



Tobacco Product Pricing Policy in Vermont

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I. Introduction

The price of tobacco products is strongly correlated with tobacco use. Research shows that tobacco consumption decreases in response to price increases.¹ Tobacco companies, keenly aware how tobacco product prices influence tobacco use, manipulate product sale prices in a manner that drives use. These efforts are an integral part of tobacco companies' point of sale marketing strategy. Tobacco companies prioritize control over the retail environment because this is where they are able to recruit new (meaning youth) users, the users upon which companies rely to replace current tobacco consumers who either quit or die – typically from tobacco related disease.

The tobacco industry has spent phenomenal resources learning how to best influence potential and existing customers, with the result perhaps most apparent in the retail environment. Over \$8.3 billion dollars were funneled to tobacco product marketing at the point of sale in 2011, the most recent

year publicly reported.² The vast majority (over \$7.38 billion) was designated to price promotions that lower the purchase price of tobacco products. The industry spends billions of dollars discounting their products because they know it works: A lower purchase price attracts new and future users and existing price sensitive users from cutting down or quitting.

Excise taxes are an effective method to raise tobacco product prices and offer

additional benefits to governments imposing them. However, the increase in sales price resulting from an increase in tax is routinely

This report focuses on the literature demonstrating the relationship between tobacco product price and use and illustrates state policies that apply this understanding of consumer behavior for public health gain, in stark contrast to tobacco companies' exploitation of this same knowledge for profit.

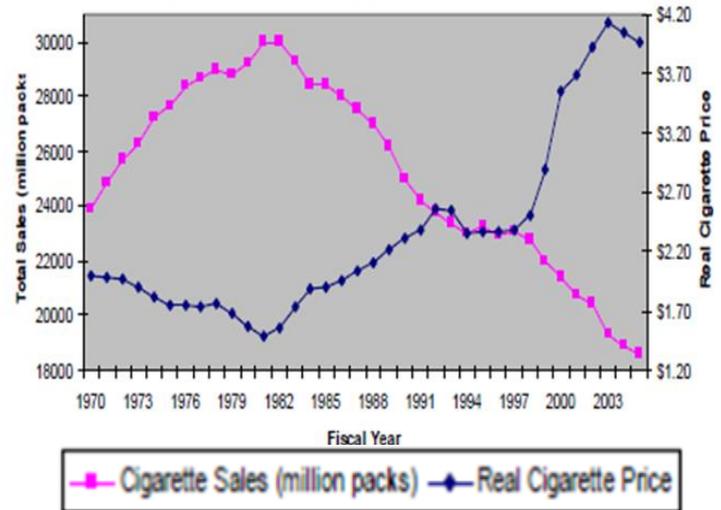
undermined through tobacco companies' price discounting tactics. This report outlines tobacco company discounting practices, highlighting those which nullify the effect of state tax increases, with the goal educating the reader on the issue and providing a context for developing policies to keep tobacco product prices high.

Prior to this discussion, this report provides a broader overview of tobacco companies' extensive and careful retail marketing practices. It then focuses on the

literature demonstrating the relationship between tobacco product *price* and *use* and illustrates state policies that apply this understanding of consumer behavior for public health gain. These policies stand in contrast to tobacco company practices, which exploit this same knowledge for customers and accompanying profit. A focus on consumer demographics, such as age and income level, reveals evidence of tobacco industry targeting the most price-sensitive populations with offers for cheaper tobacco products. The report concludes with policy options, inclusive of legal and regulatory considerations, aimed at reducing tobacco consumption rates through maintaining high prices.

Discussion in this report is centered on foundational information and the public health rationale supporting tobacco product pricing policies in Vermont. Future investigation into the policy options best suited for Vermont can build on and complement this report.

Figure Three
Total Cigarette Sales and Cigarette Prices, US, 1970-2005



Source: Orzechowski and Walker (2006) and author's calculations.

II. Overview of Tobacco Industry Retail Advertising & Price Promotion Practices

Tobacco companies seek to commandeer the retail environment in order to recruit new users and derail the cessation efforts of current or former users.³ Tobacco companies methodically inundate stores with their products and marketing, which effectively compel immediate and future sales. An important component of this strategy is price, and specifically the price promotions which drive down the sale price of premium tobacco brands and are aimed at the industry's most price sensitive and reliable customers, youth among them. After all, the tobacco industry's survival is

dependent on recruiting new users to replace those that die or quit using tobacco.⁴

Marketing in the retail environment, or point of sale, is an especially effective method to gain sales by both new tobacco users and those trying to quit or reduce use.⁵ Research shows retail advertising is an important factor in youth initiation, with the very young internalizing messages of tobacco use normalcy and acceptability and ‘tweens and teens higher recall of specific advertising images and displays.⁶ Sadly, it is precisely these youth the tobacco companies need to recruit as new users, since new tobacco users are almost never adults. The overwhelming majority of regular smokers start smoking as youth—nearly 90% by age 18 and 99% by age 26.⁷

In-store tobacco marketing is also effective at increasing tobacco consumption of the current customer base,⁸ despite the fact that most tobacco users want to quit.⁹ Like youth, consumers who have quit or are in the process of trying take far more notice of the ubiquitous shelves of tobacco product confronting them when shopping for daily needs.¹⁰ Viewing these shelves of tobacco products frequently triggers an urge for these products, often resulting in impulse purchases.¹¹ A consumer’s will power may be further eroded when her favorite brand

becomes more accessible, such as offered at a steep price discount, as she may lose her short term motivation to quit or may justify a purchase because it’s on discount.

Promotions offering added volume – more product for the same price - also leads to buying more than intended, further stymying efforts to reduce or quit tobacco use.¹²

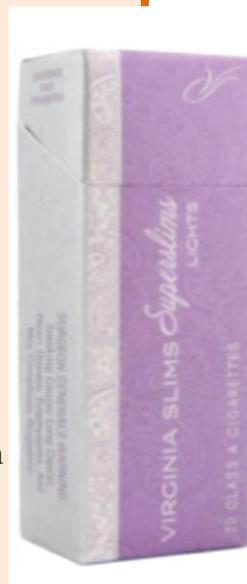
Tobacco companies are very successful at marketing their products. The industry has poured enormous resources into marketing and has extensively researched the most effective means of targeting new and current and users.¹³ For instance, tobacco companies highly prioritize understanding the behaviors and preferences of youth and use that information to market their products to young people:¹⁴ There is evidence that the tobacco industry has collected research on youth smoking initiation and preferences and has created marketing campaigns that entice youth to start using tobacco.¹⁵ Tobacco companies used such research to craft brands especially appealing to youth by implying its “rugged independence, rebelliousness, love of life, adventurousness, confidence, self-assurance, and belonging to the ‘in’ crowd.”¹⁶

POS Marketing and Youth

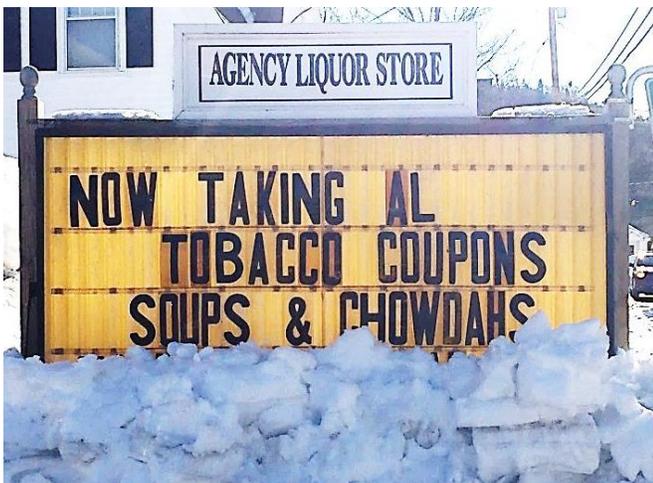
Tobacco companies entice adolescents to use their products through the use of prominent product displays, sometimes referred to as “power walls.” This eye-catching display of tobacco products and advertisements is usually located directly behind the checkout counter and can be found in most tobacco retail outlets. Power walls are highly engineered by tobacco companies to maximize visual intrusiveness and instigate impulse purchases.¹⁷ They function as a form of promotion, conveying the message that cigarettes are popular, desirable and easily accessible—and they are effective. Several studies have come to similar conclusions that “young people’s exposure to tobacco displays at the point of sale is significantly associated with being susceptible to smoking, experimenting with smoking and current smoking.”¹⁸

Young people are especially vulnerable to tobacco companies’ point of sale marketing. The marketing is prevalent in places youth frequent and quickly absorbed by youth.¹⁹ Young consumers visit convenience stores more frequently and spend more time on each visit than older consumers, with around one-third of adolescents shopping in convenience stores two or three times a week and 70% at least weekly.²⁰ Even brief exposure to tobacco marketing influences youth perceptions about tobacco and can persuade youth to try smoking.²¹ Retail tobacco messaging is often placed at a child’s eye level (at or below three feet high).²² In California, 48% of stores had at least one cigarette marketing item at or below three feet from the floor.²³ Further, a recent study found 39% had cigarette displays near candy.²⁴

Tobacco companies’ point of sale marketing strategy includes the tobacco packaging itself.²⁵ Packaging is designed to attract attention, appeal to specific consumers, reinforce brand identity, and suggest specific product qualities.²⁶ Historically, the companies have used a package’s color to help establish brand identity.²⁷ For example, silver and gold colors have been used to convey status and prestige, particularly for “premium” brands,²⁸ while red packages and logos convey excitement, strength, wealth, and power.²⁹ In contrast, pastel colors are associated with freshness, innocence, and relaxation and are more common among brands that appeal to females.³⁰ Tobacco marketing also employs choice words to appear on packs and are often incorporated into the brand name to promote brand appeal among target groups.³¹ For example, “slims” descriptors on packs promote beliefs about smoking and weight control—an important factor in smoking behavior among young women.³² Further, the packages, when displayed together in a power wall, form one large pro-tobacco advertisement.



The vast majority of the tobacco industry's marketing efforts are at the point of sale.³³ Under the 1998 tobacco Master Settlement Agreement (“MSA”), which resolved lawsuits brought by 46 states against tobacco product manufacturers, settling manufacturers agreed to marketing restrictions, including on billboard advertising and brand name sponsorships and merchandise.³⁴ Rather than reduce spending on advertising and promotion, however, these tobacco companies shifted much of their marketing budget to the point of sale. Nationally, tobacco companies spent more than \$8.8 billion on marketing in 2011,³⁵ including an estimated \$18.4 million marketing its products in Vermont each year.³⁶ Over 94% of these sums are spent promoting tobacco products at the point of sale through advertising, price promotions, and retailer incentives.³⁷



A significant portion of tobacco companies' point of sale promotional budget is devoted to sealing behind the scene deals, specifically, “promotional allowances” that incentivize retailers for stocking and selling tobacco products.³⁸ To benefit from these allowances, and in fact to even carry most tobacco brands, retailers are typically required to enter into contracts dictating nearly every aspect of in-store marketing of a tobacco company's brands, including the location, manner, volume of tobacco product displays. These requirements may infringe on the display of other retail items and monopolize more prime retail space than justified by sales alone. Accordingly, retailers are well-compensated for agreeing to their terms.³⁹ Retailers are offered further profit incentives for increasing sales of specified products during specified periods, a feat usually accomplished through price discounts.⁴⁰ And usually at the expense of vulnerable populations (as discussed in Section III(D)). The income retailers earn through these promotional allowances is significant and declining to engage in these contracts places one at a perceived competitive disadvantage. Retailers therefore feel compelled to participate in these contracts, despite the significant and often burdensome restrictions they impose.

Among the various components of the tobacco industry's point of sale marketing strategy, the industry prioritizes price discounting and uses product discounting as a marketing strategy to build brand loyalty among youth⁴¹ and encourage use of premium brands.⁴² A huge portion of the tobacco companies' marketing budgets are devoted to price discounting. In 2011, tobacco discounts at the point of sale totaled \$7.38 billion, or 83.7% of the tobacco industry's total marketing budget and 88.6% of its point of sale marketing budget.⁴³ Tobacco manufacturers are well aware that smoking rates are affected by cigarette prices and that price increases from increased taxes lead to decreased sales. In fact, discount pricing has been a key marketing tool for tobacco companies since the late 1880s.⁴⁴ Although the list price of cigarettes has increase since the 1998 MSA, the tobacco industry has massively increased their pricing promotions, which has the effect of reducing the consumer sale price.⁴⁵

The tobacco industry knows that some groups of users are more price sensitive and their continued use of tobacco products is greatly influenced by product prices.⁴⁶ Knowing this, the industry carefully targets its promotions at these groups of users in order to get the best return

on its spending.⁴⁷ The industry also uses discounting strategies to circumvent state efforts to keep tobacco product prices high, such as increases in the sales and excise tax. The tobacco industry's strategies to keep prices low range from offering consumers coupons and multi-pack discounts to implementing complex contractual agreements with wholesalers and retailers, as discussed in Section V.

III. Consumer Responses to High Tobacco Product Prices: Reduce Consumption, Alter Purchase Behavior

In general, product price and the consumer's disposable income influence a purchase decision.⁴⁸ This holds true for a consumer's decision to purchase tobacco products.⁴⁹ Accordingly, as prices rise and affordability decreases, consumers shift behavior to minimize the impact of the price increase – generally through either reducing consumption or switching to a less expensive product or way to purchase the product. Price-motivated behavioral adjustments are common: One study found that more than half (59%) of smokers try to avoid paying higher prices for tobacco.⁵⁰ Further, they occur across a wide spectrum of racial and socioeconomic groups.⁵¹

Changes in use and purchase behaviors in response to high tobacco product prices are especially evident among price sensitive populations, such as youth,⁵² lower income,⁵³ heavy smokers,⁵⁴ women,⁵⁵ African-Americans.⁵⁶

Youth Price Sensitivity

The relationship between tobacco price and youth use is of special concern because nearly all regular tobacco users start before age 18. Factors contributing to youth price responsiveness include:

- Youth have less income to spend on tobacco,
- Youth may be less addicted than older smokers and therefore not compelled to pay higher prices,
- As youth tobacco use becomes less common youth will be susceptible to peer pressure not to smoke from their non-smoking peers,
- Young people are unable to fully appreciate the dangerous and far off health consequences of tobacco use. Because of this, short terms costs, such as price, are more meaningful to them than protecting their health.

See Frank J. Chaloupka & Rosalie Liccardo Pacula, The Impact of Price on Youth Tobacco Use, Changing Adolescent Smoking Prevalence: Where It Is and Why, SMOKING AND TOBACCO CONTROL MONOGRAPH No. 14 (2001).

A. Response to High Tobacco Prices: Reduce Consumption

Tobacco product price increases are correlated with consumers' stopping use, using less, or altogether deterring initial use of tobacco products.⁵⁷ The evidence overwhelmingly shows that an inverse relationship exists between the price of tobacco products and their consumption.⁵⁸

Increasing the price of cigarettes prevents young people from initiating daily smoking, reduces the number of cigarettes consumed by people who smoke, and increases cessation (with fewer relapses among former smokers).⁵⁹ Studies show that a 10% increase in the price of cigarettes results in a 3-7% decrease in smoking among adult consumers and a 5-15% decrease in consumers under age 18.⁶⁰ Price sensitive populations such as youth, young adults, women, African Americans and low-income adults would likely experience sharper declines.⁶¹

Youth are especially responsive to pricing and a policy maintaining high tobacco product prices will be especially effective in supporting Vermont's goal of reducing youth smoking to 10% by 2020.⁶² Studies suggest that youth are as much as two to three times more sensitive to price than the general population.⁶³ Further, research indicates high tobacco product prices would interfere with the progression of youth experimentation with tobacco to regular use, therefore deterring youth from lifelong tobacco addiction.⁶⁴ This is notable for many reasons, including that most adolescents who smoke cigarettes want to stop, yet few are successful at remaining tobacco-free.⁶⁵

Higher cigarette prices also correlate with a reduction in adult cigarette consumption,⁶⁶ as consumers are unable or unwilling to spend more to purchase the same amount of product. Tobacco users commonly cope with higher prices by cutting back on their use, smoking fewer cigarettes per day.⁶⁷

This price-driven behavior shift applies to a wide spectrum of consumers, including adults, youth, and low-income adults.⁶⁸

Likewise, high tobacco product prices are correlated with increased cessation.⁶⁹ When cigarette prices are raised, current adult smokers, including young adult, are more likely to try to quit.⁷⁰ This holds true for tobacco users from a range of ethnicities and income levels.⁷¹ This price-motivated increase in cessation attempts and success, as reported by tobacco consumers, is critical considering over 70% of smokers wish to quit and most struggle to do so.⁷² Maintaining high prices on tobacco products will support another Vermont Healthy 2020 goal, namely achieving an 80% increase in the percent of adult smokers who attempted to stop smoking in the past year.⁷³

The sale of discounted tobacco products, frustrate price-motivated cessation, use reduction and initiation deterrence. Among other concerns, when tobacco prices are discounted, consumers are shown to purchase tobacco in larger volume, which in turn is thought to prompt

higher consumption of tobacco products.⁷⁴ Youth in particular, with typically less disposable income than adults, are especially vulnerable to tobacco

[Tobacco companies] recognize that youth and young adults are more responsive to increases in cigarette and other tobacco prices, and will not try smoking or continue to smoke if cigarette prices rise.

Judge Gladys Kessler, U.S. v. Philip Morris, 2006

industry price promotions which circumvent many state strategies aimed at keeping tobacco product prices high.⁷⁵ While the increased rates of cessation and use reduction associated with high tobacco prices are encouraging, other consumers may instead employ tax avoidance and other strategies to keep tobacco use affordable.

Consumer Strategies to Keep Tobacco Use Affordable

B. Response to High Prices: Brand Switching

Cigarette users are extremely brand loyal and brand switching is rare as compared to other consumer goods.⁷⁶ A consumer's loyalty to a brand plays a

significant role in his or her purchasing decision;⁷⁷ youth tend to stick with the brand of their first cigarette⁷⁸ and only about nine percent of adults are likely to switch brands over the years they are using tobacco.⁷⁹ Despite this high brand loyalty, certain circumstances - such as price disparity - do motivate certain users to switch to cheaper, discount cigarette brands.⁸⁰

Discount cigarette brands grew from a very small portion of the market to over one-third of the market between 1980 and 1993,⁸¹ largely due to price sensitive customers opting for these cheaper brands.⁸² Consumers attracted to discount tobacco brands tend to be older smokers,⁸³ those smoking a greater number of cigarettes per day than a random population of smokers,⁸⁴ and either middle or low income.⁸⁵ In general, studies have found that heavy product users and those of low socio-economic status are the most willing to switch to a discount brand of cigarettes.⁸⁶

On the other hand, youth, despite being price sensitive, are among the least likely to resort to switching to a discount tobacco brand in response to tobacco price increases.⁸⁷ Likewise, young adult tobacco

consumers (age 18-24) appear unwilling to switch to discount brands, although they do extend their loyalty to premium tobacco brands as a whole and may frequently switch between premium brands,⁸⁸ perhaps in response to price and price discounts.

There is no disconnect between youth price sensitivity and loyalty to high-priced premium brands; this relationship is explored in Sections III (D) and V.



C. Response to High Prices: Product Switching

The price of tobacco products can sway price sensitive tobacco users to switch from one product to another in order to maintain their addiction at the lowest possible financial cost. The vast majority of tobacco use is manufactured cigarettes.⁸⁹ Cigarettes are also taxed at a higher rate than other tobacco products and as cigarette prices climb, consumers are taking note.

While tobacco control efforts substantially contribute to the decline in cigarette consumption, a portion of the decline appears to be attributable to the undertaxation of non-cigarette tobacco

products. Since price is a factor in tobacco consumers' purchasing decisions, price sensitive consumers may substitute cigarettes – intermittently or completely – with less expensive tobacco products instead of attempting cessation. Concurrent use of multiple tobacco products, is prevalent among youth.⁹⁰ There is also evidence of significant use of multiple types of tobacco products among adults as well.⁹¹ In recent years Vermont has seen a rise in rates of concurrent tobacco - specifically, use of cigarettes and one or more other tobacco product.⁹²

As cigarettes become more expensive, cheaper tobacco products may serve as more affordable alternatives. Examining tax and use rates illustrates product switching is a prevalent consumer strategy to maintain use of affordable tobacco products.

Switching to Little Cigars:



A little cigar is a roll of tobacco wrapped in a tobacco leaf (or other substance) weighing not more than three pounds per thousand.⁹³ It is the roughly the same size and contains roughly the same

volume of tobacco as a cigarette; a little cigar differs from a cigarette essentially through its brown tobacco leaf wrapping versus a cigarette's white paper wrapping. (Little cigars are also available in flavors, including candy and fruit flavors, whereas federal law prohibits the sale of



flavored cigarettes.⁹⁴) Given their likeness, examining the pricing and consumption history of cigarettes and little cigars is especially telling. As cigarette prices increased due to the 1998 MSA and subsequent increases to many states' cigarette excise taxes, sales of little cigars rose by a remarkable 240% from 1997 to 2007.⁹⁵ Further, youth cigar use (both little and large cigars) has held steady since 2005 despite youth (and adult) cigarette use has declined since 1999.⁹⁶ In an effort to reduce the cigarette/little cigar price disparity and curb rising use of little cigars, in 2009 the federal government, and in 2011 Vermont, began taxing little cigars at the same rate as cigarettes⁹⁷ and, like cigarettes, requires they be sold in packages no smaller than 20.⁹⁸ Since the tax increase has taken effect, sales of little cigars have fallen considerably. Nationally, little cigar sales dropped more than 85% from 2008 to 2011.⁹⁹

Switching to Large Cigars:

A large cigar is a roll of tobacco wrapped in a tobacco leaf (or other substance) weighing more than three pounds per thousand.¹⁰⁰



Federal tax rates on large cigars have remained low over the last 15 years while cigarette prices have risen considerably. The 1998 MSA led to further cigarette price increases and with this increase, cigarette consumption dropped by a third, from 2000 to 2011. During the same time period, use of large cigars dramatically increased (123%).¹⁰¹ The largest surge in cigar use occurred between 2008 and 2011¹⁰² and corresponds to the 2009 federal cigarette and little cigar excise tax increase.¹⁰³ During this time, large cigar consumption increased by 126.3%.¹⁰⁴ The data suggests this increase is due at least in part to cigarette users switching products, encouraged by the low price of large cigars in comparison to cigarettes.¹⁰⁵



Switching to Roll-Your-Own Tobacco:

Roll Your Own (RYO) tobacco is loose tobacco intended for use in cigarettes.

There have been three significant changes in RYO use patterns and track with changes to tobacco product tax rates.

Prior to 2009, cigarette users were increasingly migrating to the lower taxed, less expensive RYO tobacco. In response, the federal government raised and equalized cigarette and RYO tobacco tax rates in 2009.¹⁰⁶ Vermont began equally taxing cigarettes and RYO tobacco in 2011.¹⁰⁷ Between 2008 and 2011, sales of RYO decreased by more than 76 percent.¹⁰⁸

However, during the same period as RYO consumption fell, consumption of loose pipe tobacco – which was not subject to the 2009 tax increase – skyrocketed, increasing by 573.1%.¹⁰⁹ It was evident that the significant tax disparity between RYO and pipe tobacco encouraged RYO consumers to switch to cheaper pipe tobacco.¹¹⁰ Companies even began reclassifying RYO tobacco as pipe tobacco in order to benefit from the lower tax rate.¹¹¹

Consumer interest in lower priced tobacco product was so high, retailers also capitalized on the tax disparity and resulting “pipe” tobacco craze by purchasing commercial RYO machines that would quickly roll loose tobacco into cigarettes. These machines made it possible to sell a cigarette without paying the high federal and state cigarette excise taxes intended for packaged cigarettes and sales soared.¹¹² Both the federal government¹¹³ and Vermont have taken steps to curb this tax loophole; Vermont completely prohibits RYO machines in Vermont.¹¹⁴

Switching to Smokeless Tobacco:

Vermont currently taxes larger packages (1.2 – 1.5 ounces) of snuff and “new smokeless tobacco” at a rate of \$0.75 less than cigarettes.¹¹⁵ This is consistent with the federal government and most other states, wherein other tobacco products (OTP) are or have traditionally been taxed at far lower rates than cigarettes, if at all.¹¹⁶ By no coincidence, nationally cigarette use is declining at a faster rate than use of other tobacco products (“OTP”),¹¹⁷ and some types of OTP use is increasing.¹¹⁸ Vermont use rates are consistent with the nationwide trend: adult smoking is down from 21% in 2000 to 17% in 2012,¹¹⁹ while rates of adult smokeless use (high in comparison to other states¹²⁰) have remained relatively immobile for the last five years.¹²¹ These trends are particularly acute among youth, and again, Vermont is no exception.¹²² Vermont youth reporting ever use of a cigarette declined significantly from 2011 to 2013,¹²³ while high school use of chewing tobacco, snuff, dip,¹²⁴ cigars, cigarillos or little cigars remained steady.¹²⁵



Switching to Hookah Tobacco:

A “hookah,” also known as a narghile or shisha, is a water pipe used to smoke tobacco or other substances. Hookah tobacco, sometimes known as shisha, is very moist and usually sweetened with either molasses or fruit. As cigarette prices have increased, high school students’ cigarette use has declined.¹²⁶ Meanwhile, during 2011 to 2012 hookah use increased among high school students.¹²⁷ Cigarettes are subject to both a federal and state excise tax, however hookah tobacco remains untaxed and is therefore sold at lower prices.



Electronic Nicotine Delivery System:

Electronic Nicotine Delivery Systems (ENDS), which include e-cigarettes and e-hookahs, are “battery-powered devices that provide doses of nicotine and/or other additives to the user in an aerosol.”¹²⁸ ENDS are taxed less than cigarettes and OTP and typically cost less. The ENDS market is growing rapidly¹²⁹ as is their use.¹³⁰

D. Response to High Prices: Utilize Discount Offers

In addition to switching to a discount brand or to a cheaper type of tobacco product, price sensitive tobacco consumers are apt to find their favorite brands can remain affordable through numerous industry sponsored price promotions. This is especially true for image-conscious price sensitive consumers strongly preferring premium brands – namely youth and young adults.¹³¹ These youth and young adults, along with others identified as price sensitive, including women,¹³² heavy users,¹³³ and those of low SES¹³⁴ respond positively to discount offers.

Tobacco companies recognize the central role product affordability plays in maintaining these treasured customers and “rewards” frequent users of price promotions with more promotions. As discussed below, research shows these consumers are more likely to receive direct marketing offering tobacco price discounts and/or live in neighborhoods where retailers offer tobacco products that are more often steeply discounted. Tobacco companies have increasingly expanded their use of price promotions in recent years.¹³⁵

At the same time, states have increased state excise tobacco taxes.¹³⁶ Tobacco companies currently report spending \$7.38 billion or 83.7% of their total marketing budget on point of sale price promotions.¹³⁷

Heavy smokers, price sensitive by virtue of their high consumption, are more likely than lighter smokers to report receiving and redeeming coupons.¹³⁸

Likewise, females have been identified as price sensitive and are more likely than males to receive and redeem coupons than men.¹³⁹ Other populations

have been identified as price sensitive include youth,¹⁴⁰ African-Americans¹⁴¹ and African-American youth.¹⁴²

Youth

Youth are particularly sensitive to the price of tobacco products. The tobacco industry capitalizes on this sensitivity by optimizing price promotions to be especially appealing and convenient to youth.¹⁴³ In fact, research shows that there is a higher prevalence of and steeper discounts on multipacks of best-selling cigarette brands in retailers in zip codes with a higher percentage of people under 18.¹⁴⁴ Further, research suggests that there are more price promotions for premium menthol cigarettes in neighborhoods with more black youth, the

Did you know?

Tobacco companies offer price discounts directly to consumers, at the POS and even through behind the scene deals made with tobacco retailers. See Section V for details.

demographic most likely to use premium menthol cigarettes, and that menthol cigarettes are cheaper near schools with more black students.¹⁴⁵ Because youth are more sensitive to the price of tobacco, price increases are particularly effective in curbing youth tobacco use and deterring tobacco initiation.

Tobacco product promotional offers that lower the price of tobacco products are particularly effective at encouraging use by youth who are already experimenting with cigarettes.¹⁴⁶ Research suggests that high tobacco product prices would interfere with that progression of youth experimentation with tobacco to regular use, therefore deterring youth from becoming regular users.¹⁴⁷ While most adolescents that smoke cigarettes want to stop, few are successful at stopping and remaining tobacco-free.¹⁴⁸

Economically Disadvantaged Populations

Smoking rates are higher among low socioeconomic (SES) populations in high income countries all over the world, including the United States.¹⁴⁹ Tobacco marketing is often more prevalent in economically disadvantaged neighborhoods and targeted toward economically disadvantaged groups;¹⁵⁰ tobacco product

prices are lower in these areas,¹⁵¹ and tobacco companies design product promotions to especially appeal to subpopulations of low SES tobacco consumers.¹⁵² Such subpopulations include women,¹⁵³ the less educated,¹⁵⁴ youth,¹⁵⁵ African Americans¹⁵⁶ and Hispanics.¹⁵⁷ Low-income tobacco users are known to be price sensitive shoppers,¹⁵⁸ meaning tobacco companies are increasingly using price promotions to keep these customers and policies keeping prices high can be an effective strategy for decreasing use among low SES populations. In fact, researchers have concluded “pricing tobacco products high appears to be the tobacco control intervention with the most potential to reduce health inequalities resulting from tobacco use.”¹⁵⁹

Low-income smokers tend to respond to tobacco tax increases by reducing their consumption of cigarettes, rather than by spending more on cigarettes and reducing their consumption of other goods.¹⁶⁰ One study found that, on average, the lowest-income tobacco users reduce cigarette consumption by one percent for every one percent price increase.¹⁶¹ This implies that when tobacco product prices rise, the lowest income smokers will spend the same total amount for fewer cigarettes (rather than

spend more on the same number of cigarettes). While not all members of a group will respond in the same way, this indicates that tobacco price increases will lead to a decrease in tobacco consumption among low-income tobacco users.

Low SES women have been a specific marketing target of tobacco companies.¹⁶² One study found that for decades the tobacco industry specifically targeted low SES military wives, minority women and older price sensitive female tobacco users.¹⁶³ Tobacco use among low-income women is higher than for higher income women. From 2005 to 2010, of women living below the poverty line 28.7% reported smoking cigarettes.¹⁶⁴ During the same time period, 16.7% of women living above the poverty line smoked cigarettes.¹⁶⁵ While the majority of the smoking population wants to stop smoking, low-income women are less likely to be successful in their quit attempts even when they make the same number of attempts as higher income smokers.¹⁶⁶ Higher tobacco prices would likely interfere with the effectiveness of tobacco price promotions on low SES women and higher prices could support quit attempts among this population.¹⁶⁷

Tobacco company marketing has also targeted those with low education levels and those who are less likely to make choices based on future benefits.¹⁶⁸ Overall, the research demonstrates that tobacco companies study the psychological characteristics of low SES populations and intentionally exploit these traits in tobacco price promotions and other marketing initiatives.¹⁶⁹

E. Response to High Prices: Illicit Tax Avoidance

High tobacco product prices, while deterring individual use, may also fuel an illicit market for tobacco products.¹⁷⁰ In an effort to avoid paying more for tobacco products, some consumers will seek untaxed or otherwise cheaper sales of tobacco products.¹⁷¹ Federal and state tobacco excise taxes are prepaid by wholesalers, meaning the costs are factored into the retail sales price.¹⁷² Accordingly, tobacco products sold without tax paid are by and large illegal. In addition to supplying a market of cheap tobacco products and thus frustrating government efforts to reduce use, these sales deprive the government of the tax revenue generated by legal sales.¹⁷³

There is a narrow class of legal tax-free tobacco product sales. Qualified duty-free purchases by an individual departing the U.S. are federal and state tax exempt. An eligible consumer purchasing tobacco product from a qualified licensed Native American tobacco retailer is exempt from state excise tax in specific circumstances.¹⁷⁴ This narrow exemption is often exploited and a common source of tobacco tax avoidance in certain regions. Likewise, internet retailers are source of cheap, typically-untaxed cigarettes. Internet purchases are subject to federal and state tax laws, but are difficult to enforce. There is no federal law that prohibits internet tobacco product sales; however, Vermont and federal law prohibit delivery of such sales.¹⁷⁵

Illicit tobacco product sales emerge through many channels. Sales are made outside of the retail environment – frequently by unlicensed vendors selling either counterfeit product or product illegally transported (smuggled) from a lower to a higher tax state.¹⁷⁶ Illicit sales may also be made by a licensed tobacco retailer who either unknowingly or

knowingly sells untaxed product. No matter the source, the result is the same: the sale of cheaper, often unregulated, tobacco products and the accompanying negative public health effects.

As noted with other consumer strategies to keep tobacco use affordable, where there is a large price disparity, there is greater incentive to shift purchase behavior – be it brand choice, or shift to black market or illegal purchases. For instance, one report

claims that in New York, which has the highest state cigarette tax rate, nearly two-thirds of the cigarette market is illegal due to smuggling, internet

sales, and Native American retailers.¹⁷⁷

However, the true scope of illegal sales is unclear and the extent of the problem is often significantly overstated.¹⁷⁸ While illicit trade is certainly a concern, experience demonstrates that an increase in the tobacco state excise tax will result in both a reduction in tobacco product consumption and higher state revenue.¹⁷⁹ That is, any increase in illicit sales will not offset the public health gains.¹⁸⁰



IV. Tobacco Product Excise Taxes

In both the United States and abroad, governments have relied on taxation to increase the price of tobacco products.¹⁸¹ Tobacco taxes are traditionally aimed at generating revenue, but offer the secondary benefit of reducing tobacco use.¹⁸² Tobacco taxes are widely recognized for their effectiveness in reducing tobacco use and correlating improved public health.¹⁸³ To date, Vermont's legislative efforts to address tobacco product consumption through pricing have been through state excise tax. Tobacco products sold in Vermont are additionally subject to federal excise tax; there is no local tobacco tax imposed in the state.¹⁸⁴

Revenue generated from the sale tobacco products may be designated to fund tobacco control and cessation programs.¹⁸⁵ This includes revenue from state excise taxes and MSA payments, the latter which are assessed to companies based on their sales volume.

As discussed above, high cigarette taxes, while deterring individual cigarette use, have been faulted for potentially fueling a market for illicit sales of cigarettes.¹⁸⁶ Illicit sales of tobacco products can undermine both the positive revenue and

public health impact of increased excise taxes. There is evidence that a stark tax differential between jurisdictions may increase the frequency of illicit tobacco product sales.¹⁸⁷ However, numerous studies indicate that any illicit trade triggered by increased excise taxes does not eliminate the positive health and revenue impacts of higher taxes, and that claims of negative impact from tax and price increases are false or greatly exaggerated.¹⁸⁸ Studies have concluded that tax and price policies are effective in the control of tobacco use and the improvement of public health.¹⁸⁹

While state and local tobacco product taxes can vary greatly between jurisdictions, federal tobacco excise taxes apply equally to most domestic sales. Presently, the federal government taxes cigarettes and little cigars at a rate of \$1.01 per pack.¹⁹⁰ The federal excise tax rates on smokeless tobacco products are weight-based and contingent on the type of tobacco product.¹⁹¹ Table A outlines the federal tax on different types of tobacco products.

All states and the District of Columbia tax cigarettes based on a single pack of 20, with rates ranging from \$0.17 per pack in Missouri, to \$4.35 per pack in New York, and averaging \$1.53.¹⁹² As of January 2014, Vermont imposes the ninth

highest state excise tax on cigarettes, at a rate of \$2.62 per pack.¹⁹³ This is well below the excise tax rate of neighboring New York (\$4.35 per pack) and Massachusetts (\$3.51 per pack) – representing the first and second highest state tax rates in the country, respectively – while higher than New Hampshire’s \$1.78 per pack.¹⁹⁴ Regionally, Vermont’s tax rate falls below that of Rhode Island (\$3.50) and Connecticut (\$3.40) and above Maine (\$2.00).¹⁹⁵

Vermont imposes an excise tax on all tobacco products sold in the state, including large cigars, little cigars, roll-your-own tobacco, snuff and “new smokeless tobacco.”¹⁹⁶ Smokeless tobacco, including snuff and chewing tobacco are taxed by weight; large cigars and all other OTP are *ad valorem*.¹⁹⁷ Little cigars, which resemble cigarettes but for their brown tobacco-leaf wrapping, are taxed at the same rate as cigarettes.¹⁹⁸ Likewise, the state imposes an excise tax on RYO tobacco equal to the state cigarette excise tax.¹⁹⁹ Notably, Vermont legislature sought this tax parity between RYO tobacco and cigarettes in response to a price-motivated rise in RYO use by youth and adult cigarette consumers.²⁰⁰ Table A outlines Vermont state excise taxes on different types of tobacco products.

Table A: Tobacco Excise Tax Rates

Tobacco Product	Federal Excise Tax		Vermont Excise Tax	
	1000 units	Pack of 20		
Small Cigarettes	\$50.33	\$1.01	\$2.62/ pack of 20	
Large Cigarettes	\$105.69	\$2.11	\$2.62/pack of 20	
Small Cigars	\$50.33	\$1.01	\$2.62/pack of 20	
Tobacco Products	1000 units	Individual	Vermont Excise Tax	
Large Cigars	52.75% of sales price, not to exceed \$402.60 per 1,000	\$.4026 maximum	Product Price	Tax
			< \$2.17	92% of wholesale cost
			\$2.18- \$9.99	\$2.00/ cigar
			>\$10.00	\$4.00/cigar
Tobacco Products	1 lb.	1 Ounce Tin or Pouch	Vermont Excise Tax	
Pipe Tobacco	\$2.8311	\$0.1769	92% of Wholesale Cost	
Chewing Tobacco	\$0.5033	\$0.0315	\$1.87/ounce, or \$2.24/ package <1.2 ounces	
Snuff	\$1.51	\$0.0944	\$1.87 ounce (or fractional part thereof)	
Roll-your-own Tobacco	\$24.78	\$1.5488	\$0.131/cigarette equivalent (0.0325 ounce of tobacco)	

In order to secure the health and revenue benefits associated with higher tobacco prices, state legislature may consider a tobacco tax increase resulting in price parity across products and state lines, a price increase significant enough change behavior (e.g., motivate cessation) and a designated funding source for tobacco control and cessation initiatives.²⁰¹ A significant tobacco tax increase will exceed increases in personal income and will make tobacco products less affordable.²⁰² Regular and significant increases in tobacco product taxation are important in order to stay current with inflation.²⁰³ For example, in Vermont a cigarette tax increase of \$1.25 per pack could make a substantial impact on public health and state revenues.²⁰⁴ It is estimated that the benefits of a \$1.25 cigarette tax increase in Vermont would include: a savings of \$96.65 million in long-term health care costs; raise \$14.92 million in new annual revenue; prevent 2,400 kids from becoming smokers; inspire 2,700 adult smokers to stop using; and prevent 1,400 Vermont residents from suffering premature smoking related deaths.²⁰⁵



Future tax increases on non-cigarette tobacco products should be made with tax parity in mind. That is, taxes on non-cigarette tobacco products should be comparable to taxes on cigarettes. Vermont's current tobacco excise tax structure contributes to a price disparity between cigarettes and many of the non-cigarette tobacco products. Snuff and "new smokeless tobacco," with larger packages (1.2 – 1.5 ounces) are taxed at a rate of \$0.75 less than cigarettes.²⁰⁶ Snus and other tobacco products that regularly sell at less volume than 1.2 ounces are taxed more similarly to cigarettes at \$2.24 per package.²⁰⁷

Since price is a factor in tobacco consumers' purchasing decisions, price sensitive consumers may substitute cigarettes – intermittently or continually - with less expensive tobacco products instead of attempting cessation. Applying an equal tax rate to all tobacco products may reduce product switching in lieu of cessation or deter initiation all together.²⁰⁸

Despite state efforts keep tobacco product prices high through taxation, the tobacco industry has been able to manipulate

and undermine the effect of high taxes. An overview of tobacco industry strategies to circumvent state policies can be found below in Section V. Further, there are numerous non-tax laws that both directly and indirectly may impact the price of tobacco products. These include sales and use tax, as well as minimum product package size requirements, tobacco retailer licensing laws, and compliance with other tobacco control rules and regulations. Some of these are discussed in more detail in Section VI, where policy options related to countering tobacco industry price promotion strategies are discussed.

V. Circumventing State Policy to Keep Price High: Tobacco Industry Price Promotions

Tobacco companies understand that high tobacco product prices lead to decreased sales. In fact, tobacco companies have employed price discounting as a key marketing tool since the late 1880s.²⁰⁹ Currently, tobacco companies spend more money on price discounts than on any other form of tobacco promotion. In 2011, the tobacco industry spent more than \$7.38 billion on price discounts.²¹⁰ This accounted for more than 83.7% of the industry's

overall marketing expenditures.²¹¹ Included in this total is more than \$8 billion in incentive payments made to wholesalers and retailers as inducements to reduce tobacco prices (e.g., buy-downs and off-invoice discounts, which are discussed in more detail below), as well as \$229 million that the industry spent on discount coupons and sampling (the distribution of free tobacco products or coupons for free products).²¹² These expenditures demonstrate the crucial role price manipulation serves in recruiting new and retaining current tobacco consumers.

As tobacco companies are well aware, the use of promotional offers is generally highest among the youngest smokers.²¹³ Youth are known to be price sensitive, but nonetheless do not resort to discount brands even when prices increase.²¹⁴ Among youth aged 12-17, just three cigarette brands (Marlboro, Newport and Camel) - by no coincidence the three most heavily advertised brands - account for more than 80% of the favorite brand choice (as compared to just over one-half for cigarette consumers aged 26 and older).²¹⁵ These image conscious consumers appear more likely to quit or reduce tobacco consumption before turning away from premium brands. In the face of price

increases, tobacco companies risk losing this critical customer base if their premium brands cannot remain price competitive and simultaneously preserve their high-end image.²¹⁶

Hence the evolution of tobacco companies' savvy, concentrated focus on price discounting schemes. Industry-sponsored price promotions that discount premium brands have enabled tobacco companies to reduce the sale price of their premium brands, thus capturing and maintaining price sensitive populations while also diluting states' efforts to raise tobacco prices and reduce youth use.²¹⁷ This is a winning scenario for tobacco companies, allowing them to maintain profits on regularly-priced products while both recruiting new, typically brand-conscious replacement smokers and

ensuring existing price-sensitive customers maintain current usage rates.²¹⁸

Industry Discounting Methods

Tobacco companies have been methodical and creative in developing pricing strategies to reduce the real price paid per pack of cigarettes. Discounts may be offered to wholesalers and retailers or directly to consumers. The particular strategies range from publicly distributed coupons to more complex financial arrangements with retailers.²¹⁹

Tobacco companies use a combination of methods to pursue their strategic aims, and understanding their tactics is crucial for formulating a policy response (and community support for it).



An introductory overview of key tactics is presented below.



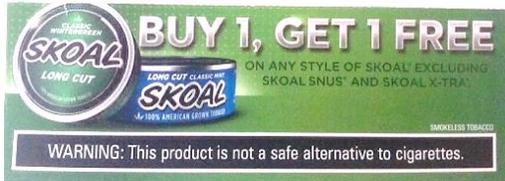
Discount Coupons – A voucher distributed by a seller or manufacturer to a consumer, allowing the consumer to obtain a stated reduction in price on a specific tobacco product or products. Such pricing mechanisms allow premium tobacco brands to maintain their brand image (as a higher-end product) while competing with generic brands and other competitive premium brands on price. Often these coupons are targeted to appeal to specific demographic groups based on self-identified price sensitivity or as determined by industry studies. Such coupons may be attached to packs of certain brands or directly mailed to targeted consumers, among other distribution mechanisms.

Off-Invoice Discounts – A promotion in which a manufacturer offers a wholesaler a price reduction in return for the purchase of specific quantities of goods within a specified time.²²⁰ It may be thought of as a discount for stocking a specific product to promote the purchase of a particular brand. The discount is not deducted from the invoice, but rather paid or credited separately to the wholesaler. Such a discount could then be passed down to the retailer and, subsequently, to the consumer.

Buy-Down Programs – An agreement between a manufacturer and retailer through which the retailer is paid a rebate for sales of a particular brand of cigarettes. The rebate is paid either for the sale of a specific quantity of cigarettes or for the sale of cigarettes sold over a specified period of time. Like off-invoice discounts, this type of promotion may be used to encourage the purchase of a particular brand. Additionally, the manufacturer may choose the specific retailers to which it offers the program, resulting in community- and state-wide price differentials.²²¹ These programs may be thought of as “paperless coupons” because the cigarettes sold in connection with buy-downs are typically discounted at the point-of-sale.²²²

Wholesale Pricing Agreement – A program administered by a cigarette wholesaler and sponsored by a manufacturer, through which a wholesaler agrees to pay a retailer a rebate for the sale of particular brands of cigarettes.²²³ The wholesaler is later reimbursed for these rebates by the manufacturer, and may be paid an additional fee for administering the program. Like buy-downs, manufacturers use this type of program to reduce the price of tobacco products to consumers (who may think of this program as a “paperless coupon” as well) and to encourage retailers to carry and promote their brands.

Retail Value-Added Promotion – A promotion that includes the sale of multiple packages for a single combined price (e.g., “buy one get one free” offers) or offers of free tobacco products with the purchase of another type of tobacco product.



As can be gleaned from this (non-exhaustive) list, tobacco companies have a wide range of price-related marketing techniques that they strategically deploy in order to encourage tobacco use and offset the impact of tobacco tax increases. Policymakers must be flexible and creative in responding to these promotional strategies and to others the industry will surely develop.

This report is intended to detail how tobacco price influences use and, in the context of formulating pricing policy to reduce tobacco use, provide a broad overview of how the tobacco industry influences price. Once a governing entity has identified priorities, obstacles and political will, it may benefit from a tailored analysis of likely policy responses.

VI. Policy Options & Best Practices



While Vermont’s Community Tobacco Coalitions are community educators and cannot advocate or lobby for specific legislation,²²⁴ they can provide the community education essential to support environmental change. In these efforts, Community Tobacco Coalitions may educate their communities about tobacco industry marketing schemes that promote tobacco use and proven public health strategies that a state may implement to counter Big Tobacco and reduce tobacco use. This includes providing information on the relationship between tobacco product price and tobacco consumption, industry price promotions and price manipulation, and the importance of state policies maintaining high tobacco products prices in order to lower rates of tobacco use.²²⁵

The tobacco industry is known to use litigation or the threat thereof as a strategy to defeat tobacco control laws aimed at improving public health, often regardless of

a claim's merit.²²⁶ With this in mind, it is especially important to identify the federal and state legal authority to implement a given tobacco control policy and carefully study associated legal implications. Different of policies will implicate different legal concerns and each should be individually weighed. While this report will not discuss the specific legal implications of each policy example listed below, there are a several areas of law that tend to be associated with tobacco control policy that are highlighted here.

Federal Cigarette Labeling and Advertising Act (FCLAA)

The tobacco industry will typically argue that state law was passed in violation of FCLAA. The FCLAA is the law which requires cigarette packages to display warning labels.²²⁷ When the FCLAA was passed in 1965, the law provided that the federal government held the exclusive authority to regulate tobacco advertising and promotion, and for decades this law prohibited state and local governments from adopting any regulation of the advertising or promotion of cigarettes. In 2009, however,

this preemption language was amended by the Family Smoking Prevention and Tobacco Control Act (FSPTCA).²²⁸ The FCLAA now permits states greater regulatory authority over cigarette promotion and advertising.²²⁹

Recent examples of tobacco companies' arguing that FCLAA preempts a new local law concern local laws restricting tobacco product price promotions. In 2012 the city of Providence, Rhode Island passed an ordinance restricting retailers from honoring tobacco product coupons and

specific other tobacco product price discounts.

The First Circuit Court of Appeals upheld the Providence law, finding the

The First Circuit Court of Appeals upheld the Providence law, finding the restrictions are neither preempted by FCLAA nor violate the U.S. Constitution's First Amendment.

restrictions are neither preempted by FCLAA nor violate the U.S. or Rhode Island's Constitutions' First Amendment.²³⁰ Similarly, in 2013 New York City Council enacted "Sensible Tobacco Enforcement Policies" (STEP), which seeks to maintain high tobacco product prices through, among other provisions, prohibiting retailers from redeeming coupons or honoring other price discounts for cigarettes and tobacco products.²³¹ Legal opinions issued by the First Circuit are not binding on New York courts and tobacco companies are currently

challenging this NYC ordinance, alleging STEP's discount restrictions are preempted by the FCLAA and New York law and further violate U.S. and New York First Amendment rights. At the time of writing, the case is active in the U.S. District Court for the Southern District of New York.²³²

First Amendment

Any policy that addresses tobacco companies' marketing activities, including restrictions on certain types of price promotions, may become subject to challenges under the Vermont and U.S. Constitutions' First Amendment free speech provision. First Amendment challenges will typically allege that a law impermissibly restricts the tobacco companies' "commercial speech." Policies carefully drafted to restrict only conduct, and not speech will help avoid a First Amendment violation.

Commerce Clause

Tobacco control measures targeting tobacco industry price promotions will also benefit from drafting with consideration of the Commerce Clause of the U.S. Constitution. The Commerce Clause gives

the U.S. Congress the authority to regulate commercial activity between the states.²³³ Because only the federal government is able to regulate interstate commerce, it follows that state governments may not interfere with this role by unduly burdening commerce between the states; this doctrine is known as the Dormant Commerce Clause.²³⁴ Building a rich record in support of the law, one which demonstrates both the severe toll of tobacco use on Vermont and how the law will help reduce tobacco use and otherwise serve the State's interest, will help a state prevail over Commerce Clause and other legal claims.

Vermont Law

There are also various Vermont state laws that should be incorporated into the policy analysis accompanying the development and implementation of a tobacco control policy. These include, but are not limited to, provisions of the Constitution of the State of Vermont, Vermont's tobacco product tax laws, tobacco retailer licensing requirements, and other state tobacco control regulations.

Vermont's First Amendment

As illustrated above, any challenge alleging a state tobacco control law infringes

on federal First Amendment rights, will likely include a parallel assertion of infringement on the state constitution's First Amendment provision. Court interpretations of U.S. and Vermont First Amendment provisions will be influential.

Vermont Tax Laws

As noted, excise tax increases are the most effective policy mechanism for reducing tobacco use.²³⁵ When evaluating the effectiveness and feasibility of strengthening Vermont's current tobacco tax approach, it may be helpful to place Vermont's current tobacco taxes in context. Vermont imposes the ninth highest state excise tax on cigarettes in the U.S., at a rate of \$2.62 per pack of 20 cigarettes.²³⁶ This is below the excise tax rate of neighboring New York (\$4.35 per pack) and Massachusetts (\$3.51 per pack) - the first and second highest tax rates in the country, respectively - while higher than New Hampshire's \$1.78 per pack.²³⁷ Regionally, Vermont's tax rate falls below that of Rhode Island (\$3.50) and Connecticut (\$3.40) and above Maine (\$2.00).²³⁸ A significant increase in cigarette taxes would reduce the tax disparity between



Vermont and most states of the region, while increasing Vermont revenue and the number of Vermonters quit and do not start cigarette use.

In addition, the Vermont legislature may identify opportunities to equalize taxes between various types of tobacco products. There is precedent for such a measure, including Vermont's 2011 tax increase on little cigars, specifically set to equal that of cigarettes.²³⁹ This increase was in reaction to the jarring rise in little cigar use, attributed to the lower state tax and federal tax and resultant lower sales price.²⁴⁰ Adjusting existing tax disparities between cigarettes and other tobacco products such as snus, snuff, and smokeless tobacco, through increasing

taxes on these other products may benefit Vermont through increased revenue and reduced tobacco product consumption.

Vermont's Tobacco Retailers

Many policies that aim to keep tobacco product prices high rely upon tobacco retailers' compliance with federal and state laws. Vermont-licensed tobacco retailers are subject to monitoring and inspections under these federal²⁴¹ and state laws,²⁴² and accordingly a state pricing

policy need not create a new enforcement regime; rather, enforcement of a pricing policy may build on Vermont's current enforcement, enabling the state to efficiently utilize resources.

In Vermont, licensed tobacco retailers are subject to Food and Drug Administration (FDA) compliance checks authorized under the FSPTCA to ensure retailers are compliant with federal laws.²⁴³ To assist with federal compliance checks, the FDA issues contracts with state agencies²⁴⁴ -- in Vermont it's the Vermont Department of Liquor Control (DLC), the state agency responsible for licensing Vermont's tobacco retailers.²⁴⁵ The DLC is also responsible for state compliance checks to ensure that Vermont remains eligible for federal funding under the federal Synar Amendment requiring states to enforce and report enforcement status of age verification tobacco control laws.²⁴⁶ The DLC is further charged with maintaining a registry of all Vermont licensed tobacco retailers, educating retailers on the state's tobacco control laws, and conducting in-store state law compliance checks. (Tobacco retailer licensing is a state function as Vermont law does not delegate legal authority to municipalities to license tobacco retailers.²⁴⁷)

A new pricing policy may be likewise folded into this existing enforcement regime and likewise have associated enforcement and education costs covered by the tobacco retailer licensing fee.²⁴⁸ Retailers often transfer business costs to the source of the cost, in this case tobacco products, in which case the effectiveness of a pricing policy is even further increased.

The policy examples below illustrate various government measures that have been taken to address tobacco or other product pricing. While these pricing policies may be implemented in isolation, the most effective approaches will increase the tobacco product sales price and then secure the price from tobacco company discounting promotions designed to circumvent high sales prices.

VII. Sample Policies

Policy: Increase State Excise Tax

Method and Rationale: Setting a higher excise taxes increases a product's sales price.

Considerations:

- Tobacco taxes can be either specific or ad valorem. Specific excise taxes are levied on set quantity of tobacco products and ad valorem excise taxes are a percentage of the wholesale or retail price.
- Increase tobacco taxes with the intent to reduce tobacco use.²⁴⁹
- Tax increase of \$1.50 as recommended by Healthy People 2020's agenda for improving the nation's health.²⁵⁰
- Establish a tobacco tax that is at least 70% of the retail price for tobacco products.²⁵¹
- Set periodic increases in order to stay abreast of inflation.²⁵²
- Create a simple tax structure in order to avoid loopholes, difficulties in administration, and maximize public health effectiveness.²⁵³
- Designate a portion of the tax revenue to fund cessation services for low income populations.²⁵⁴

Increase State Excise, Example A:

New York State Cigarette Excise Tax. Effective July 1, 2010.

There is hereby imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale . . . Such tax on cigarettes shall be at the rate of **four dollars and thirty-five cents** for each twenty cigarettes or fraction thereof, provided, however, that if a package of cigarettes contains more than twenty cigarettes, the rate of tax on the cigarettes in such package in excess of twenty shall be one dollar and eight and three-quarters cents for each five cigarettes or fraction thereof. Such tax is intended to be imposed upon only one sale of the same package of cigarettes. It shall be presumed that all cigarettes within the state are subject to tax until the contrary is established, and the burden of proof that any cigarettes are not taxable hereunder shall be upon the person in possession thereof (emphasis added). N.Y. TAX LAW § 471

- Highest state tobacco excise tax in the nation.
- Specific tax.
- Not tied to inflation, no set periodic increases.

Increase State Excise, Example B:**Massachusetts Payment of Excise. July 31, 2013**

Every licensee who is required to file a return under section 16 of chapter 62C shall, at the time of filing such return, pay to the commissioner an excise equal to 150 1/2 mills [\$3.01 per pack] plus any amount by which the federal excise tax on cigarettes is less than 8 mills for each cigarette so sold during the calendar month covered by the return[.] MGLA Ch. 64C § 6

- \$3.51 total excise tax in Massachusetts.
- 2nd highest state tobacco excise tax in the nation.

Massachusetts Additional Payment of Excise; Credit to Children's and Seniors' Health Care Assistance Fund (§ 7A); Credit to Health Protection Fund (§ 7C).

In addition to the excise imposed by section six, every licensee who is required to file a return under section sixteen of chapter sixty-two C shall, at the time of filing such a return, pay to the commissioner an excise equal to twelve and one-half mills for each cigarette so sold [**\$0.25 per pack**] during the calendar month covered by the return[.] MGCL Ch. 64C §§ 7A, 7C.

Policy: Tax Parity Across Tobacco Products

Method and Rationale: Applying like tax rates to like tobacco products helps equalize sales prices across products. Price disparities are eliminated; there are no longer tobacco products sold for vastly cheaper than competing products.

Considerations:

- Set a meaningful tax rate resulting in comparable tobacco product prices among cigarettes and other tobacco products.
- Some products are taxed specific, others ad valorem.
- Tobacco products deemed “less harmful” could be exempt, taxed at lower rate.

Tax Parity, Example A:**Vermont Tax on Cigarettes and Little Cigars. Effective July 1, 2011.**

A tax is imposed on all cigarettes, little cigars, and roll-your-own tobacco held in this state by any person for sale . . . The tax imposed under this section shall be at the rate of 131 mills **per cigarette or little cigar** and for each 0.0325 ounces of roll-your-own tobacco. The interest and penalty provisions of section 3202 of this title shall apply to liabilities under this section. VT. STAT. ANN. tit., 32 . § 7771

Tax Parity, Example B:

New York Tax on Cigarettes and Little Cigars. Effective Aug. 1, 2010.

Such tax on little cigars shall be at the same rate imposed on cigarettes under this article and is intended to be imposed only once upon the sale of any little cigars. N.Y. TAX LAW § 471-c

Tax Parity, Example C:

Minnesota Tobacco Modernization and Compliance Act of 2010. Effective May 11, 2010.

‘Tobacco products’ means any products containing, made, or derived from tobacco that is intended for human consumption, whether chewed, smoked, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, or any component, part, or accessory of a tobacco product, including, but not limited to, cigars; little cigars; cheroots; stogies; periques; granulated, plug cut, crimp cut, ready rubbed, and other smoking tobacco; snuff; snuff flour; cavendish; plug and twist tobacco; fine-cut and other chewing tobacco; shorts; refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco but does not include cigarettes as defined in this section.

➤ The definition of “tobacco products” was modified for excise tax purposes. The definition formerly encompassed only products suitable for smoking or chewing. As amended, it broadens to encompass many forms of tobacco.

Policy: Minimum Sales Price

Method and Rationale: Establish a lowest legal sale at any point in the product distribution chain, e.g., sales from manufacturer wholesaler, wholesaler to retailer and/or retailer to consumer. Setting a price threshold sale price, irrespective of price promotions, eliminates legal in-state sales of steeply discounted tobacco products.

Considerations:

- Applicable at many points along the distribution chain.
- Determine minimum price based on either formula (e.g. a percent of the wholesale price) or as a set dollar amount.
- Define minimum price carefully in order to eliminate loopholes
- Explicitly prevent price discounts from bringing sale price below established minimum price.
- Set a meaningful minimum price (not too high, not too low).
- Set a minimum price for both cigarettes and other tobacco products.
- A minimal sales price raises has an unintended outcome of enriching tobacco companies.²⁵⁵ Regardless, research demonstrates that there remain significant beneficial public health outcomes associated with policies that increase the price of tobacco products.²⁵⁶



Price Minimum, Example A:**New York Cigarette Marketing Standards Act.
Effective March 31, 2011.**

[I]t shall be unlawful . . . [f]or any agent, wholesale dealer or retail dealer, with intent to injure competitors or destroy or substantially lessen competition, or with intent to avoid the collect or paying over of such taxes as may be required by law, to advertise, offer to sell, or sell cigarettes at less than cost of such agent wholesale dealer or retailer dealer . . . N.Y. TAX LAW §484(a)(1).

‘Basic cost of cigarettes’ shall mean the invoice cost of cigarettes to the agent who purchases from the manufacturer, or the replacement cost of cigarettes to the agent, in the quantity last purchased, whichever is lower, less all trade discounts, except discounts for cash, to which shall be added the full face value of any stamps which may be required by law. N.Y. TAX LAW § 483(a)(1).

The term ‘cost of the agent’ shall mean the basic cost of cigarettes plus the cost of doing business by the agent . . . N.Y. TAX LAW § 483(b)1.(A).

- Prohibits retailer and wholesaler discounts that bring the sale price below the statutory minimum.
- Only applies to cigarettes.

Price Minimum, Example B:**Massachusetts Minimum Price Law. Amended Nov. 22, 1995.**

In all advertisements, offers for sale or sales involving two or more items at a combined price, and in all advertisements, offers for sale or sales involving the giving of any concession of any kind whatsoever (whether it be coupons or otherwise), the retailer’s or wholesaler’s selling price shall not be below the ‘cost to the retailer’ or the ‘cost to the wholesaler,’ respectively, of all articles, products, commodities and concessions included in such transactions. MASS. GEN. LAWS Ch 64C § 13(e).

- Prohibits the use of coupons or other rebates (e.g., multi-pack discounts) that reduce the cost paid by consumers for cigarettes (below the statutory minimum).

Policy: Minimum Package Size

Method and Rationale: Require cheaper tobacco products popular with youth be sold in a larger quantity; prohibit sales of single use quantities. Increasing the volume of product will increase the sales price.

Considerations:

- Determine a minimum weight or minimum number of units of tobacco that when sold together will have a meaningful impact on public health.
- Avoid exceptions or loopholes in the law for certain products; pay close attention to product definitions.

Minimum Pack Size, Example A:

New York City, NY. Out-of-package sales prohibited. Enacted November 19, 2013.

No retail dealer shall sell or offer for sale a cigar unless the cigar is sold in a package of **at least four** cigars, provided that this subdivision shall not apply to the sale or distribution of an individual cigar whose listed price, as defined in section 17-176.1 of this code, is greater than three dollars.

No retail dealer shall sell or offer for sale a little cigar unless the little cigar is sold in a package of at least twenty little cigars (emphasis added). N.Y. PUB. HEALTH LAW § 17-704.

Minimum Pack Size, Example B:

Boston, MA. A Regulation Limiting Tobacco and Nicotine Access by Youth (“Youth Access Regulation”). Amended December 1, 2011.

No retailer, retail establishment, or other individual or entity shall sell or distribute or cause to be sold or distributed a cigar unless the cigar is contained in an original package of **at least four (4)** cigars (emphasis added). BOSTON PUB. HEALTH COMM’N, CITY OF BOSTON, MASS., A REGULATION LIMITING TOBACCO AND NICOTINE ACCESS BY YOUTH, §III(4).

Minimum Pack Size, Example C:

Prince George’s County, MD. Minimum Package Size. 2009.

Notwithstanding any other provision of law, a retailer, wholesaler, or their agent or employee may not purchase . . . unpackaged cigars from a tobacco manufacturer or sell, resell, distribute, dispense or give away unpackaged cigarettes or unpackaged cigars to any person. Unpackaged cigars means any cigar or cigar product not contained within a sealed original package of **at least five (5)** cigars or cigar products. (emphasis added) P.G. COUNTY CODE § 12-204.

- Not currently enforced. Legal challenged upheld: On April 25, 2013, the Maryland Court of Appeals held that MD law impliedly preempted ordinances.

Policy: Restrict Redemption of Discount Coupons

Method and Rationale: Restrict the redemption of vouchers reducing the price tobacco products. This limits sales tobacco products at cheaper prices.

Considerations:

- Prohibit redemption of coupons, and not the distribution of coupons, to minimize legal complications.
- Prohibit redemption of coupons for cigarettes and other tobacco products.
- At a minimum, prohibit redemption of coupons that reduce tobacco product prices below a statutory minimum.
- A tobacco product pricing policy which raises the purchase price of tobacco through restricting redemption of discount offers has an unintended outcome enriching tobacco companies.²⁵⁷ Regardless, research demonstrates that there remain significant beneficial public health outcomes associated with policies that increase the price of tobacco products.²⁵⁸

Coupon Redemption Restriction, Example A:

Providence, RI. An Ordinance Amending Section 14-300 and Section 14-303 of Article XV of Chapter 14 of the Code of Ordinance of the City of Providence, Entitled: “Licenses – Tobacco Dealers.” Adopted January 9, 2012.

No person who holds a license issued under this article, nor any employee or agent of same, shall . . . accept or redeem, offer to accept or redeem, or cause or hire any person to accept or redeem or offer to accept or redeem any coupon that provides any tobacco products without charge or for less than the listed or non-discounted price; or . . . accept or redeem, offer to accept or redeem, or cause or hire any person to accept or redeem or offer to accept or redeem any coupon that provides any cigarettes without charge or for less than the listed or non-discounted price[.]

- Legally challenged by members of the tobacco industry on preemption and constitutional grounds.
- The ordinance was upheld. The court found that the ordinance was not preempted by FCLAA or state law and did not violate federal or state protections around free speech.

Coupon Redemption Restriction, Example B:

New York, NY. Prohibition on the sale of discounted cigarettes and tobacco products. Enacted November 19, 2013.

‘Price reduction instrument’ means 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.

Prohibition on the sale of cigarettes for less than the listed price. No person . . . shall honor or accept a price reduction instrument in any transaction related to the sale of cigarettes to a consumer[.]

Prohibition on the sale of tobacco products for less than the listed price. No person shall . . . honor or accept a price reduction instrument in any transaction related to the sale of tobacco products to a consumer[.] § 17-176.1.

- Not currently enforced.
- Legally challenged by members of the tobacco industry arguing the ordinance is preempted by the FCLAA and New York law, and that it violates federal and state protections around free speech.
- Litigation ongoing at time of publication.

Policy: Restrict Manufacturer Inducements to Wholesalers and Retailers

Method and Rationale: Restrict manufacturer inducements resulting in wholesaler or retailer discounting the price of tobacco products. This restriction reduces the volume of cheaper tobacco products on the market.

Considerations:

- Prohibit use of rebate programs.
- Prohibit the payment of promotional allowances to retailers in connection with the sale of tobacco products.
- Apply to both cigarettes and other tobacco products.

Restrict Inducements, Example A:

Federal Law. Alcohol, Unlawful Inducements: Furnishing Things of Value. General. January 27, 2004.

[T]he act by an industry member of furnishing, giving, renting, lending, or selling any equipment, fixtures, signs, supplies, money, services, or other things of value to a retailer constitutes a means to induce[.] 27 C.F.R. § 6.41.

Restrict Inducements, Example B:**Inducement through Third Party Arrangements. January 27, 2004.**

The furnishing, giving, renting, lending, or selling of equipment, fixtures, signs, supplies, money, services, or other thing of value by an industry member to a third party, where the benefits resulting from such things of value flow to individual retailers, is the indirect furnishing of a thing of value within the meaning of the Act. Indirect furnishing of a thing of value includes, but is not limited to, making payments for advertising to a retailer association or a display company where the resulting benefits flow to individual retailers. 27 C.F.R. § 6.42.

Restrict Inducements, Example C:**Federal Law. Alcohol, Unlawful Inducements: Paying for Advertising, Display, or Distribution Service. January 27, 2004.**

The act by an industry member of paying or crediting a retailer for any advertising, display, or distribution service constitutes a means to induce within the meaning of the Act, whether or not the advertising, display, or distribution service received by the industry member in these instances is commensurate with the amount paid therefor. This includes payments or credits to retailers that are merely reimbursements, in full or in part, for such services purchased by a retailer from a third party. 27 C.F.R. § 6.51.

Policy: Restrict Retail Value-Added Promotions

Method and Rationale: Restrict redemption of offers for an additional free or low-cost tobacco product or other good in return for the initial purchase of a tobacco product. This limits the opportunity to “get more than one paid for” upon purchasing a tobacco product, increasing the transaction value and thus cheapening the price of each good received, including the tobacco product or products.

Considerations:

- Restrict redemption, not promotion.
- Prohibit multi-pack discounts and buy-one-get-one free offers.
- Prohibit cross promotions that add free non-cigarette tobacco products to packs of cigarettes.
- Require that the price paid by consumers for tobacco products sold in combination meets the minimum price for each product.
- A tobacco product pricing policy which raises the purchase price of tobacco through restricting redemption of retail value-added promotions has an unintended outcome enriching tobacco companies.²⁵⁹ Regardless, research demonstrates that there remain significant beneficial public health outcomes associated with policies that increase the price of tobacco products.²⁶⁰

Example:

**Massachusetts Minimum Price Law.
Amended Nov 22, 1995.**

In all advertisements, offers for sale or sales involving two or more items at a combined price, and in all advertisements, offers for sale or sales involving the giving of any concession of any kind whatsoever (whether it be coupons or otherwise), the retailer's or wholesaler's selling price shall not be below the 'cost to the retailer' or the 'cost to the wholesaler', respectively, of all articles, products, commodities and concessions included in such transactions. MASS. GEN. LAWS Ch. 64C § 13(e).

- Prohibits the use of coupons or other rebates (e.g., multi-pack discounts) that reduce the cost paid by consumers for cigarettes (below the statutory minimum).

Policy: Sunshine or Disclosure Requirements

Method and Rationale: Require a tobacco manufacturer to provide data concerning price manipulation strategies employed in the state. This data would help the state understand the tobacco industry price discounting strategies at play in its communities as it moves forward with tobacco pricing policies.

Considerations:

- Require tobacco manufacturers to publicly disclose payments and discounts provided to all retailers.

Example:

Federal Law. Physician Payment Sunshine Act. Effective: March 23, 2010.

[A]ny applicable manufacturer that provides a payment or other transfer of value to a covered recipient (or to an entity or individual at the request of or designated on behalf of a covered recipient), shall submit to the Secretary, in such electronic form as the Secretary shall require, the following information with respect to the preceding calendar year . . . 42 U.S.C.A. § 1320a-7h.

Citations

- ¹ U.S. DEP'T OF HEALTH & HUMAN SERVS., SURGEON GENERAL'S REPORT: REDUCING TOBACCO USE, 322-37 (2000) [hereinafter 2000 SURGEON GENERAL'S REPORT]; *see also*, Frank J. Chaloupka et al. *Tax, Price and Cigarette Smoking: Evidence from the Tobacco Documents and Implications for Tobacco Company Marketing Strategies*, 11 TOBACCO CONTROL i62, i63-i64 (2002)[hereinafter Chaloupka, *Tax, Price and Smoking*]; Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, 20 TOBACCO CONTROL 235, 235-36 tbl. 1 (2010)[hereinafter Chaloupka, *Effectiveness of Tax and Price Policies*]. For more information about the relationship between price and tobacco consumption, see CENTER FOR PUBLIC HEALTH & TOBACCO POLICY, TOBACCO PRICE PROMOTION: POLICY RESPONSES TO INDUSTRY PRICE MANIPULATION 2-7, available at <http://www.tobaccopolicycenter.org/documents/Tobacco%20Price%20Promotion%20Complete%20Report.pdf>.
- ² FED. TRADE COMM'N, CIGARETTE REPORT FOR 2011 (2013), available at <http://www.ftc.gov/os/2013/05/130521cigarettereport.pdf> (\$8.0 billion)[hereinafter FED. TRADE COMM'N, CIGARETTE REPORT]; FED. TRADE COMM'N, SMOKELESS TOBACCO REPORT FOR 2011 (2013), available at <http://www.ftc.gov/os/2013/05/130521smokelesstobaccoreport.pdf> (\$331 million) [hereinafter FED. TRADE COMM'N, SMOKELESS TOBACCO REPORT].
- ³ U.S. DEP'T. OF HEALTH & HUMAN SERVS. , PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS, A REPORT OF THE SURGEON GENERAL 508 (2012)[hereinafter 2012 SURGEON GENERAL'S REPORT]. (In her landmark 2006 ruling that the tobacco industry violated the Racketeer Influenced and Corrupt Organizations (RICO) Act, Judge Gladys Kessler concluded that cigarette marketing recruits youth to smoke and that the major cigarette companies know it.)
- ⁴ *Id.*
- ⁵ Melanie Wakefield et al., *The Effect of Retail Cigarette Pack Displays on Impulse Purchase*, 103 ADDICTION 322, 325 (2007).
- ⁶ 2012 SURGEON GENERAL'S REPORT, *supra* note 3, at 487, 508, 519; *see also* Wakefield, *supra* note 5. ("Our study demonstrated that younger smokers were more likely to notice cigarette displays and tended to be more likely to purchase on impulse.").
- ⁷ 2012 SURGEON GENERAL'S REPORT, *supra* note 3, at 165.
- ⁸ Marvin Goldberg et al., *The Role of Tobacco Advertising and Promotion: Themes Employed in Litigation by Tobacco Industry Witnesses*, 15 TOBACCO CONTROL i54, i54 (2006).
- ⁹ Ctr. for Disease Control & Prevention, Smoking & Tobacco Use, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/cessation/quitting/ (last visited March 21, 2014).
- ¹⁰ Wakefield, *supra* note 5 at 325 (some smokers who are trying to quit will even avoid store where they know there is a display in order to avoid temptation).
- ¹¹ Nigel Gray, *Powerwalls Prey on the Susceptible*, 103 ADDICTION 329, 330 (2007) (commenting on Wakefield, *supra* note 5). Nearly 37.7% of smokers attempting to quit agree that the presence of tobacco displays elicits an urge to smoke.
- ¹² *See generally* Brian Wansink et al., *An Anchoring and Adjustment Model of Purchase Quantity Decisions*, J. OF MARKETING RESEARCH 71, 73 (1998) ([M]ultiple-unit prices resulted in a 32% increase in sales over the single-unit control.").
- ¹³ *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1, 2717 (D.D.C. 2006).
- ¹⁴ *Id.*
- ¹⁵ *Id.* at 2762.
- ¹⁶ *Id.* at 2892.

¹⁷ Richard W. Pollay, *More Than Meets the Eye: On the Importance of Retail Cigarette Advertising*, 16 TOBACCO CONTROL 270, 271 (2007) (detailing the manner in which “power walls” are designed for maximum impact, using high tech devices such as eye gaze cameras to plan out the displays).

¹⁸ J. Paynter et al., *Point of Sale Tobacco Displays and Smoking Across 14-15 Year Olds in New Zealand: A Cross Sectional Study*, 18 TOBACCO CONTROL 268, 273 (2009); *see also* Michael Johns et al., *Exposure to Tobacco Retail Outlets and Smoking Initiation among New York City adolescents*, J. URBAN HEALTH 7-8 (published online May 2013) (on file with author) (finding significant association between visiting tobacco retailers two or more times and smoking initiation and the “probability of initiating among students visiting retailers seven or more times a week... was double that of students who never visit retailers in a typical week”; finding also that this association was comparable to that of the association between initiation and living with a smoker”); Lisa Henriksen et al., *A Longitudinal Study of Exposure to Retail Cigarette Advertising and Smoking Initiation*, 126 PEDIATRICS 232, 232 (2010) (finding chances of 11-14 year olds initiating smoking increased with visits to retailers with tobacco advertising); *see also* Annice E. Kim et al., *Influence of Tobacco Displays and Ads on Youth: A Virtual Store Experiment*, 131 PEDIATRICS e88, e92 (2013) (concluding “enclosing tobacco product displays significantly lowers the likelihood that youth will try to purchase tobacco in the virtual store”).

¹⁹ 2012 SURGEON GENERAL’S REPORT, *supra* note 3, at 543 (noting it is common industry practice to strategically locate tobacco related marketing materials where youth will be exposed to it).

²⁰ *Id.*

²¹ *Id.* (NCI’s tobacco control monograph, *The Role of the Media in Promoting and Reducing Tobacco Use* (2008), also examined the evidence on how tobacco marketing efforts affect tobacco use among adolescents. Using numerous studies and tobacco industry documents, the report concluded that even brief exposure to tobacco advertising influences attitudes and perceptions about smoking and adolescents’ intentions to smoke. In addition, the evidence showed that exposure to cigarette advertising influences nonsmoking adolescents to begin smoking and move toward regular smoking.).

²² *Id.*

²³ *Id.*

²⁴ ChangeLab Solutions, *How to Make Communities Healthier with Healthy Stores*, <http://changelabsolutions.org/news/how-make-communities-healthier-healthy-stores> (last visited March 26, 2014).

²⁵ 2012 SURGEON GENERAL’S REPORT, *supra* note 3, at 488.

²⁶ *Id.*

²⁷ *Id.* at 530.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 530-531.

³² *Id.*

³³ *See* FED. TRADE COMM’N, CIGARETTE REPORT, *supra* note 2; FED. TRADE COMM’N, SMOKELESS TOBACCO REPORT, *supra* note 2.

³⁴ Master Settlement Agreement, III(c) (1998), *available at* <http://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf>.

³⁵ FED. TRADE COMM’N, CIGARETTE REPORT, *supra* note 2, at 3 (\$8.366 billion); FED. TRADE COMM’N, SMOKELESS TOBACCO REPORT, *supra* note 2, at 2 (\$451.7 million). The tobacco industry spent a combined total of \$8.8177 billion in advertising expenditures for cigarettes and smokeless tobacco in 2011.

³⁶ Campaign for Tobacco Free Kids, *The Toll of Tobacco in Vermont*, https://www.tobaccofreekids.org/facts_issues/toll_us/Vermont (last visited April 22, 2014).

³⁷ FED. TRADE COMM’N, CIGARETTE REPORT, *supra* note 2, at 2 (more than \$8 billion in 2011); FED. TRADE COMM’N, SMOKELESS TOBACCO REPORT, *supra* note 2. Cigarette manufacturers’ “Point of Sale” expenditures are comprised of expenditures on “Coupons,” “Point of Sale,” “Price Discounts,” “Promotional Allowances – Retailers,” “Promotional Allowances – Wholesalers,” “Retail Value Added – Bonus Cigarettes” and “Retail Value Added – Non-Cigarette Bonus” as defined in the report. Smokeless tobacco manufacturers’ “Point of Sale” expenditures are comprised of expenditures on “Coupons,” “Point of Sale,” “Price Discounts,” “Promotional Allowances – Retailers,” “Promotional Allowances – Wholesalers,” “Retail Value Added – Bonus Smokeless Tobacco Product” and “Retail Value Added – Non-Smokeless Tobacco Bonus” as defined in the report.

³⁸ E.C. Feighery, et al., *How Tobacco Companies Ensure Prime Placement of Their Advertising and Products in Stores: Interviews with Retailers about Tobacco Company Incentive Programmes*, 12 TOBACCO CONTROL, 184, 186 (2003).

- ³⁹ Paul N. Bloom, *Role of Slotting Fees and Trade Promotions in Shaping How Tobacco is Marketed in Retail Stores*, 10 TOBACCO CONTROL 340, 341 (2001).
- ⁴⁰ Ann Lavack & Graham Toth, *Tobacco Point-of-Purchase Promotion: Examining Tobacco Industry Documents*, 15 TOBACCO CONTROL 377, 380 (2006).
- ⁴¹ See, e.g., Diane S. Burrows, *Younger Adult Smokers: Strategies and Opportunities*, February 29, 1984, at 1, bates no. 501928462-501928550, available at <http://legacy.library.ucsf.edu/tid/fet29d00> (proposing targeting multi-pack discounts to younger adults (age 18-24) because the demographic represents “renewal of market” and their brand loyalty “far outweighs any tendency to switch with age”).
- ⁴² Monica Cornelius et al., *Trends in the use of Premium and Discount Cigarette Brands; Findings from the ITC US Surveys* (2002 – 2011), TOBACCO CONTROL ONLINE FIRST, October 3, 2013, at 1, <http://tobaccocontrol.bmj.com/content/early/2013/10/03/tobaccocontrol-2013-051045.full.html#re>.
- ⁴³ FED. TRADE COMM’N, CIGARETTE REPORT, *supra* note 2; and FED. TRADE COMM’N, SMOKELESS TOBACCO REPORT, *supra* note 2. Tobacco industry consists of the five largest cigarette manufacturers and the five major smokeless tobacco companies. Cigarette manufacturers’ price discounting expenditures are comprised of “Price Discounts,” “Coupons,” and “Retail-value-added – Bonus Cigarette” as defined in the report. Smokeless tobacco manufacturers’ price discounting expenditures are comprised of “Price Discounts,” “Coupons,” and “Retail-value-added – Bonus Smokeless Tobacco Product” as defined in the report.
- ⁴⁴ See Chaloupka, *Tax, Price and Smoking*, *supra* note 1, at i63.
- ⁴⁵ *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1, 2997 (D.D.C. 2006).
- ⁴⁶ *Id.* at 2991
- ⁴⁷ See, e.g., F.V. Creighton, *Camel Growth Among Males 18-24 years old in the Midwest*, Jul. 25, 1986, bates no. 505727418-505727431 available at <http://legacy.library.ucsf.edu/tid/pda72d00>; see Victoria M. White et al., *Cigarette Promotional Offers: Who Takes Advantage?*, 30 AM. J. PREV. MED. 228, 229 (2006).
- ⁴⁸ Cornelius, *supra* note 42.
- ⁴⁹ *Id.*
- ⁵⁰ Andrew Hyland et al., *Higher Cigarette Prices Influence Cigarette Purchase Patterns*, 14 TOBACCO CONTROL 86, 86 (2005).
- ⁵¹ IOM, ENDING THE TOBACCO PROBLEM: BLUEPRINT FOR THE NATION 182-3 (2007) [hereinafter IOM, ENDING THE TOBACCO PROBLEM] (“The June 2006 National Institutes of Health (NIH) state-of-the-science panel on tobacco use (NIH 2006b) found that an increase in the unit price of tobacco products increases the rate of tobacco use cessation and reduces the level of consumption among individuals across a wide spectrum of racial and socioeconomic groups.”); Nat’l Inst. of Health, *NIH State-of-the-Science Conference Statement on Tobacco Use: Prevention, Cessation, and Control*, 23(3) NIH CONSENSUS AND STATE-OF-THE-SCIENCE STATEMENTS 7 (June 2006), available at <http://consensus.nih.gov/2006/tobaccostatement.pdf>. (“Increasing the unit price for tobacco products increases tobacco use cessation and reduces consumption regardless of the smoker’s ethnicity, gender, and socioeconomic status.”); see also Hyland, *supra* note 50, at 86; and White, *supra* note 47, at 225, 228.
- ⁵² 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. PUBLIC HEALTH 4418, 4123 (2011); John P. Pierce et al., *Tobacco Industry Price-Subsidizing Promotions May Overcome the Downward Pressure of Higher Prices on Initiation of Regular Smoking*, 14 HEALTH ECON. 1061, 1061(2005).
- ⁵³ Bader, *supra* note 52, at 4127.
- ⁵⁴ Hyland, *supra* note 50, at 91.
- ⁵⁵ White, *supra* note 47, at 228, 230.
- ⁵⁶ Lisa Henrikson et al., *Targeted Advertising, Promotion, and Price For Menthol Cigarettes in California High School Neighborhoods*, 14 NICOTINE & TOBACCO RESEARCH 116, 119 (2012) [hereinafter *Targeted Advertising*]; and White, *supra* note 47, 228, 230.
- ⁵⁷ Hana Ross et al., *Do Cigarette Prices Motivate Smokers to Quit? New Evidence from the ITC Survey*, 106 ADDICTION 609, 609 (2010); IOM, ENDING THE TOBACCO PROBLEM, *supra* note 51, at 182 (“Recent studies with microlevel data have found that higher cigarette prices increase the probability that a current adult smoker will make an attempt to quit (Levy et al. 2005) and that a young adult smoker will stop smoking (Tauras 2004b).”); Priti Bandi et al., *Cigarette Affordability in the United States*, 15 NICOTINE & TOBACCO RESEARCH 1484, 1484 (2013); Michelle Leverett et al., *Tobacco Use: The Impact of Prices*, 30 J.L.MED.& ETHICS 88, 89 (2002).

⁵⁸ 2000 SURGEON GENERAL'S REPORT *supra* note 1, at 322-36; *see also*, Chaloupka, *Tax, Price and Smoking*, *supra* note 1, at i63-64; Chaloupka, *Effectiveness of Tax and Price Policies* *supra* note 1, at 235-36 tbl. 1. For more information about the relationship between price and tobacco consumption, see CENTER FOR PUBLIC HEALTH & TOBACCO POLICY, TOBACCO PRICE PROMOTION: POLICY RESPONSES TO INDUSTRY PRICE MANIPULATION 2-7, *supra* note 1.

⁵⁹ Frank Chaloupka, *Tobacco Control Lessons Learned: The Impact of State and Local Policies*, 14 (ImpacTEEN, Research Paper Series No. 38, 2010) [hereinafter Chaloupka, *Tobacco Control Lessons Learned*]; Michael Tynan et al., *Impact of Cigarette Minimum Price Laws on the Retail Price of Cigarettes in the USA*, 22(e1) TOB. CONTROL e78, e78 (2013) [hereinafter *Impact of Cigarette Minimum Price Laws*].

⁶⁰ CHUCK MARR ET AL., CTR. ON BUDGET AND POLICY PRIORITIES, HIGHER TOBACCO TAXES CAN IMPROVE HEALTH AND RAISE REVENUE 2 (June 19, 2013) (citing the Congressional Budget Office); *see also* 2000 SURGEON GENERAL'S REPORT *supra* note 1, at 337; 2012 SURGEON GENERAL'S REPORT, *supra* note 3, at 528, 530, 699 (estimating a 3-5 percent decrease in adult consumption); Chaloupka, *Tax, Price and Smoking*, *supra* note 1 at i64 (estimating a 2.5-5 percent decrease in adult consumption).

⁶¹ *See* Bader, *supra* note 52, at 4127 (“[I]ncreasing cigarette prices through tobacco taxation as a powerful strategy for achieving major reductions in smoking among some, but not all, high-risk populations. This is a highly effective policy tool for reducing smoking participation and consumption among youth, young adults and persons of low socioeconomic status.”); White, *supra* note 47, 228, 230 (“Our results provide strong evidence that tobacco industry promotional offers are particularly appealing to certain market segments, including young adults, women, African Americans, those with higher daily consumption levels, and those worried about cigarette cost.”); *Targeted Advertising*, *supra* note 56, at 118-119.

⁶² 2012 SURGEON GENERAL'S REPORT, *supra* note 3, at 528, 530, 699 (showing that youth are especially responsive to tobacco product pricing); and VT DEPT. OF HEALTH, HEALTHY VERMONTERS 2020 24 (2012) available at http://healthvermont.gov/hv2020/documents/hv2020_intro.pdf (A goal of Healthy Vermonters 2020 is to reduce youth smoking to 10% by 2020.).

⁶³ Bader, *supra* note 52, at 4123.

⁶⁴ Bandi, *supra* note 57, at 1484.

⁶⁵ Bader, *supra* note 52, at 4120; *citing* J. O'Loughlin et al., *Milestones in the Process of Cessation among Novice Adolescent Smokers*, 10 AM. J. PUBLIC HEALTH (2008).

⁶⁶ Bandi, *supra* note 57, at 1484; Leverett, *supra* note 57, at 89.

⁶⁷ *See* Andrea Licht et al., *Socio-Economic Variation in Price Minimizing Behaviors: Findings from the International Tobacco Control (ITC) Four Country Survey*, 8 INT. J. ENVIRON. RES. PUBLIC HEALTH 234, 236 (2011); *see generally* Chaloupka, *Tax, Price and Smoking*, *supra* note 1 at i70.

⁶⁸ Bader, *supra* note 52, at 4124-5 (2011); IOM, ENDING THE TOBACCO PROBLEM, *supra* note 51, at 182 (“Recent studies with microlevel data have found that higher cigarette prices increase the probability that a current adult smoker will make an attempt to quit (Levy et al. 2005) and that a young adult smoker will stop smoking (Tauras 2004b).”).

⁶⁹ IOM, ENDING THE TOBACCO PROBLEM, *supra* note 51, at 182 (“Recent studies with microlevel data have found that higher cigarette prices increase the probability that a current adult smoker will make an attempt to quit (Levy et al. 2005) and that a young adult smoker will stop smoking (Tauras 2004b).”).

⁷⁰ *Id.*

⁷¹ *Id.* at 182-3. (“The June 2006 National Institutes of Health (NIH) state-of-the-science panel on tobacco use (NIH 2006b) found that an increase in the unit price of tobacco products increases the rate of tobacco use cessation and reduces the level of consumption among individuals across a wide spectrum of racial and socioeconomic groups.”); Nat'l Inst. of Health, *NIH State-of-the-Science Conference Statement on Tobacco Use: Prevention, Cessation, and Control*, 23(3) NIH CONSENSUS AND STATE-OF-THE-SCIENCE STATEMENTS 7 (June 2006), available at <http://consensus.nih.gov/2006/tobaccostatement.pdf> (“Increasing the unit price for tobacco products increases tobacco use cessation and reduces consumption regardless of the smoker's ethnicity, gender, and socioeconomic status.”).

⁷² IOM, ENDING THE TOBACCO PROBLEM, *supra* note 51, at 182 (“Recent studies with microlevel data have found that higher cigarette prices increase the probability that a current adult smoker will make an attempt to quit (Levy et al. 2005) and that a young adult smoker will stop smoking (Tauras 2004b).”); and Ctr. for Disease Control & Prevention, *Smoking & Tobacco Use*, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/cessation/quitting/ (last visited April 2, 2014) (“Among current U.S. adult cigarette smokers, 68.8% report that they want to quit completely.”).

⁷³ VT DEPT. OF HEALTH, HEALTHY VERMONTERS 2020 24 (2012) available at http://healthvermont.gov/hv2020/documents/hv2020_intro.pdf.

⁷⁴ Suzan Burton et al., *Marketing Cigarettes when all else is Unavailable: Evidence of Discounting in Price-Sensitive Neighbourhoods*, TOBACCO CONTROL 1 (2013); citing Timothy Dewhirst, *Price and Tobacco Marketing Strategy: Lessons from 'Dark Markets' and Implications for WHO Framework Convention on Tobacco Control*, 21 TOBACCO CONTROL 519-23 (2012) (“There is also evidence that tobacco purchase sizes are larger at outlets with lower prices, and larger purchases are likely to encourage increased consumption of cigarettes.”).

⁷⁵ 2012 SURGEON GENERAL’S REPORT, *supra* note 3, at 528; Bader, *supra* note 52, at 4120.

⁷⁶ John Dawes, *Cigarette Brand Loyalty and Purchase Patterns: An Examination Using US Consumer Panel Data*, JOURNAL OF BUSINESS RESEARCH 2 (2013) (“[O]verall level of repeat-purchase loyalty for cigarettes is very high compared to other consumer goods' contexts. Average consumer goods brand SCR (based on share of purchase occasions) in a twelvemonth period is approximately 29% . . . to 33% . . . [.] Cigarette buyers, with average SCR (occasions) of around 60% are therefore highly loyal to their brands compared to what is typically seen in other consumer goods categories.”); see also Herald J. Van Heerde et al., *Is 75% of the Sales Promotion Bump Due to Brand Switching? No, Only 33% is*, XL J. OF MARKETING RESEARCH 481, 481-82 (2003) (The authors reviewed previous studies and found that there is approximately 33% brand switching during sales promotions for products such as coffee, yogurt, margarine, soft drinks, and sugar.).

⁷⁷ Dawes, *supra* note 76, at 2.

⁷⁸ *Id.* (“Various studies suggest, or report, high loyalty for cigarettes. DiFranza, Eddy, Brown, Ryan, and Bogojavlensky (1994) report that 51% of youths interviewed stated they smoke the same brand as their first cigarette.”).

⁷⁹ *Id.*

⁸⁰ *Id.* at 9.

⁸¹ K. Michael Cummings et al., *Use of Discount Cigarettes by Smokers in 20 Communities in the United States, 1988-1993*, 6 TOBACCO CONTROL S25, S25 (1997) (“[L]ower priced [cigarette] options virtually disappeared from the market . . . [until] 1980 when Liggett, the smallest American cigarette maker, launched the first price-value cigarette.”).

⁸² *Id.* (“Use of low-priced cigarettes was more common among those who would be predicted to be sensitive to price; namely, those with lower incomes, higher levels of daily cigarette consumption, and those living in areas with higher average cigarette prices.”).

⁸³ *Id.* (“The use of low-priced cigarettes was most popular among middle-aged adults (aged 35-54 years) and least popular among younger adults (aged 25-34 years).”).

⁸⁴ Licht, *supra* note 67, at 234, 235; citing Hyland, *supra* note 50, at 92.

⁸⁵ Cornelius, *supra* note 42 at 1.

⁸⁶ Hyland, *supra* note 50, at 91; see also *Use of Discount Cigarettes by Smokers in 20 Communities in the United States*, *supra* note 81.

⁸⁷ Cummings, *supra* note 81, at S30.

⁸⁸ Cornelius, *supra* note 42, at 4. (“[E]ven though smokers in our sample between the ages of 18 and 24 years were more likely to report smoking a premium brand cigarette compared with older smokers, loyalty to a given brand was not that strong since we observed frequent switching between different premium brands.”).

⁸⁹ Even in states with the highest rates of smokeless tobacco use, smokeless use is significantly lower than rates of smoking. Ctr. for Disease Control & Prevention, *Adult Smoking in the United States: Current Estimates*, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/ (last visited April 4, 2014) (“An estimated 42.1 million people, or 18.1% of all adults . . . in the United States smoke cigarettes.”); Ctr. for Disease Control & Prevention, *State-Specific Prevalence of Cigarette Smoking and Smokeless Tobacco Use Among Adults -- United States, 2009*, 59 MORBIDITY AND MORTALITY WEEKLY REPORT (2010), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5943a2.htm> (last visited April 4, 2013) (“Smokeless tobacco use within states was highest in Wyoming (9.1%), West Virginia (8.5%), and Mississippi (7.5%)”); Ctr. for Disease Control & Prevention, *Tobacco Product Use Among Middle and High School Students—United States, 2011 and 2012*, 62 MORBIDITY AND MORTALITY WEEKLY REPORT 893–7 (2013); http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6245a2.htm?s_cid=%20mm6245a2.htm_w (last visited April 4, 2014) (Cigarettes are the most commonly used tobacco product among middle and high school students.); and Ctr. for Disease Control & Prevention, *Smoking & Tobacco Use: Youth and Tobacco Use*, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm#estimates_ (last visited April 25, 2014).

⁹⁰ 2012 SURGEON GENERAL’S REPORT, *supra* note 3, at 165 (“Concurrent use of multiple tobacco products is prevalent among youth. Among high school students who report currently using tobacco, almost one-third of females and one-half of males report using more than one tobacco product in the past 30 days.”); *see also* Jennifer M. Bombard, et. al, *Monitoring Polytabacco Use Among Adolescents: do Cigarette Smokers use Other Forms of Tobacco?*, 11 NICOTINE TOB RES.1581, 1581(2008).

⁹¹ *See e.g.*, Irma Corral et al., *Polytabacco Use and Mutliple-Product Smoking Among a Random Community Sample of African-American Adults*, 3 BMJ OPEN (2013)(“Almost half (49.3%) of the African-American cigarette-smokers and 14.9% of the cigarette nonsmokers had smoked at least one non-cigarette product in the past 30 days.”), available at <http://bmjopen.bmj.com/content/3/12/e003606.full.pdf+html>; and Jennifer M. Bombard et al., *Are Smokers Only using Cigarettes? Exploring Current Polytabacco use Among an Adult Population*, 32 ADDICTIVE BEHAVIORS 2411, 2411, 2416 (2007)(“Among men who smoked cigarettes, one out of four used at least one other tobacco product.”).

⁹² U.S. DEP’T. OF HEALTH & HUMAN SERVS. , THE HEALTH CONSEQUENCES OF SMOKING – 50 YEARS OF PROGRESS, EXECUTIVE SUMMARY i (2014); VT DEPT. OF HEALTH, VERMONT TOBACCO CONTROL PROGRAM 2012 VERMONT ADULT TOBACCO SURVEY 5 (2012) available at http://healthvermont.gov/research/documents/2012_atr_report_final.pdf (Among smokers, the prevalence of other tobacco use was higher for every type of product asked in the survey.).

⁹³ TTB, Tobacco Products, <http://www.ttb.gov/tobacco/tobacco-products.shtml> (last visited April 9, 2014); *see also* VT. STAT. ANN. tit., 32 §7702 (2013)(“Little cigars” means any rolls of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of subdivision (1) of this section) and as to which 1,000 units weigh not more than four and one-half pounds.”). Vermont’s definition of little cigars is more inclusive than the federal definition.

⁹⁴ Press Release, Ctr. for Disease Control & Prevention, More than 40 Percent of Middle and High Schoolers who Smoke use Flavored Little Cigars or Flavored Cigarettes (Oct. 22, 2013), http://www.cdc.gov/media/releases/2013/p1022-flavored-cigarettes.html?utm_source=rss&utm_medium=rss&utm_campaign=more-than-40-percent-of-middle-and-high-schoolers-who-smoke-use-flavored-little-cigars-or-flavored-cigarettes.

⁹⁵ *Id.*

⁹⁶ Ctr. for Disease Control & Prevention, *Youth Risk Behavior Surveillance – United States, 2011*, 61 MORBIDITY AND MORTALITY WEEKLY REPORT (2012), available at <http://www.cdc.gov/mmwr/pdf/ss/ss6104.pdf>; and Ctr. for Disease Control & Prevention, *Smoking & Tobacco Use: Youth and Tobacco Use*, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/ (last visited April 22, 2013); and *Consumption of Cigarettes and Combustible Tobacco*, *supra* note 94.

⁹⁷ VT. STAT. ANN. tit. 32, § 7771 (2011).

⁹⁸ VT. STAT. ANN. tit. 7, § 1003 (2013).

⁹⁹ *Consumption of Cigarettes and Combustible Tobacco*, *supra* note 94.

¹⁰⁰ TTB, Tobacco Products, <http://www.ttb.gov/tobacco/tobacco-products.shtml> (last visited April 9, 2014); *see also* VT. STAT. ANN. tit., 32 § 7702 (2013)(Large cigars are defined as “any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco” other than cigarettes or little cigars.).

¹⁰¹ Ctr. for Disease Control & Prevention, *Consumption of Cigarettes and Combustible Tobacco United States, 2000-2011*, 61 MORBIDITY AND MORTALITY WEEKLY REPORT (2012) [hereinafter *Consumption of Cigarettes and Combustible Tobacco*], available at <http://www.cdc.gov/mmwr/pdf/wk/mm6130.pdf>.

¹⁰² *Id.*

¹⁰³ *Id.*; Catherine L. Jo et al., *US Consumer Interest in Non-Cigarette Products Spikes Around the 2009 Federal Tobacco Tax Increase*, TOBACCO CONTROL PUBLISHED ONLINE FIRST (Feb. 5, 2014), available at <http://tobaccocontrol.bmj.com/content/early/2014/02/05/tobaccocontrol-2013-051261.short>.

¹⁰⁴ *Consumption of Cigarettes and Combustible Tobacco*, *supra* note 94.

¹⁰⁵ *Id.*

¹⁰⁶ The Children’s Health Insurance Program Reauthorization Act of 2009, Pub. L. 111–3 (2009).

¹⁰⁷ VT. STAT. ANN. tit. 32, § 7771 (2011).

¹⁰⁸ *Consumption of Cigarettes and Combustible Tobacco*, *supra* note 94.

¹⁰⁹ *Id.*

¹¹⁰ Jo, *supra* note 96.

¹¹¹ *See* Daniel Morris and Michael Tynan, *Fiscal and Policy Implications of Selling Pipe Tobacco for Roll-Your-Own Cigarettes in the United States*, PLoS ONE 7(5): e36487 (2012), available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0036487>.

¹¹² TOBACCO CONTROL LEGAL CONSORTIUM, REGULATING ROLL YOUR OWN TOBACCO MACHINES (2012), *available at* <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-regulating-RYOmachine-2012.pdf>.

¹¹³ 26 U.S.C. 5702(o), as amended, defines roll-your-own tobacco as “any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes or cigars, or for use as wrappers thereof.” Specifically, the Children’s Health Insurance Program Reauthorization Act added the words, “or cigars, or for use as wrappers thereof” to the end of the definition. As a result, existing permit requirements applicable to manufacturers and importers of roll-your-own tobacco will now extend to manufacturers and importers of tobacco for making cigars and tobacco for use as wrappers of cigarettes and cigars. There is no transitional rule for these new industry members. The effective date for this provision is also April 1, 2009.

¹¹⁴ VT. STAT. ANN. tit., 7 § 1011 (2012).

¹¹⁵ Ann Boonn, Campaign for Tobacco Free Kids, Closing Weight Based Tax Loopholes for the New Generation of Low Weight Moist Snuff Smokeless Tobacco Products (December 23, 2013), <https://www.tobaccofreekids.org/research/factsheets/pdf/0355.pdf>; and VT. STAT. ANN. tit. 32, § 7811 (2013).

¹¹⁶ *See* TTB.gov, Tax and Fee Rates, http://www.ttb.gov/tax_audit/atftaxes.shtml (last visited April 4, 2013); *see, e.g.*, PENNSYLVANIA BUDGET & POLICY CTR., WHY DOES HE GET A TAX BREAK AND YOU DON’T, <http://pennbpc.org/sites/pennbpc.org/files/Cigar-Tax-One-Pager.pdf> (“Pennsylvania is one of only two states that in the union without an excise tax on cigars and the only one without a tax on other tobacco products like snuff and chewing tobacco.”); *see* Ann Boonn, Campaign for Tobacco Free Kids, The Rise of Cigars and Cigar Smoking Harms (March 7, 2013), <http://www.tobaccofreekids.org/research/factsheets/pdf/0333.pdf> (“The federal government and almost all of the states compound these problems by sharply under-taxing cigars compared to cigarettes, often making smaller cigars a less-expensive alternative to cigarettes.”).

¹¹⁷ U.S. DEP’T. OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING – 50 YEARS OF PROGRESS, EXECUTIVE SUMMARY i (2014) (National smoking rates have declined from 42% in 1965 to 18% in 2012.); VT DEPT. OF HEALTH, VERMONT TOBACCO CONTROL PROGRAM 2012 VERMONT ADULT TOBACCO SURVEY 4 (2012) *available at* http://healthvermont.gov/research/documents/2012_ats_report_final.pdf (Adult smoking rate 17% in 2012) (*showing* the last decades have seen a decline in smoking rates nationwide and in Vermont); L.D. Johnston et al., *Monitoring the Future National Results on Adolescent Drug Use: Overview of Key Findings* (2013), U. OF MICH. INST. FOR SOCIAL RESEARCH (2014) (finding current use of smokeless tobacco is about half of what it was in the mid-1990s. However, only a modest decline has occurred since 2010 and no change occurred between 2012 and 2013.).

¹¹⁸ Michael Freiberg, *Options for State and Local Governments to Regulate Non-Cigarette Tobacco Products*, 21 ANNALS OF HEALTH LAW 407, 408 (2012), *available at* <http://publichealthlawcenter.org/sites/default/files/resources/phlc-lreview-freiberg-regulating-otp-2012.pdf>; Ctr. for Disease Control & Prevention, Smoking & Tobacco Use: Youth and Tobacco Use, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm#estimates (last visited April 9, 2014)(From 2011–2012, hookah use increased among high school students.).

¹¹⁹ VT. TOBACCO CONTROL PROGRAM, 2012 VERMONT ADULT TOBACCO SURVEY 21, *available at* http://healthvermont.gov/research/documents/2012_ats_report_final.pdf.

¹²⁰ Ctr. for Disease Control & Prevention, Smoking & Tobacco Use: State Highlights, http://www.cdc.gov/tobacco/data_statistics/state_data/state_highlights/2012/states/vermont/index.htm (last visited April 9, 2014) (Adult smokeless tobacco use in Vermont is ranked 12th highest in the country, in comparison to other states. Youth smokeless tobacco use in Vermont is ranked 9th highest in the country, in comparison to other states.).

¹²¹ Freiberg, *supra* note 118; *citing* MINN. DEP’T OF HEALTH, TEENS AND TOBACCO IN MINNESOTA, THE VIEW FROM 2008 (2008), *available at* <http://www.health.state.mn.us/divs/chs/tobacco/execsummary07.pdf> (“While cigarette smoking has declined since 2000, there has been no change since 2000 in the percentage of students smoking cigars or little cigars or using smokeless tobacco.”).

¹²² *Id.* (Studies showing stagnant or growing youth OTP use.)

¹²³ VT DEPT. OF HEALTH, 2013 YOUTH RISK BEHAVIOR SURVEY 39 http://healthvermont.gov/research/yrbs/2013/documents/2013_yrbs_full_report.pdf

¹²⁴ *Id.* at 45; *and* VT. DEPT. OF HEALTH, 2009 YOUTH RISK BEHAVIOR SURVEY 36 *available at* http://healthvermont.gov/pubs/yrbs2009/documents/YRBS_2009.pdf. (chewing tobacco, snuff, dip - 2009, 2011, 2013).

¹²⁵ VT. DEPT. OF HEALTH, 2013 YOUTH RISK BEHAVIOR SURVEY 45 *available at* http://healthvermont.gov/research/yrbs/2013/documents/2013_yrbs_full_report.pdf; *and* VT. DEPT. OF HEALTH,

2009 YOUTH RISK BEHAVIOR SURVEY 36 available at

http://healthvermont.gov/pubs/yrbs2009/documents/YRBS_2009.pdf. (cigars, cigarillos, 2009, 2011, 2013)

¹²⁶ Ctr. for Disease Control & Prevention, Smoking & Tobacco Use: Youth and Tobacco Use,

http://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/ (last visited April 9, 2014).

¹²⁷ Ctr. for Disease Control & Prevention, *Tobacco Product Use Among Middle and High School Students—United States, 2011 and 2012*, 62 MORBIDITY AND MORTALITY WEEKLY REPORT 893–7 (2013).

¹²⁸ Ctr. for Disease Control & Prevention, *Notes from the Field: Electronic Cigarette Use Among Middle and High School Students — United States, 2011–2012*, 62 MORBIDITY AND MORTALITY WEEKLY REPORT 729–730 (2013), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm>.

¹²⁹ Jo, *supra* note 96; see also Megan McArdle, *E-Cigarettes: A \$1.5 Billion Industry Braces for FDA Regulation*, BLOOMBERGBUSINESSWEEK, (Feb. 6, 2014), <http://www.businessweek.com/articles/2014-02-06/e-cigarettes-fda-regulation-looms-for-1-dot-5-billion-industry> (last visited April 9, 2014).

¹³⁰ Ctr. for Disease Control & Prevention, *Notes from the Field: Electronic Cigarette Use Among Middle and High School Students — United States, 2011–2012*, 62 MORBIDITY AND MORTALITY WEEKLY REPORT 729–730 (2013), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm>.

¹³¹ 2012 SURGEON GENERAL’S REPORT, *supra* note 3, at 177, 507 (80% of youth prefer Marlboro, Newport and Camel.); Burton, *supra* note 74, at 4 (2013).

¹³² Kelvin Choi et al., *Receipt and Redemption of Cigarette Coupons, Perceptions of Cigarette Companies and Smoking Cessation*, 22 TOBACCO CONTROL 418, 420 (2013).

¹³³ *Id.*

¹³⁴ Cati G. Brown-Johnson et al., *Tobacco Industry Marketing to Low Socioeconomic Status Women in the USA*, TOBACCO CONTROL ONLINE FIRST (Jan. 21, 2014),

<http://tobaccocontrol.bmj.com/content/early/2014/01/21/tobaccocontrol-2013-051224.full.pdf+html>.

¹³⁵ FED. TRADE COMM’N, SMOKELESS TOBACCO REPORT FOR 2010 (2012). Tobacco Industry consists of the five largest cigarette manufacturers and five major smokeless tobacco companies. Cigarette manufacturers’ price discounting expenditures are comprised of “Price Discounts,” “Coupons,” and “Retail-value-added – Bonus Cigarette” as defined in the report. Smokeless tobacco manufacturers’ price discounting expenditures are comprised of “Price Discounts,” “Coupons,” and “Retail-value-added – Bonus Smokeless Tobacco Product” as defined in the report. (In 2010 the tobacco industry spent \$6.9 billion on price discounts at the POS), and FED. TRADE COMM’N, CIGARETTE REPORT, *supra* note 2; FED. TRADE COMM’N, SMOKELESS TOBACCO REPORT, *supra* note 2. Tobacco Industry consists of the five largest cigarette manufacturers and five major smokeless tobacco companies. Cigarette manufacturers’ price discounting expenditures are comprised of “Price Discounts,” “Coupons,” and “Retail-value-added – Bonus Cigarette” as defined in the report. Smokeless tobacco manufacturers’ price discounting expenditures are comprised of “Price Discounts,” “Coupons,” and “Retail-value-added – Bonus Smokeless Tobacco Product” as defined in the report. (In 2011 the tobacco industry spent \$7.38 billion on price discounts at the POS.).

¹³⁶ Campaign for Tobacco Free Kids, *State Cigarette Excise Tax Rates and Rankings* (Dec. 3, 2013), available at <https://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf> (“Since 2002, 47 states, DC, and several U.S. territories have increased their cigarette tax rates 110 times.”).

¹³⁷ FED. TRADE COMM’N, CIGARETTE REPORT, *supra* note 2; FED. TRADE COMM’N, SMOKELESS TOBACCO REPORT, *supra* note 2. Tobacco Industry consists of the five largest cigarette manufacturers and five major smokeless tobacco companies. Cigarette manufacturers’ price discounting expenditures are comprised of “Price Discounts,” “Coupons,” and “Retail-value-added – Bonus Cigarette” as defined in the report. Smokeless tobacco manufacturers’ price discounting expenditures are comprised of “Price Discounts,” “Coupons,” and “Retail-value-added – Bonus Smokeless Tobacco Product” as defined in the report.

¹³⁸ Choi, *supra* note 132, at 420.

¹³⁹ *Id.*

¹⁴⁰ Sandy J. Slater et al., *The Impact of Retail Cigarette Marketing Practices on Youth Smoking Uptake*, 161 ARCH. PEDIATRIC ADOLESCENT MED. 440, 440 (2007); see also Choi, *supra* note 132.

¹⁴¹ *Targeted Advertising*, *supra* note 56, at 119; and White, *supra* note 47, at 228.

¹⁴² *Targeted Advertising*, *supra* note 56, at 119; and White, *supra* note 47, at 228.

¹⁴³ Slater, *supra* note 140, at 440; see also John P. Pierce et al., *Tobacco Industry Price-Subsidizing Promotions May Overcome the Downward Pressure of Higher Prices on Initiation of Regular Smoking*, 14 HEALTH ECON. 1061, 1067–69 (2005); White, *supra* note 47, at 228, 230; Burton, *supra* note 74.

¹⁴⁴ Burton, *supra* note 74, at 4.

¹⁴⁵ *Targeted Advertising*, *supra* note 56, at 116, 118.

¹⁴⁶ Slater, *supra* note 140, at 444.

- ¹⁴⁷ Bandi, *supra* note 57, at 1484.
- ¹⁴⁸ Bader, *supra* note 52, at 4120; citing O’Loughlin, J.; Gervais, A.; Dugas, E.; Meshefedjian, G., *Milestones in the Process of Cessation among Novice Adolescent Smokers*, AM. J. PUBLIC HEALTH (2008).
- ¹⁴⁹ *Id.* at 4119; see also Licht, *supra* note 67, at 235.
- ¹⁵⁰ Hiscock, et al., *Socioeconomic status and smoking: a review*. ANNALS OF THE NEW YORK ACADEMY OF SCIENCES (2012) (citing Esson (2010) and Warner (2011)).
- ¹⁵¹ Burton, *supra* note 74, at 4; and M. McCarthy, et al., *Price Discounting of Cigarettes in Milk Bars Near Secondary Schools Occurs More Frequently in Areas with Greater Socioeconomic Disadvantage*, 35 AUST N.Z. J. PUB HEALTH 71 (2011) (finding increased price discounting at Australian corner stores near secondary schools in low SES areas as compared to mid and high SES areas.).
- ¹⁵² See, e.g., Brown-Johnson, *supra* note 134.
- ¹⁵³ *Id.*
- ¹⁵⁴ Hiscock, et al., *Socioeconomic status and smoking: a review*. ANNALS OF THE NEW YORK ACADEMY OF SCIENCES (2012); and see Lisbeth Iglesias-Rios & Mark Parascandola, *A Historical Review of R. J. Reynolds’ Strategies for Marketing Tobacco to Hispanics in the United States*, 103 AM. J. OF PUB. HEALTH e15, e15 (2013).
- ¹⁵⁵ See, e.g., Iglesias-Rios & Parascandola, *supra* note 154.
- ¹⁵⁶ See Sarah Moreland-Russell et al., *Disparities and Menthol Marketing: Additional Evidence in Support of Point of Sale Policies*, 10 INT. J. ENVIRON. RES. PUBLIC HEALTH 4571, 4572 (2013).
- ¹⁵⁷ See Iglesias-Rios & Parascandola, *supra* note 154.
- ¹⁵⁸ Licht, *supra* note 67, at 235. (Respondents with low SES 85% more likely to report using discount brands/RYO compared to participants with high SES.).
- ¹⁵⁹ See Hiscock, *supra* note 154.
- ¹⁶⁰ See Jonathan Gruber and Botond Koszegi, *Tax Incidence when Individuals are Time-Inconsistent: the Case of Cigarette Excise Taxes*, 88 J. OF PUBLIC ECONOMICS 1959, 1975 (2004).
- ¹⁶¹ *Id.* at 1961.
- ¹⁶² White, *supra* note 47, at 228; and Brown-Johnson, *supra* note 134.
- ¹⁶³ See e.g., Brown-Johnson, *supra* note 134.
- ¹⁶⁴ *Id.*
- ¹⁶⁵ *Id.*
- ¹⁶⁶ *Id.*
- ¹⁶⁷ Choi, *supra* note 132, at 422.
- ¹⁶⁸ Hiscock, *supra* note 154.
- ¹⁶⁹ *Id.*
- ¹⁷⁰ See Mark Niquette & Esmé E. Deprez, *Cigarette Smuggling Increase Prompts Crackdown by States*, BLOOMBERG, Mar. 24, 2014, <http://www.bloomberg.com/news/print/2014-03-25/cigarette-smuggling-increase-prompts-crackdown-by-states.html>.
- ¹⁷¹ Frank J. Chaloupka, *Tobacco Taxes as a Tobacco Control Strategy*, 21 TOBACCO CONTROL 172, 177 (2012) [hereinafter *Tobacco Taxes as a Tobacco Control Strategy*].
- ¹⁷² See VT. STAT. ANN. tit., 32 §§ 7771, 7811, 7815.
- ¹⁷³ FRAMEWORK CONVENTION ALLIANCE, *THE ILLICIT TRADE IN TOBACCO PRODUCTS: HOW INTERNATIONAL COOPERATION CAN SAVE LIVES AND BILLIONS OF DOLLARS*, available at http://www.ftc.org/publications/bulletins/doc_view/115-the-illicit-trade-in-tobacco-products.
- ¹⁷⁴ See Indian General Allotment Act, § 6, 25 U.S.C. § 349.
- ¹⁷⁵ VT. STAT. ANN. tit., 7 §1010 (2013); 15 U.S.C. § 1716e (2006).
- ¹⁷⁶ Joseph Henchman & Scott Drenkard, *Cigarette Taxes and Cigarette Smuggling by State*, THE TAX FOUNDATION (March 19, 2014), <http://taxfoundation.org/article/cigarette-taxes-and-cigarette-smuggling-state>
- ¹⁷⁷ Aaron Smith, *60% of Cigarettes Sold in New York are Smuggled: Report*, CNN MONEY (Jan. 10, 2013), <http://money.cnn.com/2013/01/10/news/companies/cigarette-tax-new-york/>.
- ¹⁷⁸ See generally Orzechowski & Walker, *The Tax Burden on Tobacco*, 46 HISTORICAL COMPILATION 1 (2011), available at http://www.taxadmin.org/fta/tobacco/papers/Tax_Burden_2011.pdf; see also Chaloupka, *Effectiveness of Tax and Price Policies*, *supra* note 1; and see *Tobacco Taxes as a Tobacco Control Strategy*, *supra* note 171, at 177; and see generally INTERNATIONAL AGENCY FOR RESEARCH ON CANCER (IARC) HANDBOOK VOLUME 14 (2010), available at <http://www.iarc.fr/en/publications/pdfs-online/prev/handbook14/handbook14-1.pdf> [hereinafter IARC HANDBOOK].

¹⁷⁹ See generally Orzechowski & Walker, *supra* note 178; see also Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, *supra* note 1; and see *Tobacco Taxes as a Tobacco Control Strategy*, *supra* note 171; and see generally IARC HANDBOOK, *supra* note 178.

¹⁸⁰ See generally Orzechowski & Walker, *supra* note 178; see also Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, *supra* note 1; and see *Tobacco Taxes as a Tobacco Control Strategy*, *supra* note 171; and see generally IARC HANDBOOK, *supra* note 178.

¹⁸¹ See generally Orzechowski & Walker, *supra* note 178; see also Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, *supra* note 1; and see *Tobacco Taxes as a Tobacco Control Strategy*, *supra* note 171; and see generally IARC HANDBOOK, *supra* note 178.

¹⁸² See generally Orzechowski & Walker, *supra* note 178; see also Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, *supra* note 1; and see *Tobacco Taxes as a Tobacco Control Strategy*, *supra* note 171; and see generally IARC HANDBOOK, *supra* note 178.

¹⁸³ See generally Orzechowski & Walker, *supra* note 178; see also Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, *supra* note 1; and see *Tobacco Taxes as a Tobacco Control Strategy*, *supra* note 171; and see generally IARC HANDBOOK, *supra* note 178.

¹⁸⁴ Eleven communities do impose a 1% local option sales tax in addition to the 6% state sales tax. Those communities are: Burlington, Dover, Killington, Manchester, Middlebury, Rutland Town, South Burlington, Stratton, Williston, Winhall, Wilmington. VT Dep't of Taxes, Business Taxes – Local Option, <http://www.state.vt.us/tax/businesslocaloption.shtml> (last visited April 7, 2014); see also VT. STAT. ANN. tit., 24 § 138 (“Local option taxes are authorized under this section for the purpose of affording municipalities an alternative method of raising revenues to facilitate the transition and reduce the dislocations in those municipalities that may be caused by reforms to the method of financing public education under the Equal Educational Opportunity Act of 1997.”).

¹⁸⁵ In a March 2014 memo to the House and Human Services Committee, the Coalition for a Tobacco Free Vermont (CTFV), including the American Cancer Society, the American Heart Association and the American Lung Association outline their legislative priorities which include: Maintain adequate funding for VT’s Comprehensive Tobacco Control Program; Increase and preserve the Tobacco Trust Fund, which will be zeroed out by the Governor’s FY15 recommended budget – putting VT’s tobacco control program at risk; Support effective tobacco tax policies that will reduce and prevent smoking. Vermont’s FY2014 total funding for state tobacco control programs is \$5,428,061, just over half of the \$10,400,000 CDC recommended spending level. American Lung Association, State of Tobacco Control, <http://www.stateoftobaccocontrol.org/state-grades/vermont/> (last visited April 23, 2014).

¹⁸⁶ See Mark Niquette & Esmé E. Deprez, *Cigarette Smuggling Increase Prompts Crackdown by States*, BLOOMBERG, Mar. 24, 2014, <http://www.bloomberg.com/news/print/2014-03-25/cigarette-smuggling-increase-prompts-crackdown-by-states.html>.

¹⁸⁷ TAX FOUNDATION, BACKGROUND PAPER: 2014 STATE BUSINESS TAX CLIMATE INDEX 23 (October 2013), available at <http://taxfoundation.org/sites/taxfoundation.org/files/docs/2014%20State%20Business%20Tax%20Climate%20Index.pdf>.

¹⁸⁸ See generally Orzechowski & Walker, *supra* note 178; see also Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, *supra* note 1; and see *Tobacco Taxes as a Tobacco Control Strategy*, *supra* note 171; and see generally IARC HANDBOOK, *supra* note 178.

¹⁸⁹ See generally Orzechowski & Walker, *supra* note 178; see also Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, *supra* note 1; and see *Tobacco Taxes as a Tobacco Control Strategy*, *supra* note 171; and see generally IARC HANDBOOK, *supra* note 178.

¹⁹⁰ TTB, Tax and Fee Rates, http://www.ttb.gov/tax_audit/atftaxes.shtml (last visited March 5, 2014).

¹⁹¹ TOBACCO CONTROL LEGAL CONSORTIUM, STATE TAXATION OF NON-CIGARETTE TOBACCO PRODUCTS 3 (2012), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-state-tax-OTP-2012.pdf>.

¹⁹² Ann Boonn, Campaign for Tobacco Free Kids, Map of State Cigarette Tax Rates, (December 3, 2013), <http://www.tobaccofreekids.org/research/factsheets/pdf/0222.pdf>.

¹⁹³ FEDERATION OF TAX ADMINISTRATORS, STATE EXCISE TAX RATES ON CIGARETTES (Jan. 1, 2014), available at <http://www.taxadmin.org/fta/rate/cigarette.pdf>.

¹⁹⁴ Ann Boonn, Campaign for Tobacco Free Kids, Map of State Cigarette Tax Rates, (December 3, 2013), <http://www.tobaccofreekids.org/research/factsheets/pdf/0222.pdf>.

¹⁹⁵ *Id.*

¹⁹⁶ VT. STAT. ANN. tit. 32, § 7771(a)(1)-(3) (2011); VT. STAT. ANN. tit. 32, § 7811 (2013) (“New smokeless tobacco” means any tobacco product manufactured from, derived from, or containing tobacco that is not intended to be smoked, has a moisture content of less than 45 percent, or is offered in individual single-dose tablets or other discrete single-use units.”); VT. STAT. ANN. tit. 32, § 7702 (2013).

¹⁹⁷ Tobacco taxes can be either specific or ad valorem. Specific excise taxes are levied on set quantity of tobacco products and ad valorem excise taxes are a percentage of the wholesale or retail price.

¹⁹⁸ VT. STAT. ANN. tit. 32, § 7771 (2011).

¹⁹⁹ *Id.*

²⁰⁰ CENTER FOR PUBLIC HEALTH SYSTEMS SCIENCE. PRICING POLICY: A TOBACCO CONTROL GUIDE (2014), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-pricing-policy-WashU-2014.pdf> (citing National Cancer Institute, Cigars: Health Effects and Trends. Bethesda, MD: Economic Research Service, US Dept of Agriculture; 1998. Smoking and Tobacco Control Monograph No. 9.).

²⁰¹ *Tobacco Taxes as a Tobacco Control Strategy*, *supra* note 171, at 178.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ COALITION FOR A TOBACCO FREE VERMONT ET AL., VERMONT’S CIGARETTE TAX AND BENEFITS OF A \$1.25 INCREASE, <http://www.tobaccofreevermont.org/assets/files/CTFV-Tobacco-Tax-Factsheet.pdf>.

²⁰⁵ *Id.*

²⁰⁶ Ann Boonn, Campaign for Tobacco Free Kids, Closing Weight Based Tax Loopholes for the New Generation of Low Weight Moist Snuff Smokeless Tobacco Products (December 23, 2013), <https://www.tobaccofreekids.org/research/factsheets/pdf/0355.pdf>; and VT. STAT. ANN. tit. 32, § 7811 (2013).

²⁰⁷ Ann Boonn, Campaign for Tobacco Free Kids, Closing Weight Based Tax Loopholes for the New Generation of Low Weight Moist Snuff Smokeless Tobacco Products (December 23, 2013), <https://www.tobaccofreekids.org/research/factsheets/pdf/0355.pdf>; and VT. STAT. ANN. tit. 32, § 7811 (2013).

²⁰⁸ *Tobacco Taxes as a Tobacco Control Strategy*, *supra* note 171, at 177.

²⁰⁹ See Chaloupka, *Tax, Price and Smoking*, *supra* note 1 at i62.

²¹⁰ FED. TRADE COMM’N, CIGARETTE REPORT, *supra* note 2; FED. TRADE COMM’N, SMOKELESS TOBACCO REPORT, *supra* note 2. Tobacco industry consists of the largest cigarette manufacturers and the major smokeless tobacco companies. Cigarette manufacturers’ price discounting expenditures are comprised of “Price Discounts,” “Coupons,” and “Retail-value-added – Bonus Cigarette” as defined in the report. Smokeless tobacco manufacturers’ price discounting expenditures are comprised of “Price Discounts,” “Coupons,” and “Retail-value-added – Bonus Smokeless Tobacco Product” as defined in the report.

²¹¹ FED. TRADE COMM’N, CIGARETTE REPORT, *supra* note 2; FED. TRADE COMM’N, SMOKELESS TOBACCO REPORT, *supra* note 2. Tobacco industry consists of the largest cigarette manufacturers and the major smokeless tobacco companies. Cigarette manufacturers’ price discounting expenditures are comprised of “Price Discounts,” “Coupons,” and “Retail-value-added – Bonus Cigarette” as defined in the report. Smokeless tobacco manufacturers’ price discounting expenditures are comprised of “Price Discounts,” “Coupons,” and “Retail-value-added – Bonus Smokeless Tobacco Product” as defined in the report.

²¹² FED. TRADE COMM’N, CIGARETTE REPORT, *supra* note 2; FED. TRADE COMM’N, SMOKELESS TOBACCO REPORT, *supra* note 2. Tobacco industry consists of the largest cigarette manufacturers and the major smokeless tobacco companies. Incentive payments is made up of “Price Discounts,” “Promotional Allowances – Retailers,” and “Promotional Allowances – Wholesalers” as defined in the reports.

²¹³ White, *supra* note 47, at 227.

²¹⁴ See Leverett, *supra* note 57, at 89; Chaloupka, *Tobacco Control Lessons Learned*, *supra* note 59; see also Frank J. Chaloupka *Macro-social Influences: The Effects of Prices and Tobacco-Control Policies on the Demand for Tobacco Products*, 1 NIC. & TOB. RSCH s105, s106 (Supp. 1, 1999).

²¹⁵ 2012 SURGEON GENERAL’S REPORT, *supra* note 3, at 177, 507, 850 (2012); and Ctr. for Disease Control & Prevention, Smoking & Tobacco Use: Tobacco Brand Preferences, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/tobacco_industry/brand_preference/index.htm (last visited April 10, 2014) (“The three most heavily advertised brands—Marlboro, Newport, and Camel—continue to be the preferred brands of cigarettes smoked by young people.”).

²¹⁶ See Pierce, *supra* note , at 1068-69; see also Price Gap Strategy, Retail Representative Training Guide, bates no. 517051354-517051357, available at <http://legacy.library.ucsf.edu/tid/esy66d00> (detailing defensive discount strategy for R.J. Reynolds’ premium brands to compete with generic brands) [hereinafter Price Gap Strategy].

²¹⁷ See e.g., Brown-Johnson., *supra* note 134, at .1 (Tobacco companies focused marketing on low SES women starting in the late 1970s, including military wives, low-income inner-city minority women, ‘discount susceptible’

older female smokers and less-educated young white women. Strategies included distributing discount coupons with food stamps to reach the very poor, discount offers at point-of-sale and via direct mail to keep cigarette prices low, developing new brands for low SES females and promoting luxury images to low SES African-American women. More recently, companies integrated promotional strategies targeting low-income women into marketing plans for established brands.); *see also* 2012 SURGEON GENERAL'S REPORT *supra* note 3, at 526-27 ("When retail prices rise following tax increases, companies engage in a variety of price-related marketing efforts that appear to be aimed at softening the impact of the increased prices."). Studies also show that price promotions are targeted to states with strong tobacco control policies other than taxes to offset the effect of those policies. *Id.* at 527-28.

²¹⁸ *See* Pierce, *supra* note , at 1068-69; *see also* Price Gap Strategy (detailing defensive discount strategy for R.J. Reynolds' premium brands to compete with generic brands).

²¹⁹ Some of these arrangements come in the form of contracts between a tobacco company and a retailer, which offer incentive payments in exchange for marketing, stocking and displaying certain brands as determined by the tobacco company. Such arrangements are discussed in more detail in our technical report entitled Tobacco Product Display Bans (October 2010) *available at* http://www.tobaccopolicycenter.org/documents/CPHTP_Display_Report_October2010.pdf. While such incentive payments may be used by some retailers to reduce the price of tobacco products, the focus of this report is the price discount programs—or payments made by the industry to wholesalers and retailers specifically to reduce the price of cigarettes at the retail level.

²²⁰ TOBACCO CONTROL LEGAL CONSORTIUM, PRICE-RELATED PROMOTIONS FOR TOBACCO PRODUCTS: AN INTRODUCTION TO KEY TERMS & CONCEPTS 1, note 2 (2011), *available at* http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-pricerelatedpromotions-2011_0.pdf.

²²¹ *Id.*

²²² *See* Lorillard Tobacco Co. v. Roth, 786 N.E.2d 7, 9 (N.Y. 2003).

²²³ Master-type programs usually include other requirements imposed on the wholesaler, such as the stocking of certain products or maintaining a specific inventory of certain products. This report, however, will focus solely on the price discounting that occurs under these programs.

²²⁴ *See e.g.*, Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 503, 125 Stat. 786, 883 (2011) (restricting the use of federal grant funds to influence legislation at the federal, state or local level); Treas. Reg. § 56.4911-1 (general restrictions on lobbying for all nonprofit organizations).

²²⁵ *Id.*

²²⁶ *See* M. L. Nixon et al., *Tobacco Industry Litigation to Deter Local Public Health Ordinances: the Industry Usually Loses in Court*, 13 TOBACCO CONTROL 65, 65 (2004).

²²⁷ Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat 282 (codified as amended at 15 U.S.C. §§ 1331-1341 (2010)).

²²⁸ 15 U.S.C. §1334 (2012).

²²⁹ *Id.*

²³⁰ Nat'l Ass'n of Tobacco Outlets (NATO) v. City of Providence, 731 F.3d 71 (2013).

²³¹ N.Y.C., N.Y., Sensible Tobacco Enforcement Policies (Oct. 22, 2013).

²³² National Association of Tobacco Outlets Inc. et al. v. City of New York et al., case number 14-cv-00577(TPG) (S.D.N.Y. Mar. 3, 2014).

²³³ U.S. CONST. art. I, §8.

²³⁴ *See, e.g.*, Granholm v. Heald, 544 U.S. 460 (2005); West Lynn Creamery v. Healy, 512 U.S. 186 (1994); Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

²³⁵ *See* Chaloupka, *Effectiveness of Tax and Price Policies*, *supra* note 1.

²³⁶ FEDERATION OF TAX ADMINISTRATORS, STATE EXCISE TAX RATES ON CIGARETTES (2014), *available at* <http://www.taxadmin.org/fta/rate/cigarette.pdf>.

²³⁷ Ann Boonn, Campaign for Tobacco Free Kids, Map of State Cigarette Tax Rates, (December 3, 2013), <http://www.tobaccofreekids.org/research/factsheets/pdf/0222.pdf>.

²³⁸ Ann Boonn, Campaign for Tobacco Free Kids, State Cigarette Taxes, (December 3, 2013), <https://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf>.

²³⁹ Coalition for a Tobacco Free Vermont, Legislative Wrap-up 2011-2012, <http://www.tobaccofreevermont.org/legislative-wrap-up.html> (last visited April 14, 2014).

²⁴⁰ *See* Discussion of Little Cigars in Section III; *and* Press Release, Ctr. for Disease Control & Prevention, More than 40 Percent of Middle and High Schoolers who Smoke use Flavored Little Cigars or Flavored Cigarettes (Oct. 22, 2013), http://www.cdc.gov/media/releases/2013/p1022-flavored-cigarettes.html?utm_source=rss&utm_medium=rss&utm_campaign=more-than-40-percent-of-middle-and-high

schoolers-who-smoke-use-flavored-little-cigars-or-flavored-cigarettes; Ctr. for Disease Control & Prevention, *Youth Risk Behavior Surveillance – United States, 2011*, 61 MORBIDITY AND MORTALITY WEEKLY REPORT (2012), available at <http://www.cdc.gov/mmwr/pdf/ss/ss6104.pdf>; and Ctr. for Disease Control & Prevention, Smoking & Tobacco Use: Youth and Tobacco Use,

http://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/ (last visited April 22, 2014);

Consumption of Cigarettes and Combustible Tobacco, *supra* note 94.

²⁴¹ FDA, Tobacco Products: Compliance and Enforcement,

<http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm232109.htm> (““FDA conducts compliance check inspections of tobacco product retailers to determine a retailer’s compliance with federal laws and regulations, and generally issues Warning Letters for first-time violations. FDA generally issues civil money penalties for violations found on subsequent inspections.”) (last visited April 14, 2014).

²⁴² VT. STAT. ANN. tit. 7, § 1002 (2013)(tobacco license required to sell tobacco products); VT. STAT. ANN. tit. 18, § 4351 (1989) (any business where food is prepared and served must obtain a license from the Vermont Department of Health); VT. STAT. ANN. tit. 18, § 4356 (1959) (businesses licensed to prepare and sell food are subject to inspections by the health department).

²⁴³ FDA, Tobacco Products: Compliance and Enforcement

<http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm232109.htm> (““FDA conducts compliance check inspections of tobacco product retailers to determine a retailer’s compliance with federal laws and regulations, and generally issues Warning Letters for first-time violations. FDA generally issues civil money penalties for violations found on subsequent inspections.”)(last visited April 14, 2014).

²⁴⁴ FDA, FDA Tobacco Retail Inspection Contracts,

<http://www.fda.gov/TobaccoProducts/ResourcesforYou/ucm228914.htm> (last visited April 14, 2014).

²⁴⁵ FDA, FDA Tobacco Retail Inspection Contracts,

<http://www.fda.gov/TobaccoProducts/ResourcesforYou/ucm228914.htm> (last visited April 14, 2014).

²⁴⁶ Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub.L. 102-321 (1992); Substance Abuse and Mental Health Services Administration, Tobacco / Synar Program,

<http://www.samhsa.gov/prevention/synar.aspx>. The Synar Amendment requires States to implement and enforce laws prohibiting the sale and distribution of tobacco products to persons under 18. In order to remain eligible to receive funding under the Synar Amendment, Vermont must demonstrate a reduction in underage tobacco sales.

²⁴⁷ With exception to at least three municipalities with charters that seemingly permit local regulation of tobacco retailers. VT. STAT. ANN. tit. 24A § 151-8 (St. Johnsbury); VT. STAT. ANN. tit. 24A § 237-4 (Village of Lyndonville); and VT. STAT. ANN. tit. 24A § 285-4 (Village of Wells River).

²⁴⁸ License fees have been challenged as illegal taxes. While it is unclear how a Vermont court would decide this type of legal challenge, in an effort to avoid a legal challenge, license fees should be set at an amount that will fund the cost of administering and enforcing the licensing system. *See, e.g.*, *Suffolk Cnty Builders Ass’n v. Cnty of Suffolk*, 389 N.E.2d 133 (N.Y. 1979); *ATM One, L.L.C. v. Incorporated Village of Freeport*, 714 N.Y.S.2d 721 (N.Y. App. Div. 2000); *N.Y. Telephone Co. v. City of Amsterdam*, 613 N.Y.S.2d 993 (N.Y. App. Div. 1994); *Torsoe Bros. Construction Corp. v. Bd. of Trustees of Monroe*, 375 N.Y.S.2d 612 (N.Y. App. Div. 1975); *Town of N. Hempstead v. Colonial Sand & Gravel Co.*, 178 N.Y.S.2d 579 (N.Y. Sup. Ct. 1958); *Sperling v. Valentine*, 28 N.Y.S.2d 788 (N.Y. Sup. Ct. 1941); *Dugan Bros. of N. J. v. Dunnery*, 269 N.Y.S. 844 (N.Y. Sup. Ct. 1933). The current license fee for new Vermont tobacco retail license applicant is \$100.00. VT. STAT. ANN. tit. 7, § 1002(d) (2013).

²⁴⁹ *See Tobacco Taxes as a Tobacco Control Strategy*, *supra* note 171, at 172.

²⁵⁰ U.S. Dep’t of Health and Human Resources, Healthy People 2020,

<http://healthypeople.gov/2020/topicsobjectives2020/objectiveslist.aspx?topicId=41>(last visited April 3, 2014).

²⁵¹ *See Tobacco Taxes as a Tobacco Control Strategy*, *supra* note 171, at 172.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ CTR. FOR DISEASE CONTROL & PREVENTION, BEST PRACTICES FOR COMPREHENSIVE TOBACCO CONTROL PROGRAMS—2014 50, available at

http://www.cdc.gov/tobacco/stateandcommunity/best_practices/pdfs/2014/comprehensive.pdf.

²⁵⁵ *Impact of Cigarette Minimum Price Laws*, *supra* note 59, at 1.

²⁵⁶ Chaloupka, *Effectiveness of Tax and Price Policies*, *supra* note 1, at 235.

²⁵⁷ *Impact of Cigarette Minimum Price Laws*, *supra* note 59, at 1.

²⁵⁸ Chaloupka, *Effectiveness of Tax and Price Policies*, *supra* note 1, at 235.

²⁵⁹ *Impact of Cigarette Minimum Price Laws*, *supra* note 59, at 1.

²⁶⁰ Chaloupka, *Effectiveness of Tax and Price Policies*, *supra* note 1, at 235.



Providing legal expertise to support policies benefiting the public health.

The **Public Health and Tobacco Policy Center** is a legal research Center within the Public Health Advocacy Institute. Our shared goal is to support and enhance a commitment to public health in individuals and institutes who shape public policy through law. We are committed to research in public health law, public health policy development; to legal technical assistance; and to collaborative work at the intersection of law and public health. Our current areas of work include tobacco control and childhood obesity and chronic disease prevention. We are housed in Northeastern University School of Law.

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- work with the New York State Cancer Prevention Program to design policies to prevent cancer
- assist local governments and state legislators in their development of initiatives to reduce tobacco use
- develop model ordinances for local communities and model policies for businesses and school districts

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