



## Sunshine Laws: Requiring Reporting of Tobacco Industry Price Discounting and Promotional Allowance Payments to Retailers and Wholesalers

The Tobacco Control Legal Consortium has created this series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures.<sup>1</sup> For more details about these policy considerations, please contact the Consortium. In addition, readers may find it helpful to review the Consortium's introductory [fact sheet](#) on tobacco product price promotions as a companion piece to this publication.

### Background

Price is one of the most powerful factors affecting tobacco use for all tobacco users, and youth in particular.<sup>2</sup> According to the U.S. Surgeon General, raising the price of tobacco products is the single most effective method for improving the public health outcomes of decreased smoking prevalence and initiation, reduced consumption, and increased, sustained cessation.<sup>3</sup> Researchers estimate that a 10 percent increase in the price of cigarettes reduces consumption by about 7 percent for youth and 4 percent for adults.<sup>4</sup>



Thus, it comes as no surprise that the tobacco industry focuses much of its marketing resources on strategies aimed at reducing prices and dampening the public health benefits of high tobacco taxes. In 2008 (the most recent year in which data is available from the Federal Trade Commission (FTC)), the major cigarette manufacturers spent a total of \$8.10 billion—81.5 percent of all advertising and promotion expenditures—on payments to retailers and wholesalers designed to make cigarettes cheaper for consumers and to buy retailer cooperation in preferred product placements and promotion for their brands.<sup>5</sup> The vast majority of these payments, which the FTC refers to as “promotional allowances,” went to retailers to enable them to offer discounts on cigarette prices (\$7.17 billion). Out of the remaining amount, another \$481.5 million was also paid to retailers as incentives to promote increased sales or secure preferred shelving in the store; and an additional \$448.5 million was paid to wholesalers for volume rebates, incentive payments, and services related to cigarette promotions in stores.<sup>6</sup>

These last two types of payments to retailers and wholesalers may not seem like much compared to how much the industry spends on price discounts. However, these retailer and wholesaler incentive payments have been linked to significant increases in promotional activity in stores.<sup>7</sup> Further, a number of studies have shown strong associations between exposure to retail tobacco marketing and product placement, youth smoking initiation intent and behaviors, and unplanned tobacco purchases by smokers.<sup>8</sup>

Pricing is a key area of tobacco control subject to state—and to a lesser extent, local—regulation through cigarette minimum price laws and taxes. Despite this fact, state and local governments have little, if any, access to data or information about how much the industry is spending on price discounting and promotional allowances in their jurisdictions. As a result, they have incomplete data when assessing how the industry may be using these payments to manipulate tobacco product prices and promote tobacco products in problematic ways in their communities. Although the FTC collects advertising and promotion expenditure data from the major cigarette manufacturers and periodically issues reports about its findings,<sup>9</sup> the information is usually outdated by the time it is published. The data is also aggregated, making it impossible for states and localities to determine how much is spent by each tobacco manufacturer on any particular brand and the amount paid to individual retailers within their jurisdictions. Because of this lack of detail, some jurisdictions have expressed interest in passing laws that would allow them to obtain information about these tobacco industry expenditures.

This guide provides information for state and local policymakers, advocates, and others who are considering requiring disclosure or reporting of industry price discounting and promotional allowance payments (i.e., “sunshine laws”) as a tobacco control strategy.

### Policy Benefits

- Providing data to help address marketing practices that target communities already disadvantaged by health disparities:** A sunshine law could allow governments to track tobacco company control over retail price discounting and promotion of different brands across their jurisdictions. Researchers have documented that tobacco advertising and promotion activities in retail stores can vary widely across communities. Studies have found that compared to stores in more affluent, nonminority areas, stores in minority and low-income neighborhoods have more storefront advertising, promote some types or brands of cigarettes (specifically, menthol) over others, and/or advertise lower prices for certain brands or overall.<sup>10</sup> This is in contrast to at least one manufacturer’s denial that its price discounts or promotions for menthol cigarettes were based “in any way” on race or ethnicity.<sup>11</sup> Additionally, some studies indicate that retail stores frequented by adolescents or near schools have more tobacco marketing.<sup>12</sup> Data provided pursuant to a sunshine law could be used to inform policy solutions appropriately tailored to address concerns about pricing and promotional activities that appear to target disadvantaged or vulnerable populations.

- **Aiding enforcement of tobacco settlement agreement restrictions:** Requiring reporting of discount pricing and promotional allowance payments could provide useful data to support compliance with and enforcement of the Master Settlement Agreement (and related settlement agreements) with tobacco manufacturers. These agreements include a number of restrictions on tobacco marketing activities, including on youth-targeted marketing and use of storefront advertising.
- **Aiding enforcement of state cigarette minimum price laws:** For states with these laws (also referred to as unfair cigarette sales laws), requiring the reporting of discount pricing and promotional allowance payments to tobacco wholesalers and retailers within the state could help with monitoring and enforcement.<sup>13</sup> This information could be particularly useful for those states that do not allow or restrict the use of discounts, rebates, or other incentive payments in calculating legal minimum prices.<sup>14</sup> Even for those states that do not expressly address these payments, however, the information gathered would be useful for evaluating the impact of their minimum price laws and how tobacco industry pricing strategies may be circumventing the law's purpose.

### Policy Elements

Key policy elements for inclusion in a sunshine law are listed below.

- **Findings:** Effective tobacco control policies generally include brief statements of fact or statistics that outline the issue being addressed, provide evidence to support the need for the policy, help clarify the goals, and are designed to help the law withstand legal challenges.
- **Parties required to report:** The law could require manufacturers to report the payments, or it could require retailers, wholesalers and distributors to report, or it could require reporting by all of them. Each permutation would bring its own set of political and legal considerations.
- **Department responsible for implementation and enforcement:** This element would depend on how the sunshine law fits within existing tobacco control laws. For example, state revenue or tax agencies often oversee enforcement of cigarette minimum price laws; a commerce department may oversee licensees, etc. When selecting an enforcement agency, practical issues such as which agency is likely to have both the capacity and the strongest interest in enforcing the law should be considered. Including broad rulemaking authority for the designated agency would also be important.
- **Substantive reporting requirements:** The law should clearly identify the information required to be reported. If the jurisdiction has a cigarette minimum price law that addresses discount pricing or promotional allowances in some way, it would be useful to be aware of any definitions contained in that law.

- **Procedural reporting requirements:** Many requirements relating to how often reports should be made, the level of detail, the format, the timing of submissions, and so forth could be included in the law, or the authority to create rules for these requirements could be delegated to the enforcement agency.
- **Public access to reports:** As discussed below, it may or may not be possible to make the data publicly available. Or, it may be possible to make the data public only in aggregated form. Any provisions of the law that protect the confidentiality of the reported data should be no broader than necessary. For example, if information has already been publicly disclosed elsewhere, it would no longer be confidential. Additionally, it would be helpful to make clear that information may be disclosed as necessary to enforce the law.
- **Enforcement:** Including penalties for failure to submit timely and complete data in the required format would be crucial. The penalties for failing to meet the law's requirements could include monetary fines and license suspensions, as applicable.

### Policy Considerations

- **Taking a novel approach:** At present, we are not aware of any jurisdiction that has implemented the range of reporting requirements contemplated by this type of sunshine law. New Jersey requires some reporting of sales promotion information under its minimum price law (see below). Other states may impose more limited reporting requirements in connection with these or excise tax laws.<sup>15</sup> And while sunshine laws have not historically been adopted in the context of tobacco control, some states have imposed disclosure and reporting requirements on other industries, such as pharmaceutical marketers (see below). States could justify sunshine laws in tobacco control in ways similar to how they support these other disclosure laws, and could also view such measures as an extension of existing reporting requirements applicable to the tobacco industry.
- **Addressing confidentiality:** While information collected under this type of law could be useful for policymakers, researchers and community members, applicable data practices law may or may not permit public disclosure or may permit disclosure only in certain circumstances (e.g., pursuant to court order, or stripped of identifying information). It may be possible for the law to expressly make these reports public, as do a number of state laws requiring reporting of payments made by pharmaceutical marketers to healthcare providers (see table below). Thus, an understanding of how a state's data practices law could apply to this type of reporting law would be crucial. The industry or retailers might also try to argue that the information is trade secret data and that disclosure is prohibited by the U.S. Constitution's Takings Clause (see below). A law allowing disclosure of aggregate data may be less susceptible to legal challenge, though aggregate data may be less useful.

Even if the data cannot be shared publicly, it likely could be shared between government entities so that a health department or the attorney general's office, for

example, could use the data to increase the effectiveness of its tobacco control efforts even if the data is not reported directly to it.

- **Fitting into the legal framework:** Another issue to consider is where the law might be incorporated within a jurisdiction’s existing legal framework. The law could be enacted at the state or local level, assuming that a local government has authority to pass this kind of law (see below). The law may fit better within a minimum pricing law framework for the states that have one, because the vast majority of promotional allowance payments are related to price discounts. However, it also could be incorporated into a jurisdiction’s tobacco licensing law or youth access law. Finally, whether the reporting requirements are assigned to manufacturers versus wholesalers, distributors or retailers also could be a factor in deciding whether this type of law fits better at the state or at the local level.

Finally, the policy approach discussed here focuses on price discounting and other promotional allowance payments. Another possible approach not explored here would be to require tobacco manufacturers to report *all* advertising and promotion expenditures pertaining to the jurisdiction, and not just those related to promotional allowances. This would be similar to what the FTC does when it issues the Cigarette Report. However, this is a requirement that could be imposed only upon manufacturers because wholesalers, distributors, and retailers would not have information about all of the industry’s advertising and promotion expenditures. Because of these limitations, this option is beyond the scope of this publication. It should be noted, however, that in some circumstances, state attorneys general (AG) might be able to obtain and share information similar to the FTC, pursuant to their authority to enforce state laws.<sup>16</sup> To do so however, a state AG would typically need a reasonable basis to believe that an existing law it has authority to enforce is being violated.

### Possible Legal Challenges

Policymakers and advocates considering a sunshine law should consult with local legal counsel about their goals and possible approaches for achieving them in their jurisdictions. The tobacco industry frequently challenges tobacco control laws in court, and a novel approach that relates to a practice important to the industry seems particularly likely to draw a challenge, regardless of the actual legal merits of the claims. Thus, early input and buy-in from legal counsel could be especially important in this context.

While laws that require reporting or disclosure of promotional payments by the tobacco industry might encounter challenges brought on other grounds, the more likely challenges would be ones based on preemption, the First Amendment, or a takings theory.

- **Preemption:** Preemption in legal terms occurs when a higher level of government (e.g., federal or state) eliminates or limits the authority of a lower level of government (e.g., state or local) to regulate a certain issue.<sup>17</sup> A law can specifically preempt state or local authority (“express preemption”) or it can preempt by implication (“implied preemption”).<sup>18</sup> In terms of federal preemption of state or local authority in this area,

a preemption argument seems unlikely to succeed. The Family Smoking Prevention and Tobacco Control Act,<sup>19</sup> which expressly grants the Food and Drug Administration authority to regulate many aspects of the tobacco industry, specifically states that it does not preempt states or localities from imposing more stringent regulations relating to “the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, *information reporting to the State*, or measures relating to fire safety standards for tobacco products.”<sup>20</sup>

Regarding state preemption of local authority, however, the situation could be more uncertain. A number of state youth access or smoke-free laws preempt local authority to pass tobacco control laws in some manner.<sup>21</sup> In states with cigarette minimum price laws, the industry might argue that those laws somehow preempt local authority in this area. Additionally, there could be another state law, such as a state data practices law or other law relating to business regulations that could arguably preempt local authority in this area in some way. It would be important to assess whether another state tobacco control or other type of law might limit local authority to pass a sunshine law, and if so, what the scope of those limitations might be.

- **First Amendment:** Tobacco companies or the businesses in their supply chain might argue that being required to report promotional allowance payments violates their First Amendment rights. This argument would be primarily applicable if the law does not require the reported data to remain confidential. Laws that compel disclosure of factual commercial information generally do not violate the First Amendment if they are reasonably related to a legitimate state interest, such as preventing consumer confusion or deception.<sup>22</sup> As legal minimum price and excise tax laws demonstrate, states have multiple legitimate interests in ensuring that cigarette prices are not artificially reduced by promotional allowance payment programs, rooted in both consumer protection and public health and safety concerns. Including findings that describe these interests could be useful. Also, tailoring the scope of reporting requirements so they are reasonably related to these government interests would be important.
- **Fifth Amendment – Takings Clause:** The Fifth Amendment’s Takings Clause prohibits governments from taking private property for public use “without just compensation.”<sup>23</sup> It includes regulatory takings, where the government does not physically take away property but regulates the property to the extent it essentially loses its value. The tobacco industry might argue that being required to disclose valuable marketing data is an unconstitutional regulatory taking. The Supreme Court has identified three factors for determining if a regulatory taking has occurred: 1) the regulation’s economic impact on the company; 2) the extent to which the regulation interferes with investment-backed expectations; and 3) the character of the government’s action.<sup>24</sup>

A law that requires tobacco licensees, as opposed to manufacturers, to disclose the information as a condition of their licenses may be less vulnerable to a takings

challenge. Because a license is a privilege rather than a right, it is well established that a license is not usually a property interest that qualifies for compensation under the Takings Clause when negatively affected by regulation.<sup>25</sup> Again, it would be helpful to consult with local legal counsel to determine the extent to which licenses might be protected as property interests in a particular jurisdiction.

### Samples of Select Language

Because no jurisdiction has passed a law of this kind to our knowledge, there are no existing laws from which to draw examples. Below are samples from laws and sources that are relevant or comparable to a tobacco price discounting and promotional allowance payment reporting law. If a state or local government considers adapting any language from the following policies or sources, it should ensure that the language is appropriate, practical, and legal for its goals and jurisdiction. Please note that the Tobacco Control Legal Consortium does not endorse or recommend any of the following policies. We provide these examples for illustrative purposes only.

Jurisdiction	Law/Source	Excerpts
New Jersey	New Jersey Unfair Cigarette Sales Act N.J. Stat. § 56: 7-1 <i>et seq.</i>	Merchandise given gratis or payment made to a retailer or wholesaler by the manufacturer thereof for display, or advertising, or promotion purposes, or otherwise . . . . N.J. Stat. Ann. § 56:7-28.b.
	N.J. Admin. Code Tit. 18, Ch. 6	Written notification must be given to the Director by every sponsoring manufacturer at least 30 days prior to the commencement of any manufacturer's promotional sales plan, including a description of the plan in detail and the dates and period of time during which the plan is to be operative. N.J. Admin. Code 18:6-4.2
		Every retailer on whose premises a promotional sales plan is being conducted is required to keep on file a written statement from the sponsoring manufacturer describing the promotion and indicating the dates and period of time during which the plan is to be operative. N.J. Admin. Code 18:6-4.5
Arkansas	Arkansas Unfair Cigarette Sales Act Ark. Code §§ 4-75-701-714	(14) "Manufacturer promotional allowance" means any payment or compensation given by a manufacturer of cigarettes to wholesalers or to retailers to promote the sale of cigarettes and which the manufacturer requires the wholesaler to pass on to the retailer and the retailer to pass on to the retailer's customer. Ark. Code Ann. § 4-75-702(14)

FTC, Cigarette Report For 2007 and 2008 (2011) (Appendix)

Price discounts: Price discounts paid to cigarette retailers or wholesalers in order to reduce the price of cigarettes to consumers, including off invoice discounts, buy downs, voluntary price reductions, and trade programs; but excluding retail value added expenditures for promotions involving free cigarettes and expenditures involving coupons.

Promotional Allowances Retail: Promotional allowances paid to cigarette retailers in order to facilitate the sale or placement of any cigarette, including payments for stocking, shelving, displaying and merchandising brands, volume rebates, incentive payments, and the cost of cigarettes given to retailers for free for subsequent sale to consumers; but excluding expenditures in connection with newspapers, magazines, outdoor, audio visual, transit, direct mail, point of sale, and price discounts.

Promotional Allowances Wholesale: Promotional allowances paid to cigarette wholesalers in order to facilitate the sale or placement of any cigarette, including payments for volume rebates, incentive payments, value added services, promotional execution and satisfaction of reporting requirements; but excluding expenditures in connection with newspapers, magazines, outdoor, audio visual, transit, direct mail, point of sale, price discounts, and retail promotional allowances.

**Massachusetts**

Mass. Gen. Laws Tit. 26, Ch. 111N  
Pharmaceutical and Medical  
Device Manufacturer Conduct

(1) By July 1 of each year, every pharmaceutical or medical device manufacturing company that employs a person to sell or market a drug, medicine, chemical, device or appliance in the commonwealth shall disclose to the department of public health the value, nature, purpose and particular recipient of any fee, payment, subsidy or other economic benefit with a value of at least \$50, which the company provides, directly or through its agents, to any physician, hospital, nursing home, . . . or other person in the commonwealth authorized to prescribe, dispense, or purchase prescription drugs or medical devices . . . . The disclosure shall be accompanied by the payment of a fee, to be determined by the department, to pay the costs of administering this section.

(2) The department of public health shall make all disclosed data publicly available and easily searchable on its website.

Mass. Gen. Laws Ann. ch. 111N, § 6 (1) & (2)

Minnesota	Minn. Stat. §§ 151.42 <i>et seq.</i> Wholesale Drug Distribution Licensing Act	(f) A wholesale drug distributor shall file with the board an annual report, in a form and on the date prescribed by the board, identifying all payments, honoraria, reimbursement or other compensation authorized under section 151.461, clauses (3) to (5), paid to practitioners in Minnesota during the preceding calendar year. The report shall identify the nature and value of any payments . . . to a particular practitioner during the year, and shall identify the practitioner. Reports filed under this provision are public data. Minn. Stat. § 151.47 subd. 1(f)
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## Other Helpful Resources

The Tobacco Control Legal Consortium has several publications that may be helpful for communities considering this and related policies, including: a [legal synopsis](#) of state and local tobacco product pricing regulations, [guidelines](#) on cigarette minimum price laws, [guidelines](#) about tobacco control and the Takings Clause, and [guidelines](#) about tobacco advertising restrictions and the First Amendment. The Center for Public Health and Tobacco Policy, one of the legal centers affiliated with the Consortium, has a [publication](#) about policy responses to tobacco price promotions, including “sunshine” laws. The [Campaign for Tobacco-Free Kids](#) has a model minimum price law which includes language requiring disclosures of marketing-related payments from tobacco companies. The website, [www.countertobacco.org](http://www.countertobacco.org), provides resources for local, state, and federal organizations interested in policies aimed at counteracting tobacco product sales and marketing at the point of sale, and includes a discussion of sunshine laws. Finally, the Vermont Attorney General’s Office has issued [pharmaceutical marketing disclosure reports](#) that illustrate what a marketing disclosure report might look like.

## Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at [publichealthlaw@wmitchell.edu](mailto:publichealthlaw@wmitchell.edu) with any questions about the information included in this guide or to discuss local concerns you may have about implementing such a policy.

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## Notes

<sup>1</sup> The information contained in this document is not intended to constitute or replace legal advice.

<sup>2</sup> Andrew Hyland et al., *Higher Cigarette Prices Influence Cigarette Purchase Patterns*, 14 TOBACCO CONTROL 86 (2005).

<sup>3</sup> CTNS. FOR DISEASE CONTROL & PREVENTION, REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL *passim* (2000), available at [http://www.cdc.gov/tobacco/data\\_statistics/sgr/2000/complete\\_report/pdfs/fullreport.pdf](http://www.cdc.gov/tobacco/data_statistics/sgr/2000/complete_report/pdfs/fullreport.pdf).

<sup>4</sup> JOHN A. TAURAS ET AL., BRIDGING THE GAP RESEARCH, IMPACTEEN, EFFECTS OF PRICE AND ACCESS LAWS ON TEENAGE SMOKING INITIATION: A NATIONAL LONGITUDINAL ANALYSIS 5 (2001), available at [http://www.impacteen.org/generalarea\\_PDFs/AccessLaws.pdf](http://www.impacteen.org/generalarea_PDFs/AccessLaws.pdf).

<sup>5</sup> FED. TRADE COMM'N, CIGARETTE REPORT FOR 2007 AND 2008, at 4 (2011), available at <http://www.ftc.gov/os/2011/07/110729cigarettereport.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> P.N. Bloom, *Role of Slotting Fees and Trade Promotions in Shaping How Tobacco is Marketed in Retail Stores*, 10 TOBACCO CONTROL 340 (2001); E. Feighery et al., *Retailer Participation in Cigarette Company Incentive Programs Is Related to Increased Levels of Cigarette Advertising and Cheaper Cigarette Prices in Stores*, 38 PREV. MED. 876 (2004).

<sup>8</sup> See, e.g., O.B.J. Carter et al., *The Effect of Retail Cigarette Pack Displays on Unplanned Purchases: Results from Immediate Postpurchase Interviews*, 18 TOBACCO CONTROL 218 (2009); Reiner Hanewinkel et al., *Cigarette Advertising and Adolescent Smoking*, 38 AMER. J. PREVENTATIVE MED. 359 (2010); Lisa Henriksen, *A Longitudinal Study of Exposure to Retail Cigarette Advertising and Smoking Initiation*, 126 PEDIATRICS 232 (2010); Chris Lovato, et al., *Impact of Tobacco Advertising and Promotion on Increasing Adolescent Smoking Behaviours*, THE COCHRANE DATABASE OF SYSTEMIC REVIEWS Aug. 2011, Issue 10. Art. No.: CD003439. DOI: 10.1002/14651858.CD003439.pub2.

<sup>9</sup> The FTC is able to do this through its powers under the FTC Act. Fed. Trade Comm'n Act of Sept. 26, 1914, 15 U.S.C. § 41-58 (2006). Under this law, the FTC can require companies to answer questions about their business practices and publish reports based on the information it gathers. *Id.* at §§ 46(b) & (f).

<sup>10</sup> See, e.g., Lisa Henriksen et al., *Targeted Advertising, Promotion, and Price for Menthol Cigarettes in California High School Neighborhoods*, NICOTINE & TOBACCO RES. June, 2011 [hereinafter Henriksen, *Targeted Advertising, Promotion, and Price for Menthol Cigarettes*], available at <http://www.trdrp.org/priorities/targeted-advpromos.pdf>; M.B. Laws et al., *Tobacco Availability and Point of Sale Marketing in Demographically Contrasting Districts of Massachusetts*, 11 TOBACCO CONTROL ii71(Suppl. II 2002); R. John et al., *Point-of-sale Marketing of Tobacco Products: Taking Advantage of the Socially Disadvantaged?* 20 J. HEALTH CARE FOR THE POOR & UNDERSERVED 489 (2009); Andrew B. Seidenberg et al., *Storefront Cigarette Advertising Differs by Community Demographic Profile*, 24 AM. J. HEALTH PROMOTION e26 (2010).

<sup>11</sup> Henriksen, *Targeted Advertising, Promotion, and Price for Menthol Cigarettes*, *supra* note 10, at 4 (quoting LORILLARD TOBACCO CO., MEETING OF THE TOBACCO PRODUCTS SCIENTIFIC ADVISORY COMMITTEE : RESPONSE TO FDA REQUESTS FOR INFORMATION ON MENTHOL CIGARETTES 39 (2010), available at <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM218780.pdf>).

<sup>12</sup> See, e.g., Lisa Henriksen et al., *Reaching Youth at the Point of Sale: Cigarette Marketing Is More Prevalent in Stores Where Adolescents Shop Frequently*, 13 TOBACCO CONTROL 315 (2004); Seidenberg et al., *supra* note 10.

<sup>13</sup> As of 2009, 25 states and the District of Columbia had cigarette minimum pricing laws. CTRS. FOR DISEASE CONTROL & PREVENTION, *State Cigarette Minimum Price Laws—United States, 2009*, 59 MORBIDITY & MORTALITY WEEKLY REPORT 389, 389 (Apr. 9, 2010) [hereinafter CDC], available at <http://www.cdc.gov/mmwr/pdf/wk/mm5913.pdf>.

<sup>14</sup> Arkansas, Minnesota, Montana, Nebraska New York, Pennsylvania, and the District of Columbia's minimum price statutes expressly exclude some or all promotional allowance payments from calculations of minimum cigarette prices. CDC, *supra* note 13, at 390. Additionally, Massachusetts' Department of Revenue issued a Directive that manufacturers' promotional pricing programs cannot be used to reduce the state's presumptive minimum cigarette prices. Mass. Dep't of Rev. Directive 02-2 (Mar. 15, 2002).

<sup>15</sup> *E.g.*, MASS. GEN. LAWS ch. 64C § 5 (2006) (requiring manufacturers, wholesalers, and licensees to maintain records relating to tobacco sales, including prices paid for each brand, and for licensees, accurately reflecting discounts and terms of sale).

<sup>16</sup> For example, the Minnesota Attorney General's Office has issued reports on its investigations into gasoline and E-85 pricing, including aggregated data, in response to consumer complaints about high prices and potential price-fixing. *See e.g.*, MINNESOTA ATTORNEY GENERAL'S OFFICE, E-85 (2006) (on file with author).

<sup>17</sup> The Public Health Law Center's website has more information about preemption as well as resources for understanding how it works and how it can impact public health policy development. PUBLIC HEALTH LAW CENTER, <http://publichealthlawcenter.org/topics/other-public-health-law/preemption-public-health> (last visited Mar. 1, 2012).

<sup>18</sup> The Public Health Law Center's website (<http://publichealthlawcenter.org/topics/other-public-health-law/preemption-public-health>) has more information about preemption as well as resources for understanding how it works and how it can impact public health policy development.

<sup>19</sup> 21 U.S.C.A. 387 *et. seq.* (West 2009); Pub. L. No. 111-31, 123 Stat. 1776 (2009).

<sup>20</sup> 21 U.S.C. § 387p(a)(1) (emphasis added).

<sup>21</sup> *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access—United States, 2000–2010*, 60 MORBIDITY AND MORTALITY WEEKLY REP. 1124 (2011), available at <http://www.cdc.gov/mmwr/pdf/wk/mm6033.pdf>.

<sup>22</sup> *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009).

<sup>23</sup> U.S. CONST. amend. V.

<sup>24</sup> *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 225 (1986) (citations omitted).

<sup>25</sup> *U.S. v. Fuller*, 409 U.S. 488, 493 (1973); *Conti v. U.S.*, 291 F.3d 1334, 1340 (Fed. Cir. 2002).