

RESTRICTING THE SALE OF FLAVORED TOBACCO PRODUCTS

Sample Language



This sample language contains a number of provisions that a local government may use to place restrictions on the sale of flavored tobacco products.*

Consistent with best practices for public health and experience in local jurisdictions around the country, this sample does not exempt retail tobacco shops and it includes a prohibition of the sale of all flavored tobacco products. Best practices policies also focus the prohibition and punishment on those that sell such products, not those who possess or use them and not store clerks or employees.

The gray context boxes interspersed with the text contain additional information that may be useful to understand some of the concepts addressed by the sample language. These boxes are not meant to be included in any final policy. A city or county wishing to adopt this language should remove the context boxes.



* The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. Comparatively, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit <http://www.keepitsacred.itcml.org>. When the word "tobacco" is used throughout this document, a commercial context is implied and intended.

In some instances, blanks (such as [_____]) prompt cities or counties to customize the language to fit a community's needs. A degree of customization is always necessary to ensure that a community's existing laws are consistent and that communities are using this sample language to address local needs and support health equity.

The information provided in this document does not constitute legal advice or legal representation. If you are considering using any of this sample language or are seeking legal advice, consult local legal counsel.

Additional information on restricting the sale of flavored tobacco products is available in the Public Health Law Center's guide, *Regulating Flavored Tobacco Products*, and its regularly updated list of state and local policies, *U.S. Sales Restrictions on Flavored Tobacco Products*. For information on regulating menthol tobacco products, check the Center's [website](#).

SECTION I. FINDINGS

The [city council/county board] of [insert local jurisdiction] finds that:

Documents obtained during litigation against the tobacco industry reveal that tobacco companies have used fruit, candy, and alcohol flavors as a way to target youth. Tobacco industry documents stated that "sweetness can impart a different delivery taste dimension which younger adults may be receptive to,"¹ that "[i]t's a well known [sic] fact that teenagers like sweet products,"² and that flavored products would have appeal "in the under 35 age group, especially in the 14-24 group."³

Marketing and public health research shows that flavors such as fruit, candy, and alcohol hold an intense appeal to minors and young adults.⁴ The presence of flavors such as menthol in tobacco products can make it more difficult for adult tobacco users to quit.⁵ Moreover, menthol cigarettes in particular have a disproportionate health impact on youth, as well as members of racial and ethnic populations, the LGBT community, and people of low socio-economic status.⁶ The tobacco industry has a history of targeting these groups with flavored products, including menthol.⁷

Between 2004 and 2014, use of non-menthol cigarettes decreased among all populations, but overall use of menthol cigarettes increased among young adults (ages 18 to 25) and adults (ages 26+).⁸

The Family Smoking Prevention and Tobacco Control Act of 2009 prohibits the manufacture and sale of flavored cigarettes, except menthol cigarettes.⁹ No federal prohibition exists for flavored non-cigarette tobacco products.¹⁰

Also, [insert state name] state laws do not restrict the sale of menthol cigarettes or flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, [electronic smoking devices], and the solutions used in these devices.

In 2018, both the U.S. Food and Drug Administration¹¹ and the U.S. Surgeon General¹² declared an “epidemic” of youth e-cigarette use. In explaining the huge uptick in youth use, the FDA Commissioner said “[e]vidence shows that minors are especially attracted to flavored e-cigarette products[.]”¹³

Jurisdictions such as New York City;¹⁴ Providence, Rhode Island;¹⁵ Chicago, Illinois;¹⁶ Newton, Massachusetts;¹⁷ Duluth, Minnesota;¹⁸ Sacramento, California;¹⁹ San Francisco, California;²⁰ and many others²¹ have passed restrictions on the sale of flavored tobacco products. The authority of state and local governments to restrict the sale of these products has been upheld by federal courts.²²

Research shows that the implementation of a prohibition on menthol cigarette sales results in an increase in quit attempts, even among smokers who planned to switch to non-flavored cigarettes.²³ Those who try to quit after such a restriction are more successful in doing so than those who have historically attempted to quit without such a restriction.²⁴ Youth who live in a city with a flavor restriction have a significantly reduced chance of ever trying flavored tobacco products.²⁵

[Insert additional findings with data and examples specific to the state and local jurisdiction.]

Accordingly, the [city council/county board] finds and declares that the purpose of this ordinance is to protect public health and welfare by reducing the appeal of commercial tobacco products to minors and decreasing the likelihood that minors will become nicotine or tobacco users.

Timely findings and clear statement 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.

Laws and regulations that restrict the sale of flavored tobacco products typically include findings that set forth evidence demonstrating how the products create a problem within the community or state (e.g., documentation about the disproportionate use of flavored tobacco products by youth), 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 to 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.

SECTION II. DEFINITIONS

As used in this ordinance:

- (a) “Electronic smoking device” means any device that may be used to deliver any aerosolized or vaporized substance to the person inhaling from the device, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah. Electronic smoking device includes any component, part, or accessory of the device, and also includes any substance that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine. Electronic smoking device does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act.²⁶
- (b) “Flavored tobacco product” means any tobacco product 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 the consumption of, a tobacco product, including, but not limited to, any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, molasses, honey, or any candy, dessert, alcoholic beverage, herb, or spice.
- (c) “Person” means any natural person, partnership, firm, joint stock company, corporation, or other legal entity, including an employee of a legal entity.
- (d) “Tobacco product” means:
 - (1) any product containing, made of, or derived from tobacco or nicotine that is intended for human consumption or is likely to be consumed, whether inhaled, absorbed, or ingested by any other means, including but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus;
 - (2) any electronic smoking device and any substances that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine; or
 - (3) any component, part, or accessory of (1) or (2), whether or not any of these contains tobacco or nicotine, including but not limited to filters, rolling papers, blunt or hemp wraps, hookahs, and pipes.

“Tobacco product” does not mean drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act.²⁷

- (e) “Tobacco Retailer” means any person who sells, offers for sale, or exchanges or offers to exchange for any form of consideration, tobacco products. This definition is without regard to the quantity of tobacco products sold, offered for sale, exchanged, or offered for exchange.
- (f) “Tobacco Retailing” means engaging in the activities of a tobacco retailer.

Clear definitions and concise language

To help ensure people understand their obligations under the law, key terms need to be defined.

Avoid confusion about what constitutes “flavor,” “flavoring” or “non-cigarette tobacco product” by clearly defining critical terms. Because descriptions such as “mellow” or “arctic” can imply a flavor, and because testing for actual flavoring may be difficult or expensive, consider regulating not only products that are flavored, but also all products that are marketed as having a distinguishable, distinctive or characterizing flavor (or aroma).

Draft the definition of “tobacco product” broadly so it encompasses products such as electronic cigarettes, flavored cigars, little cigars and spit/chewing tobacco, as well as dissolvable tobacco products, flavored tobacco lozenges, and other emerging smokeless products, along with their components and related accessories. Flavored cigarettes, except those containing menthol, are prohibited by federal law.

While some jurisdictions have carved out exceptions for certain products (e.g., menthol cigarettes or flavored shisha) the strongest policy for public health is to cover all flavors and all products. Having such a comprehensive standard should also aid in implementation and enforcement, making the policy simpler for retailers to understand and inspectors to administer.

SECTION III. PROHIBITION ON SALE

It shall be unlawful for any tobacco retailer to sell or offer for sale any flavored tobacco product.

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 taste or smell other than tobacco shall constitute presumptive evidence that the tobacco product is a flavored tobacco product.

Nothing in this [article/chapter/ordinance] shall be construed to penalize the purchase, use, or possession of a tobacco product by any person not engaged in tobacco retailing.

Clear scope of regulation

Use clear terms to specify what behavior is prohibited and to whom the policy applies. Also, consider the means by which products are determined to be flavored (perhaps including smell-testing by enforcement authorities or factfinders²⁸) and who will bear the costs associated with such determinations.

This sample language can be modified, if preferred, to allow the continued sale of flavored products in certain adult-only establishments.²⁹ This would mean allowing the sale of flavored products in a much smaller subset of tobacco retailers, who do not admit anyone under the minimum legal sales age and who get a large percentage (e.g., 90 percent) of their revenue from the sale of tobacco products. Such an exception would require an additional definition that specified which businesses would qualify.

Since the purpose of this policy is to restrict the sale of flavored tobacco products and studies have shown that punishing product users for use and possession does not promote overall public health, this provision explicitly disclaims any punishment for purchase/use/possession of any tobacco product.

SECTION IV. VIOLATIONS AND PENALTIES

It is a violation for any tobacco retailer to fail to comply with the requirements of this ordinance. If a tobacco retailer is found to have violated this ordinance, the retailer shall be charged an administrative penalty as follows:

- 1 First violation. The [city council/county board/enforcement agency] shall impose a civil fine of at least [five hundred dollars (\$500)].
- 2 Second violation within sixty (60) months of a first violation. The [city council/county board/enforcement agency] shall impose a civil fine of at least [seven hundred fifty dollars (\$750)].
- 3 Third violation within sixty (60) months of any preceding violation. The [city council/county board/enforcement agency] shall impose a civil fine of at least [one thousand dollars (\$1,000)].

Each day of violation constitutes a separate offense. Failure to comply with any provision of this ordinance shall constitute grounds for the denial of, refusal to renew, suspension of,

or revocation of any [food, liquor, tobacco, or other] business license issued by the [city/county]. Any fines collected under this ordinance shall be used for its implementation and enforcement. Any punishments are cumulative with civil or criminal sanctions applicable under other law. All tobacco retailers are responsible for the actions of their employees relating to the sale, offer to sell, and furnishing of tobacco products at the retail location. The sale of any tobacco product by an employee shall be considered an act of the tobacco retailer.

Robust penalty and enforcement options

Regulating the 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. Also, specify 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 repeat violations and revocation for additional violations.

As a matter of best practices it is more effective to levy penalties against the retailer — the owner or operator of a tobacco-selling business — rather than their staff member or store clerk.

The selection of an enforcement agency will be based on factors such as the agency's authority, political will and interest in enforcing the ordinance, the resources it can dedicate to enforcement, and its ability to gain the cooperation of other agencies that could assist in carrying out inspections or issue/revoke business licenses.

Consider whether the ordinance will specify the assessment of re-inspection fees against repeat violators of the ordinance.

SECTION V. ENFORCEMENT

The [enforcement agency] shall enforce the provisions of this ordinance.³⁰ All tobacco retailers shall be subject to a compliance check at least twice a year with violators being checked more frequently until two consecutive checks are completed without a violation.

SECTION VI. SEVERABILITY

It is the intent of the [city council/county board] of [city/county] to supplement applicable state and federal law and not to duplicate or contradict such law and this ordinance shall be construed consistently with that intention. If any section, subsection, subdivision, paragraph,

sentence, clause, or phrase of this [article/chapter/ordinance], or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases of this [article/chapter/ordinance], or its application to any other person or circumstance.

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 the effective date is realistic 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 example, it may be helpful to create educational materials for distribution to tobacco retailers informing them of the ordinance's key provisions, showing examples of products that can no longer be sold, explaining how existing inventories may be treated, distributing signage describing the policy to customers at the point of sale, and providing regulated sellers an opportunity to ask questions.

SECTION VII. EFFECTIVE DATE

This ordinance shall take effect [ninety (90) days] after its publication.

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Endnotes

- 1 Memorandum from J.L. Gemma, Marketing Development Department, R.J. Reynolds Tobacco Co., to the Marketing Development Department Committee, R.J. Reynolds Tobacco Co. (Aug. 16, 1985), <http://legacy.library.ucsf.edu/tid/xgm15d00/pdf>.
- 2 Memorandum from Marketing Innovations, Inc., to Brown & Williamson Tobacco Corp. (Sept. 1972), <http://legacy.library.ucsf.edu/tid/wwq54a99/pdf>.
- 3 Memorandum from A.P. Ritchy, Product Group, R.J. Reynolds Tobacco Co., to P.R. Ray, Jr., R.J. Reynolds Tobacco Co. (Dec. 18, 1972), <http://legacy.library.ucsf.edu/tid/buq49d00/pdf>.

- 4 See, e.g., Paula Frank, *Kids' Drinks*, NATURAL PRODUCTS INSIDER (Jan. 1, 2000), <https://www.naturalproductsinsider.com/healthy-living/kids-drinks>; Carrie M. Carpenter et al., *New Cigarette Brands with Flavors that Appeal to Youth: Tobacco Marketing Strategies*, 24 HEALTH AFFS. 1601, 1608 (2005).
- 5 Cristine D. Delnevo et al., *Smoking-Cessation Prevalence Among U.S. Smokers of Menthol Versus Non-Menthol Cigarettes*, 41 AM. J. PREVENTIVE MED. 357 (2011).
- 6 U.S. DEP'T HEALTH & HUM. SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 190 (2012) (indicating that 47.7 percent of 12- to 17-year old smokers in the U.S. use menthol cigarettes); Substance Abuse & Mental Health Admin., *Recent Trends in Menthol Cigarette Use*, THE NSDUH REP. (Nov. 18, 2011), https://www.samhsa.gov/data/sites/default/files/WEB_SR_O88/WEB_SR_O88/WEB_SR_O88.pdf [hereinafter SAMHSA, 2011] (explaining that menthol use increased among youth (ages 12 to 17) and young adults (ages 18 to 25) from 2004 to 2010, despite declines in non-menthol cigarette use over the same period). See also U.S. DEP'T HEALTH & HUM. SERVS., TOBACCO USE AMONG U.S. RACIAL/ETHNIC MINORITY GROUPS: A REPORT OF THE SURGEON GENERAL 138 (1998), https://www.cdc.gov/tobacco/data_statistics/sgr/1998/complete_report/pdfs/complete_report.pdf (reviewing data indicating that African American men experience a higher incidence of lung cancer and are more likely to die from lung cancer than any other group, a trend that has been observed since the 1970s).
- 7 Stacey J. Anderson, *Marketing of Menthol Cigarettes and Consumer Perceptions: A Review of Tobacco Industry Documents*, 20 TOBACCO CONTROL ii20 (2011). See also Cati G. Brown-Johnson et al., *Tobacco Industry Marketing to Low Socioeconomic Status Women in the USA*, 23 TOBACCO CONTROL e139 (2014).
- 8 Andrea C. Villanti et al., *Changes in the Prevalence and Correlates of Menthol Cigarette Use in the USA, 2004–2014*, 25 TOBACCO CONTROL ii14 (2016).
- 9 21 U.S.C. § 387g(a)(1)(A) (2009).
- 10 Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (codified, in relevant part, at 15 U.S.C.A. §§ 1333-34 and 21 U.S.C.A. § 301 et seq. (West 2010)), <http://www.govtrack.us/congress/billtext.xpd?bill=h111-1256>. The provision of the Act prohibiting the manufacture, marketing, and sale of flavored cigarettes took effect September 22, 2009. 21 U.S.C.A. § 387g(a)(1)(A) (2009).
- 11 Press Release, U.S. Food & Drug Admin., Statement from FDA Commissioner Scott Gottlieb, M.D., on New Steps to Address Epidemic of Youth E-Cigarette Use (Sept. 11, 2018), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-steps-address-epidemic-youth-e-cigarette-use>.
- 12 Press Release, U.S. Dep't Health & Hum. Servs., Surgeon General Releases Advisory on E-Cigarette Epidemic Among Youth (Dec. 18, 2018), <https://public3.pagefreezer.com/browse/HHS.gov/31-12-2020T08:51/https://www.hhs.gov/about/news/2018/12/18/surgeon-general-releases-advisory-e-cigarette-epidemic-among-youth.html>; *Surgeon General's Advisory on E-Cigarette Use Among Youth*, U.S. SURGEON GEN. (2018), <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>.
- 13 Press Release, U.S. Food & Drug Admin., Statement from FDA Commissioner Scott Gottlieb, M.D., on New Data Demonstrating Rising Youth Use of Tobacco Products and the Agency's Ongoing Actions to Confront the Epidemic of Youth E-Cigarette Use (Feb. 11, 2019), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-new-data-demonstrating-rising-youth-use-tobacco>.
- 14 N.Y.C., N.Y., MUN. CODE § 17-715 (2020), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCad-min/0-0-0-29262>.
- 15 PROVIDENCE, R.I., MUN. CODE art. XV, § 14-309 (2012), https://library.municode.com/ri/providence/codes/code_of_ordinances?nodeId=PTIICOOR_CH14LI_ARTXVTODE_S14-309SAFLTOPRPR.
- 16 Chi., Ill., Amendment of Municipal Code Chapters 4-64 and 7-32 (Jan. 15, 2014), <https://chicago.legistar.com/LegislationDetail.aspx?ID=1531471&GUID=8FBB15D9-D5CF-4211-8396-78EF37BA8F87&Options=Advanced&Search>.

- 17 NEWTON, MASS., MUN. CODE art. 1, § 20-2(j), <https://www.newtonma.gov/Home/ShowDocument?id=29803>.
- 18 DULUTH, MINN., CODE § 11-11 (2019), https://library.municode.com/mn/duluth/codes/legislative_code?nodeld=Chapter%2011%20-%20Tobacco%20and%20Tobacco%20Related%20Devices.
- 19 Sacramento, Cal., Ordinance No. 2019-0012 (Apr. 16, 2019), <http://www.qcode.us/codes/sacramento/revi-sions/2019-0012.pdf>.
- 20 S.F., CAL., HEALTH CODE art. 19Q, § 19Q.3 (2018), https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_health/0-0-0-59324.
- 21 Public Health Law Center, *U.S. Sales Restrictions on Flavored Tobacco Products* (2021), <https://www.publichealthlawcenter.org/sites/default/files/resources/US-sales-restrictions-flavored-tobacco-products.pdf>.
- 22 *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013) (upholding the city's sales restrictions concerning non-menthol, flavored cigars and smokeless tobacco products, except in certain adult-only establishments); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013) (upholding the city's sales restrictions concerning non-menthol, flavored cigars, smokeless tobacco products, and e-cigarettes, except in certain adult-only establishments); *Independents Gas & Service Stations Associations, Inc. v. City of Chicago*, 112 F.Supp.3d 749 (N.D. Ill. 2015) (upholding the city's sales restriction on flavored products, including menthol cigarettes, within 500 feet of schools). See also 21 U.S.C. § 387p(a)(1).
- 23 Michael Chaiton et al., *Association of Ontario's Ban on Menthol Cigarettes with Smoking Behavior 1 Month After Implementation*, 178 JAMA INTERNAL MED. 710 (2018).
- 24 Stanton A. Glantz & Philip Gardiner, *Local Movement to Ban Menthol Tobacco Products as a Result of Federal Inaction*, 178 JAMA INTERNAL MED. 711 (2018).
- 25 Shannon M. Farley & Michael Johns, *New York City Flavoured Tobacco Product Sales Ban Evaluation*, 26 TOBACCO CONTROL 78 (2017).
- 26 See, e.g., 21 U.S.C. § 321(g)(1), 21 U.S.C. § 321(h) and 21 U.S.C. § 353(g).
- 27 See, e.g., 21 U.S.C. § 321(g)(1), 21 U.S.C. § 321(h) and 21 U.S.C. § 353(g).
- 28 See generally *Cumberland Farms, Inc. v. Bd. of Health of Yarmouth*, No. 19-P-20, 2020 WL 1898439 (Mass. App. Ct. Apr. 17, 2020) (finding that a smell test was sufficient evidence of flavoring in tobacco products).
- 29 The New York City ordinance exempts certain "tobacco bars" from the prohibition on the sale of flavored tobacco products. Under the federal Tobacco Control Act, state and local governments are able to adopt sales restrictions on tobacco products, but are preempted from regulating the manufacturing and ingredients of the products themselves. 21 U.S.C. § 387p(a). In upholding the New York City ordinance, the District Court stated that New York's exemption was not necessary for its ordinance to withstand judicial scrutiny. See *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 703 F. Supp. 2d 329 (S.D.N.Y. 2010). See also *Duluth, Minn. Code § 11-11(a)* (2019) (exempting from flavored sale restrictions retail establishments that prohibit persons under the age of 18 from entering at all times and that derive at least 90 percent of their revenues from the sale of tobacco and tobacco-related devices), https://library.municode.com/mn/duluth/codes/legislative_code?nodeld=Chapter%2011%20-%20Tobacco%20and%20Tobacco%20Related%20Devices. No such exemptions are included in this sample language.
- 30 If state or local law provides the enforcement agency with the power to establish regulations, it may be helpful to include a provision allowing the agency to issue rules necessary for the effective implementation and enforcement of this policy.