



## Regulatory Options for Hookahs and Water Pipes

### Background

Hookahs, also known as water pipes, are used for smoking flavored tobacco or other substances.<sup>1</sup> Hookah bars or “lounges” have grown in popularity in the United States, particularly in cities with large Middle-Eastern communities and in areas with many young adults, such as near college campuses. Hundreds of hookah bars now operate throughout the U.S., with new establishments opening every month. This fact sheet provides an overview of health risks associated with hookah use, gaps in their regulation, and policy options for state and local governments to regulate hookah smoking and the sale and marketing of hookah tobacco.

### Product Description

Hookah pipes generally consist of a head, body, water bowl, and hose (see photo). The tobacco used in hookahs is typically shredded tobacco leaf flavored with molasses, honey, or dried fruit. This sweetened tobacco product is generally called shisha in the United States.



### Health Risks

Several health risks are associated with hookah smoking.<sup>2</sup> Hookah smoke contains significant amounts of nicotine, tar, heavy metals, and carcinogens, and may also contain charcoal or wood cinder byproduct carcinogens and carbon monoxide.<sup>3</sup> Many of these substances are known to cause lung, bladder, and oral cancers, as well as clogged arteries and heart diseases.<sup>4</sup> An unfortunate myth persists that hookah use is less damaging to health than cigarette smoking because the water filtration system and extended hose serve as filters for harmful agents.<sup>5</sup> In fact, the water filtration system only cools the smoke, allowing the user to inhale greater amounts of smoke over a longer period of time. A typical hookah session may last for an hour or more, a period of sustained inhalation that increases exposure to carcinogens.<sup>6</sup> Also, because hookah smoking is typically practiced in groups, the same mouthpiece is passed from person to person, raising the risk of the transmission of infectious diseases such as herpes, hepatitis, and tuberculosis.<sup>7</sup>

## Regulatory Gaps & Options

### Flavoring

- Regulatory Gap:** Under the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act),<sup>8</sup> the federal law giving the Food and Drug Administration (FDA) the authority to regulate tobacco products, tobacco companies are prohibited from producing cigarettes containing any characterizing flavor other than tobacco or menthol.<sup>9</sup> This prohibition is limited to flavored cigarettes, however. The tobacco smoked in hookah pipes regularly comes in flavors such as fruit, mint, and vanilla.<sup>10</sup> As a result, hookah smoking has grown in popularity, particularly among the young, who often find the smell, taste, and smoothness of the sweetened tobacco in hookahs more appealing than that in cigarettes.<sup>11</sup>
- Regulatory Options:** Although the Tobacco Control Act prohibits state and local governments from regulating tobacco product standards, states and localities can regulate the sale and distribution of tobacco products.<sup>12</sup>

In 2009, New York City enacted an ordinance prohibiting the sale of flavored non-cigarette tobacco products with a characterizing flavor other than menthol, mint, or wintergreen, except in certain “tobacco bars.”<sup>13</sup> Smokeless tobacco companies sued the city, arguing that the ordinance imposed manufacturing standards on their products in conflict with federal law. In 2010, the federal district court for the Southern District of New York ruled in favor of the city, denying the tobacco companies’ request to delay enforcement of the law.<sup>14</sup> The court stated that the Tobacco Control Act gives the federal government exclusive authority over tobacco product manufacturing standards, but preserves state and local authority to regulate the sale and distribution of tobacco products. The court then found that the New York City ordinance was a sales restriction, not a product standard. In 2011, the court affirmed the reasoning of its previous decision and dismissed the complaint.<sup>15</sup>

In early 2012, Providence, Rhode Island enacted a similar ordinance prohibiting the sale of flavored tobacco products, except in “smoking bars.”<sup>16</sup> Several tobacco industry stakeholders sued the city, arguing that the ordinance was preempted by the Tobacco Control Act because it attempted to establish a product standard, and also violated the First Amendment because it limited their ability to describe their products. Like the New York court, the federal district court in Rhode Island concluded that the ordinance was a sales restriction, not a product standard, and thus was not preempted under the Tobacco Control Act.<sup>17</sup> The court also concluded that Providence’s ordinance did not limit the plaintiffs’ First Amendment rights, finding that it was simply an economic regulation on the sale of a particular product.<sup>18</sup>

Although both of these decisions are on appeal and, even if upheld, would not be precedential in all jurisdictions, New York City’s and Providence’s initial successes may

help support similar state or local laws to prohibit or significantly restrict the sale of flavored tobacco products, including hookah tobacco.

### Free Samples

- **Regulatory Gap:** Under the Tobacco Control Act, tobacco manufacturers are restricted from distributing free samples of “cigarettes, smokeless tobacco or other tobacco products.”<sup>19</sup> Some sections of the Tobacco Control Act, however, suggest that the law applies only to “cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco,”<sup>20</sup> which would mean the restriction on free samples does not apply to products smoked in hookah pipes.<sup>21</sup> At present, it appears that the FDA has taken the position that the law’s sampling restrictions apply only to cigarettes and smokeless tobacco products.<sup>22</sup>
- **Regulatory Options:** State and local governments could prohibit the distribution of all free samples of all tobacco products, including hookah tobacco.<sup>23</sup>

### Youth Access

- **Regulatory Gap:** Under federal law, retailers cannot “sell cigarettes or smokeless tobacco to any person younger than eighteen years of age.”<sup>24</sup> Since products smoked in hookah pipes are neither cigarettes nor smokeless tobacco, they are not covered under this law. In fact, some materials smoked in hookahs are not even made from tobacco.<sup>25</sup>
- **Regulatory Options:** State and local governments could consider passing stronger, more comprehensive youth access laws to include hookah tobacco and other non-tobacco products smoked in hookahs. States could also raise the minimum age to purchase tobacco products, as several states have done for cigarettes.<sup>26</sup>

### Use Restrictions

- **Regulatory Gap:** Although hookah smoking is just as harmful as smoking cigarettes or cigars, the use of hookahs may not be adequately covered under smoke-free laws. For example, some smoke-free laws define smoking in terms of “tobacco products” only. Under such laws, it would be permissible to smoke non-tobacco products in hookahs in public.<sup>27</sup> Also many smoke-free laws prohibit only the direct burning of a tobacco or plant product.<sup>28</sup> Since hookahs indirectly heat the tobacco over a flame, smoking them may not be prohibited under these laws. Finally, many smoke-free laws exempt establishments that primarily sell tobacco and related products. Some hookah bars claim that they are tobacco products shops and qualify for this exemption.<sup>29</sup>
- **Regulatory Options:** To address these loopholes, state and local governments could consider adopting smoke-free laws that broadly define “smoking” as the direct burning or indirect heating of any tobacco or plant product intended for inhalation, so they encompass hookahs.<sup>30</sup> Governments might also want to draft laws that specifically define hookahs and explicitly prohibit their use in public places. In addition, because hookah establishments can sometimes be considered tobacco product shops, smoke-free

laws should not include these exemptions. At a minimum, smoke-free laws should stipulate that establishments that serve food or beverages for on-premises consumption, as many hookah lounges do, are not eligible for exemption as tobacco product shops.

### **Point-of-Sale Warnings, Marketing Restrictions, & Broad Sales Prohibitions**

- **Regulatory Gap:** The Federal Cigarette Labeling and Advertising Act<sup>31</sup> limits the authority of state and local governments to regulate the advertising and promotion of cigarettes; however, no federal statute limits the authority of local or state governments to regulate the advertising and promotion of non-cigarette tobacco products, including hookah tobacco. In addition, as discussed above, the Tobacco Control Act expressly preserves state and local government authority to regulate the sale of tobacco products. Therefore, state and local governments are able to warn consumers of the dangers of using hookahs, regulate the advertising or promotion of hookah tobacco, and regulate the sale of hookah tobacco without risking federal preemption concerns.
- **Regulatory Options:** To determine the most effective options for regulating the sale and marketing of hookah tobacco or for warning consumers about the use of hookahs, state and local governments need to analyze their jurisdiction-specific needs, priorities, and goals. Possible policy options include posting health warnings at the point-of-sale,<sup>32</sup> imposing marketing restrictions, and prohibiting the sale of all hookah tobacco.<sup>33</sup> Although federal statutes should not pose a barrier for state and local policies restricting the sale and marketing of hookah tobacco, such laws may be challenged on the basis that they violate state or federal constitutional provisions related to free speech or interstate commerce.<sup>34</sup> Although it is important to work with an attorney when pursuing any policy options, the legal issues surrounding the First Amendment are complicated, and jurisdictions must consult with legal counsel before pursuing these types of policies.

### **Contact Us**

Please feel free to contact the Tobacco Control Legal Consortium at (651) 290-7506 or [publichealthlaw@wmitchell.edu](mailto:publichealthlaw@wmitchell.edu) with any questions about the information included in this fact sheet or to discuss local concerns you may have about implementing these policy options.

*The Tobacco Control Legal Consortium provides information and technical assistance on issues related to tobacco and public health. The Consortium does not provide legal representation or advice. This document should not be considered legal advice or a substitute for obtaining legal advice from an attorney who can represent you. We recommend that you consult with local legal counsel before attempting to implement any of these measures.*

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## Notes

<sup>1</sup> In this fact sheet, “hookah” is used as a general term to describe all types of water pipes. A wide range of water pipe products are available, each with its own health risks. See Michael Freiberg, *Options for State and Local Governments to Regulate Non-Cigarette Tobacco Products*, 21 ANNALS OF HEALTH LAW 407, 408 (2012), available at <http://publichealthlawcenter.org/sites/default/files/resources/phlc-lreview-freiberg-regulating-otp-2012.pdf>.

<sup>2</sup> World Health Org., *WHO Study Group on Tobacco Product Regulation, Advisory Note: Waterpipe Tobacco Smoking: Health Effects, Research Needs and Recommended Actions by Regulators* 3 (2005), available at [http://www.who.int/tobacco/global\\_interaction/tobreg/Waterpipe%20recommendation\\_Final.pdf](http://www.who.int/tobacco/global_interaction/tobreg/Waterpipe%20recommendation_Final.pdf).

<sup>3</sup> Elie Akl et al, *The Effects of Waterpipe Tobacco Smoking on Health Outcomes: A Systematic Review*, 39 INT’L J. OF EPIDEMIOLOGY 834 (2010).

<sup>4</sup> World Health Org., *supra* note 2, at 3.

<sup>5</sup> *Id.* at 3-5.

<sup>6</sup> *Id.*

<sup>7</sup> Am. Lung Ass’n, *An Emerging Deadly Trend: Waterpipe Tobacco Use* 2 (2007), available at [http://www.lungusa2.org/embargo/slati/Trendalert\\_Waterpipes.pdf](http://www.lungusa2.org/embargo/slati/Trendalert_Waterpipes.pdf).

<sup>8</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in relevant part at 21 U.S.C. §§ 301, 321, 387), available at [www.govtrack.us/congress/bills/111/hr1256/text](http://www.govtrack.us/congress/bills/111/hr1256/text).

<sup>9</sup> See U.S. Food & Drug Admin., *Flavored Tobacco*, <http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/default.htm> (last visited Feb. 20, 2013) (containing links to resources related to 2009 law prohibiting the manufacture and sale of cigarettes containing certain characterizing flavors).

<sup>10</sup> See, e.g., Melissa D. Blank et al., *Acute Effects of Waterpipe Tobacco Smoking: A Double-Blind, Placebo-Control Study*, 116 DRUG & ALCOHOL DEPENDENCE 102, 103 (2010).

<sup>11</sup> See Am. Lung Ass’n, *supra* note 7, at 3.

<sup>12</sup> See Tobacco Control Legal Consortium, *Federal Regulation of Tobacco: Impact on State and Local Authority* (2009), available at <http://www.publichealthlawcenter.org/sites/default/files/fda-1.pdf>.

<sup>13</sup> N.Y.C. CODE § 17-713, 715 (prohibiting the sale of smokeless tobacco products that have as a component part tastes or aromas relating to “any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice.”).

<sup>14</sup> *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 703 F. Supp. 2d 329, 344-45 (S.D.N.Y. 2010) (denying plaintiffs’ motion for a preliminary injunction, finding them unlikely to prevail on the merits of their federal preemption claim; concluding that the Tobacco Control Act gives the federal government the exclusive authority to regulate the manufacture of tobacco products, while reserving to the states the power to regulate the sale and distribution of tobacco products).

<sup>15</sup> *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, No. 09 Civ. 10511, 2011 WL 5569431 (S.D.N.Y. Nov. 15, 2011) (affirming reasoning of preliminary injunction order that the ordinance is an allowable sales restriction, denying plaintiffs’ motion for summary judgment, granting defendant’s cross-motion for summary judgment, and dismissing the complaint).

<sup>16</sup> PROVIDENCE, R.I. CODE §§ 14-308, 14-309, and 14-310.

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<sup>17</sup> Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, No. 12–96–ML, 2012 WL 6128707 at \*12–13 (D.R.I. Dec. 12, 2012).

<sup>18</sup> *Id.* at \*8.

<sup>19</sup> 21 C.F.R. § 1140.16(d)(1).

<sup>20</sup> 21 U.S.C. § 387a(b).

<sup>21</sup> Freiberg, *supra* note 1, at 425–26. *See also* Public Health Law and Policy & Tobacco Control Legal Consortium, Comments on the FDA’s “Draft Guidance for Industry: Compliance With Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents” (May 20, 2011), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fdacomments-cigarsinsamplingrestrictions-2011.pdf>.

<sup>22</sup> *See, e.g.*, U.S. Food & Drug Admin., Docket No. FDA-2010-D-0277, *Draft Guidance for Industry: Compliance With Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco To Protect Children and Adolescents* 3 (2011), available at <http://www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM248241.pdf>.

<sup>23</sup> *See, e.g.*, Tobacco Control Legal Consortium, *Tobacco Coupon Regulations and Sampling Restrictions – Tips and Tools* (2011), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-tobcouponregsandsampling-2011.pdf>.

<sup>24</sup> 21 C.F.R. § 1140.14(a).

<sup>25</sup> *See, e.g.*, *Tobacco Regulation in the West a Boom for Shisah*, TOBACCO J. INT’L (2011) (“ . . . Soex herbal hookah molasses is 100 percent tobacco- and nicotine –free”).

<sup>26</sup> *See, e.g.*, Tobacco Control Legal Consortium, *Raising the Minimum Legal Sale Age for Tobacco and Related Products* (2012), available at [http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-minimumlegal-saleage-2012\\_0.pdf](http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-minimumlegal-saleage-2012_0.pdf). *See also* ALASKA STAT. ANN. § 11.76.100(a)(2) (minimum age of 19 to purchase tobacco); N.J. STAT. ANN. § 2A:170-51.4 (same); UTAH CODE ANN. § 76-10-104 (same).

<sup>27</sup> Freiberg, *supra* note 1, at 437.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See* Tobacco Control Legal Consortium, *Regulating Hookah and Waterpipe Smoking* (last visited Oct. 2012) (containing select legislature and policies regulating hookah use), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-guide-regulatinghookahs-2010.pdf>.

<sup>31</sup> 15 U.S.C. § 1331 *et seq.*

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<sup>32</sup> See 23-34 94<sup>th</sup> St. Grocery Corp. v. New York City Bd. of Health, 685 F.3d 174, 183-85 (2d Cir. 2012) (affirming a district court decision ruling that New York City may not require cigarette retailers to post graphic health warnings next to cash registers or adjacent to cigarette displays, on the grounds that the Federal Cigarette Labeling and Advertising Act prevents state or local governments from adopting laws that affect the content of tobacco retailers' and manufacturers' promotional efforts). The challenged warning signs depicted the health impacts of smoking and contained the message "quit smoking today." It should be noted that if a jurisdiction adopted graphic point-of-sale warning requirements applying to non-cigarette tobacco products such as hookah tobacco, the FCLAA would not apply. However, the law would almost certainly be challenged on First Amendment grounds.

<sup>33</sup> Freiberg, *supra* note 1, at 438.

<sup>34</sup> For additional information, see the Tobacco Control Legal Consortium's publications on First Amendment and Commerce Clause issues in the regulation of tobacco products, available at <http://publichealthlawcenter.org/topics/special-collections/federal-regulation-tobacco-collection>.