



**Peter Franchot**  
*Comptroller*

**Thad Russell**  
*Director*  
*MATT Regulatory Division*

July 9, 2008

Baltimore City Health Department  
210 Guilford Avenue  
Baltimore, Maryland 21202

Attn.: Rianna Brown

Re: Proposed Regulation Banning the Sale of Single, Cheap Cigars in Baltimore City

Dear Ms. Brown:

I am writing to formally request that comments submitted on June 30, 2008, by the Motor Fuel, Alcohol and Tobacco Tax Regulatory division concerning the proposed ban on the sale of single, cheap cigars be withdrawn, and that the attached Attorney General's advice letter on the matter be included in the public record.

Thank you for your consideration of this request. If you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

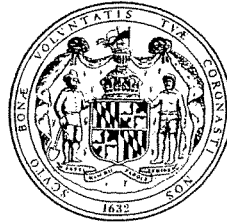
Thad Russell, Director, MATT Regulatory Division

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**MEMORANDUM**

**TO:** Comptroller Franchot  
**FROM:** Brian L. Oliner *[Signature]*  
**DATE:** July 8, 2008  
**RE:** Baltimore City Proposed Regulation Banning Certain Cigar Sales

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You have requested advice regarding a regulation proposed by the Baltimore City Health Department to prohibit the sale of cigars in packages of less than five. Excepted from this prohibition would be: (a) cigars rolled in whole leaf tobacco and sold for at least \$2.00 at wholesale; and (b) sales by tobacconists, as defined under the Clean Indoor Air Law. You have specifically asked whether or not regulation in this instance is preempted by the State.

For the reasons explained below, it is my conclusion that the Baltimore City Health Department can implement this regulation.

As a general premise, "unless a general public law contains an express denial of the right to act by local authority, the State's prohibition of certain activity in a field does not impliedly guarantee that all other activity shall be free from local regulation and in such a situation the same field may thus be opened to supplemental local regulation." *City of Baltimore v. Sitnick*, 245 Md. 303, 317 (1969). The validity of local laws, so long as they do not conflict with the Public General Laws of the State is constitutionally provided for in Article XI-A, § 3 of the Maryland Constitution.

The theory of "preemption" is implicated when reviewing a local law or regulation for validity. The doctrine of preemption is predicated on the ground that the General Assembly may reserve to itself exclusive dominion over an entire field of legislative concern. In such areas, local jurisdiction over that specific field is preempted by the State. Preemption may occur by

conflict (when a local law and a state law clearly are at odds with one another), by express terms, or by implication. Preemption by implication is indicated when the entire field of law is comprehensively occupied by legislative action by the General Assembly. See *Allied Vending, Inc. v. City of Bowie*, 332 Md. 279 (1993).

In the instant situation, there is no express provision in State law prohibiting a local jurisdiction from enacting a health regulation related to cigars. Neither is there any State law or regulation that is in direct conflict with the proposed local regulation. Thus, the question is whether or not the proposed regulation is implicitly preempted.

Unlike cigarettes which are extensively regulated by the State under laws emanating from Title 16 of the Business Regulation Article and its corresponding regulations, "other tobacco products," which include cigars, are not so regulated.<sup>1</sup> In addition, over the last several years, the General Assembly has considered and chosen not to enact exacting legislation that would have regulated and granted to the Comptroller enforcement responsibility over cigars similar to the laws covering cigarettes. See House Bill 20/Senate Bill 23, 2007 Special Session; House Bill 609, 2008 Legislative Session. Given the opportunity, the General Assembly has chosen not to legislate in this particular field. Consequently, there is "no indicia of a legislative purpose to preempt an entire field," nor has the General Assembly "acted with such force that an intent by the State to occupy the entire field must be implied." *Allied Vending, Inc.*, 332 Md. at 299, 300, citing *Talbot County v. Skipper*, 329 Md. 481, 488 (1993) and *County Council v. Montgomery Ass'n, Inc.*, 27 Md. 52, 59 (1975).

In 1993, the Court of Appeals decided *Allied Vending*, which held that "in light of the comprehensive state-licensing scheme for cigarette vending machines provided in Article 56, §§ 607 through 631, we conclude that the sale of cigarettes through cigarette vending machines is one of those 'area[s] in which the Legislature has acted with such force that an intent by the State to occupy the entire field must be implied....'" (citations omitted) Shortly after the issuance of this decision, the Office of the Attorney General issued an opinion, 78 Md. Op. Att'y Gen. 359. The Opinion of the Attorney General stated that "*Allied Vending* itself neither holds nor suggests that any other kind of tobacco-related local enactment is preempted by State law."

As indicated above, since the decision in *Allied Vending, Inc.* and the issuance of the Opinion of the Attorney General, the General Assembly has considered legislation that would have created a comprehensive state-licensing scheme for cigars and other tobacco products and has declined to act. In light of the constitutional guarantee allowing local jurisdictions, such as Baltimore City, to act in those areas not covered by General Public Laws, the regulation proposed by the Baltimore City Health Department does not cover a field preempted by the State.

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<sup>1</sup> Like cigarettes, other tobacco products are taxed. See Tax-General Article, Title 12. However, in this instance, the proposed regulation does not affect the applicable tax or the collection and remission of the applicable tax.

Please note that this memorandum constitutes advice of counsel and is not an opinion of the Attorney General.

cc: David Weaver  
Linda Tanton  
Len Foxwell  
Joseph Shapiro