REGULATING FLAVORED TOBACCO PRODUCTS

On September 22, 2009, the Food and Drug Administration (FDA), under authority granted by the Family Smoking Prevention and Tobacco Control Act, prohibited cigarettes from containing any “characterizing flavor,” including candy, fruit, and alcohol flavors.¹

This prohibition extends to flavored cigarettes and flavored cigarette “component parts,” such as their “tobacco, filter or paper.”² However, the prohibition exempts the flavors of menthol and tobacco and does not apply to non-cigarette tobacco products.

The Public Health Law Center 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.³ For more details about these policy considerations, please contact the Center.
Flavored Tobacco Product Regulation

Although the FDA and its scientific advisory committee have conducted two in-depth studies of menthol as a characterizing flavor in cigarettes and, in 2013, issued an advance notice of proposed rulemaking related to menthol tobacco products, no substantive regulatory actions have been taken. In addition, the FDA’s 2016 regulation asserting jurisdiction over non-cigarette tobacco products — also known as its “deeming regulation” — does not extend the flavor restriction to non-cigarette tobacco products. As a result, menthol cigarettes remain on the market, as do many other flavored tobacco products, such as electronic cigarettes (e.g., Juul), cigars, smokeless tobacco, hookah tobacco (“shisha”), little cigars, and dissolvable tobacco products (e.g., strips and orbs), as well as flavored component parts (e.g., blunt wraps). Federal law allows state and local governments to regulate the sale of tobacco products, including flavored tobacco products and their component parts.

Research demonstrates that flavored tobacco products are especially attractive to youth, who are an enticing target market for the tobacco industry. These products have been shown to increase initiation among all populations by masking the harsh taste of tobacco and nicotine. Research suggests that most smokers try cigarettes before turning 18 and that most teens
start with flavored tobacco products. Largely unregulated, flavored non-cigarette tobacco products have been heavily and marketed as a safer alternative to conventional cigarettes, leading many tobacco users (particularly youth) to mistakenly assume that flavored tobacco products are safer than other tobacco products. Flavors such as menthol in tobacco products can also make quitting more difficult by influencing the action of nicotine in the brain and increasing puff volume and duration while using the products.

On July 28, 2017, the FDA announced a comprehensive regulatory plan for tobacco products that prioritizes restrictions on kid-attractive flavors, including menthol, and establishes a cohesive agency-wide approach to nicotine. However, the FDA has taken no substantive regulatory actions on flavored tobacco products to date and in the meantime, e-cigarette use among youth has skyrocketed. Given the significant threat to public health that flavored tobacco products pose, many local and state governments are not waiting for the FDA to act and are often using their authority to regulate the sale, pricing, marketing, and advertising of these products. This guide provides pointers that communities and policy makers might want to consider in drafting and implementing policies that regulate flavored tobacco products.

**Menthol Is a Significant Flavor**

The FDA has commissioned two extensive reports that document the evidence and conclude that removing menthol from all commercial tobacco products would benefit the public's health and save thousands of lives, 33 to 50 percent of which would be African American. The tobacco industry has spent billions of dollars targeting menthol tobacco product marketing and price promotions to certain marginalized populations, including youth generally, and specifically African American and other communities of color, women, those of the LGBTQ+ community, and those with mental health issues. The industry has also directed billions of dollars opposing menthol prohibitions.

Thus, it is no surprise that menthol cigarettes are used at disproportionately higher rates by racial and ethnic minority smokers, including African Americans (84.6 percent), Hispanics or Latinos (46.9 percent) and Asian Americans (38 percent), compared to White smokers (28.9 percent). Also, approximately 71 percent of all young LGBT smokers use menthol cigarettes. At least half of all teen smokers use menthol tobacco products, including more than 70 percent of adolescent African American smokers and more than half of all adolescent Latino smokers. Use of menthol products is also prevalent among non-minority youth and those making less than $10,000 per year. Menthol is a flavor with critical public health significance. In spite of this voluminous evidence, many jurisdictions exempt menthol from their restrictions on the sale of flavored tobacco products.
Policy Options

- **Sales restrictions.** Studies demonstrate that a flavored tobacco sales restriction can markedly decrease the availability and sales of specified flavored tobacco products in a community,\(^{20}\) which is associated with a lower likelihood of ever using a tobacco product among teens.\(^{21}\) Some state and local governments have passed laws that restrict the sale of various flavored tobacco products. Providence, Rhode Island,\(^{22}\) and Boston, Massachusetts,\(^{23}\) for example, prohibit the sale of flavored, non-cigarette tobacco products (including electronic cigarettes), with exceptions for menthol, wintergreen, mint, or tobacco-flavored products. New York City\(^{24}\) has enacted restrictions on the sale of flavored tobacco products other than cigarettes, with exceptions for electronic cigarettes and menthol, mint, wintergreen, or tobacco-flavored products. The tobacco industry has challenged the New York City and Providence ordinances but both have been upheld by federal appeals courts as valid exercises of local authority to regulate the sale and distribution of tobacco products.\(^{25}\) Moreover, the state of Maine has restricted the sale of flavored cigars.\(^{26}\)

A prohibition on the sale of flavored tobacco products, with no flavor or location exceptions, took effect in San Francisco on July 21, 2018, despite a well-funded attempt by a large tobacco company to challenge the ordinance. Following initial adoption in July 2017, a successful petition forced the ordinance to a public referendum in June 2018. More than two-thirds of voters chose to enact the flavored tobacco product sales prohibition.\(^{27}\) (See the Center’s chart of U.S. Sales Restrictions on Flavored Tobacco Products, which contains more examples of select U.S. jurisdictions where the sale of flavored tobacco products is restricted.)\(^{28}\)

Communities might also consider prohibiting sales of flavored tobacco products at certain locations such as stores within a certain distance of schools or other youth-oriented facilities, gas stations, convenience stores, pharmacies, or grocery stores. Chicago, for example, passed an ordinance prohibiting the sale of menthol and other flavored tobacco products within 500 feet of certain city schools, with the exception of retail tobacco stores dedicated primarily to the sale of tobacco products.\(^{29}\)

- **Advertising and promotion restrictions.** Any community considering regulating tobacco advertising needs to be aware of the First Amendment, which extends some protection to commercial speech, and the Federal Cigarette Labeling and Advertising Act (FCLAA), which limits the ability of state and local governments to place restrictions on the content of cigarette advertisements or promotions.\(^{30}\) In spite of these limitations, communities might be able to restrict the advertising or promotion of flavored tobacco products in several ways.\(^{31}\)
The advertising of flavored tobacco products is often targeted at shoppers inside, outside, and on the property of convenience stores, drug stores, gas stations, and other retail sales outlets. To prevent children from being exposed to advertising and self-service racks, communities could consider restricting the placement of in-store tobacco advertisements. General restrictions on the quantity or size of signs that may appear in store windows or on sidewalks outside retail stores might also help reduce tobacco advertising, along with other kinds of advertising.32 Such regulations need to be drafted carefully to avoid the risk of legal challenges related to First Amendment concerns.33

- **Graphic warnings.** Another way to regulate flavored tobacco products in the retail environment is to require tobacco retailers to place graphic warning signs at or near the point of sale to warn of the dangers of tobacco use. These signs should make clear that the warnings are issued by the government — not the tobacco industry or retailers — to counter potential arguments that the government is compelling speech in violation of the First Amendment.34 Furthermore, warning signs limited to other tobacco products — not
cigarettes — can counter arguments that the government is in violation of the Federal Cigarette Labeling and Advertising Act. Chicago, for instance, adopted this requirement in 2018, which will take effect June 1, 2019.35

- **Restricting product access.** Communities seeking to restrict how products are distributed or sold could require all flavored tobacco products to be sold via face-to-face transactions, thus prohibiting vending machines and self-service racks. Such regulations need to be drafted carefully to avoid the risk of legal challenges related to First Amendment concerns.36 Restricting online or “delivery” sales of tobacco products directly to consumers is one way to restrict flavored product access. For example, Maine prohibits delivery sales of tobacco products, which are broadly defined to include e-cigarettes, little cigars, and other commonly flavored tobacco products, though an exception is made for premium cigars.37

- **Regulating tobacco product pricing.** Studies have suggested that the more tobacco products cost, the less likely youth are to start or keep smoking.38 Consequently, local and state governments can consider regulating retail value-added promotions and other marketing techniques for flavored tobacco products. For example, some communities restrict and even prohibit price discounts provided by tobacco manufacturers or retailers, such as multi-pack offers (e.g., buy two packs, get one free), product giveaways, samples, or point redemption schemes.39 Another price regulation option is to increase taxes on flavored tobacco products, or to ensure that taxes on non-cigarette tobacco products are equivalent to taxes on cigarettes.40

**Policy Elements**

Well-crafted restrictions on flavored tobacco products are explicit about what they cover, and how communities will implement and enforce them. Here are key elements found in such policies:

- **Timely findings and clear statements of purpose:** Findings are brief statements of fact or statistics that outline the issue being addressed, support the need for the policy, and help clarify the policy goal. Regulations on the sale, marketing, and advertising of flavored tobacco products typically include evidence showing how the products create a problem within the community or state (e.g., documentation about the disproportionate use of flavored tobacco products by youth or how flavored products impede adult nicotine cessation efforts), and explain how the policy is designed to address this problem.
If a policy is challenged in court, a good set of findings can help support it. For example, findings can explain that the local government’s authority to enact the policy comes from its responsibility to protect public health and welfare, and can explain how the policy furthers those goals.

- **Clear definitions and concise language:** Avoid confusion about what constitutes a “flavored tobacco product” by clearly defining critical terms. Because the Family Smoking Prevention and Tobacco Control Act prohibits the manufacture and sale of flavored cigarettes (except those containing a menthol or tobacco flavor), be careful that the combination of the local law and the federal law will leave no gaps in covered products. For example, draft the definition of “tobacco product” broadly so it encompasses menthol cigarettes as well as flavored cigars, little cigars, electronic cigarettes, spit/chewing tobacco, dissolvable tobacco products, tobacco lozenges, and other emerging smokeless products; and do exclude, when appropriate, products approved by the FDA. Also, because descriptions such as “mellow” or “arctic” can imply a flavor, and because testing for actual flavoring may be difficult or expensive, consider regulating all products that are marketed as having a distinguishable, distinctive, or characterizing flavor or smell.

- **Clear scope of regulation:** Under the Family Smoking Prevention and Tobacco Control Act, the FDA (and not state or local governments) has the power to regulate tobacco product standards. Although prohibiting the sale of a certain type of product, such as a flavored tobacco product, does not set a product standard, the tobacco industry has argued that such a law does resemble a product standard. Nonetheless, this tobacco industry argument has been unsuccessful to date in the few flavor restriction cases that have been litigated.

A restriction on the sale of flavored tobacco products — often enacted to protect youth or to support adult quit attempts by reducing the number of locations where the products are available — might be easier to defend if it allows the products to be sold by a narrow class of businesses, such as limited types of adult-only facilities. However, communities taking this approach should review and consider updating their licensing and zoning codes to prevent businesses from working around such a sales restriction. For example, one year after Duluth, Minnesota passed an ordinance to limit flavored tobacco sales to adults-only “smoke shops,” several convenience stores took advantage of the city’s unchanged zoning and licensing codes to renovate portions of their retail spaces and open “smoke shops” on their existing premises. (See the Center’s publication *Location, Location, Location: Tobacco & E-Cig Point of Sale* for more information about policy and legal considerations for regulating retailer locations to improve public health.)
• Robust enforcement options: Regulating the advertising, promotion, and sale of flavored tobacco products can be challenging unless clear procedures are established, including reasonable penalty provisions. Ensure that the penalties proposed are appropriate and legal within the jurisdiction and that they are sufficient to cover all administrative expenses. Use clear terms to specify what behavior is prohibited and to whom the policy applies. It may be useful for the enforcement agency to maintain an updated list of all products determined to violate the ordinance. Also carefully consider the means by which products are determined to be flavored and who will bear the costs associated with such determinations. One approach currently being considered by California is to require manufacturers to register each of their non-flavored tobacco products with the Office of the State Attorney General. Thus, any product not on this list would be considered flavored under any applicable laws.

Effective enforcement of these policies often includes coordination among different enforcement agents, such as law enforcement agencies and administrative agencies, and adherence to consistent procedures throughout a community. The penalties section of the policy should clearly identify when people can be found in violation of the policy, and the penalties or fines imposed for first, second, and subsequent violations. Ideally, this section would be part of a licensing system that would include a licensing suspension for a third violation and revocation for additional violations. Consider whether the ordinance will specify the assessment of re-inspection fees against repeat violators of the ordinance.

• Well-planned implementation process: Establish a process for publicizing the policy and educating the community, as well as procedures for receiving, tracking, and responding to complaints. Make sure to set a realistic date for the policy to take effect, so responsible authorities have sufficient time to establish the necessary procedures for implementation and enforcement, and to notify affected business owners of their obligations under the policy. For instance, it may be helpful to create educational materials for distribution to tobacco retailers informing them of the ordinance’s key provisions, explaining how existing inventories may be treated (and allowing time for existing inventories to be depleted), and providing them an opportunity to ask questions.
Policy Challenges

State and local governments have the authority to pass, implement, and enforce laws that regulate the sale of tobacco products, and they can do so in a way that addresses local concerns. Still, due to the tobacco industry’s interest in protecting its profits, even the most carefully drafted local tobacco regulation cannot avoid all risk of legal challenge. Communities considering measures to regulate flavored tobacco products should keep in mind that policies need to be drafted carefully and precisely, with awareness of potential legal issues, such as preemption, and that broad sweeping policies may be more vulnerable to legal challenge than narrow local policies.48

Also, communities considering raising prices on flavored tobacco products will need to address criticism that price increases have a disproportionate impact on people in poorer communities, where tobacco use rates are high, and that increased prices serve only to create greater economic hardship. The counterpoint is that a tobacco product price increase is not a price increase on a necessity. Another point is that research demonstrates that the industry has simultaneously targeted these communities by making flavored products cheaper,49 which price increases could rectify. Ultimately, the public health goals justifying the increased price of tobacco products far outweigh the potential for economic harm.

Furthermore, communities considering restricting sales of flavored tobacco products may need to address the counterproposal of increasing the legal sales age for any tobacco products to 21 (T21) as a comprehensive solution, leaving flavored tobacco products available in retail settings. No matter what age a person begins using tobacco products, the majority of habitual users initiate with flavored products.50 Additionally, raising the legal sales age does not address other reasons youth are attracted to flavored tobacco products; price, exposure to product advertising, and available retail supply of flavored products are other significant factors. Further evidence that restricting raising the minimum legal sales age cannot comprehensively curb youth initiation and use is the fact that the industry has recently begun publicly supporting T21 policies and opposing flavor restrictions.51 No single policy is as successful as a multi-policy approach to deter youth interest and access to commercial tobacco products.
Select Legislation and Policies

Below are examples of flavored tobacco product 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 Center does not endorse or recommend any of the following policies. These examples are included simply to illustrate how various jurisdictions have approached similar issues.52

<table>
<thead>
<tr>
<th>Policy Type</th>
<th>Organization/Jurisdiction</th>
<th>Statute/Regulation/Directive</th>
<th>Select Excerpt of Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibits manufacture, marketing &amp; sale of flavored cigarettes</td>
<td>Food &amp; Drug Administration</td>
<td>Family Smoking Prevention and Tobacco Control Act § 907: Tobacco Product Standards (codified at 21 U.S.C. § 387g)</td>
<td>… a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pine-apple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke.</td>
</tr>
<tr>
<td>Prohibits sale of all flavored tobacco products, including menthol cigarettes, in all locations</td>
<td>San Francisco S.F., CAL., HEALTH CODE § 19Q (2018)</td>
<td>“Flavored Tobacco Product” means any tobacco product, other than a cigarette, that contains a constituent that imparts a characterizing flavor. “Characterizing Flavor” means a distinguishable taste or aroma or both, other than the taste or aroma of tobacco, imparted by a tobacco product ... [and] include[s], but [is] not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice. A tobacco product shall not be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. Rather, it is the presence of a distinguishable taste or aroma or both ... that constitutes a characterizing flavor. “Distinguishable” means perceivable by either the sense of smell or taste.... The sale or distribution by an establishment of any flavored tobacco product [or flavored cigarette] is prohibited.</td>
<td></td>
</tr>
<tr>
<td>Policy Type</td>
<td>Organization/Jurisdiction</td>
<td>Statute/Regulation/Directive</td>
<td>Select Excerpt of Law</td>
</tr>
<tr>
<td>-------------</td>
<td>---------------------------</td>
<td>-----------------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>Prohibits sale of all flavored tobacco products, including menthol cigarettes, except in certain adult-only venues</td>
<td>Duluth, Minnesota</td>
<td>Duluth, Minn., Code § 11-11 (2018)</td>
<td>“Flavored tobacco product” means any tobacco or tobacco related device that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to or during consumption or use…. including, but not limited to, any taste or smell relating to menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, fruit, or any candy, dessert, alcoholic beverage, herb or spice. A public statement or claim, whether express or implied, made or disseminated by a manufacturer of tobacco or tobacco related devices, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such products, that a product has or produces a taste or smell other than tobacco will constitute presumptive evidence that the product is a flavored tobacco product…. No person shall sell, offer for sale or otherwise distribute any flavored tobacco products. This restriction does not apply to retail establishments that: (1) Prohibit persons under the age of 18 from entering at all times; and (2) Derive at least ninety percent of their revenues from the sale of tobacco, tobacco-related devices.</td>
</tr>
<tr>
<td>Restricts sale of flavored tobacco products, including menthol, within 500 ft. of city high schools</td>
<td>Chicago</td>
<td>Chicago, Ill., Code §§ 4-64-100, 4-64-515(B) (2018): Flavored Tobacco Products</td>
<td>“Flavored tobacco product” means any tobacco product that ... imparts a characterizing flavor. As used in this definition, the term “characterizing flavor” means a distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product including but not limited to tastes or aromas of menthol, mint, wintergreen, chocolate, vanilla, honey, cocoa, any candy, any dessert, any alcoholic beverage, any fruit, any herb, or any spice. No tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. A public statement or claim made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate such statement or claim, that a tobacco product has or produces a characterizing flavor shall establish that the tobacco product is a flavored tobacco product.</td>
</tr>
<tr>
<td>Policy Type</td>
<td>Organization/Jurisdiction</td>
<td>Statute/Regulation/Directive</td>
<td>Select Excerpt of Law</td>
</tr>
<tr>
<td>-------------</td>
<td>--------------------------</td>
<td>------------------------------</td>
<td>-----------------------</td>
</tr>
</tbody>
</table>
| Prohibits sale of many flavored tobacco products except in certain adult-only venues | New York City | N.Y.C. ADMIN. Code, Title 17-713 To 17-718 (2018): Regulation of the sale of herbal cigarettes and flavored tobacco products | “Flavored tobacco product” means any tobacco product or any component part thereof that contains a constituent that imparts a characterizing flavor. A public statement or claim made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such tobacco product, that such tobacco product has or produces a characterizing flavor shall constitute presumptive evidence that the tobacco product is a flavored tobacco product. “Characterizing flavor” means a distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. It shall be unlawful for any person to sell or offer for sale, or to possess with intent to sell or offer for sale, any flavored tobacco product except in a tobacco bar.  

Prohibits sale of many flavored tobacco products except in certain adult-only venues | Providence, Rhode Island | PROVIDENCE, R.I., Code, §§ 14-308 to 14-310 (2018) | “Flavored tobacco product” means any tobacco product or any component part thereof that contains a constituent that imparts a characterizing flavor. “Characterizing flavor” means a distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. It shall be unlawful for any person to sell or offer for sale any flavored tobacco product to a consumer, except in a smoking bar.
Other Helpful Resources

The Public Health Law Center has webpages containing information on federal regulation of tobacco products, as well as tobacco product regulation at the state and local levels. Our site also provides several resources on regulating flavored tobacco products, including pages devoted to flavored and menthol tobacco products, as well as e-cigarettes. Our site also has resources related to tobacco product advertising, marketing, and pricing. In addition, the Campaign for Tobacco-Free Kids has information on flavored tobacco products, including dissolvables.

Contact Us

Please feel free to contact the Public Health Law Center at publichealthlawcenter@mitchellhamline.edu with any questions about the information included in this guide or to discuss local concerns you may have about implementing any of these policies.
Regulating Flavored Tobacco Products

This publication was prepared by the Public Health Law Center at Mitchell Hamline School of Law, St. Paul, Minnesota. It was made possible by Cooperative Agreement Number 5 NU58DP006263-02-00, funded by the Centers for Disease Control and Prevention. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of the Centers for Disease Control and Prevention.

The Public Health Law Center provides information and legal technical assistance on issues related to public health. The Center does not provide legal representation or advice. This document should not be considered legal advice.

Endnotes

1 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 § 102, 123 Stat. 1776 (codified as amended in 2009 in scattered sections of 15 U.S.C. and 21 U.S.C.). According to the Act: “a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke.” 21 U.S.C. § 387g(a)(1)(A) (2017). See also Flavored Tobacco, Food & Drug Admin., https://www.fda.gov/tobaccoproducts/labeling/productsingredientscomponents/ucm2019416.htm (last updated April 17, 2019).

2 Ctr. for Tobacco Products, Food & Drug Admin., Guidance to Industry and FDA Staff: General Questions and Answers on the Ban of Cigarettes that Contain Certain Characterizing Flavors 1 (2D ED.) (2009), https://www.fda.gov/media/116681/download.

3 The information contained in this document is not intended to constitute or replace legal advice. Be aware that, when available, laws referenced in this document are cited with a link to a publicly-accessible database and the year in which that law was last reviewed in the database. Laws without links reference the year of last review in Westlaw.

4 In March 2011, the Tobacco Products Scientific Advisory Committee (TPSAC) issued a report on menthol cigarettes, concluding that they have “an adverse impact on public health in the United States” and that “[t]here are no public health benefits of menthol compared to non-menthol cigarettes.” The report recommended to the FDA that “[r]emoval of menthol cigarettes from the marketplace would benefit public health in the United States.” Food & Drug Admin., MENTHOL CIGARETTES AND PUBLIC HEALTH: REVIEW OF THE SCIENTIFIC EVIDENCE AND RECOMMENDATIONS 204, 208 (2011), https://wayback.archive-it.org/7993/20170405201731/https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf. In July 2014, a federal judge found that three members of TPSAC had a conflict of interest and that the report could not be used to influence FDA policy, Lorillard, Inc. v. U.S. Food & Drug Admin., 56 F. Supp. 3d 37 (D.D.C. 2014), but that decision was vacated in January 2016, R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin., 810 F.3d 827 (D.C. Cir. 2016). The TPSAC report is not the only FDA report on menthol. In July 2013, the agency published an independent report that concluded that “menthol use is likely associated with increased smoking initiation by youth and young adults,” “menthol in cigarettes is likely associated with greater addiction,” and “that menthol cigarettes pose a public health risk above that seen with nonmenthol cigarettes.” Food & Drug Admin., PRELIMINARY SCIENTIFIC EVALUATION OF THE POSSIBLE PUBLIC HEALTH EFFECTS OF MENTHOL VERSUS NONMENTHOL CIGARETTES 6 (2013), http://www.fda.gov/downloads/scienceresearch/specialtopics/peerreview/ucm361598.pdf. An advance notice of proposed rulemaking involving menthol flavor in tobacco products was published in the Federal Register in 2013, see Menthol in Cigarettes, Tobacco Products; Request for Comments, 78 Fed. Reg. 142,4484 (Jul. 24, 2013) (soliciting information related to the potential regulation of menthol in cigarettes and comments on FDA’s scientific evaluation of public health issues related to the use of menthol in cigarettes), https://www.federalregister.gov/documents/2013/07/24/2013-17805/menthol-in-cigarettes-tobacco-products-request-for-comments. In November 2018, four months before his abrupt resignation, then-FDA Commissioner Scott Gottlieb stated an intention to ban menthol in cigarettes and cigars through rulemaking and directed the FDA to revisit its deemed tobacco products compliance policy and limit sales of all flavored (other than 2019


9 Bridget K. Ambrose et al., Flavored Tobacco Product Use Among US Youth Aged 12–17 Years, 2013–2014, 314 J. Am. Med. Ass’n 1871 (2015), http://jamanetwork.com/journals/jama/fullarticle/2464690 (“The majority of youth ever-users reported that the first product they had used was flavored, including 88.7% of ever hookah users, 81.0% of ever e-cigarette users, 65.4% of ever users of any cigar type, and 50.1% of ever cigarette smokers. For past 30-day youth tobacco use, the overall proportion of flavored product use was 79.8% (95% CI, 77.3%–82.3%) among users of any product and 89.0% among hookah users, 85.3% among e-cigarette users, 71.7% among users of any cigar type, and 59.5% among cigarette smokers.”).


11 See Nadine Kabbani, Not So Cool? Menthol’s Discovered Actions on the Nicotinic Receptor and Its Implication for Nicotine Addiction, 4 FRONT. PHARMACOL. 1 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3720998 (“Studies have demonstrated a role for menthol in the metabolism of nicotine in the body. More recent findings now reveal an interaction between menthol and the nicotinic acetylcholine (nACh) receptor in cells. This receptor is central to the actions of nicotine in the brain, and plays an important role in nicotine addiction.”); Christina Watson et al., Smoking Behavior and Exposure: Results of a Menthol Cigarette Crossover Study, 41 Am. J. HEALTH BEHAV. 309 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5585737, (“Regardless of cigarette preference, when participants smoked the test menthol cigarette, mouth level nicotine, puff volume and puff duration were significantly higher than with the test nonmenthol cigarette.”); Cristine D. Delnovo, et al., Smoking-Cessation Prevalence Among U.S. Smokers of Menthol Versus Non-Menthol Cigarettes, 41 Am. J. PREVENTIVE MED. 357 (2011).

13 For more information about menthol tobacco products, see the Public Health Law Center’s web page, which contains dozens of resources and publications on the topic. See also Menthol Cigarettes and Public Health and Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol Versus Nonmenthol Cigarettes, supra note 4.


17 National Youth Advocacy Coalition, Coming Out About Smoking: A Report from the National LGBTQ Young Adult Tobacco Project (2010).

18 Changes in the Prevalence and Correlates of Menthol Cigarette Use in the USA, supra note 16.

19 Id.


25 U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428 (2d Cir. 2013); Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence, 731 F.3d 71 (1st Cir. 2013).


29 See CHICAGO, ILL., CODE §§ 4-64-100, 4-64-515(b) (2018), http://library.amlegal.com/nxt/gateway.dll/illinois/chicago_il/title4businessesoccupationsandconsumerspro/chapter4-64tobaccodealers*?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il$anc=JD_Ch.4-64. The ordinance exempts retail tobacco stores.


34 New York City adopted a requirement that cigarette and other tobacco product retailers display signs graphically depicting the adverse health effects of smoking, but a federal court struck down this ordinance as violating the preemption clause of the Federal Cigarette Labeling and Advertising Act. 23-34 94th St. Grocery v. N.Y.C. Board of Health, 685 F.3d 174 (2d Cir. 2012). However, because this case turned on preemption relative to cigarettes, it would not be directly relevant to an ordinance requiring point-of-sale warnings depicting the health effects of non-cigarette tobacco products. In addition, the court said that cigarette graphic warnings, if done differently, could be valid.

35 See CHICAGO, ILL., CODE §§ 4-64-220(f), 4-64-500(4) (2018) and City of Chicago, City of Chicago Rules: Warning Sign for Other Tobacco Products (published Apr. 12, 2019; effective June 1, 2019).


Regulating Flavored Tobacco Products


41 If it is not politically feasible to prohibit the sale of menthol cigarettes, and only flavored non-cigarette tobacco products are targeted by the local law, make sure that the language is precise so that products such as little cigars are not inadvertently exempted as well.


44 Id.


48 See, e.g., Point-of-Sale Strategies, supra note 30, at 12-14.

49 See, e.g., Racialized Geography, Corporate Activity, and Health Disparities: Tobacco Industry Targeting of Inner Cities, supra note 14, at 20-22.

50 See Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013–2014, supra note 9; Melissa B. Harrell et al., Flavored E-Cigarette Use: Characterizing Youth, Young Adult, and Adult Users, 5 Prev. Med. Rep. 33 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5121224. (Most e-cigarette users said their first and “usual” e-cigarettes were flavored. At initiation: 98.6% of Texas school-going youth, 95.2% of young Texas college adults, 71.2% of 18-29 year-old adults nationwide were flavored to taste like something other than tobacco, compared to 44.1% of older adults nationwide.).


52 See also U.S. Sales Restrictions on Flavored Tobacco Products, supra note 28.

53 The Second Circuit Court of Appeals noted that “there are only eight tobacco bars in New York City, all of which are in Manhattan and none of which sells flavored smokeless tobacco,” but upheld the ordinance nonetheless. 708 F.3d 428, 432, 436 (2013)

54 The ordinance originally included the language “and concepts such as spicy, arctic, ice, cool, warm, hot, mellow, fresh, and breeze.” However, a federal district court found this language to be unconstitutionally vague and struck it from the ordinance. See Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence, No. 12-96-ML, 2012 WL 6128707, *8 (D.R.I. Dec. 10, 2012).