



REGULATING MENTHOL TOBACCO PRODUCTS

Tips and Tools

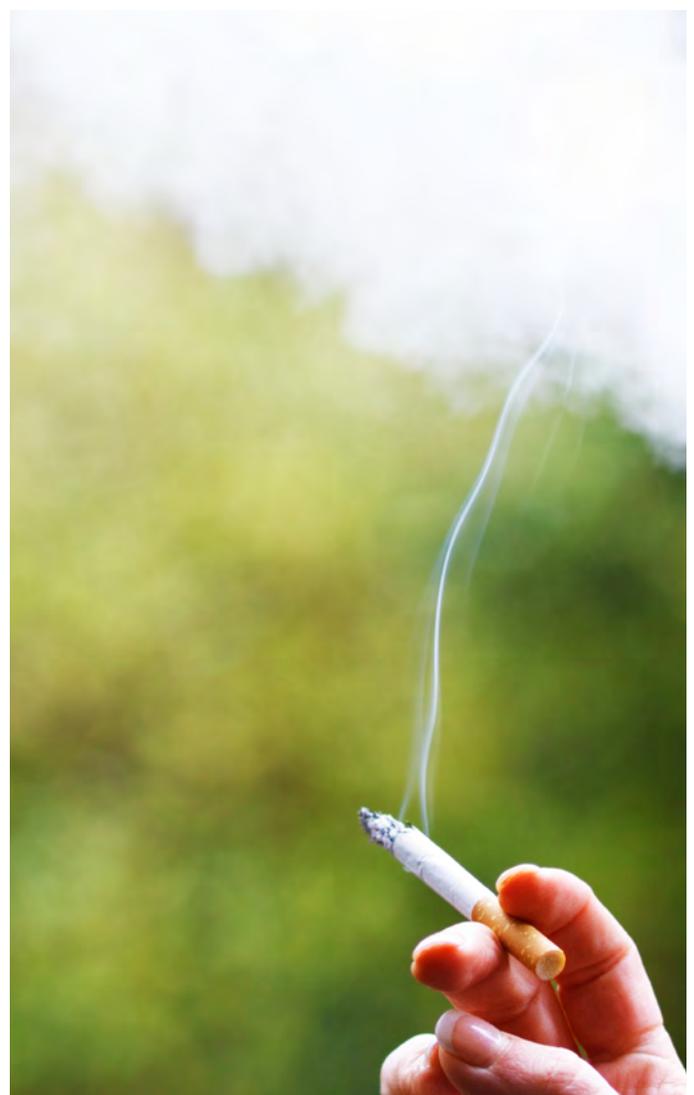


The Tobacco Control Legal Consortium has created this series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain commercial tobacco control measures.

We encourage you to consult with local legal counsel before attempting to implement these measures. For more details about these policy considerations, please contact the Consortium.

Background

Menthol, a compound used in many consumer and medicinal products, is found in most cigarettes, even those not marketed specifically as menthol cigarettes.¹ Menthol's cooling and analgesic properties reduce the harshness of cigarette smoke and irritation from nicotine. Evidence indicates that menthol enhances the



addictiveness of cigarettes, both by increasing the likelihood of nicotine addiction in youth who experiment with smoking and by making cessation among adult smokers more difficult.²

Menthol cigarettes are used at disproportionately higher rates by racial and ethnic minority smokers, including African Americans (84.6 percent), Hispanics or Latinos (46.9 percent) and Asian Americans (38.0 percent), compared to White smokers (28.9 percent).³ Also, approximately 71 percent of all young LGBT smokers use menthol cigarettes.⁴ At least half of all teen smokers use menthol tobacco products,⁵ including more than 70 percent of adolescent African American smokers and more than half of all adolescent Latino smokers.⁶ Use of menthol products is also prevalent among non-minority youth and those making less than \$10,000 per year.⁷ Moreover, a convincing body of evidence has shown that tobacco-related health disparities are exacerbated by targeted marketing in minority areas⁸ and the consumption of menthol tobacco products.⁹

Federal Regulation

The 2009 Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) prohibited cigarettes from containing any characterizing flavor, including candy, fruit, and alcohol flavors.¹⁰ Importantly, the flavor prohibition exempted tobacco and menthol flavors, and did not apply to non-cigarette tobacco products.

In part acknowledging the public health problem left unaddressed by the menthol exemption, the Tobacco Control Act directed the Tobacco Products Scientific Advisory Committee (TPSAC) to study “the issue of the impact of the use of menthol in cigarettes on the public health, including such use among children, African-Americans, Hispanics, and other racial and ethnic minorities.”¹¹ The TPSAC subsequently approved a report documenting its findings in July 2011, which concluded that removing menthol cigarettes from the marketplace would benefit public health.¹²

Rather than act promptly to protect public health by prohibiting menthol as a characterizing flavor, the U.S. Food & Drug Administration (FDA) instead announced it would conduct “a preliminary independent scientific evaluation of existing data and research on menthol cigarettes.”¹³ This report, which the FDA released in July 2013, corroborated the TPSAC report’s conclusions, as well as its findings that menthol cigarettes pose a public health risk that exceeds the risk posed by nonmenthol cigarettes.¹⁴ With the release of this report, the FDA issued a nonbinding advance notice of proposed rulemaking and accepted public comments through November 2013.¹⁵ Despite the submission of more than 174,000 public comments on this docket

— in addition to the thousands of pages of menthol research already gathered by TPSAC, FDA staff, and public health groups — the FDA remained silent on the topic of menthol until 2017.

Meanwhile in 2016, the FDA issued a regulation asserting jurisdiction over non-cigarette tobacco products — also known as its “deeming regulation.”¹⁶ The FDA’s draft version of the regulation extended the Tobacco Control Act’s flavor restriction to non-cigarette tobacco products, while retaining the exemption for menthol flavored cigarettes.¹⁷ However, the White House Office of Management and Budget removed the flavor provision before the FDA’s final “deeming regulation” was issued.¹⁸

On July 28, 2017, the FDA announced a comprehensive regulatory plan for tobacco products that prioritizes restrictions on kid-attractive flavors, including menthol, and establishes a cohesive agency-wide approach to nicotine.¹⁹ On March 21, 2018, the FDA issued a nonbinding advance notice of proposed rulemaking related to regulating flavors in tobacco products.²⁰

Given the long regulatory delays and significant public health threat that menthol tobacco poses, many local and state governments have adopted or are considering policies to regulate the sale, pricing, marketing, and advertising of these products. This guide provides a few options and pointers for local and state health departments, communities, and policy makers to consider when drafting and implementing policies that regulate menthol tobacco products. Given the rapidity with which communities are acting, this publication will be updated regularly.

Policy Options

Public health organizations support regulating menthol for several reasons, including reducing the appeal of tobacco products to youth, helping adult tobacco users quit, and decreasing disparities in tobacco use. Several policy options can advance these public health goals. Broad policies that generally prohibit the sale or limit the availability of tobacco products will also impact the availability of menthol tobacco products. The Consortium’s website contains resources that describe broad policy options to regulate tobacco product pricing, taxation, and age-of-sale, and to control tobacco retailer locations through licensing and zoning laws.²¹

Sales prohibitions and restrictions are policy options with the greatest potential to reduce the public health harms caused by menthol tobacco products.

- **Sales Prohibition.** The most straightforward way to address the problem of menthol would be to remove it from the marketplace as a characterizing flavor in commercial tobacco products. A number of countries outside the U.S. have implemented or adopted laws to ban menthol in cigarettes and/or other tobacco products.²² Given the U.S. Food and Drug



Administration's regulatory authority under the Tobacco Control Act, a U.S. state or local government cannot simply prohibit the manufacture of commercial tobacco products with a menthol flavor.²³ Nevertheless, the Tobacco Control Act does preserve the authority of state and local governments to adopt measures "relating to or prohibiting the sale, distribution, ... or use of tobacco products."²⁴ During 2014, the Hawaii Legislature considered bills to prohibit sales of all flavored tobacco products²⁵ and the 2018-19 New Jersey legislature is considering bills that would prohibit sales of menthol cigarettes.²⁶ Rather than adopt a total sales prohibition, most city and county sales prohibitions on menthol tobacco products to date have included exemptions for certain retailers or geographic areas (see "Sales Restriction" section below). However, on June 20, 2017, San Francisco became the first major U.S. city to prohibit the sale of flavored commercial tobacco products, including menthol cigarettes, with no exemptions.²⁷ In response, a commercial tobacco manufacturer mounted an expensive campaign to prevent implementation of the law by challenging it via public referendum, held June 5, 2018.²⁸ Despite the well-funded effort to oppose the legislation, San Francisco voters resoundingly upheld the law by a margin of more than 2 to 1 (68 to 32 percent).²⁹ The sales prohibition took effect July 20, 2018.

- **Sales Restriction.** Absent a full sales prohibition on menthol tobacco products, a sales restriction that limits sales of menthol tobacco products to certain adult-only tobacco stores would limit the access of these products to youth. For example, Duluth, Minnesota, adopted an ordinance restricting the sale of flavored tobacco products, including menthol, to establishments that derive at least 90 percent of their revenues from tobacco sales and that prohibit anyone under the age of 18 from entering at all times.³⁰ Another policy approach has been to create sales restrictions in areas around schools. In 2013, the City of Chicago restricted the sale of flavored tobacco products, including those with a menthol flavor, in any establishment located within 500 feet of a school, with the exception of retail tobacco stores dedicated primarily to the sale of tobacco.³¹ This groundbreaking policy was the first state or local tobacco product sales restriction that specifically included menthol. However, the 500 foot buffer zone meant that 88.25 percent of Chicago retailers could continue to sell menthol tobacco products.³² Federal appeals courts have upheld ordinances that restrict flavored tobacco sales in New York City and Providence, RI, albeit ones that do not include menthol, as valid exercises of local authority to regulate the sale and distribution of tobacco products.³³



Policy Elements

Regardless of the approach used to regulate menthol tobacco products, all strong policies share a few common elements, such as:

- **Timely findings and clear statements of purpose:** Findings are brief statements of fact or statistics that outline the issue being addressed, support the need for the policy, and help clarify the policy goal. Regulations on the sale, marketing, and advertising of menthol tobacco products typically include evidence showing how the products create a problem within the community or state (e.g., documentation about the disproportionate use of menthol tobacco products by youth or how such products impede adult cessation efforts), and explain how the policy is designed to address this problem.

If a policy is challenged in court, a good set of findings can help 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:** Avoid confusion about what constitutes a "flavored tobacco product" by clearly defining critical terms. Because the Family Smoking Prevention and Tobacco Control Act prohibits the manufacture and sale of flavored cigarettes (except



menthol and tobacco flavors), be careful that the laws will leave no gaps in covered products. For example, define “tobacco product” broadly so the term encompasses cigarettes as well as cigars, little cigars, electronic cigarettes, spit/chewing tobacco, dissolvable tobacco products, tobacco lozenges, and other related emerging products. Also, because descriptions such as “mellow” or “arctic” can imply a flavor and testing for actual flavoring may be difficult or expensive, consider regulating all products that are marketed as having a distinguishable, distinctive, or characterizing flavor or smell.

- **Clear scope of regulation:** Under the Family Smoking Prevention and Tobacco Control Act, the FDA (and not state or local governments) has the power to regulate tobacco product standards.³⁴ Although prohibiting the sale of a certain type of product, such as a menthol tobacco product, does not set a product standard, the tobacco industry has argued that such a law does resemble a product standard. As a result, restricting the sale of flavored tobacco products — often to protect youth or to support adult quit attempts by reducing locations where products are available — might be easier to defend if the law allows products to be sold by a narrow class of businesses, such as limited types of adult-only facilities.
- **Robust enforcement options:** Regulating the advertising, promotion, and sale of flavored, including menthol, tobacco products can be challenging unless clear procedures are established, including reasonable penalty provisions. Ensure that the penalties proposed are appropriate and legal within the jurisdiction and that they are sufficient to cover all administrative expenses. Use clear terms to specify what behavior is prohibited and to whom the policy applies. It may be useful for the enforcement agency to maintain an updated list of all products determined to violate the ordinance. Also carefully consider the means by which products are determined to be flavored (perhaps including chemical testing) and who will bear the costs associated with such determinations.

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

- **Well-planned implementation process:** Establish a process for publicizing the policy and educating the community, as well as procedures for receiving, tracking, and responding to

complaints. Make sure to set a realistic date for the policy to take effect, so responsible authorities have sufficient time to establish the necessary procedures for implementation and enforcement, and to notify affected business owners of their obligations under the policy. For instance, it may be helpful to create educational materials for tobacco retailers informing them of the ordinance's key provisions, explaining how existing inventories may be treated (and allowing time for existing inventories to be depleted), and providing retailers an opportunity to ask questions.

Policy Challenges

State and local governments have the authority to pass, implement, and enforce laws that regulate the sale of tobacco products, and they can do so in a way that addresses local concerns, when they are not preempted from doing so. However, as with any commercial tobacco control policies, the tobacco industry and its allies may challenge in court state and local measures regulating the sale, marketing, or price of menthol tobacco products, arguing that these restrictions are preempted by other laws or that they violate specific constitutional provisions.³⁵ For example, in 2013 the City of Providence, Rhode Island, successfully fought off a legal challenge to two ordinances: one that prohibits the sale of flavored noncigarette tobacco products in most locations and one that prohibits price discounting of tobacco products.³⁶ The industry argued that these ordinances were preempted by federal and state law and violated the First Amendment, but the court did not agree. Even as multiple courts address the preemption question and uphold local policies, new policies regulating menthol could be challenged in court as a way to dissuade other communities from adopting similar provisions.

Select Legislation and Policies

State and local governments have only recently begun to regulate menthol tobacco products. Below are a few examples of tobacco control policies that include provisions relating to menthol, or that could be adapted to regulate menthol tobacco products.

Before using any language from the following policies, take care to ensure the provision in question is practical and legal in your jurisdiction, and find out whether the state or locality where the policy was adopted faced any issues that could affect implementation in your jurisdiction. Please note that the Tobacco Control Legal Consortium does not endorse or recommend any of the following policy approaches. These examples are included simply to illustrate how various jurisdictions have approached similar issues.

Select State and Local Laws and Legislation Relevant to Menthol

Locality/State: San Francisco (Sales Prohibition)

Policy Name	Text of Policy	Case Law
<u>San Francisco Health Code § 19Q.3</u>	<p>"The sale or distribution by an Establishment of any Flavored Tobacco Product is prohibited."</p> <p>"The sale or distribution by an Establishment of any Flavored Cigarette is prohibited."</p>	No
<u>San Francisco Health Code § 19Q.2</u>	<p>Definitions: A flavored cigarette or tobacco product is "any [Tobacco Product or Cigarette] that contains a Constituent that imparts a Characterizing Flavor."</p> <p>Characterizing flavor means "a Distinguishable taste or aroma or both, other than the taste or aroma of tobacco, imparted by a Tobacco Product or any byproduct produced by the Tobacco Product. Characterizing Flavors include, but are not limited to, tastes or aromas relating to any fruit, chocolate ... menthol, mint, wintergreen, herb, or spice. A Tobacco Product shall not be determined to have a Characterizing Flavor solely because of the use of additives or flavorings or the provision of ingredient information. Rather, it is the presence of a Distinguishable taste or aroma or both, as described in the first sentence of this definition, that constitutes a Characterizing Flavor."</p> <p>Distinguishable means "perceivable by either the sense of smell or taste."</p>	

Locality/State: New Jersey (Sales Prohibition)

Policy Name	Text of Policy	Case Law
<u>Senate Bill No. 1947 (2018)</u>	<p>"No person, either directly or indirectly by an agent or employee, or by a vending machine owned by the person or located in the person's establishment, shall sell, offer for sale, distribute for commercial purpose at no cost or minimal cost or with coupons or rebate offers, give or furnish, to a person a cigarette, or any component part thereof, which contains a natural or artificial constituent or additive that causes the cigarette or any smoke emanating from that product to have a characterizing flavor other than tobacco. In no event shall a cigarette or any component part thereof be construed to have a characterizing flavor based solely on the use of additives or flavorings, or the provision of an ingredient list made available by any means."</p> <p>Characterizing flavor other than tobacco means that "the cigarette, or any smoke emanating from that product, imparts a distinguishable flavor, taste or aroma other than tobacco prior to or during consumption, including,</p>	No (legislation pending)

Select State and Local Laws and Legislation Relevant to Menthol

Locality/State: New Jersey (Sales Prohibition)

(continued)

but not limited to, any menthol, mint, wintergreen, clove ... herb or spice flavoring; or the cigarette or any component part thereof is advertised or marketed as having or producing any such flavor, taste or aroma..."

Locality/State: Hawaii (Sales Prohibition)

Policy Name	Text of Policy	Case Law
House Bill No. 1522 (2014)	"The sale or distribution of cigarettes with a menthol flavor is prohibited. Violations ... are subject to a fine of up to \$1,000 per day for each violation."	No (not signed into law)

Locality/State: Chicago, IL (Sales Restriction)

Policy Name	Text of Policy	Case Law
<u>Municipal Code of Chicago § 4-64-515</u>	"No licensee engaged in the business of retail tobacco dealer shall sell, give away, barter, exchange, or otherwise deal in flavored tobacco products, flavored tobacco product samples, 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 secondary school located in the City of Chicago. This subsection shall not apply to retail tobacco stores."	Yes Law survived preemption, vagueness, and vested rights challenges in <i>Indeps. Gas & Serv. Stations Associations, Inc. v. City of Chicago</i> , 112 F. Supp. 3d (N.D. Ill. 2015).
<u>Municipal Code of Chicago § 4-64-100</u>	Definitions: A flavored tobacco product is "any tobacco product that contains a constituent that imparts a characterizing flavor. As used in this definition, the term "characterizing flavor" means a distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product including but not limited to tastes or aromas of menthol, mint, wintergreen, chocolate, vanilla, honey, cocoa, any candy, any dessert, any alcoholic beverage, any fruit, any herb, or any spice. No tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. A public statement or claim made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate such statement or claim, that a tobacco product has or produces a characterizing flavor shall establish that the tobacco product is a flavored tobacco product."	Although elementary and middle schools were originally part of this restriction, the buffer zone near those sites was lifted in 2016 due to the financial concerns of business owners.
<u>Municipal Code of Chicago § 7-32-010</u>	A retail tobacco store is "a retail establishment that derives more than 80% of its 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 and related products, and in which the sale of other products is merely incidental. 'Retail tobacco	

Select State and Local Laws and Legislation Relevant to Menthol

Locality/State: Chicago, IL (Sales Restriction)

(continued)

store' does not include a tobacco department or section of a larger commercial establishment or any establishment with any type of liquor, food, or restaurant license."

Locality/State: Providence, RI (Sales Restriction on Flavored Tobacco Products, Exempting Menthol)

Policy Name	Text of Policy	Case Law
<u>Providence Code of Ordinances, § 14-309</u>	<p>"It shall be unlawful for any person to sell or offer for sale any flavored tobacco product to a consumer, except in a smoking bar."</p> <p>Definitions: A flavored tobacco product is "any tobacco product or any component part thereof that contains a constituent that imparts a characterizing flavor. A public statement or claim made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such tobacco product, that such tobacco product has or produces a characterizing flavor shall constitute presumptive evidence that the tobacco product is a flavored tobacco product."</p>	<p>Yes</p> <p>In regards to flavoring, the ordinance survived First Amendment and preemption challenges.</p>
<u>Providence Code of Ordinances, § 14-308</u>	<p>Characterizing flavor means "a distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice ... provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information."</p>	<p>See <i>Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence</i>, No. CA 12-96-ML, 2012 WL 6128707, at *13 (D.R.I. 2012), <i>aff'd. Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, R.I.</i>, 731 F.3d 71 (1st Cir. 2013).</p>
<u>Rhode Island General Law, § 23-20.10-2(15)</u>	<p>Smoking bar is "an establishment whose business is primarily devoted to the serving of tobacco products for consumption on the premises, in which the annual revenues generated by tobacco sales are greater than fifty percent (50%) of the total revenue for the establishment and the serving of food or alcohol is only incidental to the consumption of such tobacco products. Effective July 1, 2015, all existing establishments and establishments that open thereafter must demonstrate quarterly, for a period of one year and annually thereafter, that the annual revenue generated from the serving of tobacco products is greater than fifty percent (50%) of the total revenue for the establishment, and the serving of food, alcohol, or beverages is only incidental to the consumption of such tobacco products. Every owner of a smoking bar shall register no later than January 1 of each year with the division of taxation and shall provide, at a minimum, the owner's name and address and the name and</p>	

Select State and Local Laws and Legislation Relevant to Menthol

Locality/State: Providence, RI (Sales Restriction on Flavored Tobacco Products, Exempting Menthol) *(continued)*

address of the smoking bar. The division of taxation in the department of administration shall be responsible for the determination under this section and shall promulgate any rules or forms necessary for the implementation of this section.

Smoking bars shall only allow consumption of food and beverages sold by the establishment on the premises and the establishment shall have public access only from the street.

Any smoking bar as defined herein, is required to provide a proper ventilation system which will prevent the migration of smoke into the street."

Locality/State: Duluth, MN (Sales Restriction on Flavored Tobacco Products, Including Menthol)

Policy Name	Text of Policy	Case Law
<u>Duluth Legislative Code, § 11-11(a)</u>	"No person shall sell, offer for sale or otherwise distribute any flavored tobacco products. This restriction does not apply to retail establishments that: (1) Prohibit persons under the age of 19 from entering at all times; and (2) Derive at least ninety percent of their revenues from the sale of tobacco, tobacco-related devices."	No
<u>Duluth Legislative Code, § 11-11(c)</u>	A flavored tobacco product means "any tobacco or tobacco related device that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to or during consumption or use of the tobacco product or tobacco related device, including, but not limited to, any taste or smell relating to menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, fruit, or any candy, dessert, alcoholic beverage, herb or spice. A public statement or claim, whether express or implied, made or disseminated by a manufacturer of tobacco or tobacco related devices, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such products, that a product has or produces a taste or smell other than tobacco will constitute presumptive evidence that the product is a flavored tobacco product."	

Other Helpful Resources

The Public Health Law Center's website features several resources and publications on menthol tobacco. For information about federal regulation of menthol tobacco products, check the U.S. Food and Drug Administration's (FDA) website on menthol or the Consortium's FDA Tobacco Action Center. Other public health organizations, including Truth Initiative, the National African American Tobacco Prevention Network, and the Campaign for Tobacco-Free Kids, have material on menthol tobacco on their websites as well. For background on the tobacco industry's predatory practices towards, and its complicated relationship with, African Americans, see articles *Racial Politics Flavor Debate Over Banning Menthol Cigarettes* and *Battling Menthol Restrictions, R.J. Reynolds Reaches Out to Sharpton, Other Black Leaders*.

The Consortium's website also has information about restrictions on flavored tobacco products generally, including a policy guide, a chart of select legislation, and a sample ordinance.

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Endnotes

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- 2 TPSAC REPORT, *supra* note 1, at 225; FDA RESEARCH REPORT, *supra* note 1, at 57-58.
- 3 Andrea C. Villanti et al., *Changes in the Prevalence and Correlates of Menthol Cigarette Use in the USA, 2004-2014*, 25 TOBACCO CONTROL ii14-ii20 (2016), <http://tobaccocontrol.bmj.com/content/tobaccocontrol/early/2016/10/11/tobaccocontrol-2016-053329.full.pdf>.
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- 6 *Id.*
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- 8 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).
- 9 See, e.g., Campaign for Tobacco-Free Kids, *Tobacco Company Marketing to African Americans*, <http://www.tobaccofreekids.org/research/factsheets/pdf/0208.pdf>.
- 10 21 U.S.C. § 387g(a)(1)(A) (West 2012).
- 11 21 U.S.C. § 387g(e)(1) (West 2012).
- 12 TPSAC REPORT, *supra* note 1, at 225.
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- 14 *Id.* at 6.
- 15 Menthol in Cigarettes, Tobacco Products; Request for Comments, 78 FR 44484, July 24, 2013, <https://www.regulations.gov/document?D=FDA-2013-N-0521-0001>.
- 16 Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products. Final Rule. 81 FR 28974, May 10, 2016, <https://www.regulations.gov/document?D=FDA-2014-N-0189-82904>.
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- 24 21 U.S.C. § 387p(a)(1) (West 2012) (emphasis added).
- 25 H.B. 1522, 27th Leg. (Haw. 2014).



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- 29 San Francisco Dep't, Election Results (June 5, 2018), <https://sfelections.sfgov.org/june-5-2018-election-results-summary>.
- 30 DULUTH, MINN., CODE § 11-11(a).
- 31 CHI., ILL., CODE § 4-64-180(b). Note, in response to financial concerns of business owners, in 2016 this code was repealed and replaced with CHI., ILL., CODE § 4-64-515(b), which lifted the buffer zone restriction around elementary and middle schools lifted. See also John Byrne, *Emanuel Backs Move to Weaken Flavored Tobacco Sale Rules*, CHICAGO TRIB., Dec. 12, 2016, <http://www.chicagotribune.com/news/local/politics/ct-city-council-flavored-cigarettes-sales-met-20161212-story.html>.
- 32 Michael Freiberg, *The Minty Taste of Death: State and Local Options for Regulating Menthol in Tobacco Products*, 64 U. L. REV. 949 (2015), <https://scholarship.law.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3340&context=lawreview>.
- 33 *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013).
- 34 21 U.S.C. § 387p(a)(2)(A) (West 2012).
- 35 See Consortium publications on commercial speech, commerce clause, and void for vagueness issues in tobacco regulation on the Public Health Law Center's website at <http://www.publichealthlawcenter.org/topics/other-public-health-law/common-legal-issues-public-health>. See also Consortium, *Untangling the Preemption Doctrine in Tobacco Control* (2018) and other resources on Preemption at <http://www.publichealthlawcenter.org/topics/tobacco-control/preemption>.
- 36 See *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013), <http://media.ca1.uscourts.gov/pdf/opinions/13-1053P-01A.pdf> (upholding two 2012 Providence ordinances that restrict sales of flavored non-cigarette tobacco products and prohibit the redemption of tobacco product coupons and other price discounting practices in retail stores and ruling that the laws serve the city's legitimate goal of reducing smoking and other tobacco use and that they do not violate the First Amendment and are not preempted by federal and state law).