



UNIVERSITY OF MARYLAND
SCHOOL OF LAW

Joshua Sharfstein, M.D.
Baltimore City Health Commissioner
Baltimore City Health Department
210 Guilford Avenue
Baltimore, Maryland 21202

July 1, 2008

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

Dear Dr. Sharfstein:

I am writing in response to your request for comments on the regulation governing the sale of single, cheap cigars that you proposed on May 28, 2008. The Center for Tobacco Regulation strongly supports the regulation as proposed and we encourage you to impose a reasonable effective date, followed by effective enforcement.

The Report accompanying the proposed regulation details well the dynamics of the sale and use of single, cheap cigars among youth. I will not repeat the compelling statistics and data about youth cigar smoking prevalence nor the health risks associated with cigar use. However, I do want to highlight subsequently released data from the Centers for Disease Control that enhances the data set forth in the Report. The 2007 Youth Risk Behavior Surveillance System (YRBSS), made public on June 6, 2008, revealed that 8.6% of high school students in Baltimore City reported current cigar use.¹ Because youth cigar smoking prevalence in 2005 was measured at 7.5%, the rate of cigar smoking among Baltimore City youth increased by 15% from 2005 to 2007.² There is no doubt: Youth cigar smoking in Baltimore City is on the rise, not likely to decline without intervention.

The "intervention" proposed--a ban on the sale of single, cheap cigars--will reduce youth cigar use by increasing the price for which the product is available. Almost ten years ago, the U.S. Department of Health and Human Services (DHHS) sounded the alarm in response to research revealing increasing rates of cigar use among youth; the federal report concluded that minors who smoke cigars overwhelmingly choose relatively inexpensive manufactured cigars, particularly those blunted and containing sweet-flavored tobacco.³ There is no doubt that youth smokers are more price sensitive

¹ The complete survey is available at: <http://www.cdc.gov/HealthyYouth/yrbs/index.htm>. The Baltimore City youth cigar data is on Table 34.

² The complete 2005 survey is available at <http://www.cdc.gov/mmwr/PDF/SS/SS5505.pdf>. The Baltimore City youth cigar data is on Table 27.

³ Department of Health and Human Services, Office of the Inspector General, *Youth Use of Cigars: Patterns of Use and Perceptions of Risk*, February 1999 (OEI-06-98-00030)(available at www.oig.hhs.gov/oei/reports/oei-06-98-00030.pdf) at 8; see also Department of Health and Human Services, Office of the Inspector General, *Youth Use of Cigars: Federal, State Regulation and Enforcement*, February 1999 (OEI-06-98-00040)(available at www.oig.hhs.gov/oei/reports/oei-06-98-00040.pdf).

Administration 410-706-7214 410-706-4045 fax	Admissions 410-706-3492 410-706-1793 fax	Career Development 410-706-2080 410-706-0870 fax	Institutional Advancement 410-706-2070 410-706-0596 fax	Registration 410-706-2045 410-706-2103 fax	Student Affairs 410-706-5235 410-706-2103 fax	Technology Affairs 410-706-5771 410-706-4045 fax
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than most adult smokers, altering their smoking behavior as economics dictate.⁴ Indeed, in response to the 1999 DHHS report, then-Surgeon General David Satcher publicly appealed for an increase in federal excise taxes on cigars as a means to reduce youth cigar use;⁵ researchers have agreed with that conclusion.⁶ Requiring that cigars be sold in packages of at least five, eliminating the 75¢ single Black and Mild or the 90¢ Phillie Blunt, has a similar impact on youth cigar smokers, without increasing prices or altering access for adult consumers. With cigars available only in packages of at least five, with a retail price of \$3 to \$5, youth will be less inclined to purchase and use cigars.

As you know, the proposed regulation would be a first in this state and in the country as no other jurisdiction has adopted a prohibition on the sale of single cigars.⁷ The report accompanying the proposal explains that your authority as Health Commissioner encompasses promulgation and enforcement of a regulation designed to reduce a known public health hazard and to abate a public nuisance. I simply want to add that nothing in State law prevents you from exercising this authority as proposed.

Although there is no simple test to determine whether the General Assembly has preempted local regulation, “the primary indicia of a legislative purpose to preempt an entire field of law is the comprehensiveness with which the General Assembly has legislated in the field.” *Allied Vending v. City of Bowie*, 332 Md. 279, 298-99 (1993).⁸ Only when the legislature has exercised “exclusive dominion over an entire field of legislative concern” is a local authority preempted from regulating in the field. *Id.* at 297. In *Allied Vending*, the Court found that State law detailing how and where cigarettes could be sold via vending machine preempted a local ordinance restricting where cigarette vending machines could be placed.⁹ The Court pointed to several sections of the Maryland Code that regulated the sale of cigarettes, specifically those concerning sales through vending machines. No such statutes exist with respect to the packaging of cigars; indeed, State law says very little about the sale of cigars.

⁴ For research and statistics on the impact of cigarette taxes on youth cigarette use, see E. Lindblom and A. Boonn, *Raising Cigarette Taxes Reduces Smoking, Especially Among Kids (And The Tobacco Companies Know It)*, Campaign for Tobacco-Free Kids (June 5, 2008)(available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0146.pdf>).

⁵ D. Satcher, *Editorial: Cigars and Public Health*, NEW ENGLAND JOURNAL OF MEDICINE, Vol. 340, pp. 1829-1831 (June 10, 1999).

⁶ J. Ringel, *et al.*, *Effects of Public Policy on Adolescents’ Cigar Use: Evidence from the National Youth Tobacco Survey*, AMERICAN JOURNAL OF PUBLIC HEALTH, Vol. 95, No. 6, pp. 995-998 (June 2005)(“[O]ur results suggested that policymakers have a significant opportunity to reduce the prevalence of youth cigar smoking by raising federal and state excise taxes.”).

⁷ The City of Philadelphia passed an ordinance prohibiting, among other things, the sale of cigars in packages of less than three. The focus of the Philadelphia law was elimination of products used as drug paraphernalia; the smoking of cigars by youth was not the basis for the ordinance. PHIL. CODE §9-622(5)(a)(1). The ordinance was found to be preempted, in relevant part, by the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act. See *Holt’s Cigar Co., Inc. v. City of Philadelphia*, 2008WL2486155 (Pa. Cmwlth., June 23, 2008). That decision is unique to Pennsylvania and has no precedential value in Maryland.

⁸ A State law may preempt a local law that conflicts with the State law. See *Worton Creek Marina, LLC v. Claggett*, 381 Md. 499 (2004). As there is no State law governing the packaging of cigars with which the proposed regulation could contradict, conflict preemption is not at issue here.

⁹ Interestingly, the Court was split 5-2 on the issue, with a dissent written by Judge Rodowsky and joined by Chief Judge Murphy arguing that the majority reached too far in finding preemption.

State law dictates that the sale of tobacco products, including cigars, to minors is unlawful. MD. CRIM. LAW CODE ANN. §10-107. Yet many local jurisdictions, like Baltimore City, have promulgated ordinances prohibiting the sale of tobacco to minors.¹⁰ State law sets forth the tax imposed on other tobacco products, including cigars, and details the procedures for collection of those taxes. See MD. TAX GEN. CODE ANN. §12-101 *et seq.* Other than the Comptroller's regulations further explaining the tax collection process, *see generally* COMAR Title 3, Subtitle 2, State law does not regulate the sale of cigars. Unlike the State's rigorous regulation of the sale of cigarettes, including a minimum pack size of 20 cigarettes, *see* MD. COM. LAW CODE ANN. §§11-5A-01 *et seq.*, the sale of cigars is subject to quite modest State regulation. Hence, it cannot be said that the State has so comprehensively regulated the field of cigar sales that local regulation of such sales is preempted. Indeed, the opposite is true—the State has not preempted local jurisdictions from requiring that cigars be sold in a minimum pack size.

That modest regulation in a field does not give rise to preemption is exhibited in *Fogle v. H&G Restaurant, Inc.*, 337 Md. 441 (1995), in which the Court found that the General Assembly's passage of various restrictions on indoor smoking did not preempt an executive agency from adopting more rigorous, thorough regulation of smoking in the workplace. Given that there are scant State laws addressing the sale of cigars, and none addressing the packaging of cigars, the case law leads to the inescapable conclusion that Baltimore City, and other municipalities, are free to impose minimum pack size requirements on the sale of cigars.

Having confirmed the data and other information contained in the report accompanying the regulations and having concluded that there are no legal impediments to adoption and enforcement of the regulations, the question becomes whether and for how long should implementation of the regulations be delayed. Understanding that retailers who sell cigars covered by the proposed regulation carry a certain level of stock, some delay in effective date is appropriate. Although I am not in a position to answer definitively the question of how long the delay should be, I suggest a 3-6 month period. This will allow the City to educate cigar manufacturers, wholesalers, retailers, and consumers about the new regulations. Moreover, this period will allow retailers to sell down existing single cigar stock. Because many of the cigars subject to the regulation are already available from manufacturers in a package of five (a minimum pack size that we agree is best to achieve your goals without significant burden on manufacturers), it should not be difficult for the wholesale and retail community to adjust their buying habits to comply with the regulation.

The Center for Tobacco Regulation not only supports fully the proposed regulation, we are prepared to assist the City Health Department with designing protocols for implementation and enforcement of the regulation as we have done with other City programs. We look forward to continuing this partnership designed to reduce youth access to and use of tobacco products.

Regards,



Kathleen Hoke Dachille
Director, Center for Tobacco Regulation

¹⁰ See, e.g., Baltimore City Health Code, §§12-101 *et seq.*; Baltimore County Health Code §§13-12-101 *et seq.*; and Howard County Health Code §§12.200 *et seq.*