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,”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
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.7

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

Jurisdictions such as New York City;10 Providence, Rhode Island;11 Chicago, Illinois;12 and Newton, Massachusetts13 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.14

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.15

(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.
(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. 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.

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.
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. 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
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


14 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.


16 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


18 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.

19 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.