



# Regulators Eye Crackdown On Rising Use Of Tobacco Discounts

By Greg Ryan

Law360, New York (May 22, 2013, 9:06 PM ET) -- Tobacco companies are relying more on pricing discounts to sell cigarettes, the Federal Trade Commission reported Tuesday, a practice experts say may be the next target of regulators and lawmakers under increasing pressure from public health advocates to curb the industry's favorite marketing tactic.

The FTC released a report showing that spending on tobacco marketing rose in 2011 for the first time in nearly a decade, mostly because of an increase in discounts. Tobacco companies spent \$7.8 billion on discounts and promotional allowances to wholesalers and retailers designed to reduce cigarette prices for consumers, making up 93 percent of their marketing dollars, the report said. By contrast, in 2002, companies spent 78 percent of their marketing dollars on wholesaler and retailer discounts and allowances.

The companies spent an additional \$171 million on coupons for consumers in 2011, which represented 2 percent of their marketing total.

The shift in marketing strategy has already caught the notice of public health advocates, and they are gearing up to push states and municipalities to adopt ordinances that restrict or even ban discounts, experts said, adding that new measures are likely to occur locally, not at the federal level. In fact, some municipalities have already started to ban consumer coupons for tobacco products.

The city of Providence, R.I., approved an ordinance in January 2012 that banned the redemption of coupons for tobacco sales, as well as "buy one, get one free" promotions and other multipack discounts. New York City Mayor Michael Bloomberg **proposed a similar ban** in March 2013, and coupon bans could spread across the country if the New York measure is passed by the city council, according to experts.

"New York City is and has been a harbinger for what localities might do to the tobacco industry," Troutman Sanders LLP partner Bryan Haynes said.

The tobacco industry appears poised to mount a legal challenge to the New York City ban,

but Philip Morris USA Inc., R.J. Reynolds Tobacco Co. and seven other tobacco companies were met with failure when they challenged the Providence ordinance. A Rhode Island federal judge **ruled the laws did not violate** the First Amendment in December. The case is on appeal to the First Circuit.

But laws and regulations targeting wholesaler and retailer discounts will be more difficult to achieve, experts say. Given how much more tobacco companies spend on the discounts compared to consumer coupons and sales, such measures would likely prove more effective at reducing tobacco use, they said.

There are several types of wholesaler and retailer discounts. Under a wholesale pricing agreement, for instance, a wholesaler will pay retailers a rebate for the sale of a cigarette brand. The tobacco manufacturer will then reimburse the wholesaler. With off-invoice discounts, the manufacturer offers wholesalers reduced prices if they buy a certain quantity of goods within a certain period of time.

Public health advocates charge that the discounts allow the businesses to pass the savings onto consumers, who are more likely to buy cheaper cigarettes.

Some states have already attempted to combat the discounts indirectly, by raising taxes on cigarette packs and imposing minimum prices for packs. In a statement, the Campaign for Tobacco-Free Kids urged Congress to approve President Barack Obama's recent proposal to nearly double the federal cigarette tax rate, and states to similarly raise tobacco taxes, in order to counter the discounting.

"The evidence is clear that increasing the price of tobacco products is one of the most effective ways to reduce smoking and other tobacco use, especially among kids," the organization said.

State and local governments have the ability to regulate those types of payments directly, though they may wait to do so, according to Kerry Snyder, an attorney with New England Law Boston's Center for Public Health and Tobacco Policy.

"That might be the next step if these coupon restrictions continue to be upheld," Snyder said.

--Editing by Elizabeth Bowen and Jeremy Barker.