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**Testimony of James S. Calvin, President
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Board of Health Public Hearing on Amendment to
Article 181 of the New York City Health Code

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Headquartered in Albany, the New York Association of Convenience Stores is a private, not-for-profit trade organization representing the interests of all 7,700 mini-marts, bodegas and convenience stores across New York State, most of which are licensed to sell tobacco.

As business owners, parents and citizens, we share your commitment to preventing youth access to tobacco. In fact, NYACS is a state-approved provider of certified tobacco sales training. I have personally taught over 5,000 store managers and cashiers the techniques for ensuring that cigarettes aren't sold to kids.

While we do not defend smokers or smoking, we make no apology for responsibly selling legal tobacco products, in accordance with all federal, state and city regulations, to adult customers who choose to use them despite the known health risks. We'd love to also sell smoking cessation products, if only the federal government would let us.

Timing

Our first comment about this proposal is that we are puzzled by its timing.

After years of struggle, public health advocates finally won congressional approval for the Food & Drug Administration to regulate tobacco nationwide. Signed by President Obama 38 days ago, the new law directs the FDA to require, in the future, cigarette packs to bear color graphics depicting negative health consequences of smoking, and authorizes the FDA to broaden health warning requirements if warranted. Moreover, it will restrict in-store tobacco advertising to black text on a white background as of next June.

At long last, the FDA is about to plant your flag at the summit of Mount Everest, but it seems like suddenly you're elbowing them out of the way to get there first. We don't understand the rush to unilaterally enact rules that are bound to be inconsistent in nature and timing with FDA guidelines.

Small Business Impact

More troubling is that this proposal is presented solely as a public health issue. It indeed impacts public health, but at the same time it impacts small business. Examining only one side of the equation would be a mistake.

It's not just that the proposed number, size and placement of the signs amount to a seizure of prime retail space used for promotional messages and product displays.

If ghoulish pictures of black lungs dominate the view of our counter, they will be seen not only by adult tobacco customers, but by non-smokers entering the store to buy milk, produce, candy, beverages, newspapers, lottery and everything else we sell.

And these images are going to turn them off to coming into our store. Consequently, some non-tobacco customers will stop coming in altogether, costing us business, which in turn will impact jobs as well as excise and sales tax revenue. Perhaps nobody has thought through this scenario.

Then again, maybe the amendment is strategically designed to *create* that scenario, coercing retailers to quit selling tobacco just to spare their customers the sight of gruesome images every time they buy a Win-4 ticket or a bottle of water. I hope that's not the intent, because it would border on regulatory extortion.

Just last month, the City Council voted to create a task force to examine agency regulations that affect the business community. Speaker Quinn stated, quote: "Small businesses are the backbone of our City's economy. As we look to help these businesses through the recession, our first priority must be to ease their financial and regulatory burdens, so they can thrive and prosper."

The task force will report to the Speaker and the Mayor December 31st. Given the legitimate concerns about the impact this regulation would have on small retailers, it might be helpful for the Board of Health, before acting on this amendment, to hear its recommendations.

Double Standard

Our third point is that the proposed amendment adds to the shameful regulatory double standard that has long existed between licensed, tax-collecting, law-abiding retail stores and our unlicensed, unregulated, untaxed competitors with regard to tobacco regulation.

Are you going to also require the posting of these signs at Native American smoke shops on Long Island, whose vast tax-free tobacco exports into the City are costing local taxpayers hundreds of millions of dollars annually in lost tax revenue?

Are you going to require the display of these signs on the Internet tobacco web sites that sell millions of cartons of cigarettes to New Yorkers without tax collection or age verification?

Are you going to require that the countless black-market entrepreneurs who make a fast buck illegally selling tax-free smokes to New Yorkers post these signs in the window of their van parked in the alley?

An economist has documented that fully half the cigarettes consumed by New Yorkers are purchased from these unlicensed, unregulated, untaxed channels. This tax evasion epidemic will only worsen as licensed, tax-collecting stores drop the tobacco category rather than displaying the mandatory graphic images. In other words, this regulation is certain to chase more tobacco sales into the arms of the unregulated.

The Mayor and the Department of Health deserve a lot of credit for reducing the smoking rate in the City of New York. But the virtue of this cause does not justify forcing retailers who bother to get a license, collect taxes, and comply with regulations to forfeit grocery, lottery and other sales by having to expose their customers to nauseating pictures of internal organs while their unscrupulous competitors who control half the market continue to conduct illicit commerce unencumbered by such government standards with the tacit approval of the government. It isn't right, and it isn't fair. And the pat bureaucratic retort that "they're out of our jurisdiction" rings hollow.

If city agencies continue to impose unreasonable regulatory burdens without due consideration of their impact on small businesses, perhaps the task force created by the City Council will recommend that official notification of such regulations be accompanied by graphic images of the economic consequences – empty storefronts.

NYACS respectfully recommends that the Board of Health disapprove the proposed amendment. Thank you for the opportunity to comment.