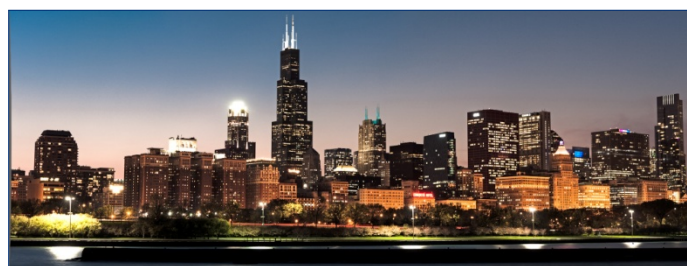


Chicago's Regulation of Menthol Flavored Tobacco Products: A Case Study

Overview

In December 2013, Chicago became the first city in the U.S. to restrict the sale of all flavored tobacco products, including menthol. Part of Chicago's campaign to curb youth smoking, the new ordinance restricts the sale of menthol flavored cigarettes and other flavored tobacco products within 500 feet of any school located in Chicago, with the

exception of retail tobacco stores dedicated primarily to the sale of tobacco. As states and local communities continue to debate ways to curtail the use of menthol cigarettes by youth, Chicago has moved ahead with a bold measure reflective of the city's "Healthy Chicago" public health agenda, which was launched by Mayor Rahm Emanuel in 2011. The back story of the Windy City's historic menthol regulation illustrates the importance of public health leadership and community mobilization in implementing tobacco control policy change.¹



Background

Menthol is the most commonly used flavoring in tobacco products.² Its pleasant minty taste and soothing cooling qualities mask the harshness of tobacco smoke and reduce the irritation associated with nicotine, all of which increases the palatability of smoking, especially among new young smokers.³ Nearly half of all teen smokers use menthol tobacco products.⁴ Also, approximately 71 percent of all young LGBT smokers use menthol cigarettes.⁵ Moreover, menthol's appeal is incredibly strong among some adult populations as well. According to the combined 2004-2008 National Survey on Drug Use and Health data, menthol cigarettes are used at disproportionately higher rates by racial and ethnic minority smokers, including African Americans (82.6 percent), Native Hawaiian or Pacific Islanders (53.2 percent), Hispanics or Latinos (32.3 percent) and Asian Americans (31.2 percent), compared to White smokers (23.8 percent).⁶ In addition, a convincing body of evidence has shown that tobacco-related health disparities are exacerbated by targeted marketing in minority areas⁷ and the consumption of menthol tobacco products.⁸

Because of the continuing popularity of this deadly flavor, menthol cigarettes have a disproportionate health impact on youth, members of racial and ethnic populations, the LGBT

community,⁹ and people of low socio-economic status.¹⁰ Not only are menthol tobacco products associated with a greater likelihood and degree of addiction, but studies have shown that the physiological properties of menthol have the potential to undermine efforts to quit tobacco use.¹¹ In fact, researchers have found a correlation between menthol cigarette smoking and severe nicotine dependence and addiction.¹² The appeal of menthol cigarettes to youth is particularly disturbing because nearly all adult smokers start as adolescents and research has shown that these products commonly serve as a gateway to regular tobacco use.¹³

The Family Smoking Prevention and Tobacco Control Act of 2009¹⁴ – the historic federal legislation that granted the U.S. Food and Drug Administration regulatory authority over tobacco products – prohibited fruit- and candy-like additives as “characterizing flavors” in cigarettes.¹⁵ The Tobacco Control Act, however, made one exception to this flavor ban, deferring action on the most popular of all flavors – menthol. Instead, the Act directed the FDA to establish a Tobacco Products Scientific Advisory Committee, consisting of leading scientific experts, to determine whether allowing menthol cigarettes is “appropriate for public health.”¹⁶ In 2011, after an exhaustive review of the scientific evidence, this FDA-appointed Committee issued a report detailing the Committee’s findings on menthol cigarettes, and concluding that the “removal of menthol cigarettes from the marketplace would benefit public health in the United States.”¹⁷

Despite these findings, the FDA did not follow up with action on menthol tobacco products. As a result, on April 12, 2013, the Tobacco Control Legal Consortium and nineteen other public health organizations filed a Citizen Petition, urging the FDA to exercise its regulatory power and protect American’s health by prohibiting the sale of mentholated tobacco products.¹⁸

Finally, on July 23, 2013, more than two years after receiving the Committee’s report, the FDA released its *Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol versus Non-menthol Cigarettes*.¹⁹ The agency opened a docket to accept public comments on menthol, including scientific data, local survey data, and evidence of the public health impact of menthol. Then, on April 25, 2014, the FDA issued a proposed rule to allow the agency to begin regulating all tobacco products.²⁰ While this was an important move toward expanded federal tobacco regulation, the proposed rule failed to extend the characterizing flavors ban to tobacco products other than cigarettes. It also failed to address menthol.

Chicago Overview

The popularity of menthol flavored tobacco products remains a public health concern throughout the U.S. In Illinois, for example, although the rate of adult smoking has declined in recent years, disparities remain, with a significantly higher percentage of smokers (many of whom smoke menthol cigarettes) in lower income, lower education, and minority populations.²¹ According to 2012 data, approximately 18.6 percent of Illinois adults and 14.1 percent of high school students smoke.²² Nearly 10,600 kids become new regular daily smokers each year in Illinois.²³ In 2011, Illinois ranked 25th of 44 states that completed the Youth Risk Behavior Survey, ranking states where high school students smoked at least one cigarette in the past 30 days.²⁴

Over the last few years, the smoking rates for Illinois youth have begun to decline – particularly in its largest city, where in 2013, 10.7% of Chicago high school students reported smoking, down from 13.6% in 2011.²⁵ Nevertheless, this statistic is still high and skewed steeply when it

comes to the popularity of menthol tobacco products among young first-time smokers, African-Americans and other ethnic and racial populations in Chicago, a city known for its rich diversity.²⁶

Laying the Groundwork

On July 23, 2013, less than 48 hours after the FDA issued its 2013 report on the public health impact of menthol, Chicago Mayor Rahm Emanuel directed the Chicago Board of Health and the Chicago Department of Public Health to identify “winnable” policy solutions to curb the use of flavored tobacco products among the city’s youth.²⁷ The Mayor asked the Board to engage in a “community-driven” initiative to address this problem.

In many ways, Mayor Emanuel was the perfect champion to tackle the problem of menthol cigarettes in Chicago. Before he was elected Chicago’s 55th mayor, Emanuel worked on tobacco control issues as a U.S. Congressman and also as Chief of Staff to President Barack Obama, while federal tobacco legislation was moving forward and eventually passed. As a member of Congress, he co-sponsored the landmark Family Smoking Prevention and Tobacco Control Act of 2009.²⁸ After Emanuel left the Obama administration and, in 2011, became Mayor of Chicago, he worked with the Chicago Board of Health and Department of Public Health to launch Healthy Chicago – a comprehensive public health plan for the City focused on policies and systems changes to improve the health of Chicago residents.²⁹ One of Mayor Emanuel’s top public health priorities at this time was to reduce tobacco use among the young. The natural target was flavored tobacco products, including those containing the industry’s most popular flavor – menthol.

In late September 2013, following the mayor’s lead, the Chicago Department of Public Health submitted a comment to the FDA, urging the agency to act expeditiously to regulate menthol tobacco products at the federal level.³⁰ The Department’s comment recommended that the FDA consider several options for restricting the use of these products, including the creation of new warning labels specific to menthol-flavored cigarettes, education and marketing campaigns that direct consumers to tobacco cessation services, a national track-and-trace system, and the agency’s exertion of its authority over all tobacco products.³¹

Engaging the Community

Focused Outreach. Within a month of Mayor Emanuel’s charge to Chicago’s public health administration to act quickly on menthol-flavored cigarettes, the Chicago Board of Public Health had taken several steps. In September 2013, the Board, in collaboration with more than 24 Chicago-based community organizations and several local policy makers, reached out to populations disproportionately affected by the use of menthol cigarettes. The Board’s goal was to solicit ideas to help “identify winnable battles” that would “curb the use of flavored tobacco products among Chicago children.”³² The Board hosted four town hall meetings that month, in neighborhoods with large African American, Latino, and LGBT populations on the North, South and West Sides of Chicago.³³ At one of the two South Side meetings, Spanish interpreters translated for attendees.³⁴

Several hundred Chicago residents attended the town hall meetings, including youth, health care clinicians, hospital staff, social service providers, leaders in the faith community, and elected officials.³⁵ A handful of national experts flew to Chicago to provide testimony.³⁶ Tobacco retailers and industry representatives participated in these town hall meetings, as well as public health organizations and other interest groups. In addition to considering testimony and feedback at these events, the Board reviewed public comments submitted through an online portal and by mail.

Involving Traditional & Nontraditional Stakeholders. In soliciting public health policy input and support, the Chicago Board of Health reached out to traditional local, state and national tobacco control partners, such as the American Cancer Society, American Lung Association, American Heart Association, the National African American Tobacco Prevention Network, and the African American Tobacco Control Leadership Council. The City also engaged members of the medical and public health communities, as well as local coalition partners. To an unusual extent, the City reached out as well to significant nontraditional stakeholders, many of whom were new to tobacco control. For example, the City partnered with the Coalition for Asian Substance Abuse Prevention, the Chicago Hispanic Health Coalition, the LGBT Advisory Council, and the Chicago Southside Cancer Disparities Initiative, among others.

Framing the Debate. Public health professionals shared information with these stakeholders about the disparate health impact of menthol tobacco products on the local community, and many speakers described the problem of menthol products as *not just a public health concern, but a social justice issue*. They pointed out that years after flavored cigarettes were removed from the market, the tobacco industry continued to aggressively market menthol cigarettes and other flavored tobacco products to youth in minority communities.³⁷ They noted that the tobacco industry targets those individuals least likely to have health insurance, seek medical care or have coverage for tobacco cessation products – all of which is likely to make them life-long smokers.³⁸ At the end of each town hall meeting, the overall consensus was that Chicago, the City of Big Shoulders, needed to take on the problem of flavored tobacco use by youth.

Following the town hall meetings, the Chicago Board of Health and Department of Public Health released a comprehensive report including feedback and testimony from participants, as well as policy recommendations from public health professionals, scientists and other experts.³⁹ Over the next few months, the Chicago City Council and Public Health Department considered the following four recommendations:

- A 50-cent cigarette tax increase.⁴⁰
- Public service advertising about menthol tobacco products, targeting black youth.⁴¹
- A requirement that all Chicago e-cigarette retailers obtain a tobacco license and keep e-cigarettes behind the counter in stores, out of the reach of kids, and a prohibition on the use of e-cigarettes in all smoke-free public places in the city.⁴²
- A ban on the sale of all menthol cigarettes and other flavored tobacco products within a 500 foot radius of schools.⁴³

These innovative tobacco control measures were all strongly endorsed and supported by Mayor Emanuel. Although the City Council ended up adopting these tobacco control policies by wide

margins, debate was still vigorous and intense on each initiative.⁴⁴ For example, the restriction on the distribution, sale and use of e-cigarettes generated a considerable amount of opposition from e-cigarette proponents and others. This ordinance was temporarily tabled in late December 2013, but then was reintroduced and passed in January 2014.⁴⁵

The proposal to prohibit the sale of flavored tobacco products within 500 feet of schools was also opposed – primarily by tobacco retailers.⁴⁶ The ordinance affects approximately 377 tobacco retailers of the City's 2,549 licensed tobacco retailers.⁴⁷ Some retailers argued that including menthol tobacco products was unnecessary because menthol cigarettes are subject to the same regulations as all cigarettes and that (in their view) “menthol use in minority groups and among youth is due to enabling adults who buy cigarettes legally and provide them to minors, as well as a black market fueled by high taxes on tobacco at the city, county, state and federal level.”⁴⁸ Nevertheless, even those who testified during town hall meetings against a sales “ban” of menthol cigarettes indicated “they were in favor [of] some other policy change to restrict youth access to menthol cigarettes.”⁴⁹

The Flavored Tobacco Sales Restriction – Part 1 (Preparation)

The public health administration had anticipated fierce opposition to these proposals and researched the issues to ensure that the public health policy case for each measure was strong, compelling and evidence-based. Because the sales restriction of flavored tobacco products included menthol cigarettes (a significant share of the tobacco market), the City was aware of the high risk of litigation. In fact, the National Association of Tobacco Outlets submitted comments to the Board in late 2013, implying that it would consider legal action against the City if the ordinance were to pass.⁵⁰

Confirming Local Authority. Because of the likelihood of litigation, Chicago attorneys took care to research and analyze existing law to ensure that the city had the legal authority to regulate the sales of flavored tobacco products. Two recent appellate decisions in other jurisdictions were encouraging. In October 2009, New York City had enacted an ordinance prohibiting the sale of flavored non-cigarette tobacco products (other than menthol), except in adult-only tobacco bars.⁵¹ In January 2013, Providence, Rhode Island had enacted a similar ordinance.⁵² Both ordinances were challenged by a group of tobacco companies under both federal and state law. In 2013, decisions by the U.S. Courts of Appeals for the First and Second Circuits affirmed that these ordinances were valid.⁵³ Neither ordinance was found to be preempted by the federal Family Smoking Prevention and Tobacco Control Act.⁵⁴ The Providence ordinance was also found not to violate the U.S. Constitution under the First Amendment (free speech), the Fourteenth Amendment (due process), or the Rhode Island Constitution.⁵⁵

Although case law from the First and Second Circuit is not legally binding in Illinois's Seventh Circuit, *and* although the New York City and Providence ordinances did not include menthol tobacco products, the City of Chicago concluded that these federal appeals court rulings provided strong support for the “robust role” that state and local governments have in restricting the sale and distribution of tobacco products and in adopting measures that are even more stringent than federal law.⁵⁶ In sum, Chicago believed it was on firm legal footing to adopt a sales restriction of flavored tobacco products, including menthol.

Building the Case. The Board proposed the flavored tobacco product sales ordinance as part of a comprehensive city-wide tobacco control initiative. By including menthol flavored tobacco products in its definition of “flavored tobacco product,” the City was targeting products that are the source of addiction of nearly half of all teen smokers.⁵⁷ The goal: *Reduce youth tobacco use*. Also, by addressing tobacco retailers located around schools, the City was focusing on neighborhoods where youth (including a high number of minority youth) were exposed to marketing that promoted menthol cigarettes and other flavored tobacco products and helped ensure their disproportionate popularity in these communities.⁵⁸ As a result, the ordinance was seen as well as an opportunity to reduce tobacco-related health disparities among targeted populations.

The rationale behind the City's decision to restrict flavored tobacco product sales around schools was fairly simple. The City was aware that the tobacco industry has historically targeted certain neighborhoods for heavy advertising and retail outlets. Not only do tobacco retail outlets near schools typically contain more cigarette advertising than outlets further from schools, but these outlets are especially common in urban minority communities.⁵⁹

Studies have shown that tobacco retail density around schools has a significant impact on the prevalence of youth tobacco use.⁶⁰ In fact, after controlling for census tract-derived school neighborhood characteristics, researchers found that the density of tobacco retailers in the Chicago area correlated with students' reported tobacco use.⁶¹ Youth smoking prevalence has increased by as much as 3.2 percent in neighborhoods with five or more tobacco retail outlets within walking distance (1/2 mile) of a high school, compared to neighborhoods with no nearby tobacco retailers.⁶²

Moreover, sales restrictions of tobacco products in other jurisdictions have successfully reduced use. In New York City, for example, the national law prohibiting the sale of flavored cigarettes and the city's law prohibiting the sale of flavored tobacco products, excluding menthol products and with the exception of retail tobacco stores, have been shown to significantly reduce flavored tobacco product sales.⁶³ As a result, Chicago's proposed ordinance was a unique opportunity to curb tobacco product sales in prime areas where youth were most commonly targeted.

Overview of the Ordinance. On November 26, 2013, the mayor introduced the flavored tobacco products sales ordinance and on December 11, the full City Council passed it 48 to 2 – a remarkable development, given the unprecedented nature of this legislation. Below is a summary of the ordinance's key components.⁶⁴

- **What Does It Do?** The Chicago sales restriction prohibits anyone from selling, giving away, bartering, exchanging or otherwise dealing in “flavored tobacco products, samples of such products, or accessories for such products at any location that has a property line within 500 feet of the property line of any public, private, or parochial elementary, middle or secondary school located in the City of Chicago.” (Five hundred feet is approximately 1.5 times the length of a football field or roughly two city blocks.)
- **Are There Exemptions?** Existing retailers are **not** grandfathered in. There is, however, an exception for “retail tobacco” stores dedicated primarily to the sale of tobacco.⁶⁵ This

exception covers stores that derive more than 80 percent of their gross revenue from the sale of loose tobacco cigarettes, cigarillos, cigars, pipes, other smoking devices and accessories, hookahs and related products, and/or electronic cigarettes.⁶⁶

- **What Constitutes a “Characterizing Flavor?”** Under the ordinance rules, a “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, and any spice.⁶⁷ (*Italics added.*) For information on whether a tobacco product is considered “flavored,” the City set up an online utility (<http://www.flavoredtobaccosearchengine.org>).
- **What Tobacco Products are Included?** The ordinance covers all flavored tobacco products, including menthol cigarettes, e-cigarettes (and related devices such as vape pens and e-hookah), as well as cigars, pipe tobacco and smokeless tobacco.
- **Who is Affected?** Of the 3,030 licensed retailers in Chicago, the restriction affects approximately 355 retailers located within 500 feet of schools (roughly 12 percent of all the City’s tobacco retailers).⁶⁸ The buffer zones cover roughly one-third of the city.⁶⁹
- **Who is the Enforcement Agent?** The Department of Business Affairs and Consumer Protection is responsible for enforcing the ordinance. The Cook County Circuit Court or the Department of Administrative Hearings adjudicates all alleged violations of the ordinance.
- **What are the Penalties for Noncompliant Tobacco Retailers?** Knowing or repeated violation of any provision of the ordinance “shall be grounds for revocation or suspension of retailer licenses. These ‘licenses’ include any and all licenses issued by any officer, department or agency of the City of Chicago required for retail or other business operations at the location at which the office occurred, and includes but is not limited to retail tobacco licenses.”⁷⁰
- **What Other Penalties Apply?** In addition to any other penalty provided by law, any person convicted of a first offense for violating any provision in the law⁷¹ shall be fined not less than \$100 and not more than \$400. Any person convicted of a second offense within a two-year-period shall be fined not less than \$250 and not more than \$500. Any person convicted of more than two offenses within a two-year-period shall be fined not less than \$500 and not more than \$1,000 for each additional offense.⁷²

The Flavored Tobacco Sales Restriction – Part 2 (Implementation)

Educating Tobacco Retailers. After the Chicago City Council passed the flavored tobacco sales restriction, the City held two public hearings in early 2014 to educate tobacco retailers and the community in general about the ordinance. The Chicago Department of Public Health promulgated regulations to implement the new ordinance and set up a 30-day comment period through June 30, 2014. During this time, retailers met with the Commissioners of the Chicago Department of Public Health and the Department of Business Affairs and Consumer Protection,

as well as with staff. Also, that summer the City sent letters to tobacco retailers in Chicago, informing them of the recent changes in tobacco laws, and notifying those retailers identified as being within 500 feet of a school that they needed to stop selling flavored tobacco products. On July 28, 2014, the Department of Public Health released Regulations and Guidelines for Tobacco Retailers, which were subsequently updated and released as Rules: Tobacco-Flavored Products in December 2015.⁷³

Although the ordinance technically took effect on July 17, 2014, the regulations provided tobacco retailers a 90-day grace period.⁷⁴ Part of the reason for the grace period was to provide retailers time to spend down their inventory. The Department was concerned about implementing an ordinance too soon, with the result that retailers would feel an incentive to liquidate their inventories at rock-bottom prices. This would have been an unfortunate development, especially since youth are price-sensitive and attracted to flavored tobacco products.

As it turned out, the actual implementation date ended up being delayed until 2016, for a variety of reasons, including protracted rulemaking and litigation (see below). To begin with, the City apparently underestimated the amount of time needed to prepare for the implementation of such a complex law. For example, the task of identifying which products were subject to the ordinance proved far more time-consuming than expected. The Department of Public Health ended up combing through nearly 12,000 tobacco products on the market to draw up a list of restricted flavored tobacco products. As a result of this research, the Department launched a convenient online search engine in 2014,⁷⁵ which users could use to determine whether or not Chicago deemed a particular product to be a restricted flavored product. In 2015, the City revised its rules to change its “Restricted Flavored Tobacco Product List” (found on the City’s website and Open Data Portal), from an exhaustive list updated on a quarterly basis to a non-exclusive list updated on an ongoing basis.⁷⁶ After searching wholesaler and manufacturer websites and industry newsletters, the Department added hundreds of additional products to the list, and continues to update the data portal with new products regularly.

Chicago’s revised rules clarified how a decision was made on whether a tobacco product was flavored, how to challenge a determination that a retail tobacco dealer was subject to the ordinance, and how to confirm that the ordinance applies to a particular product.⁷⁷ The new rules streamlined the retailer objection process, providing shortened response times and an email address for flavor inquiries. Also, for guidance purposes, the City included on its website a list of tobacco flavor terms that could be used to determine if a product is flavored.⁷⁸

The revised rulemaking process in 2015, requiring public comment and review (as in 2014), took longer than the City had anticipated.⁷⁹ Yet another reason for the pushed back enforcement was that Chicago experienced difficulty in compiling accurate data on all the hundreds of private schools in the City.⁸⁰ Although the number of public schools was easy to determine, it was challenging to identify the vast number of diverse private and charter schools in the City, and to map out which retailers were affected by the ordinance.⁸¹ The City ended up contacting each private school to verify grade levels and enrollment, and used map software to measure distances from retailer and school property lines.

Educating the Community. In addition to convening town hall meetings to raise awareness about the problem of menthol tobacco products, to solicit feedback and ideas from affected communities about policy solutions, and to gain support for curbing the sale and use of these products, the Department of Public Health launched a citywide ad campaign on the unique dangers of menthol tobacco products. The campaign focused on the addictiveness of these products and the industry's targeted marketing of young people and ethnic communities. In September 2014, the Department of Public Health teamed up with the Campaign for Tobacco-Free Kids to promote a "Don't Get Burned" public service announcement contest for youth and young adults. The contest encouraged youth to submit creative, edgy video clips that would caution their peers not to fall for the tobacco industry's attempts to hook them on menthol-flavored cigarettes.⁸² This campaign, as well as the City's other public awareness initiatives, educated young, disaffected and underserved communities most affected by the health risks of menthol tobacco products about the tobacco industry's predatory marketing tactics and the resulting nicotine addiction and health impact on their populations.

Defending Against Legal Challenges. As expected, Chicago's flavored tobacco product sales restriction was challenged in court shortly before it was scheduled to take effect. In the fall of 2014, opponents of the ordinance filed two lawsuits challenging the ordinance's constitutionality. The first case was brought by a group of convenience store owners while the second suit was filed by a trade association representing Chicago-based gasoline service stations. In both cases, the plaintiffs sought to delay enforcement of the ordinance, contending that federal law preempted – or prevented – the city from passing this type of law and arguing, among other things, that the law would cause their businesses economic harm.⁸³ Neither challenge was successful. In both cases, the court denied the plaintiffs' request for a temporary restraining order, and allowed the ordinance to take effect.⁸⁴

Lessons Learned

To reduce youth tobacco use and other tobacco-related health disparities, states and local communities are considering ways to regulate and restrict the advertisement, promotion and sale of flavored tobacco products. In adopting the first law in a major metropolitan area that restricts the sale of all flavored tobacco products, including those containing menthol, Chicago has established itself as a national leader in tobacco control.⁸⁵ The public health community across the U.S. is watching as this new ordinance is implemented and enforced. Some state and local governments, emboldened by Chicago's experience, may consider adopting similar measures or other innovative strategies to regulate menthol flavored tobacco products. As with all public health policies, the importance of legal counsel, community engagement and support, legislative champions, and hard work and commitment cannot be overestimated.

Because menthol flavored tobacco products are used so heavily by (and have such a devastating impact on) youth, African Americans, and the LGBT community in particular, those seeking to regulate menthol products need to reach out to these populations and educate and engage them in developing these policy initiatives. Focusing on the importance of public health and social justice was critical to the success of Chicago's sales restriction of flavored tobacco products.

The following list includes key lessons Chicago learned from its experience in adopting the nation's first sales restriction that includes menthol tobacco products.⁸⁶

Understand the political and legal landscape

- Research the issue thoroughly, including such items as:
 - The prevalence and use of menthol tobacco products in the particular locality or state
 - The health impact, health care costs, and demographics of menthol tobacco product use
- Consult with legal professionals and local policymakers during initial planning:
 - Confirm that the governing body has the authority to implement the policy
 - Discuss potential legal challenges
 - Clarify channels for appropriate policy approval
- Ensure that the initiative has strong support from committed public health leaders and legislative champions.
- Plan for a fierce campaign and anticipate heavy opposition, particularly from the e-cigarette community.

Engage stakeholders from diverse sectors of the community

- Reach out to groups most affected by the health risks of flavored tobacco products – especially youth, racial and ethnic populations, and the LGBT community – to raise awareness about how the tobacco industry targets them and the resulting high nicotine addiction and health impact on their populations.
- Consider edgy campaigns on the health risks and impact of menthol tobacco products to excite interest among young and disaffected communities.
- Target and engage non-English speaking communities via (for example) multi-lingual public health campaigners and translators.
- Use menthol use and targeted marketing demographics to focus on the social justice aspect of this issue.

Build supportive network of traditional and nontraditional partners

- Engage, educate and train community members affected by this issue who may not be informed about or experienced in tobacco control. Cultivate and encourage them to get involved. Build capacity at the local level for diverse and nontraditional partners.
- Make sure that traditional partners at the local, state and national levels are supportive and involved (e.g., American Cancer Society, American Lung Association, American Heart Association, Campaign for Tobacco-Free Kids, Tobacco Control Legal Consortium, National African American Tobacco Prevention Network and African American Tobacco Control Leadership Council, and members of the medical and public health communities).
- Get buy-in from local coalition partners most associated with this issue, many of whom may be new to tobacco control.

Ensure the legislation is clear, complete and well drafted

- Clearly describe the regulatory restrictions and responsibilities of all relevant parties and ensure that all necessary terms are well defined.

- Identify the governing bodies responsible for enforcement, the terms and circumstances of a violation, and the penalties or fines imposed for first, second and subsequent violations, as appropriate. Clarify the appeals process.
- Consult with local legal counsel and attorneys from the Tobacco Control Legal Consortium for legal technical assistance regarding policy strategies, draft language and legal review, and help in identifying possible loopholes that might make the legislation susceptible to challenges by the tobacco industry or third parties.

Set up a well-planned implementation process

- Recognize that passing the policy is only a first step and that successful implementation is critical to the success of any tobacco control initiative.
- Include in the implementation plan a well thought-out process for publicizing the policy and educating the community about why it is needed and how it will be implemented, as well as procedures for receiving, tracking and following up on complaints.
- Allow sufficient time to establish the necessary procedures for implementation and enforcement, to identify affected business and notify them of their obligations under the policy, and for businesses to take all steps necessary to comply.
- Use public education and comprehensive evidence-based and culturally relevant cessation resources, particularly in underserved communities, to maximize public health gain and minimize migration to the contraband market.

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Notes

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² Annette Regan et al., *Smokeless and Flavored Tobacco Products in the U.S.: 2009 Styles Survey Results*, 42 AM. J. PREVENTIVE MED. 29036 (2012).

³ CASAColumbia, *Time to Ban Menthol* 6–7 (2014), <http://www.casacolumbia.org/addiction-research/reports/time-to-ban-menthol-report-2014>.

⁴ *Id.*

⁵ National Youth Advocacy Coalition, *Coming Out About Smoking: A Report from the National LGBTQ Young Adult Tobacco Project* (2010), http://lgbttobacco.org/files/Coming_Out_About_Smoking_NYAC.pdf.

⁶ SUBSTANCE ABUSE AND MENTAL HEALTH ADMINISTRATION, OFFICE OF APPLIED STUDIES, THE NSDUH REPORT: USE OF MENTHOL CIGARETTES 2 fig. 1 (2009), <http://store.samhsa.gov/product/Use-of-Menthol-Cigarettes/NSDUH09-1119> [hereinafter SAMHSA 2009]

⁷ Sarah Moreland-Russell et al., *Disparities and Menthol Marketing: Additional Evidence in Support of Point of Sale Policies*, 10 INT. J. ENVIRON. RES. PUBLIC HEALTH 4571-83 (2013).

⁸ See, e.g., Campaign for Tobacco-Free Kids, *Tobacco Company Marketing to African Americans* (2013), <http://www.tobaccofreekids.org/research/factsheets/pdf/0208.pdf>.

⁹ Amanda Fallin et al., *Menthol Cigarette Smoking among Lesbian, Gay, Bisexual, and Transgender Adults*, 48 AM. J. PREVENTIVE MEDICINE 93 (2014), [http://www.ajpmonline.org/article/S0749-3797\(14\)00413-9/pdf](http://www.ajpmonline.org/article/S0749-3797(14)00413-9/pdf).

¹⁰ SAMSHA 2009, *supra* note 6, at 2 (fig. 1) (indicating that 47.7% of 12-17 year old smokers in the U.S. use menthol cigarettes); SUBSTANCE ABUSE AND MENTAL HEALTH ADMINISTRATION, THE NSDUH REPORT: RECENT TRENDS IN MENTHOL CIGARETTE USE 2-3 (2011), <http://store.samhsa.gov/product/Recent-Trends-in-Menthol-Cigarette-Use/NSDUH11-1118> [hereinafter SAMHSA 2011] (explaining that menthol use increased among youth (ages 12-17) and young adults (ages 18-25) from 2004-2010, despite declines in non-menthol cigarette use over the same period). See also U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, TOBACCO USE AMONG U.S. RACIAL/ETHNIC MINORITY GROUPS: A REPORT OF THE SURGEON GENERAL 138 (1998), http://www.cdc.gov/tobacco/data_statistics/sgr/1998/index.htm [hereinafter SGR, 1998] (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).

¹¹ Jennifer L. Pearson et al., *A Ban on Menthol Cigarettes: Impact on Public Opinion and Smokers' Intention to Quit*, 102(11) AM. J. OF PUB. HEALTH e107, e112 tbl. 3 (2012).

¹² SAMSHA 2009, *supra* note 6, at 216.

¹³ CENTERS FOR DISEASE CONTROL AND PREVENTION, PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL 164-5 (2012), <http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/index.html>.

¹⁴ Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31, tit. I, sec. 101, § 907(a)(1)(A), (3)(A)-(B), 123 Stat. 1776, 1799-1800 (2009) (codified at 21 U.S.C. § 387g(a)(1)(A), (3)(A)-(B)) [hereinafter Tobacco Control Act].

¹⁵ Tobacco Control Act, § 907(a)(1)(A), 123 Stat. at 1799-1800 (codified at 21 U.S.C. § 387g(a)(1)(A)).

¹⁶ Tobacco Control Act, § 907(a)(1)(A), (a)(3)(A)-(B), 123 Stat. at 1799-1800 (codified at 21 U.S.C. § 387g(a)(1)(A), (a)(3)(A)-(B)).

¹⁷ TOBACCO PRODUCTS SCIENTIFIC ADVISORY COMM., U.S. FOOD & DRUG ADMIN., MENTHOL CIGARETTES AND PUBLIC HEALTH: REVIEW OF THE SCIENTIFIC EVIDENCE AND RECOMMENDATIONS 225 (2011), <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf> (final as reviewed and approved on July 21, 2011).

¹⁸ TOBACCO CONTROL LEGAL CONSORTIUM ET AL., CITIZEN PETITION TO FOOD & DRUG ADMIN., PROHIBITING MENTHOL AS A CHARACTERIZING FLAVOR IN CIGARETTES (April. 12, 2013), <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fdacitizenpetition-menthol-2013.pdf>.

¹⁹ U.S. FOOD & DRUG ADMIN., PRELIMINARY SCIENTIFIC EVALUATION OF THE POSSIBLE PUBLIC HEALTH EFFECTS OF MENTHOL VERSUS NONMENTHOL CIGARETTES (July 23, 2013), <http://www.fda.gov/downloads/ScienceResearch/SpecialTopics/PeerReviewofScientificInformationandAssessments/UCM361598.pdf>.

²⁰ For more information about the FDA's proposed deeming regulation, visit the FDA Tobacco Action Center, at www.publichealthlawcenter.org.

²¹ Illinois Dep't of Health, *The Burden of Tobacco: Prevalence, Impact and Cost – 2013* (2013), http://www.idph.state.il.us/TobaccoWebSite/factsheets/Tobacco_Burden_2013.pdf.

²² *Id.*

²³ Campaign for Tobacco-free Kids, *Key State-Specific Tobacco-Related Data & Ranking* (2014), <http://www.tobaccofreekids.org/research/factsheets/pdf/0176.pdf> (Data derived from Youth Risk Behavioral Survey).

²⁴ Illinois Dep't of Health, *The Burden of Tobacco: Prevalence, Impact and Cost – 2013* 12 (2013), http://www.idph.state.il.us/TobaccoWebSite/factsheets/Tobacco_Burden_2013.pdf.

²⁵ City of Chicago website, *Mayor Emanuel Announces Record Drop in Chicago Youth Smoking Rates* (April 15, 2014), http://www.cityofchicago.org/city/en/depts/mayor/press_room/press_releases/2014/apr/mayor-emanuel-announces-record-drop-in-chicago-youth-smoking-rat.html.

²⁶ U.S. Census Bureau, *State and County QuickFacts – Chicago* (2013), <http://quickfacts.census.gov/qfd/states/17/1714000.html>.

²⁷ Letter from Rahm Emanuel, Mayor, City of Chicago, to Carolyn C. Lopez, President, Chicago Board of Health (July 25, 2013).

²⁸ Tobacco Control Act, § 907(a)(1)(A), 123 Stat. at 1799 (codified at 21 U.S.C. 387g(a)(1)(A)).

²⁹ City of Chicago website, Healthy Chicago, <http://www.cityofchicago.org/city/en/depts/cdph/provdrs/healthychicago.html>.

³⁰ City of Chicago Dep't of Public Health, *Menthol in Cigarettes and Tobacco Products*, Docket No: FDA-2013-N-0521 (Sept. 26, 2013), <http://www.cityofchicago.org/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2013/September/9.26.13mentholreport.pdf>.

³¹ *Id.*

³² Chicago Board of Health, *Healthy Chicago: Transforming the Health of Our City*, Mayoral Report (Nov. 2013), http://www.cityofchicago.org/content/dam/city/depts/cdph/CDPH/Menthol%20Report%20_Final%20Jan292014.pdf. The following section is adapted largely from this report.

³³ *Id.* at 12.

³⁴ According to the Chicago Department of Public Health, “Over 255 of Chicagoans over age 5 report they speak Spanish at home. However, when solely considering Chicago's 715,628 Latino residents, 86% or 615,041 report that they speak Spanish at home. Among these residents, over 185,000 report that they speak English either “Not well” or “Not at all.” Chicago Dep't of Public Health, *Enroll Chicago! A Profile of the City's Uninsured Residents* (July 30, 2013).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See, e.g.*, Lisa Henriksen et al., *Targeted Advertising, Promotion, and Price for Menthol Cigarettes in California High School Neighborhoods*, 14 NICOTINE & TOBACCO RESEARCH 11-21 (2012); *see also* Tobacco Control Legal Consortium, “Pressing the FDA on Menthol” (national webinar) (2012), <http://publichealthlawcenter.org/webinar/pressing-fda-menthol>; Cheryl Heaton, *Tobacco as a Social Justice Issue* (last accessed Sept. 15, 2014), http://www.legacyforhealth.org/content/download/2830/43307/file/LEG-Social%20Justice%20Brochure-WEB_052313.pdf.

³⁸ *Healthy Chicago: Transforming the Health of Our City*, *supra* note 32, at 17.

³⁹ *Id.*

⁴⁰ *Cigarette Tax Hike in Chicago Makes a Pack of Smokes in the Windy City the Priciest in the Nation*, HUFFINGTON POST (Nov. 26, 2013), http://www.huffingtonpost.com/2013/11/26/cigarette-tax-chicago_n_4344651.html.

⁴¹ *See, e.g.*, the Chicago Department of Public Health’s ad campaign “[BURNED](#),” which is focused on countering tobacco industry’s advertising by raising awareness and empowering Chicago youth to make healthier choices. Chicago residents can follow the “BURNED” movement on social media with hashtag [#NoMoreMenthol](#).

⁴² Amended Chicago Municipal Code Chapters 4-64 and 7-32 Concerning Distribution, Sale and Use of Alternative Nicotine Products and Electronic Cigarettes (2014), <https://chicago.legistar.com/LegislationDetail.aspx?ID=1531471&GUID=8FBB15D9-D5CF-4211-8396-78EF37BA8F87&Options=Advanced&Search>.

⁴³ Chicago Ordinance No. 02013-9185 (2014), <http://www.cityofchicago.org/content/dam/city/depts/bacp/tobacco/flavoredtobaccord04212014.pdf>.

⁴⁴ For instance, Mayor Emanuel’s original plan was to raise the tax on a pack of cigarettes by 75 cents, but he eventually agreed to increase taxes to 50 cents – a concession that still resulted in Chicago cigarettes being the most highly taxed in the nation. *Cigarette Tax Hike in Chicago Makes a Pack of Smokes in the Windy City the Priciest in the Nation*, HUFFINGTON POST (Nov. 26, 2013), http://www.huffingtonpost.com/2013/11/26/cigarette-tax-chicago_n_4344651.html.

⁴⁵ Fran Spielman, *City Snuffs Out Sales of Menthol Cigarettes Near Schools*, CHICAGO SUN-TIMES, Dec. 11, 2013.

⁴⁶ Evidently, e-cigarette supporters focused more on opposing the e-cigarette proposal than the flavored tobacco sales restriction.

⁴⁷ E-mail from Melissa Buenger, Policy Analyst, Chicago Dep’t Public Health to Kerry Cork, Staff Attorney, Tobacco Control Legal Consortium (Mar. 9, 2016, 04:55 p.m. CST) (on file with author). These numbers are subject to change as retailers and schools open or close and the City identifies other retailers to notify.

⁴⁸ Ashely Hickey, *Chicago Bureau, Parents OK With Emanuel’s Push Against Menthol Smoking, Against Criminalization* (Oct. 22, 2013), <http://www.chicago-bureau.org/parents-ok-with-emanuels-push-against-menthol-smoking-against-criminalization>.

⁴⁹ *See Healthy Chicago: Transforming the Health of Our City*, *supra* note 32, at 16.

⁵⁰ *Id.* at 18, Appendix. In 2013, the National Association of Tobacco Outlets, Inc. sued Providence, Rhode Island, over the City's flavored tobacco products sales restriction. *See Nat'l Assoc. Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013).

⁵¹ New York City Administrative Code § 17-715.

⁵² Providence, Rhode Island, City Code § 14-309.

⁵³ *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013); *Nat'l Assoc. Tobacco Outlets, Inc.*, 731 F.3d at 71.

⁵⁴ *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d at 433, 435-36 (2d Cir. 2013) (rejecting preemption challenge to New York City ordinance governing sale of flavored tobacco products); *Nat'l Assoc. Tobacco Outlets, Inc.*, 731 F.3d at 82-83 (1st Cir. 2013) (rejecting preemption challenge to Providence ordinance prohibiting most retail sales of flavored tobacco products other than cigarettes).

⁵⁵ *Nat'l Assoc. Tobacco Outlets, Inc.*, 731 F.3d at 82-83.

⁵⁶ *See, e.g., U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d at 428 (“While [the Tobacco Control Act] prohibits the FDA from banning entire categories of tobacco products throughout the country, . . . the FSPTCA nowhere extends that prohibition to state and local governments. To the contrary, the preservation clause . . . expressly preserves localities’ traditional power to adopt any measure relating to or prohibiting the sale of tobacco products. . . . As a regulation limiting the businesses at which flavored tobacco may be sold, the city ordinance establishes a ‘requirement[] relating to the sale . . . of . . . tobacco products’ within the plain meaning of the saving clause. . . . given Congress’ explicit decision to preserve for states a robust role in regulating, even banning, sales of tobacco products, we adopt a broad reading of the saving clause.”)

⁵⁷ *See, e.g., Gary Giovino et al., Differential Trends in Cigarette Smoking in the USA: Is Menthol Slowing Progress?* 10 TOBACCO CONTROL 1136/051159 (2013) (concluding that of the more than 16,000 youth nationally who become new daily smokers every year, roughly half begin by smoking menthol cigarettes).

⁵⁸ The tobacco industry has a history of using urban culture and language to promote menthol cigarettes; sponsoring hip-hop bar nights, where samples of specialty menthol cigarettes are distributed; and targeting community members with direct mail promotions. Centers for Disease Control & Prevention, *Smoking & Tobacco Use: Tobacco Industry Marketing*, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/tobacco_industry/marketing/index.htm#marketing.

⁵⁹ *See* Kendall Stagg, Chicago Dep’t of Public Health, *Tobacco Control and Social Justice: What’s Menthol Got to Do With It?* (Webinar) (April 29, 2014) (including slides of licensed tobacco retailers within 500 and 1,000 feet of public and private schools in Chicago (2013), prepared by Melissa Buenger, City of Chicago Data Portal (June 10, 2013) (on file with author)).

⁶⁰ Chicago Dep’t of Public Health, *Tobacco Retail Sales Near Schools & Youth Centered Environments* (Nov. 2013) (including cites to research on tobacco retail density around schools and the impact of youth smoking).

⁶¹ Scott Novak et al., *Retail Tobacco Outlet Density and Youth Cigarette Smoking: A Propensity-Modeling Approach*, 96 AM. J. PUBLIC HEALTH 670-76 (2006), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1470554>.

⁶² See, e.g., Henriksen et al., *supra* note 36; Wing Chan & Scott Leatherdale, *Tobacco Retailer Density Surrounding Schools and Youth Smoking Behaviour: A Multi-Level Analysis*, 9 TOBACCO INDUCED DISEASES 9 (2011), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3158107>; Ellen Feighery et al., *Is Adolescent Smoking Related to the Density and Proximity of Tobacco Outlets and Retail Cigarette Advertising Near Schools?* 47 PREVENTIVE MEDICINE 210-14 (2008); Scott Leatherdale & Jocelyn Strath, *Tobacco Retailer Density Surrounding Schools and Cigarette Access Behaviors Among Underage Smoking Students*, 33 ANNALS OF BEHAVIORAL MEDICINE 105-11 (2007).

⁶³ Shannon Farley & Michael Johns, *Evaluating Changes in Flavored and Menthol Tobacco Product Sales Before and After FDA and New York City Bans*, New York City Epidemiology Forum: First Annual Conference (2014), <http://static.squarespace.com/static/51b0d929e4b08fb0dc85acad/t/5303c8b6e4b052cb42c21413/1392756916823/3-AbstractBook-New%20York%20City%20Epidemiology%20Forum-1.pdf> (finding that sales of flavored cigars declined 91 percent; smokeless flavored products declined 100 percent; and other flavored tobacco products declined 89 percent).

⁶⁴ Chicago Ordinance No. 02013-9185 (2014).

⁶⁵ Under the Chicago Clean Indoor Air Act, a “tobacco retail establishment” is defined as “a retail establishment that derives more than 80% of its gross revenue from the sale of loose tobacco, plants, or herbs and cigars, cigarettes, pipes, and other smoking devices for burning tobacco and related smoking accessories and in which the sale of other products is merely incidental.” Municipal Code of Chicago 4-64, Sec.7-32-010, http://www.cityofchicago.org/dam/city/depts/cdph/environmental_health_and_food/ChicagoMunicipalCode732.pdf.

⁶⁶ Chicago Municipal Code § 7-32-010 (defining “retail tobacco store”). See *Independents Gas & Service Stations Ass’n, Inc. v. City of Chicago*, 1:14-cv-07536 (Compl. 18) (where defendants claim that fewer than 5 percent of retail operations within the City of Chicago qualify as “retail tobacco stores.”)

⁶⁷ *Id.*

⁶⁸ E-mail from Melissa Buenger, Policy Analyst, Chicago Dep’t Public Health to Kerry Cork, Staff Attorney, Tobacco Control Legal Consortium (Mar. 9, 2016, 04:55 p.m. CST) (on file with author). These numbers are subject to change as retailers and schools open or close and the City identifies other retailers to notify.

⁶⁹ See Stagg, *supra* note 59.

⁷⁰ Chicago Municipal Code § 4-64-240.

⁷¹ Chicago Ordinance No. 02013-9185, §§ 4-64-100, 4-64-101, 4-64-180, 4-64-181, 4-64-190, 4-64-200, 4-64-205, 4-64-210 and 4-64-220.

⁷² Chicago Municipal Code § 4-64-330.

⁷³ City of Chicago Rules, *Tobacco – Flavored Products* (Dec. 10, 2015), <http://www.cityofchicago.org/content/dam/city/depts/bacp/Rules/flavoredtobaccorulesfinal121115.pdf>.

⁷⁴ *Id.*

⁷⁵ The search engine is available at www.FlavoredTobaccoSearchEngine.net and www.FlavoredTobaccoSearchEngine.org.

⁷⁶ See City of Chicago Rules, *supra* note 73.

⁷⁷ *Id.*

⁷⁸ City of Chicago, Data Portal, Restricted Flavored Tobacco Flavor Terms, <https://data.cityofchicago.org/Health-Human-Services/Restricted-Flavored-Tobacco-Flavor-Terms/fkci-tsqs8>.

⁷⁹ E-mail from Melissa Buenger, Policy Analyst, Chicago Dep't Public Health to Kerry Cork, Staff Attorney, Tobacco Control Legal Consortium (Mar. 9, 2016, 04:55 p.m. CST) (on file with author).

⁸⁰ Telephone conversation with Kendall Stagg, former Chief of Policy/Senior Advisor, Chicago Dep't of Public Health (Jan. 23, 2015).

⁸¹ *Id.*

⁸² The contest invited participants between the ages of 9 and 24 to create an upload a unique Instagram, Vine or 30-second video educating their peers about the dangers of smoking. Winners could receive cash and prizes totaling more than \$5,000, along with a chance to air on Chicago TV. Contest participants could choose from one of three themes for their video: the dangers of flavored tobacco; the unique health harms of menthol-flavored cigarettes, or educating peers about the benefits of tobacco control policies. See winning entries at <http://www.dontgetburnedchicago.com>.

⁸³ 76 Enterprises, Inc. et al. v. City of Chicago, Case No: 14 C 08306 (2014); Independents Gas & Service Stations Ass'n, Inc. v. City of Chicago, Case No: 14 C 7536 (2014).

⁸⁴ See 76 Enterprises, Inc. et al., Case No: 14 C 08306 at 3-5. The court found that “plaintiffs’ procedural due process claim [does not] seem likely to prevail. . . . The plaintiffs’ Equal Protection challenge also appears quite weak. . . And finally, the plaintiffs’ argument that federal law preempts the Ordinance appears to fly in the face of the express language of the preemption provision in the applicable federal statute”; *Independents Gas & Service Stations Ass’n, Inc.*, Case No: 14 C 7536 at 2. The court found that “the ordinance falls squarely within the exception to preemption established by the federal Act.”

⁸⁵ See Chicago Dep't of Public Health, *Chicago Department of Public Health Named “Local Health Department of the Year” by Peers* (July 19, 2014), <http://www.cityofchicago.org/city/en/depts/cdph/provdrs/drug/news/2014/jul/chicago-department-of-public-health-named--local-health-departme.html>.

⁸⁶ For a webinar presentation on Chicago's experiences regulating menthol flavored tobacco products, see Tobacco Control Legal Consortium, “Regulating Menthol Tobacco Products: The Current Policy Landscape” (2016), <http://publichealthlawcenter.org/webinar/webinar-regulating-menthol-tobacco-products-current-policy-landscape-2016>.