Out of Flavor: Updates on Flavor Ban Legislation and Litigation
COMMERCIAL TOBACCO CONTROL TEAM
LEGAL TECHNICAL ASSISTANCE

- Legal Research
- Policy Development, Implementation, Defense
- Publications
- Trainings
- Direct Representation
- Lobby
Equality

Equity
PRESENTERS

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OVERVIEW

• Legislation
  – Why flavored products are harmful
  – Federal and tribal action
  – State and local action

• Litigation
  – Past legal challenges
  – Current lawsuits
FLAVORS AND KIDS

VS.

PUBLIC HEALTH LAW CENTER
at Mitchell Hamline School of Law
FLAVORED TOBACCO PRODUCTS
FLAVORED TOBACCO HARMs

Youth Usage Rising

• 2018 – Surgeon General declares youth vaping an “epidemic”

• 2019 Youth Survey, reported vaping in the last month:
  – 28% of high school students
  – 11% of middle school students
FLAVORED TOBACCO HARMs

Menthol

• Disproportionately used by racial and ethnic minority smokers, LGBTQ smokers, and youth

• Today, 7 out of 10 African American youth who smoke use menthol cigarettes
2009 FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT

- Banned sale of most flavored cigarettes
- Exempts menthol
- Exempts cigars, smokeless tobacco, hookahs, and e-cigarettes
FDA & FLAVORS

• July 2017 – FDA announces comprehensive flavored tobacco products plan
  – But has not followed through

• Jan. 2020 – E-cigarette flavor action
  – Prohibited sales of certain flavored e-cigarettes
  – Does not include menthol
  – Only applies to cartridges or pods
  – Excludes all flavored cigars
TRIBAL GOVERNMENT ACTION

• Many tribes have acted on e-cigarettes, including:
  – Iipay Nation of Santa Ysabel
  – Lac Courte Oreilles Tribe
  – Muckleshoot Tribe
  – Oglala Sioux Tribe
  – Puyallup Tribe
  – Saint Regis Mohawk Tribe
  – Turtle Mountain Band of Chippewa Tribe
STATE & LOCAL AUTHORITY ON FLAVORS

What can state and local do?

• Cannot set tobacco product standards

• Can put sales restrictions on certain types of products, such as flavors
COMPREHENSIVE POLICY

Best practices

- Jurisdiction-wide ban
- Menthol flavors prohibited
- All tobacco products
- No retailer exemptions
  - hookah or tobacco bars
  - retail tobacco stores
  - adult-only shops
“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 fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, molasses, or any candy, dessert, alcoholic beverage, herb, or spice.
TEMPORARY E-CIG FLAVOR BANS

8 States in 2019

- Massachusetts
- Michigan
- Montana
- New York
- Oregon
- Rhode Island
- Utah
- Washington
STATE BANS: ENACTED

Massachusetts

- In effect June 2020
- Limits sale of flavored cigarette and tobacco products
- Includes menthol and e-cigarettes
- Can still be sold for on-site consumption in licensed smoking bars
STATE BANS: ENACTED

Flavored E-Cigs Only

- Maryland (Feb. 2020)
  - Exempts menthol
- Rhode Island (March 2020)
- New Jersey (April 2020)
- New York (May 2020)
- Utah (July 2020)
  - Exempts menthol
  - Allows specialty tobacco shop sales
STATE BANS: ENACTED

Flavored Cigars Only

- Maine (2009)
STATE BANS: PROPOSED

California (SB-793)

• State-wide flavor ban
• Passed Senate 33 to 4
• Includes hookah and shisha exception if:
  – Licensed to sell tobacco products
  – No one under 21 allowed
  – Comply with rules for tobacco retailer
STATE BANS: PROPOSED

Montana

• Dept. of Public Health and Human Services proposed rule to eliminate sale of flavored e-cigarettes

• Citing epidemic of youth e-cigarette product use in Montana
LOCAL BANS

Most Active States

• Massachusetts
  – 168 localities

• California
  – 77 localities

• Minnesota
  – 12 localities

Many Big Cities

• Boston
• Chicago
• Minneapolis
• New York
• Oakland
• Philadelphia
• San Francisco
COMPREHENSIVE POLICY

Best practices

✔ Jurisdiction-wide ban
✔ Menthol flavors prohibited
✔ All tobacco products
✔ No retailer exemptions
  – hookah or tobacco bars
  – retail tobacco stores
  – adult-only shops

“Trophy” Cities

• Oakland, CA
• Sacramento, CA
• San Francisco, CA
• Saint Louis Park, MN
JURISDICTION-WIDE BAN?

Best Practice
• Minneapolis example:
“No person shall sell, offer for sale, give away, barter, exchange, or otherwise deal in flavored tobacco products or samples of such products”

Buffer Zones
• Chicago example:
No flavored tobacco sales “within 500 feet of the property line of any public, private, or parochial secondary school”
MENTHOL PROHIBITED?

**Best Practice**
- Jersey City, NJ:
  
  “Flavored tobacco product” means “any tobacco product that contains a taste or smell other than the taste or smell of tobacco”

**Menthol Exclusions**
- New York, NY:
  - Exempts menthol tobacco products
  - As of July 1, 2020, includes menthol flavor e-cigs
ALL TOBACCO PRODUCTS?

Best Practice

• Massachusetts includes:
  – cigarettes
  – cigars and little cigars
  – chewing tobacco
  – pipe tobacco
  – snuff
  – electronic cigarettes
  – electronic cigars

E-Cigs Only

• Boulder, CO
• Jersey City, NJ
• Yonkers, NY
RETAILER EXEMPTIONS: RETAIL TOBACCO STORES

- Chicago, IL
  - Derives >80% of revenue from sale of tobacco products

- Lowell, MA
  - Primary purpose is to sell tobacco products
RETAILER EXEMPTIONS: ADULT-ONLY SHOPS

- Boston, MA
  - “shall not apply to an adult-only retail tobacco store”

- Philadelphia, PA
  - “except at an adults-only establishment”
RETAILER EXEMPTIONS: TOBACCO/SMOKING BAR

- Providence, RI
  - “except in a smoking bar”
  - primarily devoted to serving tobacco products for consumption on premises
  - annual tobacco sale revenues > 50%
  - serving of food or alcohol is incidental

- New York, NY
  - exempts “tobacco bars”
RETAILER EXEMPTIONS: HOOKAH

- Burbank, CA
  - “except for hookah tobacco in a form that may only be used in a non-electric hookah pipe or water pipe”

- South San Francisco, CA
ENFORCEMENT

• No purchase, use, possession (PUP) penalties
• Retailer education
• Compliance checks
  – Example: Providence, RI success
ENFORCEMENT

• Exemptions make enforcement harder
  – Example: Duluth, MN adults-only “smoke shops”
KNOW YOUR RESOURCES

U.S. SALES RESTRICTIONS ON FLAVORED TOBACCO PRODUCTS

This chart provides select examples of U.S. cities and counties that restrict the sale of flavored tobacco products. The chart captures variations among these flavor restrictions by noting when (1) flavors are prohibited generally or only within certain “buffer” zones, (2) menthol is prohibited, (3) flavors are restricted in e-cigarettes, and (4) exemptions are provided for certain retailers. The chart also provides links to each jurisdiction’s laws and summarizes relevant legal challenges. Beneath the chart is a supplementary list showing these select flavored tobacco restrictions organized by type rather than by state.

A state or local government considering whether to adopt any language from the following policies should take care to ensure that the language is appropriate, practical, and legal for its jurisdiction. Please note that the Public Health Law Center does not endorse or recommend any of the following policies. We have included these examples to illustrate how various jurisdictions regulate the sale of flavored tobacco products and related electronic nicotine delivery devices.

This chart is not comprehensive. Feel free to contact the Public Health Law Center for more information about flavored tobacco restrictions where you live.

REGULATING FLAVORED TOBACCO PRODUCTS

On September 22, 2019, the Food and Drug Administration (FDA), under authority granted by the Family Smoking Prevention and Tobacco Control Act, prohibited cigarettes from containing any “characterizing flavor,” including candy, fruit, and alcohol flavors.

This prohibition extends to flavored cigarettes and flavored cigars. "Component parts," such as the "tobacco, filter, or paper," however, the prohibition exempts the flavors of menthol and other "traditional flavors" that do not apply to non-cigarette tobacco products.
KNOW YOUR RESOURCES

COMPREHENSIVE TOBACCO RETAILER LICENSING ORDINANCE

Introduction
This Comprehensive Tobacco Retailer Licensing Ordinance was prepared to assist California cities and counties interested in establishing or strengthening a local tobacco retailer licensing (“TRL”) program and further regulating the tobacco retail environment. Communities adopt TRL laws to ensure compliance with local business standards, reduce youth access to tobacco products, limit the negative public health and equity impacts associated with tobacco use, and enforce local, state, and federal tobacco control laws.

The Public Health Law Center revised and
LITIGATING FLAVORED TOBACCO SALES RESTRICTIONS
“This chapter shall apply to all cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco and to any other tobacco products that the Secretary by regulation deems to be subject to this chapter.”
TOBACCO CONTROL ACT OF 2009
STATE AND LOCAL AUTHORITY

Preservation of State/Local Authority
Nothing in the Act limits state/local authority to enact a law “prohibiting the sale . . . of tobacco products.”

Preemption of State/Local Laws
No state/locality may establish “any requirement which is different from . . . any requirement under [the Act] relating to tobacco product standards.”

Saving Clause
The preemption restriction above “does not apply to [state or local] requirements relating to the sale” of tobacco products.
The Act: State and Local Authority

The FDA
YES:
• Product standards
  – Nicotine yields
  – Ingredients, constituents (flavors!)
  – How constructed
• Sale restrictions
• Advertising and marketing

NO:
• Smoke-free
• Tax
• Ban a class of products

States/Locals
NO: Product standards

YES:
• Smoke-free
• Youth access
• Taxes and pricing
• Sales & distribution
• Advertising and promotion
FLAVORED TOBACCO RESTRICTIONS
THE EVOLUTION
LITIGATION CHALLENGES
WHAT WE HAVE LEARNED TO DATE
New York, New York
- No sale of non-menthol flavored OTPs except in “tobacco bars”
- District Court & 2nd Circuit upheld
- Sales restriction, not product standard

Providence, Rhode Island
- No sale of non-menthol flavored OTPs except in “smoking bars”
- District Court & 1st Circuit upheld
- Sales restriction, not product standard
“Chicago’s ordinance does not regulate the content of tobacco products; it simply says where certain types of tobacco products cannot be sold … The ordinance falls squarely within the exception to preemption established by the federal Act.”

*Independents Gas & Service Stations Associations, Inc. v. City of Chicago, Order, Nov. 12, 2014*
LITIGATION CHALLENGES
MASSACHUSETTS TOWNS

• Cumberland Farms is plaintiff.
• Flavored tobacco list culled from multiple sources.
• Argued that “smell test” is arbitrary and capricious.
• Outcome: local ordinance and process for identifying flavored tobacco products upheld in Yarmouth
CHALLENGE OUTSIDE OF LITIGATION
SAN FRANCISCO ELIMINATES FLAVOR SALES

• Ordinance ended the sale of flavored tobacco products in the city.

• R.J. Reynolds attempted to repeal by ballot measure.

• Voters upheld the ordinance!
CALIFORNIA CASES

- California Smoke & Vape Association v. County of Los Angeles
- R.J. Reynolds Tobacco Co. v. County of Los Angeles

  - Challenge based on federal preemption and vagueness
  - Motion for preliminary injunction denied in each case:
    “Plaintiffs have not demonstrated serious questions going to, or a likelihood of success on, the merits of their preemption claim.”
  - Motions for summary judgment to be heard August 10, 2020.
CALIFORNIA CASES

• *California Smoke & Vape Association v. City of Palmdale*
  – Policy prohibits the sale of all flavored e-cigarettes, including the flavors tobacco and menthol.
  – Challenge relies on express and implied federal preemption.

• *Neighborhood Market Association v. County of San Diego*
  – Policy prohibits the sale of flavored tobacco products, except for hookah, and pauses e-cigarette sales.
  – Challenge relies on federal preemption under FSPTCA.
MINNESOTA CASES

• *Arden Hills Tobacco v. City of Arden Hills*
  – Policy eliminates sale of all flavored tobacco products
  – Challenge filed in state court.
  – Retailer argues federal preemption, equal protection, vagueness, takings, and more.

• *R.J. Reynolds Tobacco Company v. City of Edina*
  – Policy eliminates the sale of all flavored tobacco products.
  – RJR alleges FSPTCA preempts the ordinance.
Cigar Association of America v. City of Philadelphia

- Ordinance prohibits the sale of all flavored tobacco products except by adult-only retailers.
- Filed in state court, City filed motion to remove to federal court on July 1, 2020.
- Plaintiffs argue state preemption, due process violations, and vagueness.
KEY TAKEAWAYS

• The industry is deeply concerned about flavor policy momentum.

• In every federal preemption challenge to a flavor restrictions so far, the court upheld the sales restriction.
PUSHING THE FDA TO ACT
AATCLC AND ASH FILE LAWSUIT

"Black people ARE NOT born with a Newport or Swisher Sweets in their mouth. The tobacco industry's pernicious persistent racial targeting of our community does that.

We're celebrating Juneteenth & want to be FREE of all these things damaging our community, especially menthol cigarettes."

- Carol McGruder, Co-Chair
African American Tobacco Control Leadership Council
WHAT DOES THIS MEAN FOR FLAVOR POLICIES?

• Well-drafted policy should be on solid legal grounds.

• Focus should be on restricting the sale of the products.

• Contact us with any question about:
  – Policy development
  – Litigation updates
  – Anything else!
The passage of the Family Smoking Prevention and Tobacco Control Act, granting the U.S. Food and Drug Administration regulatory authority over tobacco products has ushered in a new era of tobacco litigation.

Many of the cases below are centered on the tobacco industry’s attempts to stop the Tobacco Control Act from being implemented and to prevent effective FDA regulation. The industry has also attempted to use the Tobacco Control Act’s narrow preemption provision to stamp out local tobacco control policies. In addition, public health groups have also filed lawsuits against the FDA seeking to stop attempts to roll back important regulation and to push the agency to regulate more effectively. Click the links under each dropdown menu below for information about each case.

- Lawsuits Related to the 2016 Deeming Rule
- Lawsuits Related to Federal Laws and FDA Regulations
- Lawsuits Related to Federal Preemption
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