



Novel Non-Cigarette Tobacco Products: An Overview of Regulatory Options¹

As U.S. smoking rates have declined over the last decade, the country has seen a rise in the use of novel non-cigarette tobacco products, often called “other tobacco products” or OTPs.² These products include **dissolvables** – flavored, smokeless tobacco products that resemble candy and dissolve in the user’s mouth. Tobacco dissolvables come in different forms of finely ground flavored tobacco, such as strips, which resemble breath fresheners; sticks, which look like twisted toothpicks; and orbs, which are shaped like small hard candies.³ Other novel non-cigarette tobacco products enjoying a surge in popularity include **snus** (the Swedish word for snuff), tobacco in a teabag-like pouch that users place between their lips and gums,⁴ and **little cigars**,⁵ products that typically resemble cigarettes and are distinguished from other cigar products by their size and tobacco content weight.⁶

Under the [Family Smoking Prevention and Tobacco Control Act](#) (“Tobacco Control Act”), the Food and Drug Administration regulates the manufacturing, marketing and sale of cigarettes, including flavored cigarettes and their component parts, but many of its provisions do not apply to novel non-cigarette tobacco products.⁷ The Tobacco Control Act does, however, preserve the authority of local and state governments to regulate the sale and marketing of these products.⁸ This fact sheet is designed to answer basic questions about some of the options communities might consider in regulating novel non-cigarette tobacco products.⁹

Q. Aren’t dissolvables and other smokeless tobacco products safer to use than cigarettes? Why is the public health community so concerned about these products?

A. Although smokeless products are presumably safer than combustible tobacco products, they are far from harmless.¹⁰ There is, in fact, no safe level of tobacco use. Many smokeless tobacco products can not only lead to oral cancer, gum disease and nicotine addiction, but they can increase the risk of cardiovascular disease.¹¹ Moreover, these products come in a variety of sweet flavorings, and handy discrete forms – all of which make them particularly appealing to young people and even children.¹² The growth of a youth market hooked on nicotine concerns health professionals because they see the use of dissolvables and other smokeless products,

such as oral and nasal snuff, and chewing tobacco, as enabling tobacco initiation and perpetuating nicotine addiction.

While research is underway on the health effects of dissolvables, it is undisputed that the nicotine contained within dissolvables is addictive. In addition, studies have shown that dissolvables, which often smell and look like candy or breath mints, can pose a risk of unintentional poisoning for children.¹³

Some proponents of dissolvables and other smokeless tobacco products focus on what they see as their health benefits, arguing that these noncombustible products are a “safer alternative” to cigarettes. While health professionals support any decline in the use of cigarettes, many are concerned when one form of nicotine addiction is substituted for another. They are also troubled when smokeless products lead to tobacco/nicotine initiation or dependence, and when smokeless products are promoted for “dual use” – to be used by smokers as a temporary substitute in places where smoking is not allowed or socially acceptable.

Q: What health risks are associated with little cigars?

A: Cigar smoke contains the same toxic and carcinogenic compounds found in cigarette smoke. Smoking cigars can be just as harmful and addictive as smoking cigarettes, and can cause lung cancer, oral cancer, laryngeal and esophageal cancers.¹⁴ Cigar smokers also have a greater risk of chronic obstructive pulmonary disease than nonsmokers.¹⁵

Q: What are some pricing strategies for regulating non-cigarette tobacco products?

A: Studies have demonstrated that increasing the price of tobacco products can help reduce consumption – particularly by youth, who tend to be price-sensitive. The most direct way to affect the price of a tobacco product is to increase its tax.¹⁶ Several states and the federal government tax smokeless tobacco products (for example) according to weight.¹⁷ Because of the low weight of dissolvable tobacco products, such systems often severely undertax these products.

Also, tax laws in some states may not apply to dissolvable products, since the laws define “tobacco products” as containing tobacco that can be smoked or chewed, and do not include language that would cover products that can be dissolved in one’s mouth.¹⁸ Even in states with tobacco tax laws that do cover dissolvable tobacco products, the tax rates may be substantially lower than those imposed on more conventional tobacco products.

State and local governments interested in regulating the pricing of smokeless tobacco products and little cigars might consider equalizing tobacco taxes and closing any loopholes in their tobacco tax laws. One possible option would be to modify the definition of “tobacco products” for excise tax purposes, clarifying that the term applies to any type of product that contains, or is made or derived from, tobacco and

intended for human consumption.¹⁹ Another option would be to consider making smokeless tobacco products subject to a percentage-of-wholesale-price tax (also known as an *ad valorem* tax), rather than a weight-based tax.²⁰

Non-tax pricing options for regulating non-cigarette tobacco products include:²¹

- 1) *Restricting tobacco sampling.* Examples include restricting the distribution of free samples of these products, either by expanding the types of facilities where product sampling is prohibited, or by prohibiting the practice altogether.²²
- 2) *Restricting tobacco product coupons.* Examples include restricting or prohibiting the redemption of product coupons in retail stores or combining a coupon regulation with a sampling restriction, essentially prohibiting the distribution of any tobacco products at low or “nominal” cost.²³
- 3) *Restricting other tobacco price-related promotions.* Examples include restricting promotional allowances, such as price discounts to tobacco retailers and wholesalers; tobacco retailer incentive programs; and retail value-added promotions, such as buy-one-get-one free offers.²⁴

Q. What other policy options are available for regulating non-cigarette tobacco products?

A: To determine the most effective tobacco policies for their communities, state and local governments need to analyze their jurisdiction-specific needs, priorities and regulatory goals.²⁵ Possible regulatory options include:²⁶

- 1) Updating youth access laws to ensure they cover a broad range of other tobacco products
- 2) Posting health warnings at the point-of-sale wherever non-cigarette tobacco products are sold
- 3) Restricting the sale of flavored non-cigarette tobacco products²⁷
- 4) Limiting where non-cigarette tobacco products can be sold
- 5) Restricting tobacco product advertising²⁸
- 6) Addressing the price disparities created by small packs of other tobacco products by creating a minimum pack size for products such as dissolvables, snus and possibly small cigars, which are sold in discrete units.

Q: What about e-cigarettes and the use of waterpipes, such as hookahs? What policy options are available for regulating these popular nicotine products?

A: See the Consortium’s website for information on regulating [waterpipes](#) and [e-cigarettes](#).²⁹

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Notes

¹ The information contained in this document is not intended to constitute or replace legal advice.

² U.S. Ctrs. for Disease Control & Prevention, *State-Specific Prevalence of Cigarette Smoking and Smokeless Tobacco Use Among Adults – United States, 2009*, 59 MORBIDITY & MORTALITY WEEKLY REPORT 43 (2010), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5943a2.htm>.

³ Some dissolvable tobacco products are sold as brands such as Stonewall and Ariva; a few have also been test marketed under the popular Camel brand.

⁴ In the U.S., snus is sold under Camel and Marlboro brand names. See Karen C. Sokol, *Smoking Abroad and Smokeless at Home: Holding the Tobacco Industry Accountable in a New Era*, 13 N.Y.U.J. LEGIS. & PUB. POL'Y 81, 110 (2010), available at http://law.nyu.edu/ecm_dlv1/groups/public/@nyu_law_website_journals_journal_of_legislation_and_public_policy/documents/documents/ecm_pro_065430.pdf

⁵ Legacy, *Cigars, Cigarillos & Little Cigars Fact Sheet* (2009), available at http://www.legacyforhealth.org/PDFPublications/CIGARILLOS_0609_temp.pdf.

⁶ “Little cigars” are not defined consistently in statutes, and in many instances are indistinguishable from cigarettes. See, e.g., Christine D. Delnevo & Mary Hrywna, “A Whole ‘Nother Smoke” or a Cigarette in Disguise: How R.J. Reynolds Reframed the Image of Little Cigars, 97 AM. J. PUBLIC HEALTH 1368 (2007).

⁷ Family Smoking Prevention and Tobacco Control Act, Pub.L. 111-31, 123 Stat. 1776 (codified primarily at 21 U.S.C. § 387 *et seq.* (2009)); 21 U.S.C. § 102 (West 2010)); 21 C.F.R. §§ 1140.30, 1140.32 (2010).

⁸ See, e.g., Tobacco Control Legal Consortium, *Regulating Flavored Tobacco Products – Tips and Tools* (2011) (providing general information on flavored tobacco product regulatory options), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-regflavoredtobaccoprods-2011.pdf>.

⁹ See Tobacco Control Legal Consortium archived webinar recording, “Regulating Non-Cigarette Tobacco Products More Effectively” (2011), available at <https://publichealthlawnetwork.webex.com/publichealthlawnetwork/lsr.php?AT=pb&SP=EC&riD=4425987&rKey=185e0581164dec0a> (providing an overview of policy options for regulating other tobacco products).

¹⁰ The Food and Drug Administration is studying the health effects of dissolvable tobacco products and their potential appeal to children. See, e.g., FDA letters to the R.J. Reynolds Tobacco Company and Star Scientific, Inc. noting that their dissolvable tobacco products “resemble candy products.” FDA, Letter to Industry on Dissolvable Smokeless Tobacco Products (R.J. Reynolds Tobacco Company), Feb. 1, 2010, available at <http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm199712.htm>; FDA, Letter to Industry on Dissolvable Smokeless Tobacco Products (Star Scientific, Inc.) Feb. 1, 2010, available at

<http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm259086.htm>.

¹¹ See, e.g., Nat'l Cancer Inst., *Smokeless Tobacco and Cancer* (last visited Nov. 28, 2011), available at <http://www.cancer.gov/cancertopics/factsheet/Tobacco/smokeless>; Paolo Boffetta et al., *Smokeless Tobacco and Cancer*, 9 LANCET 7, 667-75 (2008); CTRS. FOR DISEASE CONTROL & PREVENTION, THE HEALTH CONSEQUENCES OF USING SMOKELESS TOBACCO: A REPORT OF THE SURGEON GENERAL (1986), available at <http://profiles.nlm.nih.gov/NN/B/B/F/C/>.

¹² See FDA letters, *supra* note 10; see also Campaign for Tobacco-Free Kids, *Smokeless Tobacco and Kids* (2011), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0003.pdf>.

¹³ See, e.g., Gregory N. Connolly et al., *Unintentional Child Poisonings Through Ingestion of Conventional and Novel Tobacco Products*, 5 PEDIATRICS 896 (2010).

¹⁴ Campaign for Tobacco-Free Kids, *The Rise of Cigars and Cigar-Smoking Harms* (2011), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0333.pdf>.

¹⁵ See Nat'l Cancer Inst., *Cigar Smoking and Cancer* (last visited Nov. 29, 2011), available at <http://www.cancer.gov/cancertopics/factsheet/Tobacco/cigars>; see also Melissa Blank et al., *Acute Effects of Cigarillo Smoking*, 13 NICOTINE & TOBACCO RESEARCH 9, 874-79 (2010).

¹⁶ See, e.g., Marlo Miura, Tobacco Control Legal Consortium, *Regulating Tobacco Product Pricing: Guidelines for State and Local Governments* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-pricing-2010.pdf>; Tobacco Control Legal Consortium, *Taxation of Tobacco Products: An Introduction to Key Terms and Concepts* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-taxationterms-2011.pdf>.

¹⁷ See Michael Freiberg, Tobacco Control Legal Consortium, *Comments to the FDA on the Impact of Dissolvable Tobacco Use on Public Health* (Docket No. FDA-2010-N-0123), Sept. 17, 2010, available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-regcommentfda-dissolvables-2010.pdf>.

¹⁸ See *id.* at 5-7.

¹⁹ See, e.g., MINN. STAT. § 609.685, subd. 1.

²⁰ See Campaign for Tobacco-Free Kids, *Closing Weight-Based Tax Loopholes for the New Generation of Low Weight Moist Snuff Smokeless Tobacco Products* (2009), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0355.pdf>; Campaign for Tobacco-Free Kids, *Best Way to Tax Smokeless Tobacco* (July 2009), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0282.pdf>.

²¹ See, e.g., Tobacco Control Legal Consortium, *Tobacco Coupon Regulation and Sampling Restrictions* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-tobcouponregsandsampling-2011.pdf>

²² Several states restrict the distribution of free tobacco products; however, the scope and effectiveness of these laws varies widely, with some laws applying only to products that are smoked or chewed. *See* Freiberg, *supra* note 17 at 8. Also, although the Smokeless Tobacco Master Settlement Agreement limits the distribution of free samples of smokeless tobacco, it applies only to products manufactured by companies that participated in the agreement; it exempts adult-only facilities; and it exempts two-for-one offers. Smokeless Tobacco Master Settlement Agreement III(g), available at <http://ag.ca.gov/tobacco/pdf/1stmsa.pdf>.

²³ *See* Freiberg, *supra* note 17, at 8.

²⁴ Tobacco Control Legal Consortium, *Price-Related Promotions for Tobacco Products: An Introduction to Key Terms & Concepts* (2011), available at http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-pricerelatedpromotions-2011_0.pdf.

²⁵ *See, e.g.*, Tobacco Control Legal Consortium, *Framework for Analyzing Tobacco Policy Interventions* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-framework-tobaccopolicyanalysis-2011.pdf>.

²⁶ These options are discussed in more detail in Michael Freiberg's law review article, *Options for State and Local Governments to Regulate Non-Cigarette Tobacco Products*, ANNALS OF HEALTH LAW (forthcoming 2012). This article was written as part of a Public Health Law Center grant-funded research project made possible by Grant Number RC-2009-0035 from ClearWay Minnesota.SM

²⁷ Although the Family Smoking Prevention and Tobacco Control Act prohibits tobacco manufacturers from including a "characterizing flavor" in cigarettes (with the exception of menthol and tobacco flavors), the law does not prohibit these flavors in non-cigarette tobacco products. 21 U.S.C. § 387g (a)(1) (2009).

²⁸ *See* Tobacco Control Legal Consortium, *Restricting Tobacco Advertising – Tips and Tools* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-restricttobadvert-2011.pdf>; Tobacco Control Legal Consortium, *Content-Neutral Advertising – Tips and Tools* (2011), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-contentneutralads-2011.pdf>; Kathleen Dachele, Tobacco Control Legal Consortium, *Regulating Tobacco Advertising and Promotion: A "Commerce Clause" Overview for State and Local Governments* 11 (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-regadvert-2010.pdf>.

²⁹ *See* Tobacco Control Legal Consortium, *Regulating Hookah and Waterpipe Smoking – Tips and Tools* (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-regulatinghookahs-2010.pdf>; Tobacco Control Legal Consortium, *Regulating E-Cigarettes – Tips and Tools* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-regecigs-2011.pdf>.