

CALIFORNIA'S FLAVORED TOBACCO BAN (SB793)

 On August 28, 2020, California became the second state in the nation, after Massachusetts, to pass a broad law prohibiting the sale of most flavored tobacco products.

Three days after the law's passage, a proposed referendum on the law was submitted to the state Attorney General. If this referendum qualifies for the ballot, the law will be suspended pending the referendum vote in the 2022 general election.¹ If the referendum does not qualify, the law will take effect January 1, 2021.²

California's New Law

The new California law, known by its bill number SB-793, states:

A tobacco retailer, or any of the tobacco retailer's agents or employees, shall not sell, offer for sale, or possess with the intent to sell or offer for sale, a flavored tobacco product.³



"Tobacco retailer" includes anyone selling tobacco products from a retail location or vending machine.⁴

"Flavored tobacco product" includes any tobacco product that has a characterizing flavor, which is defined to cover any distinguishable taste or aroma other than that of tobacco, explicitly listing mint and menthol flavors as examples.⁵ A violation of the flavor ban by a retailer or a retailer's agent or employee is an infraction punishable by \$250 per violation.⁶

This law does not penalize anyone who purchases, uses, or possesses a flavored tobacco product. The law only prohibits retailers or their agents or employees from selling or possessing with the intent to sell a flavored tobacco product covered by the law.

Products Covered

Although the law contains several exemptions, it still covers a broad range of flavored tobacco products, including menthol cigarettes.

Covered Products	Exempt Products ⁷
Menthol cigarettes	Hookah and shisha: Must be sold by a licensed hookah tobacco retailer that limits entry to those aged 21 and over; does not apply to electronic hookahs.
Chewing tobacco	
Snuff	Pipe tobacco: Applies to loose leaf tobacco, defined as “cut or shredded pipe tobacco, usually sold in pouches,” but not any tobacco product suitable for making cigarettes, including roll-your-own cigarettes.
Little cigars	
Cigarillos	
E-cigarettes	Premium cigars:** Cigars must be handmade; have a tobacco leaf wrapper; have a wholesale price of no less than \$12; not have a filter, tip, or non-tobacco mouthpiece; and be capped by hand.
Roll-your-own tobacco	
Flavor enhancers	

* Flavored non-menthol cigarettes are already prohibited under the federal Family Smoking Prevention and Tobacco Control Act. ** There is also an exemption for premium cigars sold in a cigar lounge and consumed on the premises.⁸

No Preemption

The new California law does not preempt local action that goes beyond state law in prohibiting the sale of flavored tobacco products.⁹ This leaves open the opportunity for local jurisdictions to close the exemptions created in state law. Also, the state law will not override laws passed by California jurisdictions that have already enacted comprehensive flavor bans with no retailer or product exemptions, such as Sacramento, San Francisco, L.A. County, Berkeley, Fremont, Oxnard, and Alameda.

If your jurisdiction is interested in modifying its existing flavor policy or pursuing a new one in light of this state law, don't hesitate to contact us.

Proposed Referendum Process

Under California's Constitution, California voters can propose referendums to approve or reject statutes enacted by the legislature.¹⁰ As of this writing, the proposed referendum on SB-793 has been approved for petition circulation. For the referendum to qualify for the ballot, the proponents must collect 623,212 signatures of registered voters. The proponents have 90 days from the bill's enactment date to gather these signatures.¹¹ For more detail on the referendum process, see our blog post.

Referendum Timeline



Aug. 28, 2020 Law enacted and chaptered	Aug. 31, 2020 Referendum submitted	Sept. 10, 2020 Cleared for circulation	Nov. 30, 2020 Circulation deadline	Nov. 2022 Vote if referendum qualifies	Dec. 2022¹² SB793 in effect if approved by voters
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The proponents of the referendum are required to file a list of their top funders for disclosure either on the petition or in a separate document presented to signers.¹³ For this referendum, the disclosed top funders are tobacco companies R.J. Reynolds and Philip Morris.

Other State Comparison

Compared to Massachusetts' flavor ban law, the California law exemptions go further by allowing direct sale to consumers, while Massachusetts requires onsite consumption. However, the Massachusetts law exempts the sale of any flavored tobacco product for onsite consumption — not just hookah or cigars — so long as the sale is at a smoking bar that limits food and beverage consumption and meets other requirements.¹⁴

California is also now the fifth state to ban menthol flavored e-cigarettes, joining Massachusetts, Rhode Island, New Jersey, and New York.

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Endnotes

- 1 Cal. Const. art. II sec. 9(c).
- 2 Cal. Const. art. IV sec. 9(c)(2).
- 3 SB-793 § (1)(b)(1) (2020).
- 4 SB-793 § (1)(a)(16) (2020).
- 5 SB-793 §§ (1)(a)(1) & (a)(4) (2020).
- 6 SB-793 § (1)(f) (2020).
- 7 SB-793 §§ (1)(a)(3), (a)(5), (a)(6), (a)(8), (a)(10), (a)(13), (c), & (e) (2020).
- 8 SB-793 § (1)(b)(1) (2020).
- 9 SB-793 § (1)(g) (2020).
- 10 Cal. Const. art. II sec. 9(a).
- 11 Cal. Const. art. II sec. 9(b).
- 12 Cal. Const. art. II sec. 10(a).
- 13 Cal. Elec. Code § 107 (2020).
- 14 Mass. Gen. Laws c.270 §§ 22(a) & 28(b) (2020).