

## **GO TO AISLE THREE IF YOU WANT TO DEVELOP A COUGH:<sup>1</sup> SAN FRANCISCO'S BAN OF TOBACCO SALES IN PHARMACIES**

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### **I. INTRODUCTION**

This case study explores the successful effort to ban tobacco products sales in San Francisco pharmacies. Tobacco use is the leading preventable cause of death in the United States.<sup>1</sup> For several decades, public health practitioners have employed a variety of strategies to reduce tobacco use.<sup>2</sup> Industry opposition has been particularly strong where state and local governments have sought to pass tobacco control laws.<sup>3</sup>

Yet, even when a lawsuit was likely, San Francisco lawmakers moved forward and banned the sale of tobacco products in pharmacies. In the early stages of the legislative process Mayor Gavin Newsom concluded in the national news media, that he was “absolutely confident” that the San Francisco Board of Supervisors would approve the ban “this month or early in June” of 2008.<sup>4</sup> The Board passed the ban on July 29, 2008, and after a second reading by the Board, Mayor Newsom signed it into law on August 8, 2008.<sup>5</sup>

#### **ABOUT THE DEFENSIVE LITIGATION PROJECT**

Funded by the Robert Wood Johnson Foundation's Public Health Practice & Policy Solutions, the Project uses case study research methodology to investigate threats of litigation made during the proposal and passage of public health laws. The case studies examine this experience across a range of public health issues. Public health officials, attorneys and advocates provide insight into their decision-making and planning process in anticipation of and in response to legal challenges.

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<sup>1</sup> The title is based on media campaigns run by the Pharmacy Partnership and the California LGBT Tobacco Education Partnership

As expected, San Francisco faced a lawsuit. In early September 2008, a large pharmacy chain operated by the Walgreen Company filed a lawsuit claiming that the ban violated its equal protection rights.<sup>6</sup> The ban excluded grocery stores and big box stores that housed pharmacies, and Walgreen claimed it was unfair to prohibit tobacco sales only in standalone pharmacies.<sup>7</sup> (The ordinance applied to all of Walgreen's pharmacies.) A few weeks later, Philip Morris filed a lawsuit claiming that the ban violated commercial free speech rights.<sup>8</sup>

The decision to pass the ban despite the threat of litigation was undergirded by some key points. First, the harm caused by tobacco easily justified the ban. Second, proponents believed establishing new, effective tobacco control laws inevitably meant having to face the industry in court, given the industry's aggressive use of litigation. Third, proponents felt that litigation would confirm the legality of pharmacy bans, and thus, establish legal precedent for other jurisdictions to follow. Third, an effort to thwart passage of the ban would generate public interest and awareness of the health effects of tobacco use. Fourth, several years of capacity building established a range of stakeholders who understood and supported the ban. Fifth, the ban represented a first step in a larger effort to reduce tobacco sales in San Francisco.

## **II. THE PUBLIC HEALTH PROBLEM: TOBACCO-RELATED DISEASE AND DEATH**

There is no dispute that tobacco use is a significant public health problem. It has been linked to numerous acute and long-term adverse health outcomes, including numerous types of cancer; adverse respiratory and cardiovascular conditions among

others.<sup>9</sup> The nicotine in tobacco is powerfully addictive. In addition, while smoking rates have gone down in general, rates among some subgroups of our population remain high.<sup>10</sup>

### **III. THE PUBLIC HEALTH LAW: A SUMMARY OF THE BAN ON TOBACCO SALES IN PHARMACIES**

The San Francisco Board of Supervisors officially passed the ban, which is actually a city and county ordinance, on August 5, 2008.<sup>11</sup> Mayor Gavin Newsom signed it into law three days later.<sup>12</sup> The ban prohibits the sale of any tobacco product in pharmacies, which is defined as any retail establishment where a licensed pharmacist practices and prescriptions are sold.<sup>13</sup> Monetary fines of up to \$1,000 for violation the ordinance are available under the San Francisco Administrative code.<sup>14</sup>

Big-box stores and general groceries are exempt. The ordinance defines a big-box store as “a single establishment occupying an area in excess of 100,000 gross square feet.” The San Francisco Planning Code defines general groceries as a retail establishment that “offers a diverse variety of unrelated, non-complementary food and non-food commodities, such as beverages, dairy, dry goods, fresh produce and other perishable items, frozen foods, household products, and paper goods . . . and may also include the sale of alcoholic beverages for consumption off premises.”<sup>15</sup>

The primary rationale for the ban is that the sale of tobacco products conflicts with the role of pharmacies as part of the healthcare delivery system.<sup>16</sup> People go to pharmacies to obtain prescription and over-the-counter medicines.<sup>17</sup> For the smoker who wants to quit, having a tobacco-free pharmacy to obtain cessation products

improves his or her chances of successfully quitting.<sup>18</sup> Additionally, because social perception of tobacco use is closely tied to initiation and quit rates for smoking, the sale of tobacco products in pharmacies, more so than other locations, conveys the message of acceptability of tobacco use.<sup>19</sup> A tobacco-free pharmacy helps de-normalize use.<sup>20</sup>

#### **IV. KEY STAKEHOLDERS: PROPONENTS AND OPPONENTS OF THE BAN ON TOBACCO SALES IN PHARMACIES**

##### **A. Proponents**

There were several key proponents. Doctor Mitchell Katz, Director of the Department of Public Health for the City and County of San Francisco, recommended the idea to Mayor Gavin Newsom. Mayor Newsom co-sponsored the ban. Director Alyonik Hrushow, Tobacco Free Project Director in the Department of Public Health was also instrumental in guiding the ordinance through passage. The Mayor's Deputy Chief of Staff, Catherine Dodd, worked closely with the Department of Public Health. Deputy Chief Dodd is responsible for oversight and convening of health and human services departments and community based organizations for the Mayor. (Dr. Katz, Project Director Hrushow and Deputy Chief of Staff Dodd were interviewed for this case study.)

Another proponent was the California Medical Association Foundation. Since the early 1990s, the California Medical Association Foundation supported banning tobacco products in pharmacies. More recently, it established a coalition and media campaign to press for the policy. Similarly, the California LGBT Tobacco Education Partnership was also active in supporting the pharmacy ban. Previous to the passage of the

ordinance, the Education Partnership worked with pharmacies and encouraged them to voluntarily stop selling tobacco products. Many of the pharmacies that worked with the Education Partnership supported the ban.

### **B. Opponents**

The Walgreen Company, a corporation that operates pharmacies in San Francisco and around the country, actively opposed the ban. When the ban was being debated, Walgreen operated 54 stores, 52 of which included pharmacies, and employed over 1,700 employees in the County of San Francisco.<sup>21</sup> Walgreen representatives and employees spoke during the committee hearing and lobbied the Board of Supervisors and the Mayor's office.<sup>22</sup> Other pharmacy chains opposed the ban and some took a neutral position. Walgreen filed the first lawsuit to challenge the ban's constitutionality.

The United Food and Commercial Workers Local No. 648, which represents employees at Walgreen, opposed the ban. Some of its members spoke at the public hearing on the ban. Their primary argument was that the ban would result in job losses and it was unfair to exclude pharmacies located in grocery stores and big-box stores. A group of business and trade associations also opposed the ban. They included the National Association of Chain Drug Stores, Convenient Care Association, California Retail Association and San Francisco Chamber of Commerce.

Philip Morris USA Inc., the largest manufacturer of cigarettes in the United States, brought the second lawsuit to challenge the ban. Its level of involvement during the legislative process is less clear. Philip Morris opposed the ban in the news media,<sup>23</sup> and historically, Philip Morris courted pharmacies to promote cigarette sales, and even

assist the industry in its efforts to block dissemination of information on smoking and health.<sup>24</sup> Records show that in the late 1970's, a senior communications manager for Walgreen met with a representative from the Tobacco Institute,<sup>25</sup> which was an industry trade association that received funding from Philip Morris.<sup>26</sup>

## **V. THE STEPS IN PASSING THE BAN ON TOBACCO PRODUCTS SALES IN PHARAMCIES**

### **A. Building an Area of Interest**

Interest in banning tobacco sales in pharmacies occurred as far back as 1971, when the American Pharmaceutical Association recommended that pharmacies not sell tobacco products.<sup>27</sup> Some modest efforts aimed at encouraging voluntary change were tried during the intervening years until 1993, when Ontario, Canada passed legislation. Proponents of the San Francisco ban cited Ontario's law as evidence that pharmacies would not face closure or substantial economic losses.<sup>28</sup> Efforts in California started to accelerate shortly after Ontario took action, largely thanks to advocacy by the California Medical Association. In 1995, the California Medical Association launched the Pharmacy Partnership, a project intended to pressure pharmacies into discontinuing tobacco product sales.<sup>29</sup> In the late 1990s, interest in the Education Partnership increased and an investigative-styled campaign published photographs showing tobacco products being sold in pharmacies next to toys and candy within the easy reach of children.<sup>30</sup>

The Pharmacy Partnership, in part, promoted a voluntary model and was able to convince many independent pharmacies to act.<sup>31</sup> Pharmacies that voluntarily discontinued sales provided opportunities to evaluate the effects going tobacco-free.<sup>32</sup>

The Pharmacy Partnership published a survey finding that 88% of pharmacies that had voluntarily discontinued tobacco sales experienced no loss in business.<sup>33</sup> The Pharmacy Partnership also reported that 97% of consumers would continue to patronize these pharmacies as often or even more often.<sup>34</sup>

Within San Francisco, California LGBT Tobacco Education Partnership became very active on this issue<sup>35</sup> and in building awareness of the health effects of smoking.<sup>36</sup>

It identified a number of independent pharmacies in the City of San Francisco that did

not sell tobacco and recruited additional independent pharmacies to discontinue tobacco sales.<sup>37</sup> Support from



some of these pharmacies and other advocates identified by the LGBT Tobacco Education Partnership were instrumental in the passage of the ban.<sup>38</sup>

#### A. An Idea Becomes a Proposed Ordinance

Dr. Katz was familiar with the literature and initiatives on pharmacy bans when he saw the opportunity to transform the concept into law.<sup>39</sup> He proposed the law in an informal meeting with Mayor Newsom in late 2007.<sup>40</sup> Dr. Katz knew that it fit well with Mayor Newsom's interest in structural public health interventions--interventions based in the law that promote environments conducive to healthy living.<sup>41</sup> Not surprisingly, Mayor Newsom agreed that the ban would be a good idea.<sup>42</sup>

The idea was then given to the Office of the City Attorney.<sup>43</sup> The City Attorney drafted the legislative language and produced a memo discussing the legal issues that

were involved.<sup>44</sup> The memo also estimated litigation costs of defending the ban in case of a lawsuit.<sup>45</sup> The content of this memo is a confidential attorney-client communication, and therefore, was not discussed nor reviewed for purposes of this case study.<sup>46</sup>

During this initial drafting period, the decision was made to focus on standalone pharmacies and exclude those located in grocery stores and big-box stores.<sup>47</sup> Dr. Katz and others involved in this initial brainstorming felt that the sale of tobacco products in standalone pharmacies was in direct contradiction to the role pharmacies play in health promotion.<sup>48</sup> By contrast, grocery stores and big-box stores sell a broad range of products and place less emphasis on health care.<sup>49</sup>

Ironically, the decision by Dr. Katz and Mayor Newsom to maintain their fidelity to the original goal of the ordinance may have actually heightened the potential for litigation. Walgreen argued that it was unfair to be singled out when people could go into a grocery store and buy their medicine and tobacco products in those locations.<sup>50</sup> This argument, in fact, formed the basis of one of Walgreen's primary legal claims.<sup>51</sup> It argued that the ban was arbitrary, and thus, in violation of its equal rights under the California and United States Constitutions.<sup>52</sup>

### **C. Moving the Proposed Ordinance through Passage**

Proponents carefully planned for the hearing and other steps in passing the law. Dr. Katz asked Board of Supervisor Aaron Peskin to co-sponsor the ban with Mayor Newsom.<sup>53</sup> The California LGBT Tobacco Education Partnership's efforts to encourage the pharmacies to voluntarily stop selling products provided ground-swell of support



around the issue.<sup>54</sup> Tobacco Free Project Director Hrushow worked closely with the Education Partnership to organize for the hearing.<sup>55</sup>

The ban was proposed to the Board of Supervisors on April 29, 2009 by Mayor Newsom, Board Supervisor President Aaron Peskin and fellow Board Member Jake McGoldrick.<sup>56</sup> “The Board of Supervisors is the Legislative Body of the City and County of San Francisco, which has several Committees that hold public hearings on proposed ordinances and resolutions where people may testify or submit written testimony.”<sup>57</sup> The Board of Supervisors assigned the ordinance to the City Operations and Neighborhood Services Committee for review.<sup>58</sup>

On May 8, 2008, the City Operations and Neighborhood Services Committee assigned the ban to the Small Business Commission.<sup>59</sup> On May 9, 2008, Mayor Newsom was quoted in news media as being in support of the ban and stated that he was “absolutely confident” that the Board would approve it.<sup>60</sup> A few days later on May 12, 2008, Dr. Katz was interviewed on a national news media program, discussing the reasons for the ban.<sup>61</sup> Both would later be quoted numerous times in news media coverage of the ban as it progress towards passage.<sup>62</sup>

On June 11, 2008, the Small Business Commission responded that it unanimously supported the ban,<sup>63</sup> and the City Operations and Neighborhood Services Committee scheduled a public hearing for July 17, 2008.<sup>64</sup> Dr. Katz gave a presentation before the hearing was open for public comment. Dr. Katz addressed the exemption for excluding grocery stores and big-box stores.<sup>65</sup> He pointed out that most of the independent pharmacies had already gone tobacco free,<sup>66</sup> which was a result of work by

the California LGBT Tobacco Education Partnership and the California Medical Association.

At this point, the United Food and Commercial Workers Local No. 648's became apparent.<sup>67</sup> The President of the Union and Union members, who were also employees of Walgreen, testified that the ban would result in job losses and that it was unfair to exclude pharmacies in grocery stores and big-box stores.<sup>68</sup> Others who spoke in opposition to the ban included representatives from the Walgreen Company, the California Retail Association and the San Francisco Chamber of Commerce.<sup>69</sup> These opponents echoed the themes of job loss, ineffectiveness and unfairness.<sup>70</sup>

The Board of Supervisors passed the ordinance on July 29, 2008 with eight votes in favor and three opposed.<sup>71</sup> A board member in favor of the ban stated "what ever we can do to make this country a smoke-free zone, we should do it."<sup>72</sup> Some members predicted that the ban would be a "first step" towards further reduction in the number of tobacco retailers in San Francisco.<sup>73</sup> One of those who voted against the ban stated "I don't see the value in driving tobacco consumers to corner stores where they aren't going to have access to smoking-cessation products."<sup>74</sup> On August 7, 2008, Mayor Newsom signed it into law after the Board of Supervisors conducted a second reading.<sup>75</sup>

## **VI. OPPOSITION PRIOR TO PASSAGE OF THE TOBACCO SALES BAN: THREATS OF ILLEGALTY AND OTHER CLAIMS**

### **A. The Threat of Job Losses**

Opponents argued that the ban would result in job losses. The Union for Walgreen employees, United Food and Commercial Workers Local No. 648, largely

focused on this argument.<sup>76</sup> Tobacco Free Project Director Hrushow felt that the Walgreen Company probably sought Local No. 648's support because it would carry more weight with members of the Board of Supervisors.<sup>77</sup> San Francisco strongly supports unions, and Walgreen has a good relationship with its employees' union and is a well-respected employer within San Francisco.<sup>78</sup>

Dr. Katz responded by pointing out that many independent pharmacies already decided not to sell tobacco products. Polling by the California Medical Association's Pharmacy Partnership found that 97% of consumers would continue to patronize these pharmacies as often or even more often.<sup>79</sup> Additionally, public sentiment probably favored leveling the playing field between chain pharmacies and independent pharmacies.<sup>80</sup> Although several independent pharmacies had decided to stop selling tobacco, most chain pharmacies did not.<sup>81</sup>

#### **B. Promotion of Cessation Services**

Another theme during the legislative process was that pharmacies are actually a good place for tobacco products to be sold, compared to other retail establishments. Walgreen conveyed this message in a variety of forums. In a placard posted at Walgreen locations, customers were urged to contact the Board of Supervisors and oppose the sales ban.<sup>82</sup> The placard stated that "the proposal will force smokers to liquor stores, tobacco shops, gas stations or other retailers that don't carry smoking cessation products and don't have pharmacists available for advice on quitting."<sup>83</sup> At the public hearing, a Walgreen representative stated that pharmacist are trained in providing

information on smoking cessation services, but the ordinance would send smokers elsewhere away from such help.<sup>84</sup>

A spokesperson for Walgreen echoed this message in the news media, stating “people buying cigarettes can speak to pharmacists in the store about quitting smoking and can buy smoking cessation products there.”<sup>85</sup> A representative for the Convenient Care Association, which advocates for medical clinics in pharmacies, even stated that “we do not understand how forcing retailers to choose between having an in-store clinic and selling tobacco products serves the broader goal of providing consumers with easier access to high-quality, affordable care.”<sup>86</sup>

Mr. Katz felt that this oppositional theme did not resonate with the public.<sup>87</sup> The more opponents pointed to the importance of cessation, the more the public was reminded of the harm caused by tobacco use and the strength of nicotine addiction.<sup>88</sup> Additionally, pharmacies could continue to provide such services even if they were not allowed to sell tobacco products.<sup>89</sup> A tobacco free environment would be more conducive for quitting.<sup>90</sup>

### **C. Threat of Litigation**

Many proponents believed that the pharmacy ban probably would be challenged in court based on past legal challenges to efforts to regulate tobacco use.<sup>91</sup> A tobacco manufacturer sued San Francisco when it banned smoking in enclosed workplaces and at sports arenas.<sup>92</sup> Since then, tobacco manufacturers have brought numerous other lawsuits in opposition to tobacco control laws in other jurisdictions.<sup>93</sup>

In news media coverage, there were no explicit threats of litigation prior to passage of the ban, except for one comment by a representative of Walgreen. He stated that the “chain had not decided whether it would take legal action against the ban” and “we are going to review all our options.”<sup>94</sup> However, several opponents claimed that the ban was “unfair” or “arbitrary.” The National Association of Chain Drug Stores stated that “[s]uch a ban would only succeed in making an arbitrary determination as to which retailers would be permitted to sell products that remain legitimately for sale in the state and nation.”<sup>95</sup> The California Distributors Association took the position that the ban “limits the rights of legitimate retailers from selling a legal product.”<sup>96</sup>

During the public hearing, a representative for Walgreen described the ban as “arbitrary” and “unfair.”<sup>97</sup> A representative of the California Retail Association, which has Walgreen’s as a member, testified “that the exceptions [regarding grocery stores and big-box stores] creates an absolute inequity in how these businesses must operate in San Francisco.”<sup>98</sup> He argued that there is no difference among these retail locations and thus, no reason to treat them differently.<sup>99</sup>

The theme of unfairness was the cornerstone of Walgreen’s lawsuit. Walgreen claimed, in its legal filings, that “by prohibiting tobacco sales only at some retail establishments with pharmacies, and not others, the [ban] . . . violates the equal protection guarantees of the Federal and State Constitutions.”<sup>100</sup> The argument was ultimately unsuccessful, as was expected by the proponents. In general, courts allow legislative and regulatory bodies to make incremental steps towards public health goals.<sup>101</sup>

There was some consideration among proponents for removing the exemption for big-box stores and groceries with in-store pharmacies,<sup>102</sup> which would have dealt with the unfairness argument. One rationale for leaving the exemption in was to keep the ban focused on the underlying rationale for the ban, which was to remove tobacco products from environments that are central to healthcare delivery.<sup>103</sup> Big-box stores and groceries offer a larger array of products and many customers patronize these types of establishments for non-health reasons.<sup>104</sup>

## **VII. LESSONS LEARNED**

The interviewees cited a number of factors that supported their decision to pass the tobacco sales ban and face the possibility of a lawsuit. First, the California LGBT Tobacco Education Partnership and the California Medical Association were very successful in raising the public's awareness in support of tobacco free pharmacies.<sup>105</sup> They successfully encouraged several pharmacies to voluntarily stop selling tobacco products.<sup>106</sup> These steps provided political support and demonstrated that standalone pharmacies could operate successfully without selling tobacco products.<sup>107</sup>

Another factor in the proponents' decision-making was the opportunity for secondary gains. Dr. Katz believed (correctly) that the ban would generate significant news coverage, effectively functioning as a public service announcement on the dangers of tobacco use.<sup>108</sup> Dr. Katz was quoted in several news stories and interviewed on television.<sup>109</sup> Another secondary benefit was an additional sales ban suggested by Supervisor McGoldrick during the legislative process.<sup>110</sup> In the City Operations and Neighborhood Services Committee hearing, Supervisor McGoldrick suggested

prohibiting the sale of tobacco products on all county property, as companion legislation to the pharmacy ban.<sup>111</sup> Supervisor McGoldrick's proposal was adopted.<sup>112</sup>

Proponents also understood that by going through the process of passing the ban and facing a legal challenge, San Francisco would help facilitate similar bans in other jurisdictions. A few health directors from other counties told Dr. Katz that they wanted to establish a ban, but were unable to because of the political barrier created by concerns of litigation. The opponents also may have recognized this concern and were motivated to stop San Francisco from taking action.

Another consideration was the role the pharmacy ban would play in the process of developing a more comprehensive strategy to reduce the prevalence of tobacco retailers. One member of the San Francisco Board of Supervisors cited this idea when asked why he supported the pharmacy ban.<sup>113</sup> Courts have long recognized that public health practitioners may proceed incrementally in developing public health laws.<sup>114</sup> Indeed, this is exactly what the litigation around the pharmacy ban appears to have accomplished.

San Francisco appears to be moving in the direction of limiting the number of its tobacco retailers.<sup>115</sup> This is a widely-recognized and effective public health law for reducing alcohol consumption. The pharmacy ban appears to represent a first step in the implementation of this broader strategy. It demonstrates a well-structured approach to developing a larger policy, an approach where legal precedent is developed carefully.

## RESEARCH METHODOLOGY

The Project utilized descriptive case study methodology to examine instances of state and local public health legislation that was opposed with legal rhetoric or faced a direct legal challenge. Descriptive case study methodology is designed to present a complete description of a case within its context. The descriptive case study technique was selected because of the lack of prior research on the issue of defensive public health litigation and the resulting lack of established theory in the area. The primary unit of analysis for each study was the proponent of the public health initiative. Background research for each case study included local and national media coverage, legislative and/or administrative documents, documents generated by the opposition, scholarly articles, legal filings and judicial opinions. A minimum of two in-depth telephone interviews were conducted for each case. Where possible, one interview was of a public health official, and one interview was with an attorney affiliated with the public health official. Given the resources available to conduct the studies interviews with opponents were not conducted.

<sup>1</sup> See *The Burden of Tobacco Use*, Office of Smoking and Health, CDC (2009) available at <http://www.cdc.gov/NCCDPHP/publications/aag/osh.htm>.

<sup>2</sup> Best Practices for Comprehensive Tobacco Control Programs – 2007, Centers for Disease Control and Prevention (Oct. 2007).

<sup>3</sup> *U.S. v. Philip Morris*, 449 Supp. 1 (D.D.C. 2006)

<sup>4</sup> Wendy Koch, Pressure Mounts for Pharmacies to Put Out Smokes: National Movement Seen Against Tobacco, USA Today (May 9, 2008) at 1A.

<sup>5</sup> Wyatt Buchanan, *Board Passes Tobacco Ban in Pharmacies*, SAN FRANCISCO CHRONICLE, July 30, 2008, at 1.

<sup>6</sup> *Walgreen Co. v. The City and County of San Francisco, et al.*, No. 479-553 (Sup. Ct. Cal., Sept., 30, 2008).

<sup>7</sup> *Id.*

<sup>8</sup> *Philip Morris USA v. City and County of San Francisco, et al.*, 2008 WL 5130460 (N.D. Cal., Dec. 5, 2008).

<sup>9</sup> SURGEON GEN. RICHARD H. CARMONA, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING (2004)

<sup>10</sup> CDC, *Cigarette smoking among adults—United States, 2006*, 56(44) MORBIDITY & MORTALITY WKLY. REP 1157–1161 (Nov. 9, 2007).

<sup>11</sup> See Press Release, Dr. Mitchell H. Katz, Director of Public Health, City and County of San Francisco, *Director's Report for Health Commission Meeting* (Aug. 5, 2008).

<sup>12</sup> See *Philip Morris USA v.*, 2008 WL at \*1.

<sup>13</sup> San Francisco Health Code, § 1009.91-99.

<sup>14</sup> San Francisco Administrative Code, c. 100.1-100.16.

<sup>15</sup> San Francisco Planning Code, § 790.102(a).

<sup>16</sup> Telephone Interview with Dr. Mitchell H. Katz, Director of the Dep't Public Health for the City and County of San Francisco (Oct., 2009) (Hereinafter "Interview with Dr. Katz").

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

<sup>21</sup> See Testimony of Dave Devencenzi, Walgreen District Manager, Hearing of the City Operations and Neighborhood Services Committee of the City and County of San Francisco Board of Supervisor (July 17, 2008) available at [http://sanfrancisco.granicus.com/MediaPlayer.php?view\\_id=8&clip\\_id=5876&meta\\_id=123526](http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=8&clip_id=5876&meta_id=123526).



- <sup>22</sup> Telephone Interview with Catherine Dodd, Deputy Chief of Staff, Office of the Mayor of San Francisco (Oct., 2009) (Hereinafter “Interview with Deputy Chief of Staff Dodd”).
- <sup>23</sup> Koch, *supra*, note 4.
- <sup>24</sup> Anne Landman, *The Beginning of the End of Cigarettes for Sale in Pharmacies*, [www.prwatch.org](http://www.prwatch.org), (Oct. 2, 2008).
- <sup>25</sup> *Id.*
- <sup>26</sup> *U.S. v. Philip Morris*, 449 Supp.
- <sup>27</sup> Ron Davis, *Tobacco Sales in Pharmacies: Mixing Good Drugs and Bad Drugs*, 1 TOBACCO CONTROL 84 (1992).
- <sup>28</sup> Mitch Katz, *Banning Tobacco Sales in Pharmacies: The Right Prescription*, 300(12) JAMA 1451, 1452 (2008).
- <sup>29</sup> *See id.*
- <sup>30</sup> *See* Cal. Med. Ass’n Found., Prescription for Change available at <http://www.thecmafoundation.org/rxchange/home.html> (last visited Dec. 12, 2009).
- <sup>31</sup> *See id.*
- <sup>32</sup> *See id.*
- <sup>33</sup> *See id.*
- <sup>34</sup> *See id.*
- <sup>35</sup> Telephone Interview with Alyonik Hrushow, Director of Tobacco Free Project, Dep’t of Public Health for the City and County of San Francisco (July, 2009) (Hereinafter “Interview with Director Hrushow”).
- <sup>36</sup> *See id.*
- <sup>37</sup> *See id.*
- <sup>38</sup> *See id.*
- <sup>39</sup> *See* Interview with Dr. Katz.
- <sup>40</sup> *See id.*
- <sup>41</sup> *See id.*
- <sup>42</sup> *See* Interview with Deputy Chief of Staff Dodd.
- <sup>43</sup> *See id.*
- <sup>44</sup> *See id.*
- <sup>45</sup> *See id.*
- <sup>46</sup> *See id.* The exact content of the memo is considered a confidential attorney-client communication, and therefore, was not discussed nor reviewed for purposes of this case study.
- <sup>47</sup> *See* Interview with Dr. Katz.
- <sup>48</sup> *See id.*
- <sup>49</sup> *See id.*
- <sup>50</sup> *See* *Walgreen Co. v. The City and County of San Francisco, et al.*, No. 479-553 (Sup. Ct. Cal., Sept., 30, 2008) (Complaint).
- <sup>51</sup> *See id.*
- <sup>52</sup> *See id.*
- <sup>53</sup> *See* Interview with Dr. Katz.
- <sup>54</sup> *See* Interview with Director Hrushow.
- <sup>55</sup> *See id.*
- <sup>56</sup> City and County of San Francisco Board of Supervisor, Meeting Minutes (April 29, 2008) available at <http://www.sfbos.org/index.aspx?page=1564>
- <sup>57</sup> <http://www.sfbos.org/> (last visited on Oct. 15, 2009).
- <sup>58</sup> City and County of San Francisco Board of Supervisor, *supra*, at note 56.
- <sup>59</sup> City Operations and Neighborhood Services Committee, Special Meeting Agenda (May 8, 2008) available at <http://www.sfbos.org/index.aspx?page=460>.
- <sup>60</sup> Koch, *supra*, note 4.
- <sup>61</sup> Interview with Dr. Mitchell Katz (CNN television broadcast May 12, 2008).
- <sup>62</sup> *See* Interview with Dr. Katz.
- <sup>63</sup> City Operations and Neighborhood Services Committee, Meeting Agenda (July 17, 2008) available at <http://www.sfbos.org/index.aspx?page=447>.

<sup>64</sup> Hearing of the City Operations and Neighborhood Services Committee of the City and County of San Francisco Board of Supervisor (July 17, 2008) *available at* [http://sanfrancisco.granicus.com/MediaPlayer.php?view\\_id=8&clip\\_id=5876&meta\\_id=123526](http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=8&clip_id=5876&meta_id=123526).

<sup>65</sup> *See id.*

<sup>66</sup> *See* Interview with Director Hrushow.

<sup>67</sup> Hearing of the City Operations and Neighborhood Services Committee, *supra*, at note 64.

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> Buchanan, *supra*, note 5.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See Walgreen Co. v. The City and County of San Francisco, et al.*, No. 479-553 (Sup. Ct. Cal., Sept., 30, 2008) (Complaint).

<sup>75</sup> *See* Interview with Director Hrushow.

<sup>76</sup> *See id.*

<sup>77</sup> *See* Interview with Dr. Katz.

<sup>78</sup> *See* Cal. Med. Ass'n Found., *supra*, note 30.

<sup>79</sup> *See* Interview with Dr. Katz.

<sup>80</sup> *See id.*

<sup>81</sup> *See* Landman, *supra*, note 24.

<sup>82</sup> *Id.*

<sup>83</sup> *See id.*

<sup>84</sup> Testimony of Dave Devencenzi, *supra*, note 21.

<sup>85</sup> Buchanan, *supra*, note 5.

<sup>86</sup> Ann Zimmerman, *Drugstore Tobacco Sales Under Fire – San Francisco Vote to Tackle Cigarettes at Health Retailers*, WALL STREET JOURNAL (July 29, 2008) at B1.

<sup>87</sup> *See* Interview with Dr. Katz.

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See* Interview with Director Hrushow.

<sup>91</sup> *See id.*

<sup>92</sup> *Reynolds Holding, Taking a Break -- Outdoors, Lawsuit Challenges S.F. Smoking Ban*, SAN FRANCISCO CHRONICLE (Feb. 2, 1994).

<sup>93</sup> Zimmerman, *supra*, note 86.

<sup>94</sup> Buchanan, *supra*, note 5.

<sup>95</sup> Zimmerman, *supra*, note 86.

<sup>96</sup> Malia Wollan, *San Francisco Board Passes Drugstore Tobacco Ban*, ASSOCIATED PRESS (July 30, 2008).

<sup>97</sup> Testimony of Dave Devencenzi, *supra*, note 21.

<sup>98</sup> Testimony of Christian Pradia, California Retail Ass'n, Hearing of the City Operations and Neighborhood Services Committee of the City and County of San Francisco Board of Supervisor (July 17, 2008) *available at* [http://sanfrancisco.granicus.com/MediaPlayer.php?view\\_id=8&clip\\_id=5876&meta\\_id=123526](http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=8&clip_id=5876&meta_id=123526).

<sup>99</sup> *See id.*

<sup>100</sup> *Walgreen Co. v. The City and County of San Francisco, et al.*, No. 479-553 (Sup. Ct. Cal., Sept., 30, 2008) (Pl. Br. Prelim. Injunc.).

<sup>101</sup> *See F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993)

<sup>102</sup> *See* Interview with Dr. Katz.

<sup>103</sup> *See id.*

<sup>104</sup> *See id.*

<sup>105</sup> *See* Interview with Director Hrushow; *see also* Interview with Dr. Katz.

<sup>106</sup> *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> See Interview with Dr. Katz.

<sup>109</sup> See *id.*

<sup>110</sup> Testimony of Supervisor Jack McGoldrick, Member of Board of Supervisors, Hearing of the City Operations and Neighborhood Services Committee of the City and County of San Francisco Board of Supervisor (July 17, 2008) available at [http://sanfrancisco.granicus.com/MediaPlayer.php?view\\_id=8&clip\\_id=5876&meta\\_id=123526](http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=8&clip_id=5876&meta_id=123526).

<sup>111</sup> See *id.*

<sup>112</sup> See Interview with Dr. Katz.

<sup>113</sup> See Buchanan, *supra*, note 5.

<sup>114</sup> See *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993). Public health responses include multifaceted interventions involving epidemiological surveillance, law, health care services, education and the dynamic between these four parts. Additionally, public health problems are complex requiring a pattern of intervention and evaluation until an accurate and complete response is achieved. Thus, where one step (or passage of a new law) in this process might appear from the layman's perspective to be arbitrary, a closer examination would reveal its relevance in an overall public health response.

<sup>115</sup> Mike Aldax, *San Francisco Moves to Curtail Tobacco Outlets*, SAN FRANCISCO EXAMINER (Nov. 24, 2009) at B1.