With most state governments in a state of crisis, the prospect of either increasing existing excise taxes or creating new ones is becoming very real. The recession, compounded by the collapse of the housing market and years of tax cutting when the economy was flourishing, has led to double-digit drops in state tax revenue. Politicians and budget officials are faced with the unappealing prospect of either slashing government programs or finding new ways to raise necessary funds. In a society that is averse to taxation of any kind, raising traditional forms of taxes is always difficult. The ability of lawmakers to raise those taxes while dealing with the effects of a recession of this magnitude would appear next to impossible. For those reasons, excise taxes appear to provide perhaps the only fertile ground for state governments to mine for desperately needed dollars.

Although the increased use of excise taxes may be inevitable, excises are nevertheless fraught with tax policy problems. This report will look at the problems of excise taxes, including some less common and emerging taxes. It will conclude by defending a particular excise tax — the District of Columbia’s bag tax — that manages to avoid many of those policy problems while still realizing an important governmental objective.

The Problematic World of Excise Taxes

An excise tax, broadly stated, is a tax on a good that is produced for sale to a third party. Before the 20th century, excise taxes were the primary source of state revenue. Today they still provide an indispensable supply of governmental income. In fiscal 2009 alone, state governments across the country collected $114.3 billion from the many types of selective sales taxes. That figure constituted approximately 16 percent of the $715.2 billion that the states collected in total. Those figures demonstrate the important role that excises play in state taxation regimes, especially as overall state tax collections continue to decrease.

Sin Taxes

Taxes on cigarettes, alcohol, and gambling represent quintessential forms of sin taxes, a subset of excise taxes. Recently, taxes on sugary foods and drinks, colloquially known as fat taxes, have emerged as one of the newest examples of the excise tax. In February, for example, Colorado Gov. Bill Ritter (D) signed into law new legislation that will charge a 2.9 percent tax on sales of candy and soda. In September 2009 Illinois increased its tax on candy from 1 percent to 6.25 percent.

Unsound Tax Policy?

Compensating for Externalities Versus Raising Revenue

Excise taxes on undesirable products are rationalized as a means of mitigating the negative effects related to their consumption. They are purportedly

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3Id. at 1-2.

intended to compensate society for the harmful externalities borne by society that are associated with the undesirable activity. But when one considers the ultimate recipient of the funds raised by many excise taxes, that justification becomes dubious. Under many state taxing schemes, the revenue raised from excise taxes is not necessarily used by state governments to address the negative externalities attributed to the underlying product. For example, while all 50 states and the District of Columbia charge excise taxes on tobacco products, there is a growing trend to use the money raised from those taxes on governmental programs unrelated to the prevention of tobacco use. According to a study published on April 9 by the Center for Disease Control and Prevention, “despite the fact that the average state cigarette tax increased from $1.18 per pack in 2008 to $1.34 per pack in 2009 ‘none of the 15 states dedicated any of the new excise tax revenue from a sin tax, for example, because consumers of goods subject to sin taxes represent one of the last remaining groups of people who can be targeted for taxation without generating political controversy.”

In reality, taxes on products like cigarettes provide such a valuable, stable revenue stream that quitting is the last thing state governments want their nicotine-addicted constituents to do. Indeed, as at least one critic has argued, “if the provision of a variety of extensive social benefits depends on the revenue from a sin tax, some level of consumption of the ‘sinful’ product must be maintained.” Given the pervasive state budget shortfalls across the country and the public antipathy to taxation, states have become more and more reliant on the revenue raised from excises. That is particularly true of sin taxes because consumers of goods subject to sin taxes represent one of the last remaining groups of people who can be targeted for taxation without generating political controversy. Indeed, in fiscal 2009, even though overall state tax collections dropped by 8.6 percent from the prior year, tobacco products taxes actually increased by 3.9 percent to a total of $16.7 billion nationwide.

Sound tax policy dictates that a tax system be used primarily as a means for raising revenue and should strive for transparency. Because the justifications for excises — raising revenue and decreasing use of the product — are mutually exclusive, those taxes cannot adhere to those standards.

Social Control and Lack of Neutrality

At least ostensibly, state and local governments institute sin taxes in a paternalistic attempt to prevent unhealthy lifestyles — that is, to promote more socially acceptable behavior. At least one purpose of taxing products like sugary beverages is to stigmatize them in an effort to curb their consumption. Excise taxes raise revenue through a punitive scheme that charges a fee to members of society who engage in the “unacceptable” behavior in an attempt to rectify aberrant behavior patterns. That is an inappropriate objective for the tax code because it clearly violates the principle of neutrality — the tax code is used to discourage individual consumers from making a market decision.

Regressivity and Discrimination

A third problem with excises is their regressivity. Any fixed-rate tax will impose a greater burden on the poor than on the rich because the tax constitutes a relatively higher percentage of the poorer individual’s overall disposable income. That problem is exacerbated because those taxes tend to be imposed on products that persons of lesser means tend to consume at higher levels compared with their income. That is evident for cigarette taxes, for example, because “smokers from the working-class spend more of their income on cigarettes than smokers who are professionals.”

Excise taxes can also be discriminatory and unfair. Consumers of alcohol, cigarettes, and sugary foods represent politically unpopular groups. Society has deemed irrational one’s decision to engage in activity that is detrimental to one’s health. It is therefore more palatable to burden consumption of

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9Brunori, supra note 1, at 102.
12Brunori, supra note 1, at 103.
13Id. at 102-03.
14U.S. Census Bureau, supra note 2, at 1-2.
socially unacceptable products because there is an element of blameworthiness associated with their use. It logically follows that excise taxes evince a patently discriminatory purpose — they impinge on a politically unpopular group's right to consume some disfavored goods. That sort of discrimination is not considered particularly problematic, however. Smokers and drinkers can hardly be considered protected classes of people, especially in light of the widespread societal consensus that their use of the products being taxed is voluntary.

Under sin tax schemes, only the wealthy may truly pick their poison.

Despite society's lack of empathy for the plight of those being discriminated against because of their product choice, excise taxes nevertheless have a discriminatory effect that reflects the sort of bad public policy society should care about: a disparate effect on the poor. The imposition of sin taxes economically compels lower-income consumers to refrain from consumption of the product being taxed. Individuals who can afford to absorb the added costs — that is, those capable of paying the excise taxation “user fee” — experience no real limitation on their range of consumption choices. It seems that under sin tax schemes, only the wealthy may truly pick their poison. Consequently, selective sales taxes violate the concepts of fairness and vertical equity that should exist in a high-quality state tax system.

The Case for Plastic Bag Taxes

Plastic bags doubtless make the lives of consumers more convenient. That is especially so in a country like the United States where individual citizens are inundated with opportunities to fritter away hard-earned cash on food and retail items and carry them away in a handy plastic sack. However, putting aside the merits of facilitating commerce, the increased use of plastic bags has begun to take a catastrophic toll on the environment. Plastic is derived from nonrenewable resources like oil, takes as many as a thousand years to decompose, and when deposited in bodies of water with marine life, has been responsible for the deaths of animals that mistake plastic material for food. As the hazards associated with ubiquitous plastic bag usage rise to outrageous proportions in some places, state and local governments have begun to make concerted efforts to curb the bags' detrimental effects. The District of Columbia is one such government.

Skip the Bag, Save the River — the D.C. Plastic Bag Tax

Carol Foster told a district council committee hearing:

With a plastic bag tax, we will send a message to any apathetic Washingtonian that the pollution of the environment is not without cost. With a tax, we can challenge those who say they are too busy to care whether the convenience of a plastic bag for ten minutes is worth the cost of our wildlife, our waterways, and even our own health.

In response to the deteriorating environmental state of the Anacostia River, on February 17, 2009, the Council of the District of Columbia introduced Bill 18-150, the Anacostia River Cleanup and Protection Act of 2009. After reviewing the bill, the Committee on Government Operations and the Environment submitted a report on May 14, 2009, recommending its approval. The committee’s report found that plastic bags were most likely the single largest component of trash in the Anacostia and accounted for almost half of the trash in its tributary streams.

According to the committee’s report, the negative consequences associated with a polluted Anacostia included destruction of the river’s ecological integrity, devastation of its use as a cultural and recreational asset, anticipated fines from the Environmental Protection Agency costing district taxpayers millions of dollars each year, and loss of a valuable economic resource and tourist attraction. The report also emphasized the more traditional problems linked to plastic bag usage and litter such as the consumption of nonrenewable fossil fuels and the blenheim of public and private spaces.

Ultimately, the committee dismissed more passive measures for addressing the pollution of the...
Anacostia and advocated Bill 18-150's proposed measures. The committee cited the successful experience of Ireland, which imposed a 15-eurocent tax on plastic bags in 2002. Anticipating public opposition to the district's proposed tax, the committee emphasized that although 40 percent of Ireland's residents originally opposed that country's tax, a staggering 91 percent of residents approved of the levy just over a year later. Indeed, only five months after the tax was introduced in Ireland, plastic bag usage was slashed by 90 percent and $3.5 million was raised for spending on environmental projects. Before recommending approval of Bill 18-150, the committee said:

In truth, there really is no such thing as a free bag. The cost of bags is built into the prices consumers pay for food. And they pay again — to the tune of $50 million a year in the District — to pick up litter and trash, including a lot of plastic bags.

Soon after the committee submitted its report on Bill 18-150, the legislation passed unanimously and was enacted on July 6, 2009, by the Council of the District of Columbia.

On January 1, 2010, the district's bag tax went into effect. The levy affects district businesses that sell food or alcoholic beverages, including grocery stores, liquor and drug stores, street vendors, and restaurants. Those businesses may now sell or distribute only recyclable plastic and paper bags that are labeled or printed with a phrase that encourages recycling. Also, those businesses must charge consumers 5 cents for every carryout plastic or paper disposable bag. The district's website encourages citizens to avoid paying the tax by refraining from bagging purchases when possible or by bringing their own disposable or reusable bags to stores and restaurants. The website also explains that “some stores and restaurants will offer [individuals] a 5-cent credit per bag for bringing [his or her] own.”

Plastic Bag Taxes Avoid the Policy Problems of Other Excise Taxes

The bag tax is not as problematic from a tax policy perspective as many other excise taxes.

Raising Revenue

The primary purpose of the bag tax is to raise money to cover the costs of a public expenditure, that is, the governmental initiative to clean up the Anacostia River. The majority of the proceeds raised through the levy are deposited into the new Anacostia River Cleanup and Protection Fund administered by the District Department of the Environment (DDOE) as a means for cleaning and protecting the Anacostia along with other local waterways. Paying for an important service is a desirable characteristic for an individual selective sales tax.

Transparency

The bag tax is also a model of transparency — one of the hallmarks of a high-quality revenue system. The bag excise tax's transparency can be illustrated by juxtaposing it with tobacco taxes. Like tobacco taxes, the bag levy is justified as a means for compensating society for the negative externalities associated with undesirable activity. However, the revenue generated through the district's taxation of paper and plastic bags, unlike most tobacco taxes, is actually allocated toward rectifying the related problem.

Unlike most tobacco taxes, the revenue generated through the district's taxation of paper and plastic bags is actually allocated toward rectifying the related problem.

The administration of the plastic bag tax is also extremely transparent. Signs explaining the tax and saying “skip the bag, save the river” are pervasive at the checkout registers of affected businesses and serve to inform consumers of its existence and operation. Moreover, the bag tax legislation required the DDOE to conduct an intensive public awareness campaign beginning October 1, 2009. The program was intended to educate district citizens about the importance of reducing disposable carryout bag usage to preserve the city's rivers and tributaries. Under the new tax law, all retail establishments are also required to “indicate on the consumer transaction receipt the number of disposable carryout bags provided and the total amount of fee charged.” All of those measures show that the district government

24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id.; see also D.C. Code section 8-102.03(b)(1)(A)-(B).
32 D.C. Code section 8-102.05.
33 D.C. Code section 8-102.06(1).
34 Id.
35 Id. at section 8-102.03(a)(3).
went to painstaking efforts to ensure that constituents understood the new bag excise tax.

**Minimizing Regressivity and Maximizing Fairness**

Although regressivity is almost unavoidable under any selective sales tax scheme, the district’s bag tax program makes a concerted effort to ensure that the levy is as equitable as possible. From a structural standpoint, the tax is less regressive than other excise taxes because it is not obligatory. When consumers refrain from using bags or bring their own when making purchases, the tax is not even imposed. Moreover, unlike other types of selective sales taxes, the bag levy does not have a discriminatory purpose or effect because it affects all district citizens in the same way. That starkly contrasts with sin taxes on products like tobacco that affect only a small percentage of the population.

The bag levy does not have a discriminatory purpose or effect because it affects all district citizens in the same way. That starkly contrasts with sin taxes.

Obviously, when the tax is actually paid it imposes a greater burden on lower-income individuals because it constitutes a higher relative proportion of their overall income. The district’s bag tax law implemented two initiatives to reduce that regressive effect. The first required the DDOE to conduct a public outreach campaign to create public-private partnerships whose goal was to distribute reusable carryout bags to district residents, primarily seniors and low-income individuals.

The second initiative is built into the Anacostia River Cleanup and Protection Fund. Some of the money collected from retailers and transferred into the fund is allocated to “providing reusable carryout bags to District residents, with priority distribution to seniors and low-income residents.” Together, those two initiatives significantly decrease the likelihood that the bag tax will be inequitable to lower-income individuals.

Although wealthier individuals are still able to absorb the bag tax “user fee” without limiting their range of consumption choices, poorer individuals are not economically compelled to refrain from consumption. A sound tax system seeks to minimize regressivity and impose taxes based on individuals’ ability to pay. The district’s bag excise tax achieves both those objectives.

**Neutrality**

The district’s bag tax violates the principle of neutrality. The levy’s primary objective is to influence market decisions based solely on tax consequences. However, there are several mitigating factors that make the district bag excise tax’s lack of neutrality less problematic. First, the political and economic realities of state and federal tax systems make it almost impossible to abide by the principle of neutrality. Second, the bag tax is not a traditional sin tax motivated by social engineering or punishing blameworthy conduct. The excise’s objective is less about discouraging undesirable behavior than it is about righting a social wrong for which most district residents are partially responsible.

Also, a lack of neutrality is not necessarily an impediment to a high-quality revenue system. According to the National Conference of State Legislatures, a sound tax system may include nonneutral devices so long as the lack of neutrality is made explicit and policymakers are “certain that these measures not only would do what is expected of them, but also reach their goal at a reasonable cost.” The district government has met both those conditions. Regarding the first condition, it has made the bag excise tax’s objective clear through an ambitious public outreach campaign. Regarding the second condition, the levy’s effectiveness during the first month of its operation speaks for itself: At a modest nickel per bag, the tax raised $150,000 in January, and a staggering 19.2 million fewer bags were issued by city’s food and grocery establishments. Under the NCSL’s criteria, despite its lack of neutrality, the district’s bag tax comports with the principles of a sound tax system.

**Conclusion**

Like any selective sales tax intended to influence behavior, the district bag tax is an imperfect vehicle

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36It is at least arguable that the tax actually affects wealthier individuals to a greater degree. That is because higher-income individuals tend to eat out more frequently than poorer individuals at restaurants and similar retail establishments that are obligated to impose the bag tax. Regardless of the force of that argument, the measures taken by the district government to reduce the levy’s regressivity are laudable and effective.

37See D.C. Code section 8-102.06(2).

38Lower-income individuals are compelled to modify their behavior, however. That is problematic in and of itself under the principle of neutrality, as discussed infra, though not to the same degree as other excise taxes.

39Brunori, supra note 1, at 15-16 (explaining that state tax systems “have generally failed to attain neutrality.”)

40See National Conference of State Legislatures, “Principles of a High-Quality State Revenue System” (June 2007).

for advancing the district council's political and social aims. The tax has loopholes\textsuperscript{42} and is not universally accepted by district citizens.\textsuperscript{43} During the council's public hearings after Bill 18-150's introduction last year, one citizen expressed a fear that the new tax would hurt small businesses, saying the excise “is the first slide down a slippery slope of raising money.”\textsuperscript{44} Whether those fears will be realized is yet to be seen. With budget shortfalls increasing, state governments may be forced to continue sliding down the excise tax slippery slope. Nevertheless, the bag tax is the product of a thoughtful attempt by the council to find a practical solution to the pollution of the Anacostia River while also avoiding most of the policy problems traditionally associated with selective sales taxes. The wisdom of such taxes aside, with a reduction of 19.2 million paper and plastic bags in January alone, it is undeniable that the bag tax has been successful in achieving its overall objective.

\textsuperscript{42}For example, the bag tax does not apply to newspaper bags, bags for laundry and dry cleaning, or bags to contain or wrap frozen foods. See D.C. Code section 8-102.01(1)(A)(ii), (C). Also, restaurants, food courts, and fast food establishments that have seating only have to collect the tax on plastic bags — they are exempt from charging the 5-cent excise tax for paper bags.
