



Regulatory Options for Little Cigars

Background

The Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) gives the U.S. Food and Drug Administration (FDA) the authority to regulate tobacco products.¹ Despite the far-reaching scope of this legislation, the FDA’s initial focus was on more commonly used tobacco products like cigarettes. Due to increased federal and state regulation and taxation of cigarettes, the tobacco industry and consumers are now directing their attention to other tobacco products that are subject to less regulation and lower taxes. Among the products that are becoming more popular for these reasons are “little cigars.” In fact, between 1997 and 2007, the sale of little cigars increased by an astounding 240 percent.² This fact sheet provides a brief overview of little cigars, their health risks, gaps in their regulation, and policy approaches that state and local governments might consider to regulate their usage, pricing, and marketing.

Product Description

Little cigars are almost identical to cigarettes in shape and size. They generally have filters like cigarettes and are packaged just like cigarettes in packages of twenty.³ Definitions of “little cigars” vary by jurisdiction, and many states do not define the term at all.⁴ The main feature that distinguishes little cigars from cigarettes is their wrapping material, which is either a tobacco leaf or a substance containing tobacco, and not solely paper, as is the case with cigarettes.⁵ Little cigars weigh less than “cigarillos” and other cigars.⁶ The graphic to the right shows the physical difference between cigarettes, little cigars, cigarillos, and traditional cigars.



Health Risks

As with all cigars, little cigars are associated with an increased risk of cancers of the lung, larynx, esophagus, and oral cavity (lip, tongue, mouth and throat).⁷ Regular cigar smoking is linked to gum disease and tooth loss.⁸ Heavy cigar smoking increases the risk of developing coronary heart disease and lung diseases such as emphysema and chronic bronchitis.⁹

Regulatory Gaps & Options

Taxation

- Regulatory Gap:** The price of tobacco products has a demonstrable effect on their use.¹⁰ As cigarette taxes have risen, cigarette consumption, especially among youth, has decreased.¹¹ Tax increases have not affected all tobacco products equally, however. Although cigarettes and little cigars are almost indistinguishable, little cigars can be purchased for substantially less than cigarettes, making them more attractive to price-sensitive populations.¹² In many jurisdictions, little cigars are subject to a percentage-of-wholesale-price tax (also known as an *ad valorem* tax), rather than a fixed excise tax, which is typically applied to traditional tobacco products and is substantially higher.¹³ In fact, the wholesale price of little cigars is so low that even a reasonably high tax rate leaves them dramatically cheaper than cigarettes.¹⁴
- Regulatory Options:** The Tobacco Control Act preserves state authority to tax tobacco products, including little cigars.¹⁵ Thus, states can raise the price of little cigars by increasing taxes to ensure that little cigars are priced comparably to their substantial equivalent – cigarettes. Given the proven impact of price on tobacco product use,¹⁶ increased taxes can be an effective way to reduce sales of little cigars.

Coupons, Discounts, & Rebates

- Regulatory Gap:** Tobacco manufacturers use coupons and other price-related incentives to make products such as little cigars more attractive to consumers, particularly young people.¹⁷ Heavily discounted little cigars represent a gap in regulation and a public health hazard.
- Regulatory Options:** The Tobacco Control Act preserves state and local government authority to regulate the sale and distribution of tobacco products, including their price.¹⁸ Local and state governments could consider restricting or prohibiting the redemption of coupons for little cigars in retail stores, or restricting other tobacco price-related marketing practices, such as price discounts to tobacco retailers and wholesalers, tobacco retailer incentive programs, and retail value-added deals (e.g., buy-one-get-one-free offers).¹⁹

While legal challenges to such policies can be anticipated in light of the tobacco industry's heavy investment in price-related marketing strategies, a federal district court has recently upheld a local law prohibiting the sale of discounted tobacco products.²⁰ In early 2012, Providence, Rhode Island enacted an ordinance prohibiting licensed tobacco dealers from selling discounted tobacco products through coupon redemption and multi-pack offers.²¹ Tobacco industry stakeholders challenged the law on First Amendment and federal and state preemption grounds. In December 2012, a federal district court upheld the pricing ordinance, concluding that its prohibition against certain industry price discounting practices did not violate the First Amendment and was not preempted by federal or state law.²²

Although this decision has been appealed, and even if upheld, would not be controlling in all jurisdictions, Providence's early success may help support state or local laws to prohibit the deeply discounted sale of little cigars.

Minimum Pack Size

- **Regulatory Gap:** Unlike cigarettes, which are sold in packs of twenty,²³ federal law does not require little cigars to be sold in any minimum pack size. When little cigars are sold individually or in smaller quantities, the product price is lower than when the products are sold as part of a pack. These lower-priced products have a direct appeal to minors.²⁴
- **Regulatory Options:** To combat price disparities caused by small packs of little cigars, and ensure that these products have a price compatible with cigarettes, state and local governments could create a standard minimum pack size for little cigars sold, thus limiting the sale of little cigars sold individually or in small quantities.²⁵

Flavoring

- **Regulatory Gap:** Another disparity exists in the way flavored little cigars are regulated versus flavored cigarettes. Under the Tobacco Control Act, tobacco companies are prohibited from producing cigarettes containing any characterizing flavor other than tobacco or menthol.²⁶ This prohibition is limited to flavored cigarettes, however. Tobacco companies can continue to market little cigars with flavors like cherry, grape, strawberry, wine, vanilla and chocolate – fruit, candy and alcohol flavors that are clearly intended to appeal to youth.²⁷ As a result, approximately one in five high school senior males is a cigar smoker,²⁸ and in some states, cigar use among adolescent males actually exceeds the prevalence of cigarette smoking in this population.²⁹ The 2012 Surgeon General's report, *Preventing Tobacco Use among Youth and Young Adults*, highlights the need to address this rise in the use of flavored cigars, particularly among the young.³⁰
- **Regulatory Options:** As noted above, the Tobacco Control Act clearly indicates that state and local governments can regulate the sale and distribution of tobacco products.

In 2009, New York City enacted an ordinance prohibiting the sale of flavored non-cigarette tobacco products with a characterizing flavor other than menthol, mint, or wintergreen, except in certain "tobacco bars."³¹ Smokeless tobacco companies sued the city, arguing that the ordinance imposed manufacturing standards on their products in conflict with federal law. In 2010, the federal district court for the Southern District of New York ruled in favor of the city, denying the tobacco companies' request to delay enforcement of the law.³² The court stated that the Tobacco Control Act gives the federal government exclusive authority over tobacco product manufacturing standards, but preserves state and local authority to regulate the sale and distribution of tobacco products. The court then found that the New York City ordinance was a sales restriction,

not a product standard. In 2011, the court affirmed the reasoning of its previous decision and dismissed the complaint.³³

In early 2012, Providence, Rhode Island enacted a similar ordinance prohibiting the sale of flavored tobacco products, except in “smoking bars.”³⁴ Several tobacco industry stakeholders sued the city, arguing that the ordinance was preempted by the Tobacco Control Act because it attempted to establish a product standard, and also violated the First Amendment because it limited their ability to describe their products. Like the New York court, the federal district court in Rhode Island concluded that the ordinance was a sales restriction, not a product standard, and thus was not preempted under the Tobacco Control Act.³⁵ The court also concluded that Providence’s ordinance did not limit the plaintiffs’ First Amendment rights, finding that it was simply an economic regulation on the sale of a particular product.³⁶

Although both of these decisions are on appeal and, even if upheld, would not be precedential in all jurisdictions, New York City’s and Providence’s initial successes may help support similar state or local laws to prohibit or significantly restrict the sale of flavored little cigars.

Free Samples

- **Regulatory Gap:** Under the Tobacco Control Act, tobacco manufacturers are restricted from distributing free samples of “cigarettes, smokeless tobacco or other tobacco products.”³⁷ Some sections of the Tobacco Control Act, however, suggest that the law applies only to “cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco,”³⁸ which would mean the restriction on free samples does not apply to little cigars.³⁹ At present, it appears that the FDA has taken the position that the law’s sampling restrictions apply only to cigarettes and smokeless tobacco products.⁴⁰
- **Regulatory Options:** State and local governments could prohibit the distribution of all free samples of other tobacco products, including little cigars.⁴¹

Youth Access

- **Regulatory Gap:** Under federal law, retailers cannot “sell cigarettes or smokeless tobacco to any person younger than eighteen years of age.”⁴² Since little cigars are neither cigarettes nor smokeless tobacco, they are not covered under this law.
- **Regulatory Options:** State and local governments could consider passing stronger, more comprehensive youth access laws to include little cigars. They could also raise the minimum age to purchase tobacco products, as several states already have.⁴³

Point-of-Sale Warnings, Marketing Restrictions, & Broad Sales Prohibitions

- **Regulatory Gap:** The Federal Cigarette Labeling and Advertising Act⁴⁴ limits the authority of state and local governments to regulate the advertising and promotion of

cigarettes; however, no federal statute limits the authority of local or state governments to regulate the advertising and promotion of non-cigarette tobacco products, including little cigars. In addition, as discussed above, the Tobacco Control Act expressly preserves state and local government authority to regulate the sale of tobacco products. Therefore, state and local governments are able to warn consumers of the dangers of using little cigars, regulate the advertising or promotion of little cigars, and regulate the sale of little cigars without risking federal preemption concerns.

- **Regulatory Options:** To determine the most effective options for regulating the sale and marketing of little cigars or for warning consumers about the use of little cigars, state and local governments need to analyze their jurisdiction-specific needs, priorities, and goals. Possible policy options include posting health warnings at the point-of-sale,⁴⁵ imposing marketing restrictions, and prohibiting the sale of all little cigars.⁴⁶ Although federal statutes should not pose a barrier for state and local policies restricting the sale and marketing of little cigars, such laws will most certainly be challenged on the basis that they violate state or federal constitutional provisions related to free speech or interstate commerce.⁴⁷ Although it is important to work with an attorney when pursuing any policy options, the legal issues surrounding the First Amendment are complicated, and jurisdictions must consult with legal counsel before pursuing these types of policies.

Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at (651) 290-7506 or publichealthlaw@wmitchell.edu with any questions about the information included in this fact sheet or to discuss local concerns you may have about implementing these policy options.

The Tobacco Control Legal Consortium provides information and technical assistance on issues related to tobacco and public health. The Consortium does not provide legal representation or advice. This document should not be considered legal advice or a substitute for obtaining legal advice from an attorney who can represent you. We recommend that you consult with local legal counsel before attempting to implement any of these measures.

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Notes

¹ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in relevant part at 21 U.S.C. §§ 301, 321, 387), available at www.govtrack.us/congress/bills/111/hr1256/text.

² Michael Freiberg, *Options for State and Local Governments to Regulate Non-Cigarette Tobacco Products* 21 ANNALS HEALTH L. 407, 413 (2012) (citing Am. Legacy Found., *Cigars, Cigarillos & Little Cigars* 2 (2009), available at <http://publichealthlawcenter.org/sites/default/files/resources/phlc-lreview-freiberg-regulating-otp-2012.pdf>).

³ Ctrs. for Disease Control & Prevention, *Smoking & Tobacco Use: Cigars*, available at http://www.cdc.gov/tobacco/data_statistics/fact_sheets/tobacco_industry/cigars/ (last visited Feb. 20,

2013). Note that cigarillos (classified as large cigars) by federal tax code, are longer, slimmer versions of a large cigar. Cigarillos generally do not have filters, but often have wood or plastic tips. *Id.*

⁴ Freiberg, *supra* note 2, at 413.

⁵ 15 U.S.C. §1332(7).

⁶ See Nat'l Cancer Institute, *Cigar Smoking & Cancer*, available at <http://www.cancer.gov/cancertopics/factsheet/Tobacco/cigars> (last visited Feb. 20, 2013).

⁷ See Frank Baker et al., *Health Risks Associated with Cigar Smoking*, 284 (6), J. AM. MED. ASS'N 735, 737-39 (2000).

⁸ See Nat'l Cancer Institute, *supra* note 6.

⁹ *Id.*; see also Campaign for Tobacco-Free Kids, *The Rise of Cigars and Cigar-Smoking Harms* (2012), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0333.pdf>.

¹⁰ U.S. Dep't of Health & Human Servs., *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General* 522-30 (2012), available at http://www.cdc.gov/tobacco/data_statistics/sgr/2012/.

¹¹ *Id.* at 522.

¹² See, e.g., Little Cigars, <http://www.buylittlecigars.com/> (last visited Feb. 20, 2013); Cigarette Prices by State, <http://cigarette-prices-by-state.com/> (last visited Feb. 20, 2013).

¹³ See Freiberg, *supra* note 2, at 419.

¹⁴ See Freiberg, *supra* note 2, at 419-20. In Minnesota, for instance, the price difference is stark, even though the state has a relatively high “other tobacco product” tax rate of 70 percent. *Id.* at 419. A pack of twenty premium-brand filtered little cigars costs less than two dollars in Minnesota, while a pack of twenty cigarettes costs over five dollars.¹⁴ *Id.* (citing MINN. STAT. § 297F.05, subd. 1 (2010); MINN. STAT. 256.9658, subd. 3(b) (2010)). In 2011, legislation was introduced to correct this imbalance. H.F. 743, 87th Sess. (Minn. 2011), available at <http://wdoc.house.leg.state.mn.us/leg/LS87/HF0743.0.pdf>; S. 493, 87th Sess. (Minn. 2011), available at <https://www.revisor.mn.gov/bin/bldbill.php?bill=S0493.0.html&session=ls87>.

¹⁵ 21 U.S.C. § 387p(a)(1).

¹⁶ U.S. Dep't of Health & Human Servs., *supra* note 10, at 522-30.

¹⁷ *Id.*

¹⁸ 21 U.S.C. § 387p(a)(1). See Marlo Miura, Tobacco Control Legal Consortium, *Regulating Tobacco Product Pricing: Guidelines for State and Local Governments* 5 (2010), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-pricing-2010.pdf>.

¹⁹ See Tobacco Control Legal Consortium, *Cause and Effect: Tobacco Marketing Increases Youth Tobacco Use – Findings from the 2012 Surgeon General's Report on Youth and Young Adult Tobacco Use* 27-28 (2012), <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-SGReport-Findings-Youth-Marketing-2012.pdf>; Miura, *supra* note 18. See also Tobacco Control Legal Consortium, *Price-Related Promotions for Tobacco Products: An Introduction to Key Terms and Concepts* (2011), available at http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-pricerelatedpromotions-2011_0.pdf.

²⁰ Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, No. 12–96–ML, 2012 WL 6128707 (D.R.I. Dec. 12, 2012).

²¹ PROVIDENCE, R.I. CODE §§ 14-300, 14-303.

²² Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, 2012 WL 6128707 at *5-7, 11.

²³ 21 C.F.R. § 1140.14.

²⁴ See, e.g., Tobacco Control Legal Consortium, *Regulating Tobacco Products Based on Pack Size* (2012), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-regulating-packsize-2012.pdf>.

²⁵ Freiberg, *supra* note 2, at 428.

²⁶ See U.S. Food & Drug Admin., Flavored Tobacco, <http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/default.htm> (last visited Feb. 20, 2013) (containing links to resources related to 2009 law prohibiting the manufacture and sale of cigarettes containing certain characterizing flavors).

²⁷ See, e.g., Prime Time Little Cigars, <http://www.gothamcigars.com/cigars/little-cigars/prime-time-little-cigars.html> (last visited Feb. 20, 2013).

²⁸ U.S. Dep't Health & Human Servs., *Youth Risk Surveillance – U.S., 2001*, MORBIDITY AND MORTALITY WKY. REP. 16 (June 18, 2012), available at www.cdc.gov/mmwr/pdf/ss/ss6104.pdf.

²⁹ *Id.*

³⁰ See U.S. Dep't of Health & Human Servs., *supra* note 10.

³¹ N.Y.C. CODE § 17-713, 715 (prohibiting the sale of smokeless tobacco products that have as a component part tastes or aromas relating to "any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice.").

³² U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 703 F. Supp. 2d 329, 344-45 (S.D.N.Y. 2010) (denying plaintiffs' motion for a preliminary injunction, finding them unlikely to prevail on the merits of their federal preemption claim; concluding that the Tobacco Control Act gives the federal government the exclusive authority to regulate the manufacture of tobacco products, while reserving to the states the power to regulate the sale and distribution of tobacco products).

³³ U.S. Smokeless Tobacco Mfg. Co. v. City of New York, No. 09 Civ. 10511, 2011 WL 5569431 (S.D.N.Y. Nov. 15, 2011) (affirming reasoning of preliminary injunction order that the ordinance is an allowable sales restriction, denying plaintiffs' motion for summary judgment, granting defendant's cross-motion for summary judgment, and dismissing the complaint).

³⁴ PROVIDENCE, R.I. CODE §§ 14-308, 14-309, and 14-310.

³⁵ Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, No. 12–96–ML, 2012 WL 6128707 at *12-13 (D.R.I. Dec. 12, 2012).

³⁶ *Id.* at *8.

³⁷ 21 C.F.R. § 1140.16(d)(1).

³⁸ 21 U.S.C. § 387a(b).

³⁹ Freiberg, *supra* note 3, at 422-23. See also Public Health Law and Policy & Tobacco Control Legal Consortium, Comments on the FDA's "Draft Guidance for Industry: Compliance With Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents" (May 20, 2011), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fdacommments-cigarsinsamplingrestrictions-2011.pdf>.

⁴⁰ See, e.g., U.S. Food & Drug Admin., Docket No. FDA-2010-D-0277, *Draft Guidance for Industry: Compliance With Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents 3* (2011), available at <http://www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM248241.pdf>.

⁴¹ See, e.g., Tobacco Control Legal Consortium, *Tobacco Coupon Regulations and Sampling Restrictions – Tips and Tools* (2011), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-tobcouponregsandsampling-2011.pdf>.

⁴² 21 C.F.R. § 1140.14(a).

⁴³ See Tobacco Control Legal Consortium, *Raising the Minimum Legal Sale Age for Tobacco and Related Products* (2012), available at http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-minimumlegal-saleage-2012_0.pdf. See also ALASKA STAT. ANN. § 11.76.100(a)(2) (minimum age of 19 to purchase tobacco); N.J. STAT. ANN. § 2A:170-51.4 (same); UTAH CODE ANN. § 76-10-104 (same).

⁴⁴ 15 U.S.C. § 1331 *et seq.*

⁴⁵ See 23-34 94th St. Grocery Corp. v. New York City Bd. of Health, 685 F.3d 174, 183-85 (2d Cir. 2012) (affirming a district court decision ruling that New York City may not require cigarette retailers to post graphic health warnings next to cash registers or adjacent to cigarette displays, on the grounds that the Federal Cigarette Labeling and Advertising Act prevents state or local governments from adopting laws that affect the content of tobacco retailers' and manufacturers' promotional efforts). The challenged warning signs depicted the health impacts of smoking and contained the message "quit smoking today." It should be noted that if a jurisdiction adopted graphic point-of-sale warning requirements applying to non-cigarette tobacco products such as little cigars, the FCLAA would not apply. However, the law would almost certainly be challenged on First Amendment grounds.

⁴⁶ Freiberg, *supra* note 2, at 438.

⁴⁷ For additional information, see the Tobacco Control Legal Consortium's publications on First Amendment and Commerce Clause issues in the regulation of tobacco products, available at <http://publichealthlawcenter.org/topics/special-collections/federal-regulation-tobacco-collection>.