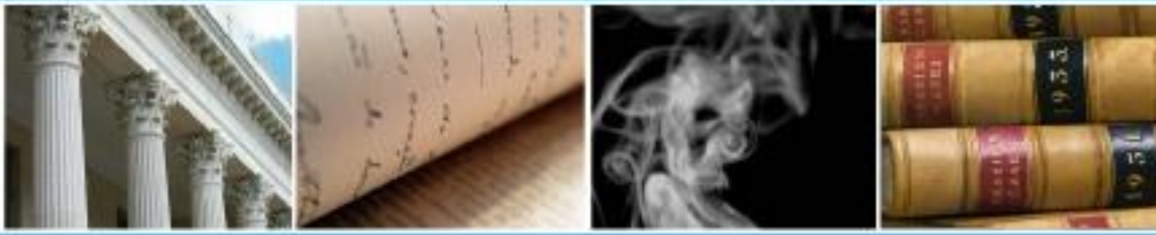
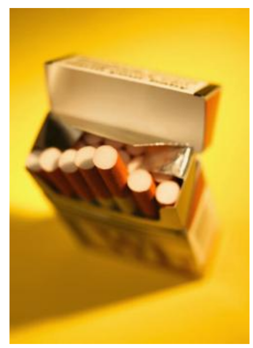


State Taxation of Cigarettes

The Tobacco Control Legal Consortium has created this series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures.[1] For more details about these policy considerations, please contact the Consortium.

Overview



State cigarette tax revenue is one of the most reliable and predictable types of state revenue. Generally, cigarette tax revenue tends to spike following a significant tax increase and then decline gradually as rates of youth and adult tobacco use drop in response to the increased price of cigarettes. Even though cigarette tax revenue declines gradually as tobacco use declines, the decline in revenue remains predictable and tends to be modest. The gradual reduction in tax revenue is more than compensated for by reductions in health care costs and other costs associated with tobacco use, even after taking into account increases in cigarette smuggling or tax evasion that might be triggered by a tax increase.

For example, a recent analysis of the predicted economic impact of a significant cigarette excise tax in Illinois found that effective implementation of a $1.00 per pack cigarette tax increase would produce a large, sustained increase in tobacco tax revenues by raising $377 million, preventing nearly 78,000 youth from becoming adult smokers, encouraging nearly 60,000 adults to quit smoking, and preventing up to 59,000 smoking-caused deaths.[2] Among the most significant public health benefits that result from increasing cigarette taxes are: (1) a decrease in youth smoking rates; (2) a reduction in the number of adults who become addicted to tobacco; (3) an increase in the number of adults who will quit; (4) a decrease in the number of smoking-affected births; (5) a reduction in the number of premature smoking-related deaths; (6) health savings from fewer smoking-affected pregnancies and births; (7) health savings from fewer heart attacks and strokes caused by smoking; and (8) long-term health savings from declines in adult and youth smoking rates.[3]

Under federal and state excise tax laws, cigarettes are taxed per unit/cigarette. The computation of the tax rate is often expressed in *mills*. A *mill* is the unit commonly used for cigarette excise tax rate calculation purposes, and is equal to 1/1000. [A tax of 24 mills would result in a tax of 48 cents per pack, calculated as follows: 0.001 x 24 mills per cigarette x 20 cigarettes/pack = 48 cents/pack.]

Cigarette excise tax rates and the procedures for tax collection are set out in federal and state tax laws. The federal cigarette excise tax rate was last increased on April 1, 2009, to $1.01 per pack.[4] By law, federal and state cigarette excise taxes are usually collected from manufacturers, wholesalers, or distributors. Collection of the tax is indicated by the presence of a tax stamp on each pack. Some states also allow local governments to levy excise taxes on cigarettes. Unlike federal and state excise taxes, local excise taxes and retail sales taxes are typically applied when a consumer purchases cigarettes.

A state's taxation of cigarettes often involves an intricate mix of inter-related taxes and fees. These may include an excise tax, a retail sales tax (or, as in Minnesota, a tax in lieu of a retail sales tax), a tax or fee in lieu of litigation settlements with the tobacco industry (applied to non-settling manufacturers to compensate partially for the lower prices of cigarettes produced by companies that were not litigants in the historic state lawsuits against tobacco companies), and other taxes or fees. The combination of some or all of a state's applicable cigarette taxes and fees are often described as though they are one—labeled informally for convenience's sake as *cigarette taxes* for discussion purposes and comparisons among states. Cigarette tax rates may be legislated as either permanent or temporary measures.

When analyzing a state's tobacco tax laws for possible reform, it is essential to examine the state's entire regulatory scheme affecting cigarettes and non-cigarette tobacco products (often called *other tobacco products* or *OTPs*), including not only tobacco tax laws but also licensing, retail sales, youth access, and other tobacco control measures. A thorough analysis of all state laws that affect tobacco is necessary to avoid missing critical components or making administrative errors that could jeopardize the intended revenue and public health outcomes. It also is important to ensure that any increase in the tax rate will be applied to all cigarettes held in the inventories of wholesalers and retailers on the date the new law takes effect. This is often done through a provision called a *floor stocks tax* or *inventory tax*—a one-time tax that is equal to the difference between the former tax rate and the newly enacted rate. Another important consideration, given the ease of transporting cigarettes and other tobacco products, is to be mindful of tobacco tax rates in neighboring jurisdictions, including bordering states and nations.

Current Federal and State Cigarette Excise Tax Rates

- All 50 states are subject to uniform federal cigarette excise tax rates. For federal excise tax purposes, cigarettes are categorized in two sizes, *small* and *large*. Different excise tax rates apply to the two sizes of cigarettes.
    - *Small cigarettes*, those that weigh 3 pounds or less per 1,000, are currently taxed at a rate of $1.01 per pack.

  - *Large cigarettes*, those that weigh more than 3 pounds per 1,000, are currently taxed at a rate of $2.11 per pack.
- All 50 states levy a separate, state-level cigarette excise tax. Generally, as at the federal level, state excise taxes are levied separately for small and large cigarettes. (Many summaries or comparisons of state cigarette excise taxes make reference only to the tax rate on small cigarettes. Presumably, this is because small cigarettes dominate the marketplace.)
- In the United States, cigarettes can be sold only in packs of twenty (20), pursuant to federal law.[5]
- Excise tax rates for small cigarettes vary widely among states, from a low of $0.17 (Missouri) to $4.35 (New York) per pack.[6]
- Not surprisingly, the major tobacco-producing states—Georgia, Kentucky, North Carolina, South Carolina, Tennessee and Virginia—have considerably lower cigarette excise tax rates than most other states, averaging $0.485 per pack.
- Currently, twenty nine (29) states, plus Washington, D.C., Puerto Rico, the Commonwealth of the Northern Mariana Islands, and Guam, have cigarette tax rates of at least $1.00 per pack.
- Fourteen (14) states, plus Washington, D.C., and Guam, have rates of at least $2.00 per pack, and five (5) states, plus Guam, have rates of $3.00 or more per pack.
- Five (5) states—Alaska, Michigan, Minnesota, Mississippi and Utah—levy separate taxes or fees on certain tobacco manufacturers—*non-participating manufacturers (NPMs)*—who did not participate in state tobacco lawsuit settlements.
- Some states, including Alaska, Illinois, Ohio and New York, allow local governments to levy separate cigarette taxes, which can substantially increase the overall price of a pack of cigarettes. Currently, New York City has the highest combined state and local tax rate ($5.85 per pack). The second highest combined rate is in Chicago, Illinois ($3.66 per pack).

Related Facts

- Generally, cigarette excise taxes constitute most of the retail cost of cigarettes.
- At least twenty four (24) states (Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Dakota, Utah and Washington) apply a portion of their cigarette tax revenue to fund state tobacco control programs.[7]
- Cigarette smoking costs the United States about $193 billion per year, including $96 billion in health care expenditures and $97 billion in lost productivity. In addition, secondhand smoke costs the U.S. more than $10 billion per year in health care expenditures, morbidity and mortality. The total economic costs associated with cigarette smoking (the combination of direct medical costs and lost productivity) are estimated at $10.47 per pack sold in the U.S.[8]
- State spending on tobacco control does not meet the funding levels recommended by the U.S. Centers for Disease Control and Prevention (CDC). States are using a very small percentage of their revenue from tobacco excise taxes and legal settlements to fund state tobacco control programs; at present, only two states, Alaska and North

Dakota, are fully funded. In 2011, states were projected to collect about $25.3 billion from tobacco taxes and legal settlements, but to spend only 2 percent of that amount on tobacco control programs. Investing 15 percent (about $3.7 billion) of the projected 2011 revenue would fund every state's tobacco control program at CDC-recommended levels.[9]

- In many jurisdictions, consumers are able to avoid paying the higher price of cigarettes resulting from the imposition of excise taxes by switching to the use of so-called little cigars, roll-your-own (RYO) tobacco, pipe tobacco (which often is used as a substitute for RYO), and cigarette rolling papers. These products are rarely subject to cigarette excise taxes; instead, they are typically taxed separately as non-cigarette tobacco products at much lower rates than cigarettes.[10]

Policy Rationale

As discussed earlier, the public health rationale for raising cigarette excise tax rates is that increases in the price of cigarettes reduce consumer demand for cigarettes and therefore lead to significant reductions in the prevalence of smoking, consumption, and youth initiation. After many years of steady decline, the rate of smoking among adults in the U.S. has stalled, and cigarette smoking remains the leading preventable cause of death in this country. Excise tax increases are the most effective intervention a government can take to increase the price of cigarettes. For example, a ten percent (10%) increase in price has been estimated to reduce overall consumption of cigarettes among youth and young adults by about four percent (4%).[11] Price increases also can significantly reduce the prevalence of smoking by motivating current smokers to quit and by reducing the number of people who begin smoking.[12]

Policy Options

The following policy options are designed to advance the overall public health goals of reducing tobacco use, death and disease, health care costs, and lost productivity caused by smoking, by closing existing tax loopholes and strengthening the health and economic impact of tax policies. As noted earlier, it is essential to consider increases in non-cigarette tobacco tax rates and options for achieving parallel rates of taxation whenever a state is considering an increase in cigarette excise tax rates. For more information, see the Consortium's companion Tips and Tools publication on *State Taxation of Non-Cigarette Tobacco Products*.

- **Raise state cigarette excise taxes by at least ten percent (10%) of a state's average retail price per pack to achieve public health benefits.** Excise tax increases of less than ten percent (10%) of a state's average retail price per pack of cigarettes do not produce significant public health gains or economic cost savings. Increases that are split into small, multi-staged (staggered) steps also fail to produce significant public health benefits.[13] In large part, this is because manufacturers are able to counteract small increases in the cigarette excise tax rate by using an arsenal of pricing strategies including coupons, retail value-added promotions (i.e., "buy one get one free" deals), temporary price cuts, volume discounts, and other price promotions that lower the price ultimately paid by consumers.[14] To achieve strong public health benefits, states need to significantly increase the excise tax rate each time the rate is amended. Every state that has significantly increased its cigarette tax has experienced a substantial, sustained increase in cigarette tax revenues.[15]

- **Amend the definition of *cigarette* to include so-called *little cigars*.** Little cigars are essentially cigarettes in all but their name. Although they are labeled as cigars, they share key characteristics of cigarettes in size, weight, packaging, marketing, and consumption. Like regular cigarettes, little cigars are mass-produced on cigarette rolling machines and are sold in packs of twenty (20). They are virtually indistinguishable from regular cigarettes in appearance, except that the individual cigarette paper wrappers are brown instead of white because a minimal amount of tobacco pulp is incorporated into the manufacture of their wrappers. Nearly all little cigars contain cigarette-like filters made of cellulose acetate or similar material. Currently, little cigars are taxed as cigars under federal law and most state laws. The public health rationale for reclassification is that they should be taxed based on what they truly are—cigarettes—and how they are marketed to and experienced by consumers, not by how they are named.

  In response to cigarette price increases in recent years, due largely to excise tax increases, the tobacco industry has marketed little cigars aggressively as a low-cost alternative to regular cigarettes, and cost-sensitive consumers have responded by switching to these products. As discussed in the next section on Policy Elements, the definition of *cigarette* in state cigarette excise tax laws can be amended slightly to include most, if not all, of the products currently being marketed as little cigars.

  Although beyond the scope of this tax-focused summary, it bears noting that there are other important policy reasons for classifying little cigars as cigarettes. At present, little cigars are exempt from sales and cigarette product regulations related to flavorings, packaging, and marketing, by virtue of being classified as cigars rather than as cigarettes. Classifying these products as cigarettes across the board will allow states to close these loopholes.

- **Tax RYO and other loose tobacco at the same rate that is applied to a pack of cigarettes.** To prevent the loss of tax revenue that occurs when cost-sensitive consumers switch to RYO tobacco or pipe tobacco in response to increases in cigarette excise taxes,[16] states can tax RYO in an amount that is equal to the state tax rate on regular cigarettes. Cigarettes made from RYO tobacco are much cheaper than standard, manufactured cigarettes. This is because most states tax RYO tobacco as a "tobacco product" at a percentage-of-price tax rate (e.g., thirty five percent (35%) of the price paid by a wholesaler or distributor for the product), that subjects RYO tobacco to a much lower tax rate than the cigarette tax rate. This problem can be fixed by taxing a cigarette pack's worth of RYO tobacco at the same tax rate as a standard pack of cigarettes.

- **Adjust the cigarette excise tax rate periodically to protect against inflation.** A state can address concerns about inflation by amending its existing law to build in automatic, periodic review of its tax rates on cigarettes and non-cigarette tobacco products. By doing so, states will ensure that the real value of the taxes—and the public health benefits—are maintained.

- **Adjust penalty and fee provisions periodically to protect against inflation or take into account increases in the price of cigarettes.** A state also can amend existing penalty, license, permit, or fee provisions to build in automatic adjustments to account for increases in general inflation or increases in the average price of cigarettes over a given period of time.

- **Include a floor stocks or inventory tax in any proposal to increase the cigarette excise tax rate.** Making a tax rate take effect as soon as possible after enactment will enhance the revenue impact by limiting the ability of distributors, retailers, or consumers to stock up on lower-taxed cigarettes for weeks or months before an increase takes effect. This problem can be minimized by also including a floor stocks or inventory tax provision, which applies a tax that is equal to the difference between the former tax and the new tax on all products in distributors' and retailers' inventories, effective on the date of enactment.

- **Make sure that any tax discount provided under state law to distributors or wholesalers responsible for stamping cigarettes (typically provided to help cover their costs for applying the tax stamps) is reviewed and adjusted, if appropriate, to account for a cigarette tax increase and avoid unintended windfalls.** If no adjustment is made, distributors or wholesalers who are responsible for applying the tax stamp may receive an unintended windfall, since an increase in the excise tax would not necessarily trigger a corresponding increase in the cost of applying the tax stamps. If there is no additional cost incurred for applying the tax stamps, there is no justification to increase the tax discount.

- **Allow cities and counties to tax cigarettes.** Unless preempted by state law, cities and counties may impose separate excise taxes on cigarettes and OTPs. Relatively few cities and counties in the U.S. have taken this step, but there are some notable exceptions, among them New York City ($1.50/pack), Chicago ($0.68) and Cook County ($2.00), wherein Chicago resides, and Anchorage ($2.206). Combined with the applicable state excise tax rates, local excise taxes can have a substantial impact on public health and revenue, particularly in areas known to have disproportionately high rates of tobacco use.

- **Allocate a portion of the cigarette excise tax revenue to state tobacco control programs at CDC-recommended funding levels.** Funding and implementing a state comprehensive tobacco control program is foremost among the CDC's recommendations for eliminating tobacco as a public health problem in the nation. Comprehensive programs can have the effect of changing social norms regarding the acceptability of smoking and are considered necessary to substantially reduce tobacco

use over time.[17] "Evidence-based, statewide tobacco control programs that are comprehensive, sustained, and accountable have been shown to reduce smoking rates, tobacco-related deaths, and diseases caused by smoking."[18]
The more states spend on *sustained* comprehensive tobacco control programs, the greater the reduction in smoking—the longer states continue to invest in these programs, the greater and quicker the impact. States with comprehensive programs have seen cigarette sales drop by more than twice as much as in the U.S. as a whole.[19] The following states have implemented comprehensive tobacco control programs: California, Indiana, Maine, Massachusetts, New York, Texas, and Washington.

Policy Elements

Loopholes in state cigarette tax laws can be eliminated and public health policy goals strengthened by amending the state laws. Below are some key elements for several of the policy options discussed above:

- **Amend the excise tax definition of "cigarette" to include "little cigars."** State excise tax definitions of "cigarette" and "cigar" tend to be very similar to the federal excise tax definitions. "Cigarette" is defined under federal law as: "(1) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (2) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filter, or its packaging or labeling, is likely to be offered to, or purchased by consumers as a cigarette described in paragraph (1)."[20] "Cigar" is defined under federal law as: "any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco (other than any roll of tobacco which is a cigarette within the meaning of subsection (b)(2))."[21]

  At the state level, the definition of "cigarette" for excise tax purposes can be amended to encompass so-called little cigars, by including the following elements:

  (1) Increase the upper weight limit to include any roll for smoking that weighs 4.5 pounds or less per thousand;
  (2) Provide that any roll for smoking that meets this weight specification may be wrapped in paper or another substance other than tobacco, or in any substance, including tobacco, regardless of how the roll is labeled or named which, because of its appearance, size, the type of tobacco used in the filler, or its packaging, pricing, marketing, or labeling, is likely to be offered to or purchased by consumers as a cigarette; and
  (3) Exclude any such roll that is wrapped in whole tobacco leaf and does not have a cellulose acetate or other cigarette-like filter.

  The rationale for increasing the weight limit to 4.5 pounds or less per thousand is to prevent manufacturers from being able to manipulate the weight of so-called little cigars to avoid taxation as cigarettes. Cigarette rolling machines are able to accommodate up to that weight limit. This weight limit also contemplates that a product that weighs more than 4.5 pounds per thousand is likely too large to resemble a cigarette. The suggested amendments regarding the composition of cigarette wrappers provides that wrappers can be made of paper and/or other substances, including paper that includes tobacco pulp, but excludes cigars that that are wrapped in a whole tobacco leaf and do not have a cigarette-like filter.

An alternative approach was taken by the State of New York, which amended its tax law, effective August 1, 2010, to tax little cigars at the same rate as cigarettes (Part D of Chapter 134 of the Laws of 2010). Instead of changing the definition of "cigarette" to incorporate little cigars, New York legislators enacted legislation creating a new definition of "little cigar" to mean "any roll for smoking made wholly or in part of tobacco if such product is wrapped in any substance containing tobacco, other than natural leaf tobacco wrapper, and weighing not more than four pounds per thousand or with a cellulose acetate or other integrated filter" (§470, 2-b). Section 471-b(1)(c) of the tax law sets the tax on little cigars at the same rate imposed on cigarettes.

- **Tax RYO and other loose tobacco at the same rate as cigarettes.** Currently, no federal regulatory standard is in place to clearly differentiate RYO tobacco from pipe tobacco. The Internal Revenue Code (IRC), 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."[22] "Pipe tobacco" is defined similarly 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 to be smoked in a pipe."[23]

  These definitions are ambiguous, in that they leave open the possibility that products may be packaged, promoted, offered for sale, or viewed by consumers as suitable either for RYO purposes or to be smoked in a pipe. At the state level, RYO tobacco and pipe tobacco tend to be listed as products that come within the general definition of "tobacco product" and taxed accordingly, either on a weight-based or percentage-of-price (*ad valorem*) basis.

  Taxing RYO, pipe, or other loose tobacco at the same rate as cigarettes involves consideration of multiple components.

  - *Defining RYO*. As in the following sample language, a state's definition of RYO should cover the expected and actual use of RYO or pipe tobacco by consumers for rolling cigarettes or other rolls of tobacco products intended for smoking:

    - "Roll-your-own tobacco" means "any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use <u>or</u> expected or likely to be offered to, or purchased <u>or used</u> by, consumers as tobacco for making cigarettes or any other rolls of tobacco <u>for smoking</u>."

- *Calculating the RYO tax rate to be comparable to the cigarette tax rate, either by setting the RYO rate or by statutorily assigning the responsibility for setting the rate to the appropriate state agency.* A RYO cigarette uses about 0.0325 ounces of loose tobacco, or 0.65 ounces for 20 cigarettes. A state can require a state agency (e.g., a state's commissioner of revenue) to set the tax rate for RYO tobacco annually to parallel the state's cigarette tax, applying an average weight of 0.0325 ounces of RYO tobacco per cigarette. By taking this approach, the rate will automatically be increased whenever the standard cigarette tax rate is increased, eliminating the need to further amend the law for this purpose.

- *Taxing pipe tobacco at the same tax rate as RYO tobacco.* Pipe tobacco is used as a substitute for RYO tobacco to make inexpensive cigarettes. For this reason, sales of pipe tobacco have been increasing steadily as the cost of cigarettes has increased. As such, proposals to tax pipe tobacco at the same tax rate as RYO tobacco are beginning to gain momentum. A state revenue department or another state agency can be required statutorily to set an annual rate, as discussed above.

- **Adjust the cigarette tax rate to account for inflation.** Language crafted for this purpose should identify the department of state government (e.g., a revenue department) responsible for adjusting the rate, state the date the new rate takes effect, and specify the interval of time for periodic review and adjustments, such as every two years. The policy should account for price increases to an average pack of cigarettes over a set period of time (e.g., the prior calendar year); it can based on the consumer price index for cigarettes or other reliable trend data available to the department that is charged with the responsibility of adjusting the rate.

- **Include a cigarette inventory or floor stocks tax.** As discussed above, a cigarette inventory or floor stocks tax is a one-time tax imposed by a state on cigarette distributors, manufacturers, manufacturers' representatives, wholesalers, and retailers. The tax applies to packs of cigarettes that are held in inventory before being sold to consumers, including packs that already have been stamped. The calculation of the tax is simply the difference between the former tax rate and the new tax rate.

- **Allocate a portion of cigarette excise tax revenue to state tobacco control programs.** In its seminal report, *Ending the Tobacco Problem: A Blueprint for the Nation*, the Institute of Medicine (IOM) determined that the goal of reducing smoking to the point that it ceases to be a significant public health problem for the country can be achieved with a two-pronged strategy: (1) strengthening and fully implementing certain interventions, as described below; and (2) changing the regulatory policies affecting tobacco products.[24] The CDC concurs with the IOM, as noted in the components of its recommendations, described below:

- Earmark and protect a portion of tobacco tax revenue for comprehensive tobacco prevention and control programs, including funds for media/counter-marketing and other health communications;
- Coordinate and collaborate with federal (and state) agencies that are working toward similar goals, including the CDC; and
- Clearly articulate goals to prevent youth initiation of tobacco use, promote cessation among current users, eliminate exposure to tobacco smoke, and identify and eliminate disparities in tobacco use and access to cessation treatment.[25]

The CDC further recommends that a statewide, sustained comprehensive tobacco control program should include the following interventions:

- Increase the price of cigarettes and other tobacco products by increasing excise tax rates;
- Implement smoke-free and tobacco-free policies;
- Reduce tobacco advertising and promotion;
- Control access to tobacco products; and
- Promote cessation and assist tobacco users in their efforts to quit.
- The CDC also recommends that tobacco control and prevention programs should operate at state and community levels and include surveillance, evaluation, administration, and management components.[26]

Policy Challenges

Regressive or progressive? Policymakers contemplating making significant increases to a state's cigarette tax rates, reclassifying products for excise tax purposes, or taxing some or all non-cigarette tobacco products at roughly the same rate as cigarettes must be prepared to respond to opponents' claims that tax increases are regressive. At a rudimentary level, tobacco excise taxes are always regressive because they have a disproportionate impact on price-sensitive, low-income individuals, by absorbing a larger proportion of their limited resources. Regressivity arguments can be countered effectively by emphasizing the important ways in which tobacco tax increases are progressive—in that they reduce consumption, initiation, and the substantial health and economic harms tobacco causes—and by emphasizing that the short- and long-term public health benefits of tobacco tax reforms far outweigh any claimed economic injustice. Evidence that direct medical and lost productivity costs associated with tobacco use total about $10.47 per pack sold in the U.S. can be persuasive.[27]

Addressing the perception that raising excise taxes will lead many consumers to change their customary venues for purchasing cigarettes. Most smokers continue to purchase cigarettes at customary store locations as a matter of convenience and habit, and do not bother to try to avoid excise tax increases by switching to buying cigarettes from a neighboring state with lower rates. Buying cigarettes from a remote location tends to require advance planning, a practice that runs counter to the habits of most consumers of tobacco products.

Authority of states to collect taxes on cigarette sales made on reservation land to non-Indian tribe members. In 2010, the New York State Legislature enacted a law requiring collection of taxes on tribes' cigarettes sales to non-tribal members, while allowing sales to qualified tribal members for their own use to remain tax-free.[28] Several tribes sued New York in federal district court to halt enforcement of the new law, claiming that it violated tribal sovereignty and would cause irreparable harm.[29] The State asserted that the law sought to balance the interests of tribal sovereignty with the State's legitimate interest in collecting excise taxes on all cigarette sales made to non-tribal members by closing a huge tax-evasion loophole that was costing the State hundreds of millions of dollars of tax revenue. The State estimated that the law would enable it to collect roughly $500,000 per day in additional tax revenue and advance important public health goals related to tobacco use and related costs. The U.S. Court of Appeals for the Second Circuit accepted the State's arguments and issued a unanimous decision vacating the stay of enforcement, ruling that under settled U.S. Supreme Court decisions, the tribes had no chance of success on the merits.[30] The U.S. Supreme Court has ruled similarly in four cases involving four other states.[31]

Helpful Resources

The website for the Campaign for Tobacco-Free Kids posts timely news, reports and related resources on cigarette and OTP taxes. For guidance on health and economic harms associated with smoking and other forms of tobacco use, we encourage you to visit the CDC's website on smoking and tobacco use facts.

Contact Us

Please feel free to contact the Tobacco Control Legal Consortium with any questions about the information included in this guide or to discuss local concerns you may have about the taxation of cigarettes or non-cigarette tobacco products.

Last updated: February 2012

Notes

[1] The information contained in this document is not intended to constitute or replace legal advice.

[2] FRANK J. CHALOUPKA & JIDONG HUANG, A SIGNIFICANT CIGARETTE TAX RATE INCREASE IN ILLINOIS WOULD PRODUCE A LARGE SUSTAINED INCREASE IN STATE TOBACCO TAX REVENUES 1 (2011), *available at* http://www.ihrp.uic.edu/files/IL%20Chaloupka-Huang%20report%201-3-11.pdf [hereinafter CHALOUPKA].

[3] *Id.* at 6–7.

[4] Natasha Jamison et al., Ctrs. for Disease Control & Prevention, *Federal and State Cigarette Excise Taxes - United States, 1995-2009*, 58 MORBIDITY & MORTALITY WEEKLY REP. 19, 524–27 (2009), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5819a2.htm. The

federal cigarette excise tax has been increased periodically over time. Since 2005, it has been increased three times. The federal cigarette excise tax was increased most recently from 39 cents (January 1, 2002) to $1.01 on April 1, 2009, as a funding mechanism for the State Children's Health Insurance Program (SCHIP). Overall, the federal cigarette excise tax has increased by 321% since December 1995. *Id.*

[5] Family Smoking Prevention & Control Act of 2009, 21 U.S.C.A. §§ 301 et. seq., § 102 (2010); 21 C.F.R. § 1140.16(b) (2010).

[6] *See* ANN BOONN, CAMPAIGN FOR TOBACCO-FREE KIDS, STATE CIGARETTE TAX RATES & RANK, DATE OF LAST INCREASE, ANNUAL PACK SALES & REVENUES, AND RELATED DATA (2012), *available at* http://www.tobaccofreekids.org/research/factsheets/pdf/0099.pdf.

[7] NAT'L CONFERENCE OF STATE LEGISLATORS, STATE CIGARETTE EXCISE TAXES: 2010 (2010), *available* at http://www.ncsl.org/issues-research/health/2010-state-cigarette-excise-taxes.aspx (citing AM. LUNG ASS'N, STATE LEGISLATED ACTIONS ON TOBACCO ISSUES 2010, DATABASE (2010), *available at* http://www.lungusa2.org/slati/search.php). *See also* MATTHEW C. FARRELLY ET AL., NAT'L BUREAU OF ECON. RESEARCH, IMPACT OF TOBACCO CONTROL PROGRAM EXPENDITURES ON AGGREGATE CIGARETTE SALES 1981–1998, at 3–4 (2001), *available at* http://tigger.uic.edu/~fjc/Presentations/Papers/NBERw8691.pdf.

[8] CTRS. FOR DISEASE CONTROL & PREVENTION, ECONOMIC FACTS ABOUT U.S. TOBACCO PRODUCTION AND USE, *available at* http://www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/index.htm (last updated Mar. 21, 2011) [hereinafter CDC ECONOMIC FACTS].

[9] CTRS. FOR DISEASE CONTROL & PREVENTION, FAST FACTS: COSTS AND EXPENDITURES, *available at* http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/ (last updated Jan. 24, 2011).

[10] *See e.g.*, *State: Lawmakers Seek to Tax Roll-Your-Own Cigarettes*, THE DAILY J., Feb. 28, 2012, *available at* http://www.daily-journal.com/archives/dj/display.php?id=487553 ("A Department of Revenue official testified Thursday that there are 60 roll-your-own machines in Illinois. He estimated that, because the cigarette tax is not being paid on roll-your-own cigarettes, the state lost out on $10.7 million in potential revenue this year.")

[11] CDC ECONOMIC FACTS, *supra* note 8.

[12] *Id*.

[13] CHALOUPKA, *supra* note 2, at 3.

[14] *See* TOBACCO CONTROL LEGAL CONSORTIUM, PRICE-RELATED PROMOTIONS FOR TOBACCO PRODUCTS: AN INTRODUCTION TO KEY TERMS & CONCEPTS (2011), *available at* http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-pricerelatedpromotions-2011_0.pdf (last updated July 2011).

[15] CHALOUPKA, *supra* note 2, at 4.

[16] For more information, *see* the Consortium's fact sheet and Tips and Tools publications on RYO tobacco machines and options for regulating them.

[17] CTRS. FOR DISEASE CONTROL & PREVENTION, BEST PRACTICES FOR COMPREHENSIVE TOBACCO CONTROL PROGRAMS 22 (2007), *available at* http://www.cdc.gov/tobacco/stateandcommunity/best_practices/pdfs/2007/BestPractices_Complet

e.pdf. *See also* Michael Tynan et. al., CTRS. FOR DISEASE CONTROL & PREVENTION, *CDC Grand Rounds: Current Opportunities in Tobacco Control*, 59 MORBIDITY & MORTALITY WKLY. REP. 487 (2010), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5916a3.htm.

[18] CTRS. FOR DISEASE CONTROL & PREVENTION, TOBACCO USE: TARGETING THE NATION'S LEADING KILLER, AT A GLANCE 2011, at 2 (2011), *available at* http://www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2011/Tobacco_AAG_2011_508.pdf.

[19] U.S. DEP'T OF HEALTH & HUM. SERVS., NAT'L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, CTRS. FOR DISEASE CONTROL & PREVENTION, OFFICE ON SMOKING & HEALTH, TOBACCO CONTROL STATE HIGHLIGHTS 2010, at 1, 10 (2010), *available at* http://www.cdc.gov/tobacco/data_statistics/state_data/state_highlights/2010/pdfs/highlights2010.pdf [hereinafter CDC STATE HIGHLIGHTS].

[20] 26 U.S.C. § 5702(b).

[21] 26 U.S.C. § 5702(a)

[22] 26 U.S.C. § 5702(o).

[23] 26 U.S.C. § 5702(n).

[24] INST. OF MEDICINE, ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION (2007), *available at* http://www.iom.edu/Reports/2007/Ending-the-Tobacco-Problem-A-Blueprint-for-the-Nation.aspx.

[25] CDC STATE HIGHLIGHTS, *supra* note 19, at 2.

[26] *Id.* at 10.

[27] CDC ECONOMIC FACTS, *supra* note 8.

[28] N.Y. Tax Law § 471-E (2010)

[29] Oneida Nation of New York v. Paterson, No. 6:10-CV-1071, 2010 WL 4053080 (N.D.N.Y. October 14, 2010)

[30] Oneida Nation of New York v. Cuomo, 645 F.3d 154 (2d. Cir. 2011).

[31] Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Wash. v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976).