



Regulating Tobacco Products Based on Pack Size

The Tobacco Control Legal Consortium has created this series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures.¹ For more details about these policy considerations, please contact the Consortium.

Policy Benefits

Increasing the price of tobacco products has a number of desirable public health outcomes, including reducing youth and adult consumption and decreasing initiation rates.² Regulating the sale or the price of tobacco products based on minimum packaging requirements is one way to reduce tobacco use by raising prices. A single cigarette, cigar, or pouch can be sold at a fraction of the price of a “pack.” This makes the product more accessible to all users, but especially appealing to youth who might be experimenting with different tobacco products and are extremely price sensitive. Additionally, while appropriate health warnings and ingredient disclosures may be placed on packs, it is impossible to give consumers this important information on a single cigar or cigarette. Larger packs are also easier to monitor for tax and trade enforcement purposes.



For these reasons, the Food and Drug Administration (“FDA”) requires that cigarettes be sold in packs of at least twenty (20).³ Unfortunately, non-cigarette tobacco products, often called “other tobacco products” or “OTPs,” are not included in this regulation, leaving products such as cigars, snuff, chew, and dissolvables to be sold at cheaper and more tempting prices. The results are predictable; while cigarette use is going down, OTP use remains high.⁴

- Among youth surveyed, 14 percent smoked cigars, cigarillos, or little cigars on at least 1 day during the 30 days before the survey and 9 percent used chewing tobacco, snuff, or dip.⁵
- Between 1997 and 2007, sales of little cigars increased by 240 percent while cigarillo sales increased by almost 150 percent.⁶

- More than half of teens surveyed by the Centers for Disease Control and Prevention in a national study admitted to smoking a cigar at some point in their lives.⁷

While many non-cigarette tobacco products can be sold in a single “dose,” enjoy a relatively low tax as compared to cigarettes, and are available in fruit, candy, and alcohol flavors, data show that cigars and cigarillos are most popular among youth.⁸

Further, evidence indicates that tobacco manufacturer spending on advertising, marketing, and price discounts for non-cigarette tobacco products is increasing, while promotional spending on cigarettes has decreased slightly in recent years.⁹ The tobacco industry is well aware that non-cigarette tobacco product use is steadily increasing, particularly among youth, and appears to be concentrating its marketing expenditures to exploit this growing target market.

Policy Options

Below are policy options that could be pursued by states or localities to place restrictions on tobacco products that do not meet minimum pack size requirements. As discussed further below, it will be important for communities interested in any of these options to make sure that state law does not limit the local government’s ability to pursue the desired policy option.

- **Sales requirements based on minimum pack size:** Several jurisdictions have passed laws that restrict sales of tobacco products, such as dissolvables, snus, and cigars, that do not meet minimum pack size standards.¹⁰ These laws establish a minimum weight or minimum number of units that must be sold per transaction. For instance, Baltimore City, Maryland passed a requirement that cigars be sold in packages of at least five.¹¹ Communities may also restrict the types of locations where certain tobacco products, such as unpackaged cigars, may be sold. For example, Boston implemented a restriction on the sale of cigars in packages of less than four at convenience stores, gas stations, grocery stores, and pharmacies.¹² As with any sales prohibition, a minimum pack size restriction is enforceable only if it serves a legitimate government interest (e.g., reducing youth access to tobacco products), and the restriction is reasonably likely to achieve that interest. In legal parlance, this means that the law has a “rational basis.”

Some communities, in response to political or industry concerns, have created exemptions that allow for the continued sale of individual tobacco products in limited circumstances. These exemptions are optional and, to achieve the public health goals of the sales restriction, ought to be drafted carefully to avoid exempting too many tobacco products. In other words, the law should be carefully crafted so that the exception(s) do not swallow the rule.

- **Exemption for tobacco products above a minimum price point:** Communities could allow tobacco products above a minimum retail or wholesale price to be exempt from a minimum pack size sales requirement. For example, Boston’s

prohibition is limited to cigars with a wholesale price of less than \$2.00.¹³ This option would not *prohibit* the sale of individual tobacco products, but would limit youth access by removing their most appealing attribute – the low price. Any ordinance with this type of exemption should allow for an increase in the minimum price point to account for inflation.

- **Exemption for a tobacco retailer that primarily sells tobacco products:** A community could exempt retailers whose primary source of revenue is derived from the sale of tobacco products. Similar exceptions were created for tobacconists in several clean indoor air laws in the United States. This exemption may be most appropriate in communities with a small number of tobacco-focused retailers that rely on individual tobacco product purchases or that check IDs at the store entrance rather than the point-of-purchase.
- **Minimum price restrictions:** Originally intended to prevent predatory pricing, minimum price restrictions can also curb the sale or distribution of small quantities of tobacco products. Half of U.S. states currently have a minimum price law for cigarettes, though none have extended minimum prices to non-cigarette tobacco products.¹⁴ A minimum price restriction for other tobacco products (i.e., \$2.00 or more per package) would force manufacturers to increase the number of units per package or substantially raise the cost of the cheap tobacco products favored by price-sensitive youth users. To date, no local price law like this has been passed.
- **Tax on sale of individual tobacco products:** Local and state governments could also encourage retailers to sell products of a minimum pack size by levying an additional tax on the sale of individual non-cigarette tobacco products. A tax that exclusively affected the sale of individual products would promote minimum pack sizes and increase the cost of non-cigarette tobacco products.
- **Reclassification of tobacco products:** The federal Family Smoking Prevention and Tobacco Control Act requires that cigarettes be sold in packs of at least twenty (20), but fails to extend similar pack size requirements to non-cigarette tobacco products.¹⁵ Subsequently, some manufacturers have modified their products to avoid cigarette advertising, packaging, and taxation requirements.¹⁶ Although labeled as “cigars,” little cigars are the functional equivalent of cigarettes. Communities may close this loophole, and in the process extend pack size requirements to little cigars, by defining a cigarette as any “roll” of tobacco (below a certain weight), regardless of wrapper. For instance, New York tax law treats little cigars like cigarettes.¹⁷

Policy Elements

Effective minimum pack size restrictions expressly state the rationale behind the policy, describe the products affected and detail the required enforcement measures. Here are a few of the elements commonly found in minimum pack size regulations:

- **Clear statement of purpose:** A statement of purpose outlines the reasons for a policy, with factual support, and establishes a clear policy goal. Effective legislation on minimum pack size restrictions documents the disproportionate use of individual non-cigarette tobacco products by youth and details how the legislation will fix the problem. The statement of purpose is important because it articulates the legitimate government interest served by the legislation.
- **Clear definitions:** Clearly define critical terms such as individual “tobacco product,” “minimum pack size,” and/or “retail tobacco store.” Any exemption to the minimum pack size restriction, such as premium cigars, should be clearly stated in the policy. In addition, the policy should include language excluding cigarettes to avoid potential preemption by the Family Smoking Prevention and Tobacco Control Act. Broadly define “tobacco product” to include cigars, dissolvable tobacco products, spit/chewing tobacco and other smokeless tobacco products. Finally, be mindful of how terms like “tobacco product,” “retail tobacco store,” or “tobacco retailer” may be defined elsewhere in local code or state statutes, in order to avoid potential conflicts with existing law.
- **Effective enforcement procedures:** Effective enforcement of minimum pack size restrictions requires coordination between law enforcement and state or local health departments. Establish clear guidelines for educating officials, retailers, and manufacturers about what products are prohibited and the penalties for any violation. Also, set a realistic and reasonable date for implementation of the policy, and create procedures for removal of individual tobacco products already on store shelves.
- **Clear scope of regulation:** The Family Smoking Prevention and Tobacco Control Act grants the FDA exclusive authority to regulate tobacco product standards.¹⁸ A minimum pack size restriction does not establish a product standard, but the tobacco industry may oppose any minimum pack size regulation on this ground. For this reason, a minimum pack size restriction may be less vulnerable to challenge from the tobacco industry if it allows individual tobacco products to be sold at retail tobacco stores or exempts premium tobacco products (e.g., expensive imported cigars).

Legal Considerations

State governments have the authority to pass, implement and enforce laws concerning the sale and price of tobacco products, including those based on pack size. In most jurisdictions local governments possess the same power. However, some states preempt local governments from enacting certain tobacco control laws that are more stringent than state law.¹⁹ In these states, local governments may be prohibited from implementing or enforcing sales or pricing requirements related to pack size absent state action on the subject, expressly delegating such authority to local units of government. Communities considering minimum pack size measures for non-cigarette tobacco products must

determine whether or not state law prevents any local tobacco control regulations prior to taking action.

For instance, in *Holt's Cigar Co., Inc. v. City of Philadelphia*,²⁰ several tobacco retailers, manufacturers, and trade associations brought suit against the City of Philadelphia for prohibiting the sale of certain tobacco products. The lawsuit claimed a city ordinance banning the sale of cigars or other tobacco products in quantities of less than three was preempted by a state statute regulating drug paraphernalia. After two lower courts considered the issues, the Supreme Court of Pennsylvania invalidated the ordinance on the grounds that it was inconsistent with the state statute.²¹

Two Maryland jurisdictions, Baltimore City and Prince George's County, have passed measures that require cigars to be sold in packs of five or more. Enforcement of both provisions has been delayed while lawsuits related to these requirements are being considered by the courts. In both jurisdictions, the ordinances were challenged by cigar manufacturers, wholesalers, retailers, and a trade group. The Complaints in both cases allege that the ordinances are not local in nature, that the local governments lack authority to issue the regulations, and that the regulations are unconstitutional. In 2010, the Circuit Court for Prince George's County²² granted summary judgment upholding the policies, whereas the Baltimore City Circuit Court found that the health officer's nuisance abatement power does not extend to the cigar packaging provision. Both cases are on appeal and awaiting a ruling.

Communities considering minimum pack size regulations also need to address industry and public criticism that prohibiting the sale of individual tobacco products will lead to an increase in the purchase and use of tobacco products. In addition, opponents will argue that minimum pack size regulations increase the cost of tobacco products and that higher prices have a disproportionate impact on people in lower-income communities. The counterpoint is that price-sensitive youth who tend to make small purchases for immediate consumption will be less likely to purchase tobacco products in higher volumes.

Select Legislation and Policies

Below are examples of minimum packaging regulations and legislation around the U.S. If you consider adapting any language from these policies, take care to ensure the provision in question is practical and legal in your jurisdiction. Please note that the Consortium does not endorse or recommend any of the following policies. These examples are included simply to illustrate how various jurisdictions have approached similar issues.

Jurisdiction	Purpose	Status	Full Text/Additional Information
Prince George's County, MD	Requires that cigars be sold in packages of at	Enacted but not enforced while lawsuit proceeds	Notwithstanding any other provision of law, a retailer, wholesaler, or their agent or employee may not purchase...

(2009)	least five; exempts certain premium cigars and retail establishments		unpackaged cigars from a tobacco manufacturer or sell, resell, distribute, dispense or give away unpackaged cigarettes or unpackaged cigars to any person. Unpackaged cigars means any cigar or cigar product not contained within a sealed <u>original</u> package of at least five (5) cigars or cigar products. P.G COUNTY CODE § 12-204. Bill Information Bill Text
Baltimore City, MD - (2009)	Requires that cigars be sold in packages of at least five; imposes civil and criminal penalties	Adopted but not enforced while lawsuit proceeds	B. Sales or Transfers of Less than Five Cigars Prohibited. A person engaged in the business of selling or otherwise distributing cigars for commercial purposes may not sell or otherwise distribute a cigar to any person in the City unless...the cigar is contained in an original package of at least 5 cigars... Regulation Information Regulation Text
Boston, MA (2009)	Prohibits the sale of cigars in packages of less than four at convenience stores, gas stations, grocery stores and pharmacies	Adopted	No retailer, retail establishment, or other individual or entity shall sell or distribute or cause to be sold or distributed a cigar unless the cigar is contained in an original package of at least four (4) cigars. Boston Pub. Health Comm'n, A Regulation Limiting Tobacco and Nicotine Access by Youth Regulation Text
Washington, DC (2011)	Restriction on sale of single cigars	Adopted	No single cigar containing reconstituted tobacco products shall be sold to individual customers at convenience stores and gas stations. D.C. CODE § 7-1721.06.
New York (2010)	Subjects little cigars to the cigarette excise tax	Adopted	(c) Such tax on little cigars shall be at the same rate imposed on cigarettes under this article and is intended to be imposed only once upon the sale of any little cigars. N.Y. TAX LAW § 471-B(1)(c).

<p>Canada (1997, amended 2009)</p>	<p>Tobacco Act, 1997 S.C., ch. 13 (Can.), amended 2009 S.C., ch.27 (Can.).</p>	<p>Adopted</p>	<p>10(1) No person shall import for sale in Canada, package, distribute or sell cigarettes, little cigars or blunt wraps except in a package that contains at least 20 cigarettes, little cigars or blunt wraps.</p> <p>10(2) No person shall import for sale in Canada, package, distribute or sell a tobacco product — other than cigarettes, little cigars or blunt wraps — that is prescribed for the purposes of this subsection, except in a package that contains at least the prescribed portions, number or quantity of the tobacco product. Tobacco Act, 1997 S.C., ch. 13 (Can.), amended 2009 S.C., ch.27 (Can.).</p>
---	--	----------------	---

Other Helpful Resources

The Consortium’s parent organization, the [Public Health Law Center](#), has web pages containing information on [tobacco product regulation](#) and [federal tobacco regulation](#). Our site also provides several publications and resources on regulating the sale of other non-cigarette tobacco products (or OTPs), including [Regulating Tobacco Product Pricing: Guidelines for State and Local Governments](#), and [Novel Non-Cigarette Tobacco Products: An Overview of Regulatory Options](#). The Consortium also has resources about [local board of health regulatory powers](#), [the regulation of flavored tobacco products](#), and [cigarette minimum price laws](#). The Food and Drug Administration, the Centers for Disease Control and Prevention, and the American Cancer Society provide fact sheets on the use of non-cigarette tobacco products. In addition, the Campaign for Tobacco-Free Kids has information on many of these products, including cigars, cigarillos, snuff, chew, and dissolvables.

Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at (651) 290-7509 or publichealthlaw@wmitchell.edu with any questions about the information included in this guide or to discuss local concerns you may have about implementing policies restricting the placement of tobacco products.

Last updated: February 2012

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 (hereinafter “CDC”), *State Cigarette Minimum Price Laws--United States, 2009*, 59 MORBIDITY & MORTALITY WEEKLY REPORT 389, 389 (Apr. 9, 2009), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5913a2.htm>.

³ 21 C.F.R. § 1140.14 (2009).

⁴ Jennifer Cullen et al., *Seven-Year Patterns in US Cigar Use Epidemiology Among Young Adults Aged 18-25 Years: A Focus on Race/Ethnicity and Brand*, 101 AM. J. PUB. HEALTH 1955, 1955-1962 (2011).

⁵ U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (hereinafter “CDC”), *Youth Risk Behavior Surveillance – United States, 2009*, 59 MORBIDITY AND MORTALITY WEEKLY REPORT 11, 12 (Jun. 4, 2010), available at <http://www.cdc.gov/mmwr/pdf/ss/ss5905.pdf>.

⁶ For information about youth cigar usage, see American Legacy Foundation, *Cigars, Cigarillos & Little Cigars Fact Sheet* (2009), available at http://www.legacyforhealth.org/PDF/Cigars-Cigarillos-and-Little-Cigars_FactSheet.pdf.

⁷ CDC, *supra* note 5, at 11.

⁸ CDC, *supra* note 5, at 12.

⁹ Press Release, Federal Trade Comm’n, *FTC Releases Reports on Cigarette and Smokeless Tobacco Advertising and Promotion: Amount Spent Declines for Cigarettes, Increases for Smokeless Tobacco in 2007 and 2008* (July 29, 2011), available at <http://ftc.gov/opa/2011/07/tobacco.shtm>; FEDERAL TRADE COMM’N, *FEDERAL TRADE COMMISSION SMOKELESS TOBACCO REPORT FOR 2007 AND 2008* (2011), available at <http://www.ftc.gov/os/2011/07/110729smokelesstobaccoreport.pdf>; FEDERAL TRADE COMM’N, *FEDERAL TRADE COMMISSION CIGARETTE REPORT FOR 2007 AND 2008* (2011), available at <http://www.ftc.gov/os/2011/07/110729cigarettereport.pdf>.

¹⁰ D.C. CODE § 7-1721.06(c) (2011); PRINCE GEORGE’S COUNTY, MD., CODE § 12-204 (Nov. 18, 2008); BALTIMORE, MD., *Final Regulation Banning the Sale of Single, Cheap Cigars in Baltimore City* (Jan. 14, 2009), available at http://www.baltimorehealth.org/info/2009_01_14.CigarRegs.pdf; BOSTON, MA., *A Regulation Limiting Tobacco and Nicotine Access by Youth* (hereinafter “Youth Access Regulation”) (Dec. 1, 2011), available at <http://www.bphc.org/boardofhealth/regulations/Forms%20%20Documents/Tobacco%20Control%20Regulation%20FINAL%20Adopted%20December%201%202011%20Corrected%20Version%20-%20Update%203.pdf>.

¹¹ BALTIMORE, MD., *Final Regulation Banning the Sale of Single, Cheap Cigars in Baltimore City* (Jan. 14, 2009).

¹² BOSTON, MA., *Youth Access Regulation* (Dec. 1, 2011).

¹³ *Id.*

¹⁴ CDC, *supra* note 2, at 389.

¹⁵ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 § 102, 123 Stat. 1776 (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C. and 21 U.S.C. (2009)).

¹⁶ Kelly O’Sullivan et al., *Petition for Rulemaking: In the Matter of the Repeal of the definitions of “Cigar” and “Cigarette” in 27 C.F.R. § 40.11, 27 C.F.R. § 41.11, 27 C.F.R. § 44.11 and 27 C.F.R. § 45.11 and Proposed New Rules Defining “Cigar” and “Cigarette” and Proposed New*

Procedural Rules for Cigar and Cigarette Rulings 2 (Apr. 24, 2006), available at <http://www.naag.org/assets/files/pdf/20060519.FinalPetitionToTTBReLittleCigars.pdf>.

¹⁷ N.Y. TAX LAW § 471-B(1)(c) (2010).

¹⁸ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 § 102, 123 Stat. 1776 (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C. and 21 U.S.C. (2009)).

¹⁹ According to the CDC, twenty-seven states preempt local tobacco control in some fashion, and 22 states preempt local youth access restrictions. For a complete list of states that preempt local tobacco control regulation see, CDC, *State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access -- United States, 2000—2010*, 60 Morbidity & Mortality Weekly Report 1124, 1124 (Aug. 6, 2011), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6033a2.htm>.

²⁰ *Holt's Cigar Co., Inc. v. City of Philadelphia*, 608 Pa. 146 (2011).

²¹ *Id.* at 165.

²² *Plescia v. Prince George's County*, CAL 08-38041, 2010 WL 5636242 (Md. Cir. Ct. 2010), available at http://www.law.umaryland.edu/programs/tobacco/cigars/documents/opinion_order_circuitcourt070210.pdf.