



## Sample Language to Restrict the Sale of Flavored Tobacco Products, Including Menthol

*This sample language contains a number of provisions that a local government may use to place restrictions on the sale of flavored tobacco products. This ordinance would go beyond ordinances adopted in cities like Chicago, New York City, and Providence, in that it would not exempt retail tobacco shops and it would include menthol tobacco products, including menthol cigarettes.*

*The gray boxes on the right contain additional information that may be useful to understand some of the concepts addressed by the sample language. **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 may be found in the Tobacco Control Legal Consortium's guide entitled [Regulating Flavored Tobacco Products](#) and its law synopsis [Pick Your Poison: Responses to the Marketing and Sale of Flavored Tobacco Products](#). For information on regulating menthol tobacco products, check the Consortium's [website](#).*

### SECTION I. FINDINGS

The City Council 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,”<sup>1</sup> that “[i]t’s a well known [sic] fact that teenagers like sweet products,”<sup>2</sup> and that flavored products would have appeal “in the under 35 age group, especially in the 14-24 group.”<sup>3</sup>

Marketing and public health research shows that flavors such as fruit, candy, and alcohol hold an intense appeal to minors and young adults.<sup>4</sup> The presence of flavors such as menthol in tobacco products can make it more difficult for adult tobacco users to quit.<sup>5</sup> 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.<sup>6</sup>

#### 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

Forty-one state attorneys general sued a tobacco company selling flavored cigarettes, arguing that it was violating the 1998 Master Settlement Agreement by targeting youth. The settlement of that litigation included an agreement that the tobacco company stop marketing flavored cigarettes.<sup>7</sup>

The Family Smoking Prevention and Tobacco Control Act of 2009 prohibits the manufacture and sale of flavored cigarettes, except menthol cigarettes.<sup>8</sup> No federal prohibition exists for flavored non-cigarette tobacco products.<sup>9</sup>

Jurisdictions such as New York City;<sup>10</sup> Providence, Rhode Island;<sup>11</sup> Chicago, Illinois,<sup>12</sup> and Newton, Massachusetts<sup>13</sup> 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.<sup>14</sup>

Accordingly, the City Council finds and declares that the purpose of this ordinance is to protect public health and welfare by reducing the appeal of tobacco to minors and reduce the likelihood that minors will become tobacco users later in life.

## SECTION II. DEFINITIONS

As used in this ordinance:

- (a) “Electronic smoking device” means any electronic product that delivers nicotine or other substances to the person inhaling from the device, including, but not limited to, an electronic cigarette, e-cigar, e-pipe, vape pen, or e-hookah. Electronic smoking device includes any component or accessory of such a product, whether or not sold separately. Electronic smoking device does not include drugs, devices, or combination products approved for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.<sup>15</sup>
- (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 menthol, mint, wintergreen, chocolate, cocoa, vanilla, 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.

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.

### Clear definitions and concise language:

To help ensure people understand their obligations under the law, it is important to define key terms.

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).

- (d) “Tobacco product” means any product containing, made of, or derived from tobacco or nicotine, that is intended for human consumption, including electronic smoking devices.<sup>16</sup> The term “tobacco product” includes any component or accessory used in the consumption of a tobacco product, such as filters, rolling papers or liquids used in electronic smoking devices. The term “tobacco product” does not include drugs, devices or combination products approved for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.<sup>17</sup>

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. If a decision is made to exempt cigarettes from the local policy (which would allow the continued sale of menthol cigarettes), take care that little cigars are not inadvertently exempted as well.

### SECTION III. PROHIBITION ON SALE

It shall be unlawful for any person 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.

#### Clear scope of regulation:

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 the products that cannot be sold. Also, consider indicating the means by which products are determined to be flavored (perhaps including chemical testing) who will bear the costs associated with such determinations.

This sample language can be modified if it is necessary, politically, to allow the continued sale of flavored products in certain adult-only establishments.<sup>18</sup>

## SECTION IV. VIOLATIONS AND PENALTIES

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

1. First violation. The Council shall impose a civil fine of at least five hundred dollars (\$500).
2. Second violation within twenty-four (24) months of a first violation. The Council shall impose a civil fine of at least seven hundred fifty dollars (\$750).
3. Third violation within twenty-four (24) months of any preceding violation. The Council 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. Any fines collected under this ordinance shall be used for implementation and enforcement of the ordinance.

## SECTION V. ENFORCEMENT

The [enforcement agency] shall enforce the provisions of this ordinance.<sup>19</sup> 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.

### **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 a third violation and revocation for additional violations.

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 such as law enforcement (which could assist in carrying out inspections) and administrative or commerce departments (which may issue business licenses revocable under this ordinance's penalty structure).

Consider whether the ordinance will specify the

assessment of re-inspection fees against repeat violators of the ordinance.

## SECTION VI. SEVERABILITY

If any portion of this ordinance, or its application to any circumstances, is held invalid, the remaining portions shall be considered severable, and shall be given effect to the maximum extent possible.

## SECTION VII. EFFECTIVE DATE

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

### 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 that 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, explaining how existing inventories may be treated, and providing them an opportunity to ask questions.

*Last updated: October 2014*

## Notes

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<sup>1</sup> 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), available at <http://legacy.library.ucsf.edu/tid/xgm15d00/pdf>.

<sup>2</sup> Memorandum from Marketing Innovations, Inc. to Brown & Williamson Tobacco Corp. (Sept. 1972), available at <http://legacy.library.ucsf.edu/tid/wwq54a99/pdf>.

<sup>3</sup> 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), available at <http://legacy.library.ucsf.edu/tid/buq49d00/pdf>.

<sup>4</sup> See, e.g., Paula Frank, *Kids' Drinks*, FOOD PRODUCT DESIGN (Jan. 1, 2000), available at <http://www.foodproductdesign.com/articles/2000/01/kids-drinks.aspx>; Carrie M. Carpenter et al., *New*

*Cigarette Brands with Flavors that Appeal to Youth: Tobacco Marketing Strategies*, 24 HEALTH AFFAIRS 1601, 1608 (2005).

<sup>5</sup> Cristine D. Delnovo, et al, *Smoking-Cessation Prevalence Among U.S. Smokers of Menthol Versus Non-Menthol Cigarettes*, 41 AM. J. PREVENTIVE MED. 357-65 (2011).

<sup>6</sup> SUBSTANCE ABUSE AND MENTAL HEALTH ADMINISTRATION, OFFICE OF APPLIED STUDIES, NSDUH REPORT: USE OF MENTHOL CIGARETTES 2 fig. 1 (2009), available at <http://store.samhsa.gov/product/Use-of-Menthol-Cigarettes/NSDUH09-1119> [hereinafter SAMHSA, 2009] (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), available at [http://www.cdc.gov/tobacco/data\\_statistics/sgr/1998/index.htm](http://www.cdc.gov/tobacco/data_statistics/sgr/1998/index.htm) (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).

<sup>7</sup> Press Release, Office of the Attorney General of Maryland, Curran and R.J. Reynolds Reach Historic Settlement to End the Sale of Flavored Cigarettes (Oct. 11, 2006), available at <http://www.oag.state.md.us/Press/2006/101106.htm>.

<sup>8</sup> 21 U.S.C.A. § 387g(a)(1)(A) (2009).

<sup>9</sup> 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)), available at <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).

<sup>10</sup> New York, N.Y., Municipal Code § 17-715 (2012), <http://www.nyc.gov/html/doh/downloads/pdf/smoke/flavored-law.pdf>.

<sup>11</sup> Providence, R.I., Municipal Code art. XV, § 14-309 (2012), <https://www.providenceri.com/efile/2036>.

<sup>12</sup> Amended Chicago Municipal Code Chapters 4-64 and 7-32 (2014), <https://chicago.legistar.com/LegislationDetail.aspx?ID=1531471&GUID=8FBB15D9-D5CF-4211-8396-78EF37BA8F87&Options=Advanced&Search>.

<sup>13</sup> Newton, Mass., Municipal Code art. 1, § 20:26(j).

<sup>14</sup> *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). See also 21 U.S.C. § 387p(a)(1). A law suit was filed in October 2014 challenging the City of Chicago's ordinance restricting the sale of flavored tobacco products; the litigation is ongoing.

<sup>15</sup> See, e.g., 21 U.S.C. § 321(g)(1), 21 U.S.C. § 321(h), and 21 U.S.C. § 353(g).

<sup>16</sup> Not all ordinances restrict the sale of flavored electronic cigarettes. For example, the sales restriction on flavored non-cigarette tobacco products in New York City excludes electronic cigarettes; the ordinance in Providence, Rhode Island includes the products. The U.S. Food and Drug Administration intends to regulate certain e-cigarettes as tobacco products, but does not currently do so, nor has it stated an intention to prohibit flavored e-cigarettes. Tobacco Control Legal Consortium, *The FDA Takes Small Steps to Expand Tobacco Regulation* (2014), available at

<http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-fda-takesmallstepexpandtobaccoregulation-2014.pdf>.

<sup>17</sup> *See, e.g.*, 21 U.S.C. § 321(g)(1), 21 U.S.C. § 321(h), and 21 U.S.C. § 353(g).

<sup>18</sup> The New York City ordinance exempts certain “tobacco bars” from the prohibition on the sale of flavored tobacco products. If an ordinance prohibiting the sale of flavored tobacco products were to be challenged in court, such an exemption may strengthen the argument that the ordinance is an acceptable sales restriction rather than a preempted product standard. 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 contents of the products themselves. 21 U.S.C. § 387p(a). In upholding the New York City ordinance, however, 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). For that reason, no such exemption is included in this sample language.

<sup>19</sup> 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.