

**LEGISLATIVE #**

**110592**



Tobacco Control  
Legal Consortium



Tips and Tools

## Regulating Flavored Tobacco Products

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 tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures.<sup>1</sup> For more details about these policy considerations, please contact the Consortium.

### Flavored Tobacco Product Regulation

On September 22, 2009, the Food and Drug Administration (FDA), under authority granted by the Family Smoking Prevention and Tobacco Control Act, prohibited the manufacturing, marketing and sale of cigarettes containing “characterizing flavors,” such as vanilla, chocolate, cherry, and coffee.<sup>2</sup> The FDA is currently examining options for regulating menthol cigarettes<sup>3</sup> and other tobacco products. At this point, however, federal law prohibits the sale, distribution and manufacture of flavored *cigarettes* and flavored *cigarette* “component parts,” such as their tobacco, filter or paper.<sup>4</sup> Despite this restriction, however, many other flavored tobacco products remain on the market, including cigars, smokeless tobacco, hookah tobacco (“shisha”), little cigars, and dissolvable tobacco products (e.g., strips and orbs), as well as flavored component parts (e.g., blunt wraps). Although federal law does not regulate flavored non-cigarette tobacco products, it does not prevent state and local governments from regulating the sale of these products (or their component parts).



Studies show that flavored tobacco products appeal to youth, who serve as an enticing target market for the tobacco industry.<sup>5</sup> The younger individuals are when they begin to use tobacco, the more likely they will become addicted to tobacco products. For example, among adults who smoke, 68 percent began smoking regularly at age 18 or younger.<sup>6</sup> Also, tobacco users (particularly youth) often mistakenly assume that flavored tobacco products are safer than cigarettes.<sup>7</sup> Given the significant threat to public health that flavored tobacco products pose, many local and state governments are considering ways to regulate their sale, pricing, marketing and advertising. This guide provides

pointers that communities and policy makers might want to consider in drafting and implementing policies that regulate flavored tobacco products.

### Policy Options

- **Sales restrictions.** Some state and local governments have passed laws that prohibit the sale of various flavored tobacco products (e.g., New York City’s restriction on the sale of flavored non-cigarette tobacco products and Maine’s prohibition of the sale of flavored cigars).<sup>8</sup> Communities might also consider prohibiting sales of flavored tobacco products at certain locations such as gas stations, convenience stores, pharmacies or grocery stores. Again, as with any sales prohibition, proponents would want to show that these restrictions serve a legitimate government interest (e.g., by reducing local youth access to tobacco products).
- **Advertising and promotion restrictions.** Any community considering regulating tobacco ads needs to be aware of the First Amendment and the Federal Cigarette Labeling and Advertising Act, which limits the ability of state and local governments to place restrictions on the advertising or promotion of cigarettes. The Act, however, does not apply to other types of tobacco products. Communities can restrict the advertising or promotion of *non-cigarette* flavored tobacco products in several ways.<sup>9</sup>

The advertising of flavored tobacco products is often targeted at shoppers inside, outside, and on the property of convenience stores, drug stores, gas stations, and other retail sales outlets. To prevent children from being exposed to advertising and on self-serve display racks on or in front of the counter, communities could consider restricting the placement of in-store tobacco advertisements. Communities might also limit tobacco advertising in the retail environment by restricting the signage that may appear in store windows or on sidewalks.<sup>10</sup> Such regulations need to be drafted carefully to avoid the risk of legal challenges related to First Amendment concerns.<sup>11</sup>

- **Graphic warnings.** Another way to regulate flavored tobacco in the retail environment is to require tobacco retailers to place graphic warning signs at or near the point of sale that warn of the dangers of tobacco use. These signs should make clear that the warnings are issued by the government – not the tobacco industry or retailers – to counter potential arguments that the government is compelling speech in violation of the First Amendment.
- **Restricting product access.** Communities seeking to restrict how products are made available for sale could require all flavored tobacco products to be sold via face-to-face transactions, thus prohibiting vending machines and self-service displays. Such regulations need to be drafted carefully to avoid the risk of legal challenges related to First Amendment concerns.<sup>12</sup>
- **Regulating tobacco product pricing.** Local and state governments could also consider regulating retail value-added promotions and other promotional expenditures for flavored tobacco products. For example, some communities restrict and even



prohibit price discounts provided by tobacco manufacturers or retailers, such as multi-pack offers (e.g., buy two packs, get one free), product giveaways, samples, or point redemption schemes.<sup>13</sup> Another price regulation option is to raise tobacco taxes on flavored non-cigarette tobacco products, or to ensure that taxes on these products are equivalent to taxes on cigarettes.<sup>14</sup>

## Policy Elements

Well-crafted restrictions on flavored tobacco products are explicit about what they cover, and how communities will implement and enforce them. Here are a few elements found in such policies:

- **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. Regulations on the sale, marketing and advertising of flavored 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 flavored tobacco products by youth), and explain how the policy is designed to address this problem.
- **Clear definitions and concise language:** Avoid confusion about what constitutes “flavor,” “flavoring” or non-cigarette “tobacco product” by clearly defining critical terms. It may be helpful to state that the policy does not regulate flavored cigarettes prohibited by the Family Smoking Prevention and Tobacco Control Act. Draft the definition of “tobacco product” broadly so it encompasses products such as flavored cigars, little cigars and spit/chewing tobacco, as well as dissolvable tobacco products, flavored tobacco lozenges, and other emerging smokeless products. Also, since descriptions such as “mellow” or “arctic” can imply a flavor, and because 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 aroma).
- **Clear scope of regulation:** Under the Family Smoking Prevention and Tobacco Control Act, the FDA has the power to regulate tobacco product standards.<sup>15</sup> Although prohibiting the sale of a certain type of product, such as a flavored 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, a restriction on the sale of flavored tobacco products – typically enacted to protect youth – might be easier to defend if it allows the 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 tobacco products can be challenging unless clear procedures are established, including reasonable penalty provisions. 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. The penalties section of the policy should

clearly identify when persons can be found in violation of the policy, and the penalties or fines imposed for first, second and subsequent violations.

- **Well-planned implementation process:** Establish a process for publicizing the policy and educating the community, as well as procedures for receiving, tracking and following up on complaints. Make sure you set a realistic date for the policy to take effect, 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.

### Policy Challenges

State and local governments have the authority to pass, implement and enforce laws that regulate tobacco products, and they can do so in a way that addresses local concerns. Still, even the most carefully drafted local tobacco regulation cannot avoid all risk of legal challenge. Communities considering measures to regulate flavored tobacco products should keep in mind that policies need to be drafted carefully and precisely, with an eye on potential First Amendment, Commerce Clause, and other constitutional issues, and that broad sweeping policies may be more vulnerable to legal challenge than narrow local policies.<sup>16</sup>

Also, communities considering taxing non-cigarette tobacco products at the same or higher rates than are imposed on cigarettes will need to address criticism that tax increases have a disproportionate impact on people in poorer communities, where tobacco use rates are high, and that increased taxation serves only to create greater economic hardship. The counterpoint is that a tobacco product tax is not a tax on a necessity and the public health goals justifying the increased taxation of tobacco products far outweigh the potential for economic harm.

### Select Legislation and Policies

Below are examples of flavored tobacco product regulations and legislation around the U.S. If you consider adapting any language from these policies, take care to ensure the provision in question is practical and legal in your jurisdiction. Please note that the Consortium does not endorse or recommend any of the following policies. These examples are included simply to illustrate how various jurisdictions have approached similar issues.

Policy Type	Organization/ Jurisdiction	Statute/Regulation/ Directive	Select Excerpt of Law
<i>Prohibits manufacture, marketing &amp; sale of flavored cigarettes</i>	Food & Drug Administration	<u>Family Smoking Prevention and Tobacco Control Act § 907: Tobacco Product Standards</u>	...a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive,



an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke.

<i>Prohibits sale of flavored cigars</i>	Maine	<u>Maine Revised Statutes, Title 22 § 1560-D: Flavored cigars</u>	"Characterizing flavor" means a distinguishable taste or aroma of candy, chocolate, vanilla, fruit, berry, nut, herb, spice, honey or an alcoholic drink that is imparted to tobacco or tobacco smoke either prior to or during consumption. "Characterizing flavor" does not include a taste or aroma from tobacco. "Constituent" means any ingredient, substance, chemical or compound, other than tobacco, water or reconstituted tobacco sheet, that is added by the manufacturer to the tobacco, paper or filter of a cigar during the processing, manufacture or packing of the cigar. "Constituent" includes a smoke constituent.
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<i>Prohibits sale of flavored non-cigarette tobacco products except in certain adult-only venues</i>	New York City	<u>New York City Administrative Code: Title 17-713 to 718: Regulation of the sale of herbal cigarettes and flavored tobacco products</u>	"Flavored tobacco product" means any tobacco product or any component part thereof that contains a constituent that imparts a characterizing flavor. ... "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
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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. . . . It shall be unlawful for any person to sell or offer for sale any flavored tobacco product except in a tobacco bar.

### Other Helpful Resources

The Consortium's parent organization, the [Public Health Law Center](#), has a [webpage](#) containing information on tobacco product regulation and federal tobacco regulation. Our site also provides several publications and resources on regulating flavored tobacco products, including [tobacco product advertising, marketing, and pricing](#), a [fact sheet on menthol tobacco products](#), a Tips & Tools guide on [Regulating Waterpipe and Hookah Smoking](#), as well as a law synopsis, [Pick Your Poison: Responses to the Marketing and Sale of Flavored Tobacco Products](#) (2009). The [Food and Drug Administration](#), the [Centers for Disease Control and Prevention](#), and the [American Cancer Society](#) provide fact sheets on flavored tobacco products. In addition, the [Campaign for Tobacco-Free Kids](#) has information on flavored smokeless tobacco products, including dissolvables.

### Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at [publichealthlaw@wmitchell.edu](mailto:publichealthlaw@wmitchell.edu) with any questions about the information included in this guide or to discuss local concerns you may have about implementing such a policy.

*Last updated: August 2011*

### Notes

<sup>1</sup> The information contained in this document is not intended to constitute or replace legal advice.

<sup>2</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 § 102, 123 Stat. 1776 (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C. and 21 U.S.C. (2009)).

According to the Act:

...a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke. 21 U.S.C. § 387g(a)(1)(A) (2009). See also FOOD & DRUG ADMIN., DEP'T OF HEALTH & HUMAN SERVS., *Fact Sheet*:



*Flavored Tobacco Products* (2010), available at <http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/ucm183198.htm>.

<sup>3</sup> Although the 2009 federal tobacco legislation did not prohibit the use of menthol as a flavor in cigarettes, an FDA advisory committee was commissioned to research mentholated cigarettes, focusing on their impact in general and on the availability and marketing of this product to children, especially children in minority communities. In March 2011, the Tobacco Products Scientific Advisory Committee issued a report on menthol cigarettes, concluding that they have “an adverse impact on public health in the United States” and that “[t]here are no public health benefits of menthol compared to non-menthol cigarettes.” The report recommended to the FDA that “[r]emoval of menthol cigarettes from the marketplace would benefit public health in the United States.” FOOD & DRUG ADMIN., DEP’T OF HEALTH & HUMAN SERVS., *Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations* 204, 208 (2011), available at

<http://www.fda.gov/advisoryCommittees/CommitteesMeetingMaterials/tobaccoproductsScientificAdvisoryCommittee/default.htm>. For more background information about menthol tobacco product regulation, see Tobacco Control Legal Consortium, *Federal Regulation of Menthol Tobacco Products: Frequently Asked Questions* (2011), available at [http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-mentholtoobprods-ganda-2011\\_0.pdf](http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-mentholtoobprods-ganda-2011_0.pdf). See also information on the FDA government website at <http://www.fda.gov/advisoryCommittees/CommitteesMeetingMaterials/tobaccoproductsScientificAdvisoryCommittee/default.htm>.

<sup>4</sup> FOOD & DRUG ADMIN., DEP’T OF HEALTH & HUMAN SERVS., *Guidance to Industry and FDA Staff: General Questions and Answers on the Ban of Cigarettes that Contain Certain Characterizing Flavors* (Ed. 2) (2009), available at <http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/ucm183228.htm>.

<sup>5</sup> FOOD AND DRUG ADMIN., DEP’T OF HEALTH & HUMAN SERVS., *Fact Sheet: Flavored Tobacco Products* (2010), available at <http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/ucm183198.htm>.

<sup>6</sup> U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, *Sustaining State Programs for Tobacco Control, State Data Highlights: 2006*, available at [http://www.cdc.gov/tobacco/data\\_statistics/state\\_data/data\\_highlights/2006/pdfs/dataHighlights06rev.pdf](http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/pdfs/dataHighlights06rev.pdf).

<sup>7</sup> *Id.*

<sup>8</sup> In 2009, wholesalers and manufacturers of flavored smokeless tobacco (“plaintiffs”) sought a preliminary injunction against New York City, concerning its regulation prohibiting the sale of flavored non-cigarette tobacco products on the ground that the local law was preempted by the federal Family Smoking Prevention and Tobacco Control Act. In 2010, a U.S. District Court denied the preliminary injunction request, holding that the plaintiffs had little chance of succeeding on the merits of the case, the New York City ordinance does not conflict with the Act, and the Act clearly preserves the rights of states and municipalities to enact laws and regulations concerning the sale of tobacco products even more restrictive than those in the Act itself. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 703 F. Supp. 2d 329 (S.D.N.Y. 2010). The New York City restriction is still being challenged in the U.S. District Court, which is considering the plaintiffs’ request for a permanent injunction. Maine’s recent law prohibiting the sale of flavored cigars has not faced litigation. ME. REV. STAT. tit. 22, § 1560-D (2009).



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<sup>9</sup> See Tobacco Control Legal Consortium, *Restricting Tobacco Advertising – Tips and Tools* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-restricttobadvert-2011.pdf>.

<sup>10</sup> See Tobacco Control Legal Consortium, *Placement of Tobacco Products – Tips and Tools* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-placementoftobprods-2011.pdf>.

<sup>11</sup> For an overview of constitutional issues that state and local governments need to consider when regulating tobacco product marketing and promotion, see Tobacco Control Legal Consortium, *Regulating Tobacco Marketing: “Commercial Speech” Guidelines for State and Local Governments* (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guidelines-speech-2010.pdf>. See also Tobacco Control Legal Consortium, *Regulating Tobacco Retailers: Options for State and Local Governments* (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-retailers-2010.pdf>.

<sup>12</sup> For an overview of constitutional issues that state and local governments need to consider when regulating tobacco product marketing and promotion, see Tobacco Control Legal Consortium, *Regulating Tobacco Marketing: “Commercial Speech” Guidelines for State and Local Governments* (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guidelines-speech-2010.pdf>. See also Tobacco Control Legal Consortium, *Regulating Tobacco Retailers: Options for State and Local Governments* (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-retailers-2010.pdf>.

<sup>13</sup> For additional information about pricing options, see the Tobacco Control Legal Consortium, *Tobacco Coupon Regulations and Sampling Restrictions – Tips and Tools* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-tobcouponregsandsampling-2011.pdf>, and *Regulating Tobacco Product Pricing: Guidelines for State and Local Governments* (2010), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-pricing-2010.pdf>. Some communities might want to consider minimum pricing laws as a complementary strategy, if they have the authority to pass such laws.

<sup>14</sup> See Tobacco Control Legal Consortium, *Taxation of Tobacco Products: An Introduction to Key Terms & Concepts* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-taxationterms-2011.pdf>.

<sup>15</sup> See *supra* note 2, § 21 U.S.C. § 387g(a)(1)(A).

<sup>16</sup> See sources cited, *supra* note 11.