

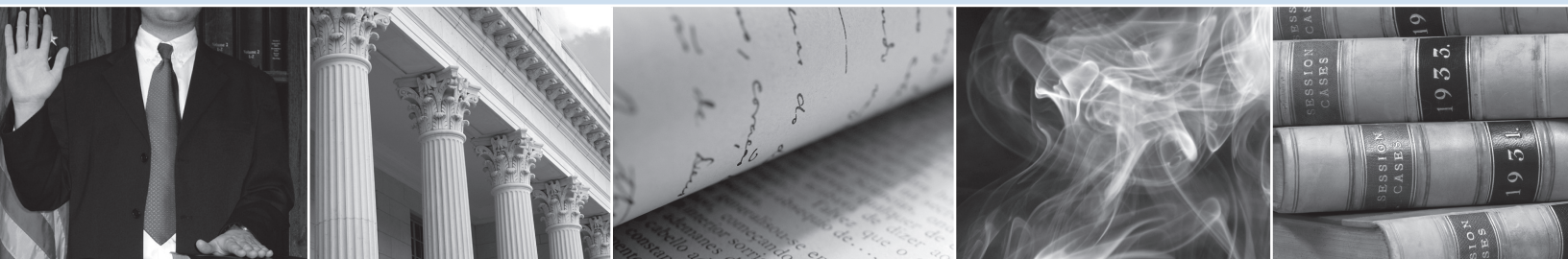
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Applying Tobacco Control Lessons to Obesity: Taxes and Other Pricing Strategies to Reduce Consumption

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Key Points

- Tobacco consumption responds to price changes. Higher taxes reduce consumption and prevalence, especially among youth and the poor. Higher taxes also raise government revenue that may be dedicated to tobacco control or other public health initiatives.
- Most tax increases are justified on policy and economic grounds. The legality of tax increases is not generally a significant issue, unlike restrictions on advertising and marketing, which often spark First Amendment commercial speech debates.
- The tobacco industry, concerned with long-term profitability, has responded to tax increases with a variety of discounting practices. Tobacco control advocates could respond more aggressively to this strategy by adopting laws to restrict discount tools, such as coupons, multi-pack discounts, and other price discounts, including removing their protection under minimum pricing laws. Although the industry may argue that limits on discounts raise First Amendment issues, this argument should not be persuasive because laws pertaining to pricing and discount practices do not implicate the commercial speech doctrine. Such laws only need to be rationally related to a legitimate public health purpose (e.g., reducing consumption) to withstand a court challenge.
- Proposed taxes on sugar-sweetened beverages raise many of the same policy and legal issues as tobacco taxes. The food industry's arguments against them are also similar to those of the tobacco industry. Tax increases, as well as any laws limiting industry discounting practices, do not implicate the First Amendment and are legally defensible as reasonable measures to reduce consumption.
- Higher taxes on sugar-sweetened beverages, at least as a first step, may currently be more politically palatable and justifiable than a potentially difficult to define and administer tax on snack foods.
- The successful strategy of dedicating a portion of tax increases to public health programs, including subsidies for healthier options, should be part of the legal policy model for taxing sugar-sweetened beverages or snack foods.

Introduction

Public health advocates, particularly those focused on chronic disease prevention, are actively exploring whether and how policy interventions tested in tobacco control apply to the obesity epidemic.¹ Today tobacco use and obesity are among the leading causes of chronic disease and death in the United States.² The tobacco and obesity epidemics are similar in several ways. For instance, both tobacco use and the consumption of high-calorie, low-nutrition foods and beverages are:³

- Major contributors to rising health care costs;
- Marketed aggressively by industries, especially to youth; and
- Likely to adversely affect low income people.

Important distinctions are also evident. For example, unlike food and beverages, which must be consumed daily, no amount of cigarettes needs to be consumed or can be safely consumed.⁴ Physical exercise may limit the adverse effects of consuming unhealthy high-calorie food and beverages, but no effective counter measure exists to reduce the harmful effects of smoking. Indeed, if only one tobacco control principle can be applied to obesity prevention, it is that a tested array of policies—rather than a single strategy—must be consistently implemented to produce significant, sustainable results.⁵

Nonetheless, price controls—especially taxes—appear to be a particularly promising intervention in both these public health areas. Taxes are identified as the most effective element in the package of six priority strategies recommended by the World Health Organization to prevent millions of tobacco-induced premature deaths and illnesses.⁶ The U.S. Surgeon General has also concluded that large increases in cigarette taxes, as well as taxes on other tobacco products, are one of the most effective methods of reducing tobacco use.⁷ Moreover, as in tobacco control, proposals to tax

sugar-sweetened beverages to reduce consumption and reverse obesity trends are beginning to gain momentum as a public health tool.

Section I of this synopsis summarizes the salient lessons learned about taxes as a legal intervention to reduce tobacco consumption. Section II considers the potential impact of increased taxes on sugar-sweetened beverages, and possibly snack foods, from a legal and policy perspective. Section III explores potential parallels between dedicated revenue plans for tobacco taxes and the earmarking of sugar-sweetened beverage tax increases for obesity prevention.

Section I – Tobacco Price Controls and Consumption

Numerous studies have demonstrated that the demand for cigarettes is predictably price sensitive.⁸ In the United States, a 10 percent cigarette price increase reduces overall consumption by approximately 4 percent.⁹ Both the number of smokers and the number of cigarettes smoked decrease when prices go up.¹⁰ Moreover, due to the addictive nature of smoking, the initial impact of a price hike doubles over time as smokers make gradual adjustments.¹¹

A. Taxes

Smokers respond to tax increases in a variety of ways, including cutting back consumption, quitting, and avoiding relapse. Price-induced declines in youth smoking are even greater than for adults, with a 10 percent price increase reducing the number of underage smokers by as much as 6 or 7 percent.¹²

The tobacco industry clearly understands the negative impact of cigarette prices on consumption and has prioritized opposing tax increases.

Of all the concerns, there is one—taxation—that alarms us the most. While marketing restrictions and public and passive smoking

[restrictions] do suppress volume, in our experience taxation depresses it more severely. Our concern for taxation is, therefore, central to our thinking¹³

Sharp increases in cigarette excise taxes have played a significant role in curtailing smoking.¹⁴ Economic studies have shown that increases in cigarette taxes reduce both adult and underage smoking rates.¹⁵ In 2009, the Centers for Disease Control and Prevention tallied recent increases in state and federal excise taxes on cigarettes, touting their effectiveness as a tool to decrease tobacco consumption.¹⁶

State Taxes

All states and the District of Columbia currently levy an excise tax on cigarettes.¹⁷ Tax rates vary, with tobacco-growing states in the Southeast heavily represented on the low end (e.g., South Carolina at \$0.07 per pack) and several states in the Northeast leading the nation (e.g., Rhode Island at \$3.46 per pack).¹⁸ States raise their cigarette excise taxes relatively often, with forty-six states imposing increases since 2002 and fourteen states and the District of Columbia raising their excise taxes in 2009 alone.¹⁹ Only a handful of states have not raised their cigarette taxes over the past ten years.²⁰

Why do states repeatedly raise tobacco taxes? States have learned that significant tobacco tax increases are a reliable tool for both reducing tobacco consumption and raising revenue. In a rebuttal to industry claims that states will lose revenue if they adopt tobacco tax increases, the Campaign for Tobacco-Free Kids reports:

Every state that has significantly increased its cigarette tax has enjoyed substantial increases in revenue, even while reducing smoking. These funds have helped states balance budgets and fund essential services like health care and tobacco prevention programs Higher cigarette taxes also save money by reducing smoking-caused health care costs.²¹

Furthermore, public support for tobacco taxes is relatively high, as public opinion polls show.²² For example, a 2008 tobacco excise tax increase campaign was supported by 63 percent of Massachusetts voters.²³ Taxpayer support grows, even among smokers, when revenue from the increase is slated to pay for tobacco control or health prevention programs.²⁴ In Massachusetts, for example, 74 percent of those polled approved of a tax increase dedicated to tobacco prevention and health care.²⁵

The states have also led the way in dedicating tobacco tax increases to public health. For instance, as early as 1988, California raised its cigarette tax by 25 cents per pack through a voter initiative and earmarked 25 percent of the increased revenue to tobacco control programs.²⁶ Shortly thereafter, in 1992, Massachusetts citizens approved a similar ballot initiative, imposing a 25 cent per pack increase in the cigarette tax and dedicating a portion to tobacco control and prevention programs.²⁷ Support for these sizeable increases with dedicated revenue represents some of the strongest evidence that the public understands and endorses the link between increased taxes and public health goals.

Some localities also tax cigarettes and other tobacco products.²⁸ In 2002, the City of New York imposed a steep increase in its cigarette tax, raising it from 8 cents to \$1.50 per pack.²⁹ Moreover, public health



was the primary policy rationale advanced in favor of the increase. Cook County, Illinois (comprising Chicago and its surrounding area) has also raised its cigarette tax twice in recent years.³⁰ This local increase, which appeared to be primarily motivated by a desire for additional revenue, was amplified by a separate tax increase in the City of Chicago, making cigarettes in the Chicago area among the most expensive in the nation.³¹

Federal Excise Tax

Initially adopted as a revenue-raising measure under Congress's general taxing and spending authority under Article I of the U.S. Constitution, a federal excise tax on cigarettes has been in place since 1864. In 2009, following the states' lead, and in recognition of taxation's value as a public health measure, Congress raised the federal cigarette tax from its 1995 level of \$0.24 to \$1.01 per pack, constituting the largest historic federal tax increase for tobacco products.³² Coupled with an average state excise tax of \$1.20 per pack, the most recent federal increase reached the public health goal of imposing a combined federal and state average tax of at least \$2.00 per pack of cigarettes.³³ Furthermore, revenue from the 2009 federal excise tax increase is specifically dedicated to paying for health care for children lacking health insurance under the Children's Health Insurance Program ("CHIP").³⁴

B. Minimum Price Laws

State minimum price laws, which exist in approximately half the states, have also been analyzed as a tobacco control measure.³⁵ These laws, which were adopted to protect small retailers from the pricing power of large competitors, generally establish a minimum resale price for the sale of cigarettes (or tobacco) at the wholesale and resale levels.³⁶ However, the effectiveness of such laws in setting a price floor at the retail level remains in question.³⁷ A 2001 research study comparing the retail price of cigarettes in states with minimum pricing laws to those in states without such laws found no significant differences.³⁸ Moreover,

the researchers suggested that the inclusion of industry discounts in the price setting formula may explain why minimum price laws appear to have no appreciable impact on retail prices.³⁹

New York was the only state examined in the 2001 study that did not permit trade discounts to alter its minimum cigarette price formula, and it reportedly had the highest priced cigarettes at that time.⁴⁰ Eliminating trade discount allowances from minimum pricing formulas might enhance minimum pricing law effectiveness. Yet given the protectionist history of minimum price laws,⁴¹ this would represent a shift in rationale and might prompt industry or retailer objections. Pairing tax increases with stricter minimum pricing laws (i.e., those not allowing deductions or trade discounts) could be a particularly effective reinforcing strategy to keep cigarette prices high and consumption low.

As discussed below, tobacco industry discount practices, which are aimed at countering the effects of price increases on consumption, have become the industry's primary strategy when it cannot outright defeat tax proposals.

C. Industry Opposition and Countermeasures

Understanding the strong link between price increases and reduced consumption, the tobacco industry has vociferously fought government-imposed price increases, especially taxes. The industry typically raises several policy arguments to oppose tax increases on tobacco products: the negative impact on the economy (i.e., job loss), diminished government revenue, personal responsibility, and disproportionate impact on the poor.⁴² Notably, these are essentially the same arguments the soda and snack food industries raise in response to proposals to increase taxes on their products.

Despite the generally regressive nature of tobacco taxes, a tobacco tax increase can have a progressive impact due to the differences in

price responsiveness across income groups. Also, because of the relatively larger reductions in tobacco use among the poor, they will receive more of the health and economic benefits that result from the tax increase.⁴³ Tax proponents might offer a similar response to arguments that a high tax on sugar-sweetened products should be rejected. Price discounting is among the tobacco industry's responses to some tobacco tax increases.⁴⁴ Discounting is often accomplished by straight price reductions through wholesalers and retailers (i.e., "buydowns") and multi-pack discounts.⁴⁵ The industry employed discounting as a countermeasure to the price increases sparked by the Master Settlement Agreement as well.⁴⁶ Coupons are also a common circumvention tool.

Tobacco control advocates could adopt a more proactive approach to industry price discounting by promoting laws that restrict these practices. For example, multi-pack discounts and coupons could conceivably be prohibited by law.⁴⁷ Advocates may fear that industry litigants will claim that such measures violate their right to free speech. Indeed, the United States Supreme Court has held that a state law banning the advertising of alcohol prices outside retail establishments violated the First Amendment commercial speech doctrine because it deprived the public of truthful information about a lawful product.⁴⁸

D. Commercial Speech and the First Amendment

Although laws that limit price advertising may trigger First Amendment scrutiny, laws restricting prices or price discounting practices should not trigger such scrutiny because they do not implicate speech. In *44 Liquormart v. Rhode Island*, the U.S. Supreme Court recognized a critical distinction between regulating conduct and speech in this context, noting that, "[a]s the State's own expert conceded, higher prices can be maintained by either direct regulation or by increased taxation."⁴⁹ Furthermore, in *Lorillard v. Reilly*, the Supreme Court upheld state tobacco regulations prohibiting

the use of self-service displays and requiring that tobacco products be kept out of purchasers' reach and accessible only to store clerks. The Court viewed these sales practice restrictions as regulations of conduct, not limits on commercial speech protected under the First Amendment.⁵⁰

Under the four-part test for analyzing regulations of commercial speech, a court must determine (1) whether the expression is protected by the First Amendment; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether it is not more extensive than is necessary to serve that interest.⁵¹ Satisfying the four prongs of the commercial speech test is challenging and the burden of proof is on the government.⁵² By contrast, the standard of review applicable to price and product laws is deferential to the government.⁵³ The challenging party has the burden of proving no logical or rational connection between the government's regulatory goal and the law at issue – a legal standard that does not require rigorous empirical proof.⁵⁴ Moreover, public health laws adopted pursuant to a state's "police power,"⁵⁵ such as those designed to discourage consumption of tobacco or high-calorie, low-nutrition beverages and food, are likely to be considered rational, particularly in the context of addressing tobacco- and obesity-induced disease.

While the Supreme Court has not ruled directly on the question of whether a law restricting price discounting practices for public health purposes is outside the ambit of the First Amendment, existing precedent indicates that such a law would not be treated as commercial speech.⁵⁶ In *Lorillard*, the Court explained that "Massachusetts' sales practices provisions regulate conduct that may have a communicative component, but Massachusetts seeks to regulate the placement of tobacco products for reasons unrelated to the communication of ideas."⁵⁷ While the line may not always be clearly demarcated, protected commercial speech is generally considered communication that primarily proposes an economic transaction.⁵⁸

Section II – Reducing Obesity Through Taxes or Other Pricing Measures

A. Taxes

Public health experts and organizations concerned about the obesity epidemic are promoting new taxes as a viable public health measure.⁵⁹ The primary target is currently sugar-sweetened beverages (“SSB”).⁶⁰ Proposals to hike taxes on these beverages are particularly attractive because “[a] growing but mixed body of research indicates that an increase in SSB consumption is associated with increases in caloric intake, weight gain, obesity and a variety of other negative health consequences among children, teens and adults.”⁶¹ Compared to the more loosely defined range of food products that could be considered snack food, sugar-sweetened beverages are also relatively easy to identify and categorize legislatively.

Several recent obesity policy reports focus on taxes. For example, a September 2009 Institute of Medicine report on childhood obesity calls upon state and local governments to “[i]mplement a tax

strategy to discourage consumption of foods and beverages that have minimal nutritional value, such as sugar-sweetened beverages.”⁶² It also acknowledges that “[t]here is no widely accepted definition of calorie-dense, nutrient-poor foods, nor is there consensus on which foods should be included in this category.”⁶³

The Urban Institute’s 2009 obesity report recognizes the relatively strong arguments favoring a sugar-sweetened beverage tax, describing the scope of the tax as one of several unresolved policy design issues.⁶⁴ The report states:

A narrowly framed tax on sugary sodas can be justified in terms of such sodas’ significant impact on obesity and their absence of nutritional value. Not only do these beverages provide “empty calories” and promote weight gain if consumed in excessive quantities [citation omitted], the typical person now consumes 190 calories a day from sugared beverages, 120 calories more than in the late 1970s. According to the CDC, this 120-calorie increase represents 50 percent of Americans’ daily average caloric increase during that period.⁶⁵



As this report points out, a new or increased tax on sugar-sweetened beverages and/or snack food could be levied at the retail level as a sales tax⁶⁶ or at the wholesale level as an excise tax.⁶⁷

A recent health policy report published in the online *New England Journal of Medicine* “propose[s] an excise tax of 1 cent per ounce for beverages that have any added caloric sweetener.”⁶⁸ The authors explain that a volume-based excise tax is particularly advantageous because it could encourage manufacturers to reduce sugar in beverages. The report states, “A specific excise tax

(a tax levied on units such as volume or weight) per ounce or per gram of added sugar would be preferable to a sales tax or ad valorem excise tax (a tax levied as percentage of price) and would provide an incentive to reduce the amount of sugar per ounce of sugar-sweetened beverage.”⁶⁹

The potential public health benefit of proposals to raise taxes on sugar-sweetened beverages is supported by data showing that higher taxes could reduce consumption, as they have for tobacco.⁷⁰ Furthermore, the size of the tax increase could be an especially important variable from a public health perspective. The modest rate at which most states currently tax sugar-sweetened beverages and snacks and the introduction of new small taxes will probably not significantly reduce obesity rates.⁷¹ Currently, forty states and the District of Columbia tax sugar-sweetened beverages and/or snack foods, but generally not for the express public health purpose of reducing consumption.⁷² Most states apply the sales tax, treating sugar-sweetened beverages and snack foods as disfavored categories by either taxing these items at a slightly higher rate than other foods or beverages or disqualifying them from a traditional food and beverage sales tax exemption.⁷³ The size of a tax on sugar-sweetened beverages matters. While even a small tax will raise revenue, researchers predict that only “heftier taxes will significantly reduce consumption.”⁷⁴ Moreover, “nontrivial pricing interventions may have some measurable effects on Americans’ weight outcomes, particularly for children and adolescents, low-SES (socio-economic status) populations, and those most at risk for overweight.”⁷⁵

During the early 1990s, some states and localities experimented with soda and snack sales tax increases in an effort to address budget deficits.⁷⁶ However, a significant backlash occurred, resulting in a series of repeals orchestrated by the food and beverage industry.⁷⁷ In fact, the taxes were repealed in twelve jurisdictions, including some where a snack food or sugar-sweetened beverage tax had already been in place for decades.⁷⁸ Notably, tax increases that sought to expand the

categories of snack food subject to tax raised particular concerns. A repeal effort in California, for example, was successful apparently because of consumer confusion combined with the difficulties of administering the tax, which was extended to apply to some, but not all, snack foods that previously had been exempt.⁷⁹ The California Grocers Association, and a new group known as the “Don’t Tax Food Coalition,” organized the repeal campaign, labeling the tax regressive and discriminatory.⁸⁰

Unlike cigarettes, sugar-sweetened beverages or snack food are not federally taxed, although the federal government undoubtedly has the necessary taxing authority.⁸¹ A proposal to adopt an excise tax on sugar-sweetened beverages surfaced in the Congressional Budget Office’s December 2008 Budget Options⁸² and reappeared during the spring of 2009 when the Senate Finance Committee issued a report describing a variety of ways to pay for comprehensive health care reform.⁸³ The proposal would impose a federal excise tax on sugar-sweetened beverages, including carbonated and noncarbonated beverages such as soft drinks, energy and sports drinks, fruit and vegetable drinks, iced tea, coffee and flavored milk and dairy drinks. Beverages with non-caloric sweeteners would not be taxed.⁸⁴

Although it is unclear whether a federal excise tax on sugar-sweetened beverages will move forward, or even whether health care reform legislation will progress, the beverage and food industries have already joined forces in opposing a tax. Relying on slogans reminiscent of early tobacco advertising campaigns, the American Beverage Association launched a \$2 million advertising campaign “to oppose a tax on sugar-sweetened drinks,” depicting it as “a tax on ‘simple pleasures.’”⁸⁵ A coalition, “Americans Against Food Taxes,” has been formed by the American Beverage Association, Grocery Manufacturers Association, and National Restaurant Association, as well as state and local industry groups claiming to represent “concerned citizens.”⁸⁶ The coalition’s goals are:

- 1) To promote a healthy economy and healthy lifestyles by educating Americans about smart solutions that rely upon science, economic realities and common sense; and
- 2) To prevent the enactment of this regressive and discriminatory tax that will not teach our children how to have a healthy lifestyle, and will have no meaningful impact on child behavior or public health, but will have a negative impact on American families struggling in this economy.⁸⁷

Repeatedly referring to struggling American families, the coalition's website labels a feared tax as punitive as well as ineffective, and urges site visitors to send letters opposing a tax to editors of local newspapers and legislators.⁸⁸

In the current environment, with historically high obesity rates and soaring health care costs, increased taxes on sugar-sweetened beverages might not be so easily defeated. Still, industry arguments focusing on the impact of a tax in a faltering economy short-circuited recent efforts to raise sugar-sweetened beverage taxes in the states of Maine and New York.⁸⁹ In Maine, voters were persuaded to repeal a new wholesale tax on soda and soda syrup,⁹⁰ while in New York, the governor abandoned his proposal to impose an 18 percent tax on sugar-sweetened beverages when faced with industry opposition.⁹¹

The state of California appears to be preparing for a possible sugar-sweetened beverage tax campaign or other legislation to curtail beverage consumption.⁹² Tax advocates, as well as industry representatives, gave testimony at a field hearing on November 5, 2009, held by the state Select Committee on Obesity and Diabetes and the Senate Health Committee at Los Angeles City Hall. Kelly Brownell, Director of the Rudd Center for Food Policy and Obesity at Yale University, a proponent of sugar-sweetened beverage taxes, asserted that there is a "compelling case for taking public health action"⁹³ to curb sugar-sweetened beverage consumption, while industry spokespeople argued that the obesity problem will not be solved by

singling out these beverages.⁹⁴ While no specific legislative proposal has yet emerged, Senator Dean Florez indicated during the hearing that he believes a tax is needed and compared the marketing of sugar-sweetened beverages to that of cigarettes.⁹⁵

The hearing was prompted by a joint report of the University of California—Los Angeles Center for Health Policy Research and the California Center for Public Health Advocacy analyzing sugar-sweetened beverage consumption by Californians.⁹⁶ The study concluded that "[f]or both adults and adolescents, the prevalence of overweight and obesity is higher among those who drink one or more sodas or other sweetened beverages every day than among those who do not."⁹⁷ Moreover, the authors observed that their results are consistent with other research, including data showing increased caloric intake from sugar-sweetened beverages over the past few decades. "Between 1977 and 2002," the report states, "Americans increased their calorie intake from soft drinks by 228%."⁹⁸

Opponents to a sugar-sweetened beverage tax decry the tax's regressive impact on low income consumers, an argument that the tobacco industry also has raised to thwart tobacco tax increases. Using the "regressive tax" argument against these beverage taxes to defend the availability of sugar-sweetened beverages is even less persuasive than using it against high cigarette taxes, given tobacco's clearly established addictive properties. Moreover, as with tobacco, the regressivity concern may be countered by the disproportionate health benefits low income populations could experience as a result of reduced consumption of sugar-sweetened beverages.⁹⁹

Advocating for tax increases only on these beverages may be more pragmatic and legally defensible, considering the link between consumption of relatively inexpensive sugar-sweetened beverages and obesity. While a small tax or modest price increase will raise revenue, which could be used for obesity prevention purposes, a

relatively large tax, comparable to cigarette taxes, may be necessary to have a significant impact on sugar-sweetened beverage consumption.¹⁰⁰ The Rudd Center estimates that for each 10 percent increase in the price of these beverages, consumption will decline by 7.8 percent.¹⁰¹ A 2009 article making a case for a tax on sugar-sweetened beverages to fight obesity further projects that a penny per ounce tax would reduce consumption by 10 percent.¹⁰²

Tax proponents do not generally specify which level of government should levy a beverage tax, implying that taxes at any or all levels (federal, state and municipal) would be welcome. Online sugar-sweetened beverage tax calculators appear to encourage states and localities to consider the revenue benefits of particular tax rates. For example, a revenue calculator for these beverages on the Rudd Center's website permits states and municipalities to estimate how much money they could raise on a per ounce basis.¹⁰³ The Center for Science in the Public Interest also endorses sugar-sweetened beverage taxes and features a "Liquid Candy Tax Calculator" on its website.¹⁰⁴

While many design elements of a tax on sugar-sweetened beverages could be debated (e.g., sales versus excise, rate, level of government), a key legal concern is that a rational tax and tax classification scheme not be vulnerable to litigation. The actual impact of such a tax on pricing and consumer behavior is unclear, as beverage companies could choose to pass along the cost by spreading it out to include other products (e.g., diet soda or water). Even assuming that a tax leads to a price increase only for sugar-sweetened beverages, the impact of any compensatory consumer behavior (for example, a shift to high-calorie sweet food) may affect the impact of the tax on calorie intake and obesity.

Furthermore, as with tobacco, it is possible that the industry might attempt to counter the effect of a tax increase on consumption by employing discounting strategies. Such strategies could effectively circumvent the public health goal of

reducing consumption. Thus, advocates of sugar-sweetened beverages and snack taxes might wish to consider companion measures to maintain higher prices, such as limiting coupons or proportional pricing measures.

Again, the threat of a legal challenge might surface, especially if tax proponents prepare for an anticipated industry counter-strategy of price discounting by pairing a tax with a law curtailing coupons. Nevertheless, advocates should not be discouraged, because a carefully crafted law designed to limit sugar-sweetened beverage discounting practices does not necessarily implicate commercial speech. Rather, such a measure should be treated as a price regulation rationally related to the government's public health purpose of reducing consumption of these beverages and thereby curtailing obesity.

B. Proportional Pricing

Another novel though untested strategy to blunt the existing economic incentive to consume sugar-sweetened beverages would be to impose proportional pricing requirements on these beverages sold by fast food restaurant chains. Proportional pricing for sugar-sweetened beverage servings could help to unwind the current supersizing trend proliferated by fast food restaurants, which has likely contributed to the obesogenic increase in consumption of these beverages over the past 30 years. For example, under a proportional pricing paradigm, a 24-ounce sugar-sweetened beverage could not be sold for 99 cents if a 12-ounce serving is also sold for 69 cents. Instead, the seller would either have to increase the price of the larger size serving (to \$1.38 in this example) or reduce the price of the smaller serving (to 49 cents in this example). The purpose of proportional pricing would be to remove a consumer's current economic incentive to purchase a larger size sugar-sweetened beverage.

The recent California study of the association between increased consumption of sugar-sweetened beverages and the prevalence of overweight and

obesity specifically noted the trend of increased portions, along with caloric intake, that has occurred over time.¹⁰⁵

Portion sizes have also increased from an average serving size of 6.5 fl oz (88 calories) in the 1950s, to 12 fl oz (150 calories), 20 fl oz (266 calories) and even larger portion sizes common today. The average serving size of soft drinks in fast food restaurants in 2002 was 23 fl oz (299 calories), with some chains now commonly selling soft drinks in 32 to 64 fl oz portions (416 to 832 calories).¹⁰⁶

Research on the economic and legal¹⁰⁷ implications of a proposal to require proportional pricing would be helpful, particularly studies designed to determine how the beverage industry might respond and whether proportional pricing would actually reduce consumption of sugar-sweetened beverages. If higher beverage prices trigger greater consumption of sugary foods as a compensatory consumer reaction, for example, the public health benefit might be compromised. Again, as discussed earlier, public health proponents should anticipate that the industry will develop a compensatory strategy to undermine proportional pricing requirements by offering other types of discounts, such as coupons.¹⁰⁸

Section III – Lessons of Capturing Revenue Streams

Given the current focus on taxes as a cross-over public health tool, the application of a dedicated revenue requirement also merits discussion. In the context of tobacco control, several important themes have emerged that are directly relevant to the design of a public health tax on sugar-sweetened beverages. First, significant taxes on these products will reduce consumption. Second, requiring even a portion of tax revenue to be spent on public health measures amplifies the public health benefit and increases public support. Third, foregoing an opportunity to include a dedicated revenue provision exacerbates the challenge to fund public health programs at optimal levels, especially when

governments face budget pressures.

The Master Settlement Agreement (“MSA”), a negotiated settlement of multiple state lawsuits against the tobacco industry, is a notable example of a public health revenue stream that lacks effective and targeted spending incentives. Under the MSA, participating states receive millions of dollars annually from the tobacco industry, but are not required to spend any of the resulting public money on tobacco control. As a result of this legal loophole, none of the states in Fiscal Year 2009 allocated revenue to tobacco control programs at the levels recommended by the Centers for Disease Control and Prevention.¹⁰⁹ When state budgets are under pressure, as they are in today’s economic climate, this pattern is likely to continue.

While the MSA is a unique legal intervention, its failure to link resulting public revenue to public health goals has important implications for revenue-based tools to address obesity. Without dedicated revenue requirements, a tax on sugar-sweetened beverages could be less effective in reducing obesity. Moreover, using the revenue raised by a tax on sugar-sweetened beverages to directly subsidize healthy beverages or food¹¹⁰ could address concerns about compensatory consumer behaviors and regressivity, making it more likely that consumers will substitute healthy choices for more expensive sugar-sweetened beverages by virtue of dual price incentives. Advocates have been calling for the use of tax revenues to fund obesity prevention programs, including subsidies for healthy food and beverages.¹¹¹

Conclusion

Tobacco excise taxes are a proven, effective tool for reducing tobacco consumption. Understanding the impact of significant taxes and price increases on consumption, the tobacco industry has often responded by offering price discounts. Tobacco control advocates may wish to consider adopting legal and economic strategies to counter industry discounting practices by, for example, limiting

coupons or removing trade discount allowances from minimum pricing laws.

Public health advocates concerned about the burgeoning obesity epidemic are examining tools that have been successfully employed to reduce tobacco consumption, including taxes. Research suggests that a significant tax on sugar-sweetened beverages could have the desired public health effect of reducing consumption of high-calorie and low-nutrition beverages. The food and beverage industry is prepared to challenge tax initiatives and many of the same legal policy issues seen in the tobacco control movement, including discounting, are likely to arise. Public health advocates may also want to consider applying other price-based strategies to sugar-sweetened beverages, such as proportional pricing requirements, to encourage decreased consumption.

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Endnotes

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About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.



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