

# Promising Strategies to Remove Inexpensive Sweet Tobacco Products From Retail Stores

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Restricting access to tobacco products is critical to controlling tobacco use among young people. A 2012 report by the US Surgeon General found that exposure to tobacco marketing in stores, coupled with price discounting, increases smoking among young people.<sup>1</sup> One study found that two-thirds of teenagers visited a convenience store or other neighborhood retailer at least once per week.<sup>2</sup> According to the Federal Trade Commission, the tobacco industry spent >94% of its total marketing budget in convenience stores, gas stations, and other retail outlets in 2011.<sup>3</sup>

In 2009, the Family Smoking Prevention and Tobacco Control Act granted the US Food and Drug Administration (FDA) the authority to regulate the manufacture, distribution, and marketing of tobacco products.<sup>4</sup> The FDA began by banning candy-, fruit-, and similarly sweet-flavored cigarettes because they were intentionally created for and marketed to young people.<sup>5</sup> After the ban, however, the industry quickly pivoted and began producing inexpensive flavored cigars that resemble and are inhaled like cigarettes.<sup>6</sup> In 2015, an estimated 10.3% of high school students in the country had smoked cigars, cigarillos, or little cigars at least once in the previous 30 days.<sup>7</sup> A study published in 2015 found that >95% of adolescent cigar users smoked flavored cigars.<sup>8</sup> Effective strategies are needed to remove low-cost flavored tobacco products from retail stores.

To address public concerns about cigar use among young people, the City of Boston, Massachusetts, created, passed, and implemented its first cigar-packaging regulation in 2012 to reduce young people's access to inexpensive flavored cigars. The regulation went into effect on January 31, 2012. It has produced promising results, as evidenced by increases in mean sale price, substantial decreases in the number of retailers selling single cigars, and reductions in disparities (by neighborhood, race, and income) in young people's access to cigars in neighborhood retail stores.<sup>9</sup> This brief article reviews the regulation and its effects.

## The Boston Cigar-Packaging Regulation

The Boston cigar-packaging requirement was proposed as an amendment to the existing regulation restricting young people's access to inexpensive sweet cigars; the most relevant part reads as follows: "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."<sup>10</sup>

The regulation exempted establishments that prohibit the entry of anyone <18 years and that offer cigars that cost at least \$2.50. These exemptions are consistent with the purpose of the law: reducing young people's access to inexpensive sweet cigars.

## Developing a Viable Evidence-Based Regulation

In May 2010, the City of Boston began the process of reviewing local data on tobacco use, policy trends, and strategies for reducing young people's access to inexpensive flavored cigars. The Boston Youth Risk Behavior Survey (1999-2011) showed that inexpensive cigars were more popular than cigarettes among public high school students.<sup>11</sup> Noncigarette

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tobacco products, such as cigars and cigarillos, were often sold individually and were taxed at lower rates than cigarettes were. These products were available in fruit, candy, and alcohol flavors that were popular among young people.<sup>12</sup> Pricing surveys of tobacco products in Boston in fall 2009 and summer 2010 found single cigars, mostly flavored, on sale for as little as 50 cents each. Black & Mild, a popular brand of cigars available in many flavors, was priced at about \$1.25 each. These products, sold individually, offered a less expensive alternative to cigarettes, which must be sold in packs of 20, per federal and state law. In addition, local assessments of access among Boston young people during the same period showed that rates of noncompliance with regulations restricting the sale of tobacco products to people <18 years were 19% for cigars and 7% for cigarettes.<sup>11</sup> These findings prompted widespread concerns among city officials, community leaders, residents, and public health experts, who came together to seek policy and legal solutions.

Through the process of regulation development, the Boston Public Health Commission considered relevant legal cases and federal court rulings that would help ensure a strong legal basis for the proposed regulation. The agency commissioned an options paper to solicit public input in June 2010 and, in January 2011, identified several potential policy options to reduce young people's access to low-cost flavored cigars (unpublished data; Harding N, Ortiz O: "The Boston Tobacco Prevention and Control Program and Communities Putting Prevention to Work," presentation to the US FDA, Boston Public Health Commission; September 14, 2011).

The legal background of each option was carefully examined. The first option was to restrict the sale of flavored tobacco products, applying the same rationale that the FDA used to ban flavored cigarettes. At the time, New York City had passed an ordinance restricting the sale of all flavored tobacco products. One manufacturer, US Smokeless Tobacco, challenged this ordinance, claiming that the Tobacco Control Act preempted New York City's ordinance. Both the US District Court in New York and the US Court of Appeals for the Second Circuit upheld the ordinance.<sup>13,14</sup>

The second option was a pricing strategy that effectively banned the sale of individual inexpensive cigars. Studies indicated that a 10% price increase in tobacco products could decrease consumption among young people by 6% to 7%.<sup>15</sup> While Boston considered its pricing regulation, a nearly identical law was passed in Providence, Rhode Island. The National Association of Tobacco Outlets, the Cigar Association of America, and 7 tobacco manufacturers and distributors sued Providence over the regulation, claiming that the Tobacco Control Act preempted the law. The US District Court and the US Court of Appeals for the First Circuit upheld the price restriction in Providence. No plaintiff appealed to the US Supreme Court, rendering the Court of Appeals' decision final.

The third option was to restrict cigar packaging. In January 2009, Prince George's County, Maryland, passed an ordinance to restrict the sale of cigars in packages of <5.<sup>16</sup> Several businesses that sold cigars within the county challenged the

ordinance in a lawsuit, which claimed that "the ordinance violated their due process rights because the ordinance was not rationally related to Prince George's County's stated governmental interest of reducing regular cigar use by youth"; that "the ordinance was unconstitutionally vague because it is not clear which businesses are subject to the packaging requirements"; that "the ordinance denied them equal protection of the laws because it created a class of cigar retailers and discriminated against some of them"; and that "exempting from the ordinance tobacco shops that do not allow minors to enter is rationally related to the goal of limiting youth access to individually-wrapped cigars." The Court of Appeals of Maryland rejected each argument and upheld the ordinance.<sup>17</sup> Although this decision was not binding in Massachusetts, it had persuasive authority, especially when coupled with the strong antipreemption history of public health laws in Massachusetts. The federal court decisions provided a strong legal basis for the City of Boston to create its cigar-packaging regulation.

### *Passing the Regulation*

As part of the Boston Board of Health's process to consider the regulation, a public comment period was offered, and a public hearing was convened on October 4, 2011. Written comments were also accepted for 60 days after the hearing. A total of 596 people, 580 of whom were Boston residents, provided oral and written comments or testimony. Eighteen people and entities opposed the regulation, including the New England Convenience Store Association and the Tobacco Retailers Association of America. They argued that Boston should wait for the FDA to regulate cigars, and they critiqued the anticipated economic loss that retailers would incur if required to sell cigars in multipacks and not singly.

Proponents argued, however, that the economic and social effects of smoking far outweighed the potential harm to retailers. The United States spends \$108.4 billion annually on federal and state Medicare, Medicaid, and veterans' health care for tobacco-related disease and death.<sup>18</sup> In addition, the regulation set a minimum price for these products across retailers in the city and did not prevent the sale of these products outright. Minimum pricing laws for cigarettes were originally designed not for public health purposes but rather to protect smaller businesses that could not afford to sell cigarettes at a loss.<sup>19</sup> Thus, the potential economic loss from the pricing and packaging regulation, they argued, was less universal than what industry representatives suggested.

On December 1, 2011, the Boston Board of Health convened a meeting to review the proposed tobacco regulation, including its rationale, legal background, and the public response, and voted unanimously to enact the cigar-packaging regulation, effective January 31, 2012.

### *Implementation Strategies*

The City of Boston used a staged approach to implement the regulation. Before the regulation went into effect, letters



**Figure.** Municipalities in Massachusetts with packaging and pricing regulations as of February 2016. Category 1 includes municipalities requiring that single cigars be sold for at least \$2.50, 2-packs for at least \$5.00, 3-packs for at least \$7.50, and 4-packs or larger at market rate (no minimum). Category 2 includes municipalities requiring the same pricing policy as in category 1, but 4-packs or larger must be sold for at least \$5.00 at retail; the exception is in Boston and Winthrop, where the minimum is \$2.50. Category 3 includes municipalities requiring that single cigars be sold for at least \$2.50 and that all multipacks be sold for at least \$5.00 at retail. Data source: Tobacco Prevention and Cessation Program, Massachusetts Association of Health Boards.

explaining the regulation were distributed to all tobacco retailers. The Boston Tobacco Prevention and Control Program (BTPCP) visited and explained the new regulation to all tobacco retailers that were permitted to sell tobacco products. After conducting educational nonenforcement visits to all retailers, the BTPCP conducted compliance inspections and issued warnings when necessary. During subsequent inspections, the BTPCP issued citations to retailers who were not in compliance with the regulation. The BTPCP continues to conduct routine educational and compliance inspections of permitted tobacco retailers and additional compliance inspections in response to complaints. Currently, the BTPCP's standard operations include enforcement and require no additional staff members or inspections for this regulation, which overall has a very high rate of compliance (>97%).<sup>9</sup>

### Public Health Implications

Boston's regulation sought to reduce young people's access to inexpensive flavored cigars, thus minimizing exposure to and use of tobacco products among young people more broadly. The regulation has the potential to decrease

disparities in access to and use of these products by race, income, and education. The use of inexpensive cigars is more prevalent than the use of premium ones among cigar smokers with lower income and less education.<sup>19</sup> Regulating these products may have a particular impact on tobacco initiation for young black people, among whom the use of cigars may be 50% higher than the use of cigarettes.<sup>20</sup>

The regulation has transformed the cigar retail environment in Boston. A recent evaluation study found citywide compliance with the regulation, increases in the mean sale price of single-packaged cigars by 115%, and substantially fewer retailers selling single cigars. The regulation has reduced disparities in the availability of inexpensive cigars in Boston neighborhoods, many of which have racial, ethnic, and income disparities. Such changes are not evident in 10 comparison cities without similar regulations.<sup>9</sup>

Taking Boston's lead, many other municipalities have enacted cigar-packaging regulations. To date, an additional 117 of the 351 municipalities in Massachusetts (one-third of the state's municipalities and 48% of the state's population) have enacted cigar-packaging regulations requiring a single cigar to be priced at least \$2.50 and packages of  $\geq 2$  cigars to

be sold for a minimum of \$5.00. Such regulations can be found among many of the state's most socioeconomically disadvantaged racial/ethnic minority communities. The language of the regulation was improved from the original Boston version after it was discovered that some retailers were selling 4-packs as "loss leaders" (ie, retailers that sell products at a loss to attract customers; Figure). More municipalities are considering or implementing such regulations.

The recent expansion of the FDA's authority to regulate all tobacco products is unlikely to diminish the importance of local regulations. The FDA does not currently regulate pricing or packaging minimums or restrict flavored tobacco products other than cigarettes.<sup>21,22</sup> Local regulations similar to those in Boston may complement existing and future FDA regulations and strengthen control over tobacco use among young people in this country.

The City of Boston's successful experience in enacting and enforcing this regulation highlights the possibilities of local public health laws without waiting for state and/or federal regulatory action. Such local regulations are legally sound and supported by multiple federal court decisions. A locality can pass, implement, and enforce effective regulation within its existing infrastructure. Together, a city and its residents can marshal their collective will to create effective local public health laws that protect young people from the harm of tobacco products.

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