap:** The Federal Cigarette Labeling and Advertising Act⁴¹ limits the authority of state and local governments to regulate the advertising and promotion of cigarettes; however, no federal statute limits the authority of local or state governments to regulate the advertising and promotion of non-cigarette tobacco products. In addition, as discussed above, the Tobacco Control Act expressly preserves state and local government authority to regulate the sale of tobacco products. Therefore, state and local governments are able to warn consumers of the dangers of using snus, regulate the advertising or promotion of snus, and regulate the sale of snus without risking federal preemption concerns.
- **Regulatory Options:** To determine the most effective options for regulating the sale and marketing of snus or for warning consumers about the use of snus, state and local governments need to analyze their jurisdiction-specific needs, priorities, and goals. Possible policy options include posting health warnings at the point-of-sale,⁴² imposing marketing restrictions, and prohibiting the sale of snus.⁴³ Although federal statutes should not pose a barrier for state and local policies restricting the sale and marketing of snus, such laws will most certainly be challenged on the basis that they violate state or federal constitutional provisions related to free speech or interstate commerce.⁴⁴ Although it is important to work with an attorney when pursuing any policy options, the legal issues surrounding the First Amendment are complicated, and jurisdictions must consult with legal counsel before pursuing these types of policies.

Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at (651) 290-7506 or publichealthlaw@wmitchell.edu with any questions about the information included in this fact sheet or to discuss local concerns you may have about implementing these policy options.

The Tobacco Control Legal Consortium provides information and technical assistance on issues related to tobacco and public health. The Consortium does not provide legal representation or advice. This document should not be considered legal advice or a substitute for obtaining legal advice from an attorney who can represent you. We recommend that you consult with local legal counsel before attempting to implement any of these measures.

Last Updated: February 2013

Notes

¹ See, e.g., WORLD HEALTH ORG. FRAMEWORK CONVENTION ON TOBACCO CONTROL, CONTROL AND PREVENTION OF SMOKELESS TOBACCO PRODUCTS 2, 5 (2012), available at http://apps.who.int/gb/fctc/PDF/cop5/FCTC_COP5_12-en.pdf.

² See Michael Freiberg, *Options for State and Local Governments to Regulate Non-Cigarette Tobacco Products*, 21 ANNALS OF HEALTH LAW 407, 414 (2012), available at <http://publichealthlawcenter.org/sites/default/files/resources/phlc-lreview-freiberg-regulating-otp-2012.pdf>.

³ See, e.g., Snus Authority, Snus Brands & Flavors List, <http://snusauthority.com/blog/snus-brands-and-flavors> (last visited Feb. 20, 2013).

⁴ Freiberg, *supra* note 2, at 414.

⁵ U.S. Dep't of Health & Human Servs., *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* 522-30 (2012), available at http://www.cdc.gov/tobacco/data_statistics/sgr/2012/.

⁶ Freiberg, *supra* note 2, at 414.

⁷ See *id.* at 416 – 21.

⁸ *Id.* at 416.

⁹ *Id.*

¹⁰ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in relevant part at 21 U.S.C. §§ 301, 321, 387), available at www.govtrack.us/congress/bills/111/hr1256/text.

¹¹ 21 U.S.C. § 387p(a)(1).

¹² U.S. Dep't of Health & Human Servs., *supra* note 5, at 522-30. See also Tobacco Control Legal Consortium, *Cause and Effect: Tobacco Marketing Increases Youth Tobacco Use – Findings from the 2012 Surgeon General's Report on Youth and Young Adult Tobacco Use* 20 (2012), <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-SGReport-Findings-Youth-Marketing-2012.pdf>.

¹³ U.S. Dep't of Health & Human Servs., *supra* note 5, at 528, 530.

¹⁴ *Id.* at 530.

¹⁵ 21 U.S.C. § 387p(a)(1). See Marlo Miura, Tobacco Control Legal Consortium, *Regulating Tobacco Product Pricing: Guidelines for State and Local Governments* 5 (2010), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-pricing-2010.pdf>.

¹⁶ See Tobacco Control Legal Consortium, *Cause and Effect*, *supra* note 12, at 27-28; Miura, *supra* note 15. See also Tobacco Control Legal Consortium, *Price-Related Promotions for Tobacco Products: An Introduction to Key Terms and Concepts* (2011), available at http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-pricerelatedpromotions-2011_0.pdf.

¹⁷ Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, No. 12-96-ML, 2012 WL 6128707 (D.R.I. Dec. 12, 2012).

¹⁸ PROVIDENCE, R.I. CODE §§ 14-300, 14-303.

¹⁹ Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, 2012 WL 6128707 at *5-7, 11.

²⁰ 21 C.F.R. § 1140.16(d)(1).

²¹ Freiberg, *supra* note 2, at 425-26. *See also* Public Health Law and Policy & Tobacco Control Legal Consortium, Comments on the FDA's "Draft Guidance for Industry: Compliance With Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents" (May 20, 2011), *available at* <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fdacommments-cigarsinsamplingrestrictions-2011.pdf>.

²² 21 U.S.C. § 387a-1(a)(2)(G)(d)(2)(A); 21 C.F.R. § 1140.16(d)(2)(iii)(A)-(F).

²³ 21 C.F.R. § 1140.16(d)(2)(iv).

²⁴ Freiberg, *supra* note 2, at 424.

²⁵ 21 U.S.C. § 387a-1(a)(2)(G)(d)(2)(B).

²⁶ *See, e.g.*, Tobacco Control Legal Consortium, *Tobacco Coupon Regulations and Sampling Restrictions – Tips and Tools* (2011), *available at* <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-tobcouponregsandsampling-2011.pdf>.

²⁷ 21 C.F.R. § 1140.14.

²⁸ *See, e.g.*, Tobacco Control Legal Consortium, *Regulating Tobacco Products Based on Pack Size* (2012), *available at* <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-regulating-packsizes-2012.pdf>.

²⁹ Freiberg, *supra* note 2, at 428.

³⁰ *See* U.S. Food & Drug Admin., Flavored Tobacco, <http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/default.htm> (last visited Feb. 8, 2013) (containing links to resources related to 2009 law prohibiting the manufacture and sale of cigarettes containing certain characterizing flavors).

³¹ *See, e.g.*, Snus Authority, Snus Brands & Flavors List, <http://snusauthority.com/blog/snus-brands-and-flavors> (last visited Feb. 20, 2013).

³² N.Y.C. CODE § 17-713, 715 (prohibiting the sale of smokeless tobacco products that have as a component part tastes or aromas relating to "any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice.").

³³ U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 703 F. Supp. 2d 329, 344-45 (S.D.N.Y. 2010) (denying plaintiffs' motion for a preliminary injunction, finding them unlikely to prevail on the merits of their federal preemption claim; concluding that the Tobacco Control Act gives the federal government the exclusive authority to regulate the manufacture of tobacco products, while reserving to the states the power to regulate the sale and distribution of tobacco products).

³⁴ U.S. Smokeless Tobacco Mfg. Co. v. City of New York, No. 09 Civ. 10511, 2011 WL 5569431 (S.D.N.Y. Nov. 15, 2011) (affirming reasoning of preliminary injunction order that the ordinance is an allowable sales restriction, denying plaintiffs' motion for summary judgment, granting defendant's cross-motion for summary judgment, and dismissing the complaint).

³⁵ PROVIDENCE, R.I. CODE §§ 14-308, 14-309, and 14-310.

³⁶ Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, No. 12-96-ML, 2012 WL 6128707 at *12-13 (D.R.I. Dec. 12, 2012).

³⁷ *Id.* at *8.

³⁸ 21 C.F.R. § 1140.14(a).

³⁹ Freiberg, *supra* note 2, at 434.

⁴⁰ See Tobacco Control Legal Consortium, *Raising the Minimum Legal Sale Age for Tobacco and Related Products* (2012), available at http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-minimumlegal-saleage-2012_0.pdf.

⁴¹ 15 U.S.C. § 1331 *et seq.*

⁴² See 23-34 94th St. Grocery Corp. v. New York City Bd. of Health, 685 F.3d 174, 183-85 (2d Cir. 2012) (affirming a district court decision ruling that New York City may not require cigarette retailers to post graphic health warnings next to cash registers or adjacent to cigarette displays, on the grounds that the Federal Cigarette Labeling and Advertising Act prevents state or local governments from adopting laws that affect the content of tobacco retailers' and manufacturers' promotional efforts). The challenged warning signs depicted the health impacts of smoking and contained the message "quit smoking today." It should be noted that if a jurisdiction adopted graphic point-of-sale warning requirements applying to non-cigarette tobacco products such as snus, the FCLAA would not apply. However, the law would almost certainly be challenged on First Amendment grounds.

⁴³ Freiberg, *supra* note 2, at 438.

⁴⁴ For additional information, see the Tobacco Control Legal Consortium's publications on First Amendment and Commerce Clause issues in the regulation of tobacco products, available at <http://publichealthlawcenter.org/topics/special-collections/federal-regulation-tobacco-collection>.