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Subject: Nicotine Free Generation
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Attachments: Nicotine-Free-Generation.pdf (2.45 MB)

Good Afternoon BOAT Voting Members,

I will be representing BOAT next week at the Select Board and Board of Health Meetings regarding the passing of Nicotine Free Generation and will be submitting a letter of support from BOAT. I have attached some more information about what this entails. The Supreme Judicial Court is in support of NFG and has upheld Brookline, MA NFG regulations. The BOH will be making an educational presentation to the Select Board on Monday, Nov. 4 and on Wednesday, Nov. 6 BOAT and several other supporters will be attending the BOH meeting at the Town Hall. We encourage BOAT Voting Members to attend in support of NFG. Further, Andrea Crete and I are requesting that you, as individuals, write a letter of support also. This is a last minute request, but if you could email myself the letters by tomorrow at 5pm that would be great. If you have any questions, please let me know. Kris

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THE NICOTINE-FREE GENERATION APPROACH

A Policy Option Overview

California's lawmakers are currently considering a nicotine-free generation policy.

New York State's home rule doctrine contains protections for local government more extensive than in many other states.

Brookline, Massachusetts, is the only U.S. locality to adopt a nicotine-free generation policy and the second jurisdiction globally to implement it.

Denmark proposed a popular tobacco-free generation package in March of 2022. It was withdrawn when legal analysts suggested it was preempted by an EU directive.

Inspired by New Zealand, **Malaysia's** policymakers have also taken interest in the nicotine-free generation idea.

The intellectual origin of the tobacco-free generation concept, **Singapore's** government has repeatedly expressed interest in such a policy.

In 2016, **Balanga City in The Philippines,** became the first city to adopt a nicotine-free generation policy.

Following Balanga City's lead, **New Zealand** began considering a similar approach. In December of 2022, it passed a nationwide policy.

Despite recent declines in the use of combustible tobacco products in the United States, commercial tobacco¹ use continues to be one of the leading causes of preventable death in the U.S.² and the world.³

The rapid market growth of e-cigarettes and related nicotine delivery products, and their popularity among young people, has raised concerns among public health authorities about the health impact of these devices and spurred discussion about effective ways to reduce tobacco consumption, particularly among youth. In addition to evidence-based tobacco control measures, such as pricing increases and licensing and marketing restrictions, some U.S. public health experts have considered additional innovative ways to reduce tobacco

use, including what has been described as “endgame” strategies or policies. This resource describes one of these endgame options: “Nicotine-Free Generation” policies, which are also called tobacco-free generation or generational phase-out policies. It highlights a few examples where this approach has been adopted or proposed around the world, and then briefly examines various legal considerations when pursuing a nicotine-free generation policy.

Background

The Youth Tobacco Epidemic

In the U.S., over 3 million young people under 18 regularly use tobacco products, including e-cigarettes and combustible cigarettes.⁴ In 2022, the Centers for Disease Control and Prevention and the U.S. Food and Drug Administration found that over 2.5 million U.S. middle and high school students use e-cigarettes on a regular basis.⁵ The rapid rise of young people using these products is concerning, given the impact of nicotine on the developing brain, as well as other health impacts.⁶ As a result, national and local public health authorities prioritize reducing youth consumption of all tobacco products, including e-cigarettes.

The tobacco industry is well aware that youth consumption is key to maintaining its business.⁷ In 1978, for example, a Lorillard executive claimed that “[T]he base of our business is the high school student”; in 1981, a Philip Morris special report stated that “Today’s teenager is tomorrow’s potential regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens.... The smoking patterns of teenagers are particularly important to Philip Morris”; and in 1984, an R.J. Reynolds executive pointed out that “Younger adult smokers are the only source of replacement smokers... If younger adults turn away from smoking, the industry must decline.” These statements help explain the industry’s persistence in target-marketing its products to young people.⁸

Tobacco’s Endgame: No More Consumers

In the last few years, endgame policies have gone from conceptual public health goals to actual fruition with the passage of policies in some U.S. communities. The policy that most effectively addresses these harms is a total ban on the sale of all tobacco products, as in Beverly Hills and Manhattan Beach, California.⁹ However, not every community may be ready for such a step. One approach with fewer social and political implications compared to comprehensive sales bans is what has been described as a “nicotine- (or tobacco-) free generation” strategy. These policies were first introduced in 2010¹⁰ and involve gradually phasing out the legal sale of tobacco products each year by raising the minimum legal sales age over time. While this allows sales to

continue to any overage person at the time of passage of the ordinance, it creates a generation of people to whom sales are illegal in perpetuity. This approach may be a compromise between the interests of those who currently use commercial tobacco and the tobacco industry, and the public health goal of preventing future generations from using tobacco products.¹¹

Nicotine-Free Generation: An Inclusive Reframing

Although “tobacco-free generation” is a prevalent term for describing a generational ban on tobacco product sales, the term is harmful to some communities. Many Tribal communities in the U.S. use sacred tobacco for cultural and spiritual ceremonies and practices.¹² Because of this important relationship, public health advocates have pivoted to calling these policies “nicotine-free generation” policies rather than “tobacco-free.” The sacred relationship that many Tribal community members have with tobacco is distinct from the commercialized — and often exploitative — relationship that the tobacco industry has cultivated. Full inclusion of Tribal communities in mainstream commercial tobacco control dialogues is paramount to advancing health equity and can begin with the recognition of traditional sacred use for tobacco as a practice distinct from commercial tobacco consumption.¹³

Advocates have also noted that using the term “nicotine-free generation” is important because “tobacco-free generation” might unduly constrict the endgame strategy to tobacco products that contain commercial tobacco leaf, leaving out electronic smoking devices and other nicotine products. While combustible tobacco product consumption is absolutely a target for this endgame strategy, including all noncombustible and nicotine products is the strongest and most comprehensive form of this policy. The Public Health Law Center will use and encourage use of the term **“nicotine-free generation,”** with the understanding that this term does not apply to sacred use of tobacco products.

National and Global Policies

In recent years, several places around the world have considered nicotine-free generation proposals, and a few have adopted variations of this approach.

Brookline, Massachusetts. The only locality in the U.S. to adopt a nicotine-free generation policy, and the second jurisdiction globally to implement the policy, is Brookline. In November 2020, the Boston suburb of Brookline passed its nicotine-free generation policy by popular vote.¹⁴ The policy, which took effect in August 2021, prohibits any “person, firm, corporation, establishment, or agency” from selling tobacco or e-cigarettes to anyone born on or after January 1, 2000.¹⁵



On September 17, 2021, local tobacco product retailers sued Brookline in the Massachusetts Superior Court on the grounds that state law preempted the town of Brookline from enacting or enforcing the provision.¹⁶ They also claimed the law violated the Equal Protection Clause, arguing that the state constitution prevented the town from conferring rights on some adults, while “refusing to recognize the same rights of other adults, based on nothing more than the date on which they reached the age of majority.”¹⁷

In October 2022, the court issued summary judgment in favor of Brookline.¹⁸ The court stated that local lawmaking could be more restrictive than state law, and that state law did not prevent the town from regulating the minimum legal sales age for tobacco products. The court rejected the claim that the law violated the Equal Protection Clause, pointing out that the prevention of tobacco product use by youth and young people is a legitimate government interest.

Balanga City, Philippines. In 2016, Balanga City in the Philippines became the first city to adopt a nicotine-free generation policy.¹⁹ Balanga City’s ordinance banned the sale and use of tobacco products and electronic nicotine delivery systems for people born after January 1, 2000. Although the ordinance was popular and supported by youth and public health

authorities, the tobacco industry successfully challenged it by arguing that the national 2003 Tobacco Act prevented the city from implementing this restriction.

New Zealand. Following Balanga City's attempts to pass and implement a nicotine-free generation policy locally, New Zealand's national government began considering a similar approach, and in December of 2022, it passed a nation-wide policy.²⁰ The policy has been well received by youth and young adults, including among those born after the proposed cut-off date of January 1, 2009.²¹ New Zealand's national government and the majority party in parliament share the goal of passing this measure and, although legal challenges may be expected, the industry cannot raise a preemption challenge as it did with Balanga City, since this is a national law. The law took effect on January 1, 2023, and the national government published regulations in June of 2023, to further the implementation and enforcement of the nation's nicotine-free generation policy.²²

New Zealand has received significant global recognition for making this generational policy a nationwide issue. This, in turn, has prompted policymakers and advocates in other countries to consider measures following the New Zealand model.²³

Singapore. Singapore enjoys recognition for being the intellectual origin of the tobacco-free generation concept, and its government has repeatedly expressed interest in such a policy. While consideration of the policy in Singapore remains in the early stages, New Zealand's bold action has rekindled interest in this measure.²⁴ The city-state's Ministry of Health began reviewing the feasibility of a generational ban in early 2023.²⁵

Malaysia. Inspired by New Zealand, Malaysia's policymakers have also taken interest in the nicotine-free generation idea, and the nation's legislature began considering the "Tobacco and Smoking Control Bill" in 2022, which proposed that those born after January 1, 2007 would be prohibited from smoking, using, or owning tobacco and vape products. This bill did not advance before the Malaysian Parliament was dissolved in that year, but a renamed version of the bill with much the same content — the "Smoking Product Control for Public Health Bill 2023" — was introduced to the reconstituted Parliament.²⁶ Though enjoying broad support from the public health community, the bill remains contentious, and it is worth noting that the bill includes penalties for personal use and possession of tobacco products by those underage, which many advocates in the public health community do not consider an equitable approach to tobacco control.²⁷ Still, the proposal is a significant step for a country with a high smoking prevalence among young adults.²⁸

Denmark. In March 2022, Denmark's government proposed a tobacco-free generation package, which would have prohibited the sale of nicotine-based products to persons born after 2010. Though widely supported, the Danish proposal was withdrawn when legal analysts

suggested it was preempted by the European Union's Tobacco Product Directive.²⁹ The Tobacco Product Directive is a legal act designed to meet the European Union's obligations under the Framework Convention on Tobacco Control by requiring a relatively uniform tobacco control landscape across the European Union, including a goal for a nicotine-free generation (<5% prevalence) by 2040. However, the directive may not be sufficiently adaptable to changing markets and products.³⁰ If the Tobacco Product Directive is revised, countries like Denmark might use that as an opportunity to remove preemptive language.

Nicotine-Free Generation Policies: U.S. Federal Law

In the U.S., no federal legal barrier prevents U.S. communities from enacting their own nicotine-free generation policies. There is no constitutional right to smoke or use tobacco products.³¹ Also, the 2009 Family Smoking Prevention and Tobacco Control Act specifically preserves the authority of state, local or Tribal authorities to exercise their rights to adopt sales-related policies, which would include nicotine-free generation policies.

The Act preserves the authority of state, Tribal, and local governments to enact measures that go beyond federal regulations and that are related to “the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products *by individuals of any age....*”³² Enacting minimum legal sales age requirements higher than the federal minimum of 21 years old — regardless of whether these requirements are fixed or adjusted — is within the purview of state, Tribal, and local authorities.

Nicotine-Free Generation Policies: State and Local Authority Analysis

Recent news coverage about nicotine-free generation policies in New Zealand and elsewhere has spurred action in several states and local communities. For example, California,³³ Hawai'i,³⁴ and Nevada³⁵ have all seen related bills proposed in their legislatures. Although bills have been introduced, these policies have not yet been passed within those states. Below are brief overviews of a few U.S. jurisdictions that might consider adopting a nicotine-free generation policy and relevant legal considerations, including local authority to do so.

New York: Implied Authorization

Colonial-era states such as New York have a history of home rule, where the preferred locus of authority is local.³⁶ That legacy is reflected in New York's state constitution and general



state legislative approach, where local action is impliedly valid. New York Municipal Home Rule Code, Chapter 36-A, Article 2, Section 10, makes clear this deference to local law:

*...every local government, as provided in this chapter, shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law, relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government....*³⁷

New York's home rule doctrine contains protections for local government that are more extensive than in many other states.³⁸ Under this doctrine, local governments are granted affirmative lawmaking powers, with local autonomy generally free from state interference. For instance, New York City raised its minimum legal sales age to 21 in 2013³⁹ — years before the state (or any other state, let alone the federal government) — and could do so because New York's state law did not clearly prohibit the city from taking that step. Nothing in state law indicates that the state legislature intended, implicitly or expressly, to preempt local minimum legal sales age policies.

Were a local jurisdiction in New York to adopt a nicotine-free generation requirement, the question would first turn on whether that local ordinance conflicts with the state's minimum legal sales age law. Every local government may adopt laws if they are “not inconsistent with”

state law.⁴⁰ It would be unlikely for New York courts to find that a local nicotine-free generation law conflicted with state law since the state does not grant a *right* to use tobacco products.

The next question would likely be whether the state legislature intended to occupy the field regulating a tobacco product minimum legal sales age. While the state's minimum legal sales age legislation previously contained preemption language, this language was removed in 2022. This suggests that the state does not intend to occupy the field.⁴¹

As noted, in 2013, New York City successfully passed a minimum legal sales age higher (and more restrictive) than state law. Nothing in state law indicates that the state legislature implicitly or expressly intended to preempt local minimum legal sales age policies. Thus, in the absence of any express state restriction, a locality that wished to pass a nicotine-free generation policy would likely be successful in implementing the policy and withstanding potential legal challenge.

California: Express Authorization and Caselaw

California's lawmakers are currently considering a statewide nicotine-free generation policy. If such a proposal were to become law, it could change the tobacco sales environment for millions of California residents, with possible ripple effects beyond the state. However, the tobacco industry would likely sue or propose a referendum on the law, as it did with California's flavored restriction policy in 2020.

Regardless of any changes at the state level, local jurisdictions in California can continue to lead the way in implementing innovative tobacco control policies. Under California's Stop Tobacco Access to Kids Enforcement (STAKE) Act, local governments can exceed state law as long as the local law does not conflict with the state's law. Indeed, various sections of the STAKE Act allow local ordinances to surpass state law minimums and restrict preemption. The STAKE Act:

...sets forth minimum state restrictions with respect to the legal age to purchase or possess tobacco products and *does not preempt or otherwise prohibit the adoption of a local standard that imposes a more restrictive legal age to purchase or possess tobacco products*. A local standard that imposes a more restrictive legal age to purchase or possess tobacco products shall control in the event of any inconsistency between this division and a local standard.⁴²

California does, however, have preemption language in its penal code with respect to the unlawful sale of tobacco products to minors. The law states that "It is the Legislature's intent to regulate the subject matter of this section. As a result, a city, county, or city and county shall not adopt any ordinance or regulation inconsistent with this section."⁴³



As with New York, California has relevant caselaw to guide court analyses in preemption matters and, given both its penal code and the STAKE Act, such guidance is helpful in forecasting how courts would review an incremental age increase schedule for a minimum legal sales age requirement.

The 2010 case *Prime Gas v. City of Sacramento* addressed this question directly in a matter involving local tobacco retail licensing.⁴⁴ In *Prime Gas*, a tobacco product retailer sued Sacramento claiming that the city's tobacco retail licensing ordinance, which prohibited the sale of tobacco products to minors and suspended or revoked the local tobacco sales licenses of retailers who violated this law, was preempted by state law that also prohibited tobacco sales to minors.

The appellate court ruled that state law did not preempt the city's tobacco retail licensing ordinance. The court stated (1) that preemption can only occur if otherwise valid local legislation conflicts with state law, and (2) that a conflict only exists if the local legislation duplicates, contradicts, or enters an area fully occupied by state law, either expressly or by implication.

The court found no conflict between the two laws. It pointed out that Sacramento's ordinance did not violate state law because the ordinance applied to local tobacco retail licensing, not the state's license; it also pointed out that the ordinance did not impose criminal penalties for violations, and so did not duplicate the penal code. The court ruled that the local tobacco retail licensing

ordinance complemented the state tobacco law and did not contradict it, and that under the STAKE Act, local jurisdictions can exceed state law for local tobacco retail licensing requirements.

Since 2010, when *Prime Gas* was decided, the STAKE Act has been amended to include a section clearly stating that state law sets “minimum state restrictions” and that a local measure that is more restrictive than state law is controlling.⁴⁵ California caselaw favors local tobacco control lawmaking, particularly with respect to tobacco retail licensing, and this includes allowing local governments to prohibit the sale of tobacco products altogether.

Summary

The nicotine-free generation concept is a relatively new tobacco control strategy that has generated significant interest as a phased-in method to end the commercial tobacco epidemic. The legal infrastructure in the U.S. would generally support such a generational prohibition. States and local jurisdictions can refer to at least one U.S.-based example and one international example of nicotine-free generation legislation as case studies highlighting opportunities, challenges, and consideration

Nicotine-Free Generation Approach in Brief

Upsides and Benefits

Legally sound at the state level; potentially legally sound at the local level where not preempted by state

Provides current retailers a long window of continued product sales before closure

Implementation costs low to immaterial as the policy relies on current minimum legal sales age enforcement

Potential to effectively eliminate tobacco and smoking among most people over time

Nicotine-free generation policy is equally applied to all persons born after a particular date, which can support implementation and enforcement

Challenges and Unknowns

Ordinances likely to face legal challenges; courts have few cases to draw upon

Retailers and industry unlikely to be receptive to the idea of *any* limits on sales in the present or future

Prices for tobacco and smoking products could incentivize underground markets; incongruity in local, Tribal, or state laws may lead to border running and commercial activity on boundaries

Benefits maximized years into the future, which presents risks that political or other factors could change in time to be less supportive of maintaining a nicotine-free generation approach

There are significant health equity and public health concerns that these policies leave behind those that already are targeted by the tobacco industry and addicted to nicotine

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Endnotes

- 1 Traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and Tribes for centuries. Commercial tobacco is manufactured for recreational use and profit, resulting in disease and death. When the word “tobacco” is used throughout this document, a commercial context is implied and intended. For more information, visit the National Native Network website: <https://keepitsacred.itcmi.org>.
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- 15 BROOKLINE, MASS., GENERAL BY-LAWS § 8.23.5(d) (2020).
- 16 See *Six Brothers v. Town of Brookline* (Mass. Superior Ct. Civil Action No. 21863) (2021), <https://d279m997dpfwgl.cloudfront.net/wp/2021/09/Brookline-tobacco-lawsuit.pdf>.
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- 36 Laura Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOKLYN L. REV. 321 (1999), <https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1395&context=facsch>.
- 37 N.Y. MUN. HOME RULE LAW § 10 (emphasis added).
- 38 See New York State Bar Ass'n, *COSC Report on Home Rule 2* (2016), [COSC-Report-on-Home-Rule-final-approved-by-the-House.pdf](https://www.nysba.org/COSC-Report-on-Home-Rule-final-approved-by-the-House.pdf) (nysba.org)
- 39 Anemona Hartocollis, *New York Raising Age to Buy Cigarettes to 21*, N.Y. TIMES (Oct. 30, 2013), <https://www.nytimes.com/2013/10/31/nyregion/new-york-approves-law-to-raise-tobacco-purchasing-age-to-21.html>.
- 40 N.Y. CONST. art. IX, § 2; N.Y. MUN. HOME RULE LAW § 10.
- 41 See Hermer, *supra* note 36.
- 42 CAL. BUS. & PROF. CODE § 22964 (2021) (emphasis added).
- 43 CAL. PENAL CODE § 308(d) (2018).
- 44 Prime Gas v. City of Sacramento, 184 Cal. App. 4th 967 (2010). Because the STAKE Act expressly grants cities and counties the authority to adopt tobacco retail license ordinances, many jurisdictions in California have adopted TRLs that are more restrictive than state law.
- 45 CAL. BUS. & PROF. CODE § 22964 (2021).