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Pick Your Poison: Responses to the Marketing and Sale of Flavored Tobacco Products

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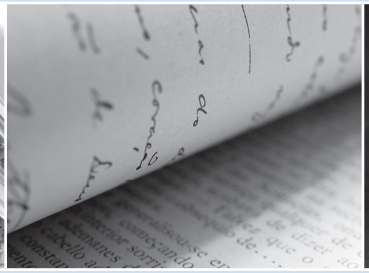

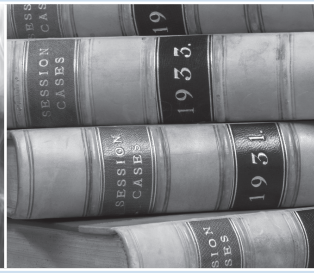

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Pick Your Poison: Responses to the Marketing and Sale of Flavored Tobacco Products

Kathleen Dachille

Introduction

Tobacco manufacturers have targeted youth for decades in the marketing of tobacco products.[1] Their continuation of such practices, despite the prohibition against youth marketing under the 1998 Master Settlement Agreement ("MSA"),[2] does not come as a surprise to many public health and tobacco control advocates. Since the signing of the MSA, state attorneys general have investigated and prosecuted numerous violations.[3] But the brazen approach some manufacturers have taken to market candy and fruit-flavored tobacco products in a manner that targets youth is astounding.

There are legal approaches for establishing oversight and protecting youth from the marketing and sale of these products. The MSA's prohibition against targeting youth in the sale of tobacco products provides states with some authority to act immediately.[4] Another, more comprehensive, approach includes federal or state legislation. The legislative approach may be gaining interest with the introduction of several bills in legislatures around the country. Indeed, the State of Maine passed a law (the "Maine Law") prohibiting the sale of flavored cigarettes that took effect January 1, 2009.[5] The Maine Law prohibits sales of cigarettes and flavored cigars that contain a "constituent that imparts a characterizing flavor," meaning a "distinguishable taste or aroma that is imparted to tobacco or tobacco smoke either prior to or during consumption, other than a taste or aroma from tobacco, menthol, clove coffee, nuts or peppers."[6] Congress is considering a similar prohibition as part of a bill that would reauthorize the United States Food and Drug Administration ("FDA") to regulate tobacco.[7]

This law synopsis explores legal approaches for addressing the marketing and sale of flavored tobacco products to youth. Section I describes the various types of flavored tobacco products and reviews the current evidence that the marketing of these products, as well as the products themselves, target youth. Internal tobacco industry documents provide some answers as to why manufacturers have developed these new products. Section II introduces the first possible legal approach, MSA enforcement. Section III focuses on legislative initiatives, such as the

Key Points

- A recent trend in tobacco is the marketing of flavored cigars, cigarettes, smokeless and other tobacco products. The flavors offered are undoubtedly attractive to youth—cherry, blueberry, watermelon, chocolate mint, and more.
- Research shows that these products entice youth to initiate tobacco use and industry documents show that tobacco companies know that these flavors are favored by children.
- The Master Settlement Agreement (MSA) prohibits tobacco manufacturers from targeting youth. Attorneys general have invoked this provision once in an action against R.J. Reynolds for marketing flavored cigarettes, but no further action has been taken under the MSA for the marketing of flavored cigarettes.
- Congress is considering prohibiting the sale of most flavored tobacco products, as part of a larger legislative initiative to authorize the Food and Drug Administration to regulate tobacco products.
- States have the legal authority to restrict the sale of flavored tobacco products. Maine has passed the only state law imposing restrictions. That law stands as a starting point for other states.
- Public health and tobacco control advocates can contribute to the effort to reduce youth smoking by educating parents and children about the enticing nature of flavored tobacco products and the industry's manipulation in luring our children to start using tobacco.

proposed FDA oversight of tobacco products, and state legislative initiatives, with particular attention paid to the Maine Law. The experiences involved in passing the Maine Law provide an initial model for public health law development in this area. Section III concludes with recommendations for refining the Maine Law. It should be noted that although the design and marketing of menthol tobacco products may also increase youth smoking rates, this synopsis focuses on the less traditional flavored cigarettes, including candy, fruit and alcohol-flavored tobacco products.

Section I – An Introduction to Flavored Tobacco Products and Their Marketing

Flavored Tobacco Products

In recent years, tobacco manufacturers have introduced and marketed fruit, alcohol and even candy-flavored cigarettes, cigars, smokeless tobacco products and less conventional tobacco products. From strawberry to exotic midnight berry, the new flavors are unlike anything marketed in the United States in the past. Some of the new flavors include cherry, blueberry, peach, grape, pineapple, watermelon, toffee, chocolate, chocolate mint, vanilla, rum, pina colada and margarita.

These flavorings form the basis of marketing campaigns. For example, Apple Blend Skoal Chew is said to "combine rich, premium tobacco with the crisp flavor of juicy apples"[8] while the marketing of Kool Smooth Fusions Caribbean Chill Cigarettes promises a "splash of citrus flavor to offer a uniquely refreshing taste."[9] One of Dean's Little Cigars touts "a nice punch of 'wild raspberry' to tantalize the taste buds."[10] The advertisements and packaging employ stylish designs and bright colors that further emphasize the flavor.[11] In fact, nearly every aspect of the marketing for these flavored tobacco products, except the health warnings, is strikingly similar to the marketing used for similarly flavored candies and sweetened beverages.

Tobacco Company Documents and the Target Audience

The marketing of these new flavored tobacco products, with an emphasis on sweet flavors and the use of colorful packaging and advertising, meets the profile of a marketing scheme that any manufacturer would create for youth consumers. Although tobacco manufacturers maintain that youth are not being targeted, industry documents uncovered in litigation demonstrate that manufacturers have considered the use of these flavors as a way to target youth. The following quotes are just some examples of what industry representatives have said in private:[12]

- "Tutti Frutti" flavored cigarettes were described as "for younger people, beginner cigarette smokers, teenagers . . . when you feel like a light smoke, want to be reminded of bubblegum." (Lorillard, 1978- Bates No. 85093450-3480)[13]
- "Two key areas identified for improvement were smoothness and sweetness delivery . . . sweetness can impart a different delivery taste dimension which younger adult smokers may be receptive to, as evidenced by their taste wants in other product areas." (RJ Reynolds, 1985- Bates No. 505520121-0126)[14]
- "Apples connote goodness and freshness and we see many possibilities for our youth-oriented

cigarette with this flavor. . . . It's a well-known fact that teenagers like sweet products. Honey might be considered." (Brown & Williamson, 1972- Bates No. 170042014)[15]

- "The cigarette should incorporate some sort of 'kick' of a similar nature to the Coca-Cola 'kick' giving the cigarette a physiological effect. . . . Two flavors which were discussed as options were Root Beer and Brazilian Fruit juice, both of which tend to appeal to the younger generation… and an alternative possibility is to have various different flavoured-cigarettes." (British American Tobacco, 1977- Bates No. 400649145-9146)[16]

- Smokers described the product (Crème de Menthe) as "being for very young, teenagers, young girls starting to smoke, those under 30 . . . ." (Lorillard, 1978- Bates No. 85093450-3480)[17]

- "With the growing popularity of fruit wines among young adults 18-25 . . . the concept of a fruit wine flavored cigarette" has been proposed to compete with competitive brands popular especially in the 14-24 group." (RJR, 1972- Bates No. 501283430-3431)[18]

Basic Marketing Research and the Target Audience

Basic marketing research likewise suggests that the flavored tobacco products target youth. Because children in the U.S. have extraordinary purchasing power, spending at least $50.7 billion annually,[19] their interests and buying behaviors are the subject of extensive marketing research by food and drink manufacturers. This research shows that flavors are a major driver of sales in the youth market and that youth want strong and intense flavors in the products they consume.[20] While adults enjoy mild and natural flavors, kids prefer high-impact flavors.[21] Kids like products that are nearly twice as sweet as those preferred by adults.[22] Product advertising and packaging is also important in attracting the young consumer. It must be "colorful, fun [and] modern."[23]

Tobacco manufacturers likely are aware of this marketing research. Nevertheless, they rationalize these new products by stating they are targeting only the eighteen- to twenty-four-year-old consumer.[24] This position may help them avoid scrutiny under an MSA enforcement action,[25] which in most states prohibits marketing cigarettes to children younger than eighteen. It does little, however, to ameliorate the concerns of public health advocates who point out that these products make it even easier to become addicted to nicotine by essentially sugar-coating the cigarette smoke.[26] Advocates also point out that children under eighteen may be attracted by the marketing of these products as much, if not more so, than their older peers.

Public Health Research and the Target Audience

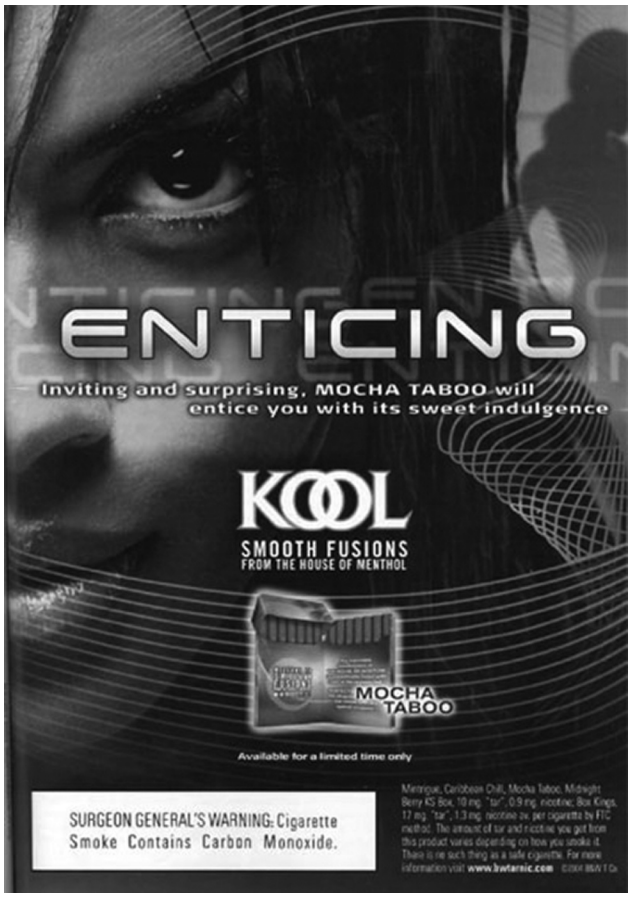
Public health research also supports the conclusion that the marketing of flavored tobacco products targets youth. Soon after the increase in marketing of flavored cigarettes, researchers from the Roswell Park Cancer Institute conducted research to determine the impact of those marketing campaigns on youth and young adult non-smokers.[27] The research shows that the use of flavored cigarettes is most common among seventeen- to nineteen-year-olds, and that seventeen-year-olds are more likely to use flavored cigarettes than twenty- to twenty-six-year-olds.[28] Moreover, a survey of ninth graders (who tend to be about thirteen to fourteen years old) in Western New York revealed that 7.9 percent of respondents had used flavored tobacco in the preceding twelve months and another 6.7 percent had an interest in trying such products in the subsequent twelve months.[29] Even college students demonstrated a higher positive reaction to advertising for flavored cigarettes than for regular brands.[30] The researchers concluded that as to flavored brands, "[R.J.] Reynolds may be targeting young adults, but [the company] appears to be influencing minors as well."[31]

After extensive review of tobacco company documents, another group of researchers concluded that flavored cigarettes instigate youth smoking initiation and "help young occasional smokers to become daily smokers by reducing or masking the natural harshness and taste of tobacco smoke and increasing the acceptability of a toxic product."[32] Even adult smokers and non-smokers understand that flavored cigarettes are designed to attract and addict youth because the marketing entices the youth to try the product and the flavors make it easier for youth to smoke successfully.[33]

That kids like flavored tobacco products is also supported by the target audience itself—the kids. After starting with Cherry Skoal at age 16, Travis

Tippetts turned to full flavor Copenhagen, explaining that Cherry Skoal is "a beginner's product" that "helped me gradually go up the ladder."[34] "'Cherry kind of prepared me to go all the way up, though I wasn't planning on it preparing me,' [said Brian Woodard, fourteen years old, of Alabama;] '[c]herry is like the kindergarten for Copenhagen.'"[35] "'Doing cherry would make me feel like a wimp,' [said] Marty White, a 15-year-old [sic] Copenhagen user in Fort Worth who began his habit at age 11 [sic] with Skoal Bandits[.] . . . Cherry, he add[ed], 'is for little kids.'"[36]

The marketing of flavored tobacco products adversely affects the public health of young adults and children. At a recent congressional hearing on tobacco industry marketing before the United States Senate Health, Education, Labor and Pensions Committee, a public health expert explained that "[c]andy-like flavorants mask the natural toxicity of smoke and could enhance initiation and addiction."[37] He went on to say that the "use of flavorants to appeal to young non-smokers is consistent with other research. . . ."[38] The remainder of this synopsis discusses exactly what response is needed and by whom.



Section II – Flavored Tobacco Products as a Violation of the MSA

The MSA provides states with legal authority, albeit limited, to oversee the marketing of flavored tobacco products immediately.[39] In 2006, the MSA provided authority for several attorneys general to force R.J. Reynolds to discontinue one of its flavored cigarette brands. The investigation uncovered evidence that the company was marketing the flavored cigarettes to youth in violation of the MSA. Since the action was concluded, however, other flavored cigarette brands have been introduced into the marketplace—brands with similar flavorings, packaging and marketing. Renewed enforcement in this area could address at least some of the concerns about the marketing of flavored tobacco.

The MSA is a 1998 litigation settlement between the state attorneys general and the major domestic cigarette manufacturers. It resolved lawsuits brought by nearly every state to recover costs for public medical expenditures that were attributable to tobacco industry malfeasance. By signing the MSA, the states released their claims against these companies for alleged violations of state antitrust and consumer protection laws, and the cigarette manufacturers agreed to pay partial restitution and to abide by a set of marketing restrictions. Shortly thereafter, the states entered into a nearly identical agreement with manufacturers of smokeless tobacco products.[40] The vast majority of domestic tobacco manufacturers have since become signatories to the MSA.

Although limited in scope, the MSA contains some oversight for protecting youth from being targeted in the marketing and distribution of flavored tobacco products. Section III (a) of the MSA forbids manufacturers from targeting youth in their marketing. "Youth" is defined as anyone younger than a state's minimum age sales law; typically it is eighteen years of age. Section III (a) provides:

> (a) Prohibition on Youth Targeting. No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of

> which is to initiate, maintain or increase the incidence of Youth smoking within any Settling State.[41]

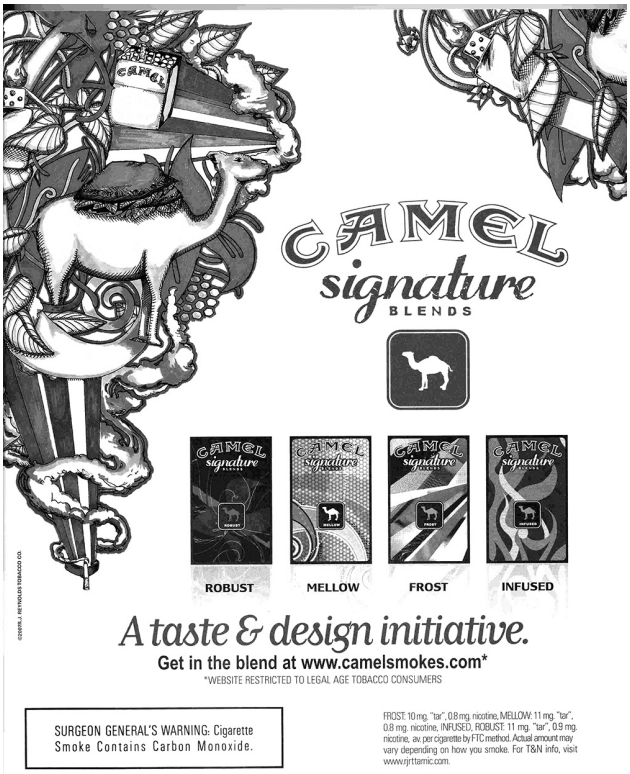
This section formed the basis of the 2006 flavored cigarette enforcement effort against R.J. Reynolds. In that action, attorneys general representing forty states investigated the company's marketing practices with respect to certain Camel, Kool and Salem brand cigarettes.[42] These products were being marketed as containing a variety of flavors, including Mandalay Lime, Midnight Berry and Cinnzabar.[43] According to the Attorney General of Maryland, the investigation had revealed evidence that R.J. Reynolds was marketing flavored cigarettes to minors, including the "use of candy, fruit and alcoholic flavors with high youth appeal; [and the] use of advertising and packaging with graphics, typography, colors, styles and themes that were enticing to youth. . . ."[44] Based in part on that evidence, the attorneys general secured an agreement from R.J. Reynolds that the company would limit its marketing of certain designated products at issue in the investigation, as well as similarly flavored cigarettes.[45] The agreement states:

> The name of a cigarette brand or style cigarette may not include a candy, fruit or alcoholic beverage term nor may Reynolds use descriptive words such as tart, tangy and sweet that evoke images of fruit, candy or alcoholic beverages.
>
> Reynolds' marketing materials, including print ads, packaging and point-of-sale displays, may not contain the name of a fruit, candy or alcoholic beverage; the banned descriptive terms; or images of fruit, candy or alcoholic beverages.
>
> Except in adult-only facilities, Reynolds may not use scented promotional materials.[46]

As a result of the settlement, R.J. Reynolds discontinued the marketing of several lines of flavored cigarette products, including the somewhat successful Camel Exotic Blends that were available in shiny, bright tins.

Although successful in some respects, the settlement's actual impact appears minimal for several reasons. First, the agreement only includes R.J. Reynolds. The attorneys general involved in the enforcement action agreed to present, within six months of the agreement, "a similar agreement to the other major tobacco companies,"[47] with the hope that the other manufacturers would also agree to the marketing restrictions. However, no other manufacturers have signed on. Accordingly, R.J. Reynolds is obligated to abide by the agreement, but other manufacturers are free to continue to market flavored tobacco products.

Another weakness of the agreement became clear several months after the settlement when R.J. Reynolds launched a new line of cigarettes called Camel Signature Blends. This line has included: *Robust*, "similar to notes found on cocoa and espresso"; *Mellow*, "accented with toasted honey"; *Frost*, "Fine Asian Mint . . . while the creamy finish delivers a smooth, buttery aftertaste"; and *Infused*, with "notes of Citrus" and a "sweet apple-like flavor."[48] A prominent tobacco control organization, Campaign for Tobacco-Free Kids, responded harshly to these new products, alleging that Reynolds is "trying to circumvent the [agreement] by introducing new flavored cigarettes in yet another marketing scheme that is likely to appeal to children."[49] Reynolds responded quickly that "Camel Signature is in full compliance with th[e] agreement,"[50] presumably because the product descriptions containing the flavored terms appeared



only on the company's age-restricted website. The attorneys general took no action to prevent or stop the marketing of Camel Signature Blends.

Today, R.J. Reynolds and many other tobacco manufacturers market numerous varieties of candy, fruit and alcohol-flavored tobacco products. Indeed, in congressional testimony before the United States House of Representatives Subcommittee on Health of the Committee on Labor and Commerce, a public health expert noted that "[s]ince the MSA, the tobacco companies have regularly introduced new candy and fruit-flavored tobacco products. . . ."[51] The expert concluded that these products "clearly are intended as starter products for new tobacco users, most of whom are children."[52]

In proving a violation of the MSA, it is important to note that proof of intent to target youth may not be needed. Instead, a violation can be based on the proof that a tobacco manufacturer "knew to a substantial certainty" that the cigarette marketing in question reaches youth to the same extent it reaches young adults who are eighteen years of age and older, according to the case *Lockyer v. R.J. Reynolds Co.*[53] Thus, a manufacturer cannot defend itself by simply ignoring the evidence. That a manufacturer excluded youth from its marketing focus groups, for example, does not necessarily show that the manufacturer meant to target only adults. The manufacturer must consider, according to the court in *Lockyer*, other reasonably accessible information. This synopsis provides just a small glimpse at some of the relevant evidence, which suggests that vast amounts, if not virtually all, of the marketing of flavored tobacco products is reaching youth and that youth are responding by buying these products.

Ironically, the proliferation of these new products may be in direct response to the MSA, given that such proliferation "comes at a time when advertising and marketing restrictions [under the MSA] have made it more difficult to target young smokers." Renewed enforcement under the MSA could address some of the marketing of the highly flavored tobacco products. The 2006 agreement with R.J. Reynolds provides a starting point to address one tobacco manufacturer's more recent marketing campaigns and to press other manufacturers similarly to end marketing flavored tobacco products that are known to target youth.

Section III – Legislative Responses to Flavored Tobacco Products

Perhaps the most effective way to address the public health concerns raised by the marketing and sale of flavored tobacco products is comprehensive legislation. Whether at the federal, state or local level, legislation can affect a complete or partial ban on the sale of highly flavored tobacco products. Legislation to ban such products has been introduced in several states and is pending in Congress as part of an FDA reauthorization bill. This section reviews the relevant section of the FDA bill and the recently enacted ban in Maine.

Federal

Congress is poised to pass FDA reauthorization legislation.[54] On July 30, 2008, the House of Representatives voted 326 to 102 in support of the legislation.[55] An identical version of the bill in the Senate already has fifty-nine sponsors.[56] The legislation articulates in great detail the manner in which the FDA would exercise its new authority.[57] The legislation provides both detailed instructions and plenary authority to protect public health from tobacco, with few limitations.[58]

With respect to flavored tobacco, the current bill requires a ban on the sale of certain products. Section 907(a)(1) of H.R. 1108 and S. 625 provides:

> 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.[59]

In addition to this specific prohibition, the bill accords the FDA power to regulate cigarettes with respect to "menthol or any artificial or natural flavor, herb, or spice not specified."[60] This authority is limited to cigarettes; no such prohibition is mentioned with

respect to smokeless tobacco. However, the FDA is granted broad power to regulate smokeless tobacco to protect the public health, particularly if a product increases the likelihood that those who do not use smokeless tobacco will initiate use.[61]

If the pending bills were to pass the Senate and become law, flavored cigarettes would be banned from sale across the United States.[62] Although the 110th congressional session ended without passing the FDA legislation, the broad level of support among lawmakers suggests that it is likely to pass next session.

States

Although future Congressional action may result in a ban on the sale of flavored tobacco products, states need not wait out the federal legislative process and the implementation and enforcement phases to achieve a ban. States have the power to enact a ban on the marketing and sale of flavored tobacco products and such action typically can go into effect quickly.

During the past few years, many state legislatures have considered legislation banning or restricting the sale of flavored tobacco products. The proposals share the same goal of reducing youth and young adult initiation of tobacco use, yet use different approaches to accomplish the goal. Some proposals include all tobacco products, while others only apply to certain types of tobacco products such as cigarettes, cigars, or bidis. Legislatures have considered bills that would ban all characterizing flavors except tobacco and menthol; other bills ban only specified flavors or types of flavors. While some of the bills apply only to tobacco products that actually contain a characterizing flavor, a few bills also apply to tobacco products marketed as containing a flavor, regardless of whether the product actually imparts such a flavor. Until recently, these bills all shared the same fate – failure in the legislature. Lessons from these efforts, however, provide insight for the development of public health law and education of key decision makers.

In June 2007, Maine became the first state to ban the sale of certain flavored tobacco products.[63] Effective July 1, 2009, the Maine law prohibits the in-state sale of flavored cigarettes and flavored cigars. The law does not apply to smokeless tobacco products. Flavored cigarettes and flavored cigars are defined as containing a "constituent that imparts a characterizing flavor," meaning a "distinguishable taste or aroma that is imparted to tobacco or tobacco smoke either prior to or during consumption, other than a taste or aroma from tobacco, menthol, clove, coffee, nuts or peppers."[64]

A comparison of the original version of the bill[65] to its enacted law reveals that some compromises were made during the legislative session. The date on which the law beame effective was changed from January 1, 2008 to July 1, 2009,[66] and retailers were given a six-month period after the effective date to sell their remaining inventory of flavored cigarettes.[67] Another change was the exemption for flavored cigarettes or cigars marketed prior to January 1, 1985,[68] although this exception does not appear so broad as to allow the sale of the relatively new candy-like flavored cigarettes. For flavored cigarettes or cigars marketed after January 1, 1985, the Maine Attorney General may grant an exemption that would allow the product to be sold if he determines that the "characterizing flavor and the associated packaging, promotion

and brand style do not directly or indirectly target youth or encourage the initiation of smoking."[69] The law authorizes, but does not require, the Attorney General to maintain a website listing the exempted flavored cigarettes and cigars.[70] Fines of up to $1,000 for a first violation, and up to $5,000 for subsequent violations, may be imposed.[71]

An important change made during the legislative process helps avoid possible federal preemption.[72] The original bill prohibited the "use or distribut[ion of] scented promotional materials for cigarettes or cigars."[73] By focusing on the promotional materials, the initial version of the Maine Law might have been preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA), which states that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising and promotion of any cigarettes the packages of which are labeled in conformity with this chapter."[74] This language has been interpreted to preclude state and local governments from regulating cigarette promotion in a broad sense. In *Lorillard Tobacco v. Reilly*, the United States Supreme Court held that the FCLAA preempted a Massachusetts regulation of outdoor and point-of-sale cigarette advertising.[75] The Court rejected the argument that as content-neutral, location-based restrictions, the provisions were not subject to the FCLAA preemption clause. Rather, the Court interpreted the FCLAA preemption provision broadly to strike down the outdoor and point-of-sale advertising restrictions, and in doing so, provided courts with a strong basis for expansive construction and application of FCLAA.[76] Some courts have heeded the Supreme Court's decision and applied the FCLAA preemption clause broadly to strike down state and local government laws relating to cigarettes. For example, in *Jones v. Vilsack*, the court held that the FCLAA preempted an Iowa law prohibiting the giving away of cigarettes, viewing the law not as a restriction on the distribution of cigarettes but on the promotion of cigarettes.[77] Although the California state supreme court held otherwise,[78] federal courts have agreed with the *Vilsack* court's broad application of FCLAA preemption.[79] Indeed, other restrictions seeking to protect children from exposure to tobacco advertising have been struck down as preempted by the FCLAA.[80]

Given this precedent, the proscription against scented promotional materials in the original Maine bill would not have survived an FCLAA preemption challenge. Therefore, it appears that Maine wisely removed the provision while still passing a substantial piece of legislation that will severely curtail the sale of flavored cigarettes and cigars in that state.

The Maine Law is an important development in public heath law. Its passage will help protect youth from tobacco addiction. In addition, its implementation will provide a model for other states to evaluate and reproduce.[81] It also serves as a case study in the advocacy that surrounds such legislative changes. The bill's sponsor, Senator Peter Mills, withstood harsh criticism from opponents and was prepared to guide the bill successfully through a series of amendments through final passage.[82] The American Lung Association of Maine and the Maine Coalition on Smoking or Health advocated for the bill and supplied legislators and community members with clarifying information about it.[83]

As effective as the Maine Law appears, some additional provisions may be needed to establish comprehensive regulation in the area of flavored tobacco products. The following issues should be considered:

Should the bill cover all tobacco products or just certain types?

The Maine Law covers only flavored cigarettes and cigars, not smokeless tobacco or the flavored tobacco used in hookahs, which is called "shisha." The exclusion of these products appears to ignore a large body of scientific research that the marketing of these products is targeting children. An internal document for one of the largest smokeless spit tobacco manufacturers outlined a strategy for hooking new users with more flavored products.[84] The document went on to conclude that once hooked, these users would progress to brands with fewer flavors and more concentrated "tobacco taste" than the entry brand.[85] With regard to shisha, although it has been smoked in hookahs for hundreds of years, surveillance of youth smoking trends has revealed an increase in shisha use in hookahs.[86] Shisha comes in a variety of flavors, including fruit flavors. The smoke from burning shisha contains nicotine and is "at least as toxic as cigarette smoke."[87]

How should the banned flavors be described or defined?

Legislators have struggled to define the flavors to be included in the ban. The 2007 proposal in West Virginia would have banned the sale of cigarettes containing a "candy, fruit or some other flavor," excluding menthol.[88] A Kansas bill called for a ban on cigarettes with a characterizing flavor including, but not limited to, "any fruit, chocolate, vanilla, honey, candy, mint, cocoa, dessert, alcoholic beverage, herb or spice," excluding menthol.[89] The Maine Law applies to characterizing flavors, defined as a "distinguishable taste or aroma" not of tobacco, menthol, clove, coffee, nuts, or peppers.[90] To improve chances of success, advocates and sponsors should avoid overly restrictive definitions of flavors, such as the Kansas list, and choose expansive language broad enough to cover flavors the tobacco companies have not yet created. Given its long history associated with many popular cigarette brands, an exception for menthol cigarettes is an imperative if a bill is to have any chance of success. Language from Hawaii's recent proposal serves as a fine model: "'Characterizing flavor' means a distinguishable taste or aroma, other than tobacco, menthol, or clove, imparted either prior to or during consumption."[91]

Should the bill ban only those flavored tobacco products that actually impart the characterizing flavor or also those products that are marketed as containing such flavors—or both?

A ban on the sale of tobacco products that actually impart a characterizing flavor is imperative. A ban on the sale of tobacco products that are marketed as imparting a characterizing flavor may be included but is not likely necessary.[92] The logic behind adding the marketing language is that a state need not prove that the tobacco product actually imparts the flavor, which may be technically difficult—just that the product was marketed as imparting a flavor. Another concern may be that a tobacco company restricted from selling a product that actually imparts a characterizing flavor will simply eliminate the actual flavor but continue to market the product as flavored, hence enticing youth and young adult smokers. Not only is this scenario unlikely, but also existing consumer protection statutes that prohibit false or deceptive advertising could be used against any manufacturer ill-advised enough to do so. Rather than adding to the complexity of the bill and instigating a potential FCLAA preemption argument, legislators should seek to ban only those cigarettes that actually impart the characterizing flavor.[93]

While the process of securing an effective ban on the sale of flavored tobacco products may be time-consuming and difficult, the development of legal oversight would help protect youth and keep youth smoking rates down.[94] Because states have extensive authority to pass laws for the protection of public health and significant experience in the implementation of tobacco control laws, state bans offer a very effective solution to the public health problem presented by flavored tobacco products. In addition, the relevant sections of the proposed FDA legislation, likewise, would establish oversight, albeit at the federal level.

Section IV – Public Health Messaging

Public health and tobacco control advocates have brought public attention to the problem of increased flavored tobacco products marketing. Public education campaigns have helped keep the issue present in the minds of stakeholders. Although not legal in nature, such public education campaigns play an important role in keeping youth smoking rates from rising.

A powerful public statement against flavored cigarettes was recently issued by the Governor of Hawaii, Linda Lingle. In a letter made public, the Governor excoriates R.J. Reynolds for marketing the Kauai Kolada Camel and demands that the marketing and sale of the product stop immediately.[95] Focusing on the obvious target of the marketing, Governor Lingle adds that "[e]nticing this vulnerable population with flavored cigarettes only serves to get them addicted at a very young age."[96] Lingle's letter came on the heels of a similar demand by the then-Commissioner of the Massachusetts Department of Public Health. Dr. Christy Ferguson sent letters to cigarette manufacturers that market flavored tobacco products asking that they stop the promotion and sale of those products, and issued a press release stating, "[i]t is outrageous that tobacco companies are marketing cigarettes which will have a tremendous appeal to teenagers . . . [and] [t]his is about preventing our young people from trying and getting hooked on smoking."[97] The press release was supported by an informational document identifying some of the flavored cigarette brands, quoting from industry documents that show the manufacturer's desire to use

flavors to target youth and explaining how flavor may be added to a cigarette.[98]

One of the most powerful counter-messages on flavored tobacco is a subtle and satirical television commercial called "Shards 'O Glass" that was created by the American Legacy Foundation's Truth Campaign.[99] The commercial aired during the 2005 Super Bowl and mocked tobacco companies by suggesting that they are akin to companies that would market popsicles containing glass while denying that they were marketing a dangerous product to kids.

These and other public health education campaigns provide a balancing perspective on the tobacco companies' richly funded marketing schemes. "Coordinated public education and community action are needed to inform youth about tobacco industry deception and confront the tobacco industry, especially in the absence of governmental regulation."[100]

Conclusion

Whether the current flavored tobacco dilemma is framed as a new front on which to fight the tobacco industry or as the same battle with different brands and advertisements, the issue is ripe for public health law development. Responsive legal action can start immediately under the MSA. For comprehensive oversight, states have the legal authority to pass legislation and limit the sale of flavored tobacco products. Should the pending legislation in Congress pass and permit the FDA to ban the sale and marketing of flavored tobacco products, states will need to work closely with the FDA to ensure implementation is coordinated with state tobacco control programs.

About the Author

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Appendix

Resources

- *From Joe Camel to Kauai Kolada—The Marketing of Candy-Flavored Cigarettes*, Tobacco Control Report-Tobacco Policy Trend Alert (American Lung Association, Tobacco Policy Project) May 2006.
- *Alcohol-Flavored Cigarettes: Continuing the Flavored Cigarette Trend*, Tobacco Control Report-Tobacco Policy Trend Alert (American Lung Association, Tobacco Policy Project) May 2006, *available at* http://slati.lungusa.org/alerts/Alcohol-Flavored-Addendum.pdf.
- *Big Tobacco Still Targeting Kids*, Special Report (Campaign for Tobacco-Free Kids) Sept. 19, 2005, *available at* http://tobaccofreekids.org/reports/targeting/.

Endnotes

1 *See* United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006)

2 Master Settlement Agreement, Section III(A), *available at* http://www.wmitchell.edu/tobaccolaw/resources/MSA.pdf. That section provides, as follows:

> No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within any Settling State.

3 Since the establishment of the Master Settlement Agreement and the Smokeless Tobacco Master Settlement Agreement in late 1998, state attorneys general have investigated many alleged and actual violations, specifically as to provisions designed to reduce youth smoking. Often the investigations result in settlements with the violators. *See, e.g.,* People v. U.S. Smokeless Tobacco Co., No. JCCP 4041 (San Diego Sup. Ct. Aug. 17, 2007) (settlement regarding marketing at National Hot Rod Association events with youth participants); People v. R. J. Reynolds Tobacco Co., No. KC-036109 (Los Angeles Sup. Ct. March 22, 2006) (settlement regarding distribution of free cigarettes); Maryland v. Phillip Morris, Inc., No.: 96122017/CL211487 (Baltimore Cir. Ct. Oct. 6, 2004) (settlement regarding campaign targeting African American youth); People v. R. J. Reynolds Tobacco Co., No. GIC 764118 (San Diego Sup. Ct. Dec. 22, 2004) (settlement after allegations that the company targeted youth in magazine ads); *see also* Paul J. Chung, et al., *Youth Targeting by Tobacco Manufacturers Since the Master Settlement Agreement*, 21 Health Affairs 254 (2002).

4 *See infra* Section II.

5 *See infra* Section III.

6 Me. Rev. Stat. Ann. tit. 22 § 1560-D(1)(A), (D) and (E) (West 2008).

7 *See infra* Section III.

8 Press Release, U.S. Smokeless Tobacco Co., Skoal Pouches Line Expands with Apple Blend Pouches (May 23, 2005), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=75256&p=irol-newsArticle_Print&ID=719395&highlight=.

9 *Candy-Like Flavored Cigarettes and Their Impact on the Tobacco Youth Market*, Massachusetts Department of Public Health (May 2004) (on file with author).

10 Tobacco Station Advertisement, http://www.tobaccostation.com/Merchant2/cat/lilcigars.html#WB (last visited Dec. 15, 2008).

11 Pictures of many of these products and their advertisements are available on the "Trinkets and Trash" website. *See* http://www.trinketsandtrash.org (last visited Dec. 15, 2008).

12 *See* Carrie M. Carpenter, et al., *New Cigarette Brands with Flavors that Appeal to Youth: Tobacco Marketing Strategies*, 24 Health Affairs 1601, 1603-05 (2005).

13 Report from R.M. Manko Assoc. to Lorillard Tobacco Co. (Aug. 1978), *available at* http://tobaccodocuments.org/lor/85093450-3480.html?pattern=85093450-3480#images.

14 Internal Memo of R.J. Reynolds Tobacco Co. from J. L. Gemma to W. D. Dahne, et al. (Aug. 16, 1985),*available at* http://tobaccodocuments.org/rjr/505520121-0126.html?pattern=505520121-0126#images.

15 Project Report of Brown & Williamson Tobacco Co. (Sept. 1972), *available at* http://tobaccodocuments.org/bw/1023751.html?pattern=170042014#images.

16 Handwritten Notes attributed to British American Tobacco (made public in Aug. 1997) *available at* http://tobaccodocuments.org/youth/AmYoBAT00000000.Me.html?pattern=%22brazilian+fruit+juice%22#images.

17 R.M. Manko Assoc., *supra* note 13.

18 Inter-Office Memorandum from A. P. Ritchy to P. R. Ray (Dec. 18. 1972), *available at* http://tobaccodocuments.org/rjr/501283430-3431.html?pattern=501283430-3431#images.

19 *See Marketing Foods to Kids*, Supermarket Guru, Feb. 24, 2002, *available at* www.supermarketguru.com/page.cfm/34 (last visited Sept. 12, 2008).

20 *See* Good Marketing, Inc., *Special Report: Kids' Candy*, Professional Candy Buyer (Jan. - Feb. 1999), *available at* http://www.thekidexperts.com/8.html.

21 *See* Paula Frank, *Kids' Drinks*, Food Product Design, Jan. 1, 2000, *available at* http://www.foodproductdesign.com/articles/0100cs.html.

22 *See id.*

23 *See* Good Marketing, Inc., *supra* note 20.

24 *See* Jake Stump, *Lawmakers Want Sweet-Flavored Cigarettes Banned*, Charleston Daily Mail, Jan. 12, 2007, at 1A (according to Kit Francis, a lobbyist for R.J. Reynolds, "[t]he [flavored] product is marketed to young adults. It's an attractive product among the young adult community [but] [t]hey're not manufactured to reach minors who are not allowed to smoke"); *see also* Tommy J. Payne, Editorial, *Flavored Smokes Not Child's Play*, Atl. J. & Const., Oct. 18, 2006, at A19. (R.J. Reynolds Executive Vice President Payne explains that "[l]ike all our brands, [flavored cigarettes] were designed for and tested among adult smokers.").

25 *See infra* Section II.

26 *See Family Smoking Prevention and Tobacco Control Act: Hearing on S. 625 before the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. 153 (Feb. 27, 2007) (testimony of Dr. Gregory Connolly, Harvard School of Public Health), *available at* http://www.tobaccofreekids.org/reports/fda/Connolly022707.pdf.

27 *See* Gary A. Giovino, et al., Address Before the National Conference on Tobacco or Health: *Use of Flavored Cigarettes Among Older Adolescent and Adult Smoker: United States, 2004* (Dec. 2005) (on file with author).

28 *See id.*

29 *See id.*

30 *See id.*

31 *Id.*

32 Carrie M. Carpenter, et al., *New Cigarette Brands with Flavors that Appeal to Youth: Tobacco Marketing Strategies*, 24 Health Affairs 1601, 1608 (2005); *see also* Joseph A. Califano, Jr. & Louis W. Sullivan, Editorial, *The Flavor of Marketing to Kids*, Wash. Post, June 29, 2006, at A27 ("By masking the regular tobacco flavor and scent, flavored cigarettes make it even more appealing for a 12- or 13-year old to take that initial puff and keep smoking until he or she gets hooked.").

33 *See* Stacy M. Carter & Simon Chapman, *Smokers and Non-smokers Talk About Regulatory Options in Tobacco Control*, 15 Tobacco Control 398 (2006).

34 Alex M. Freedman, *Juiced Up: How a Tobacco Giant Doctors Snuff Brands to Boost Their "Kick,"* Wall St. J., Oct. 26, 1994, at A1.

35 *Id.*

36 *Id.*

37 Connolly, *supra* note 26.

38 Connolly, *supra* note 26.

39 *See* Master Settlement Agreement, *supra* note 2.

40 Because the relevant provisions of the Master Settlement Agreement and the Smokeless Tobacco Master Settlement Agreement, *see supra* note 2, are substantively identical, the term "MSA" when used in this synopsis includes both agreements.

41 *Id.*

42 Press Release, Office of the Attorney General of Maryland, Curran and R.J. Reynolds Reach Historic Settlement to End the Sale of Flavored Cigarettes (Oct. 11, 2006), *available at* http://www.oag.state.md.us/Press/2006/101106.htm.

43 *See id.*

44 *See id.*

45 *Id.*

46 Agreement of state attorneys general and R.J. Reynolds Tobacco Co. dated Sept. 19, 2006, Section II(1), *available at* http://www.oag.state.md.us/tobacco/flavored.pdf.

47 *Id.* at Section IV(9).

48 Press Release, Campaign for Tobacco-Free Kids, Statement by Matthew L. Myers, President, Campaign for Tobacco-Free Kids: R. J. Reynolds Launches New Flavored Cigarettes, Circumventing Settlement with State Attorneys General (May 27, 2007), *available at* http://www.tobaccofreekids.org/Script/DisplayPressRelease.php3?Display=996&zoom_highlight=flavored.

49 *Id.*

50 Press Release, Reynolds American, Inc., Reynolds American Asks Campaign for Tobacco-Free Kids to Stick with the Facts (May 22, 2007), *available at* http://www.reynoldsamerican.com/Newsroom/..%5Ccommon%5CViewHTML.aspx?postID=1225.

51 *Family Smoking Prevention and Tobacco Control Act: Hearing on H.R. 1108 before the H. Sub. Comm. on Health of the H. Comm. on Energy and Commerce*, 110th Cong. (2007) (testimony of Dr. Risa Lavizzo-Mourey, President and CEO, Robert Woods Johnson Foundation), *available at* http://www.tobaccofreekids.org/reports/fda/testimony_10032007_LM.pdf (last visited Dec. 15, 2008).

52 *Id.*

53 People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., No. GIC 764118 (Cal. Sup. Ct. June 6, 2002); People, ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 116 Cal.App.4th 1253 (2004).

54 *See* Family Smoking Prevention and Tobacco Control Act, S. 625, H.R. 1108, 110th Cong. (2007).

55 *See* 154 Cong. Rec. D986 (daily ed. July 30, 2008).

56 *See* Thomas Law Library, Bill Status for s. 625, http://www.thomas.gov/cgi-bin/bdquery/z?d110:sn00625:@@@p (last visited Dec. 15, 2008).

57 *See* Christopher N. Banthin & Richard A. Daynard, *Room for Two in Tobacco Control: Limits on the Preemptive Scope of the Proposed Legislation Granting FDA Oversight of Tobacco*, 11(1) J. of Health Care L. & Pol'y 57 (2008).

58 *See id.*

59 Family Smoking Prevention and Tobacco Control Act, *supra* note 54, at § 907(a)(3).

60 Family Smoking Prevention and Tobacco Control Act, *supra* note 54, at § 907(a)(3).

61 *See* Banthin, *supra* note 57.

62 "Federal" relief could also have come as a result of the lawsuit filed by the Department of Justice (DOJ) against the major tobacco manufacturers. In that case, the DOJ requested as part of the relief a prohibition on the marketing and sale of flavored tobacco products. *See* U.S. v. Philip Morris, No. 99-CV-02496, (D.D.C. June 27, 2005) ([Proposed] Final Judgment and Order), *available at* http://www.usdoj.gov/civil/cases/tobacco2/20050627%20US%20Proposed%20Remedies%20Order.pdf. Although the court did not include such a provision in the final order, the order is being appealed. *See* United States v. Philip Morris USA, Inc., No 06-5267 (D.C. Cir. April 14, 2008) (Appellate Brief of United States of America).

63 *See* Me. Rev. Stat. Ann. tit. 22, § 1560-D (2008). The same chapter contains §1560-A, which bans the sale of hard snuff. A ban on the use of tobacco products on school grounds at all times passed concurrently with the flavored tobacco ban. The bills were celebrated as a package designed to reduce youth smoking and improve public health in Maine. *See* Press Release, Office of Governor John Baldacci, Governor Celebrates Ban on Flavored Cigarettes (Sept. 25, 2007), *available at* http://www.maine.gov/tools/whatsnew/index.php?topic=Gov+News&id=42524&v=Article-2006. On May 22, 2008, New Jersey passed a state law prohibiting the sale of cigarettes with "a characterizing flavor based solely on the use of addictives or flavorings, or the provision of an ingredient list made available by any means." New Jersey S-6131A-1614. The law took effect December 1, 2008.

64 Me. Rev. Stat. Ann. tit. 22 § 1560-D(1)(A), (D) and (E).

65 *See* Me. Legis. 123-1361, 1st Sess., (2007), http://www.mainelegislature.org/legis/bills/bills_123rd/billtexts/SP047501.asp (last visited Dec. 15, 2008).

66 Me. Rev. Stat. Ann. tit. 22 § 1560-D(2).

67 *See id.* at § 1560-D(7).

68 *See id.* at § 1560-D(2)(A) and (B).

69 *See id.* at § 1560-D(5).

70 *See id.* at § 1560-D(8). Presumably the Attorney General could ensure that any flavored cigarettes are not on the certification list unless exempted under § 1560-D(5).

71 *See id.* at § 1560-D(4).

72 It may simply have been fortuitous that Maine avoided this potential pitfall, as the sponsor and a lead advocate do not recall the Federal Cigarette Labeling and Advertising Act issue being raised. *See* e-mail from Peter Mills, Maine State Senator, to Kathleen Dachille (Oct. 11, 2007) (on file with author); *see also* e-mail from Pamela Studwell, Senior Policy Analyst, Maine Coalition on Smoking or Health, to Kathleen Dachille (Oct. 12, 2007) (on file with author).

73 Me. Legis. 123-1361, *supra* note 65.

74 Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b) (West 2008). [hereinafter referred to as "FCLAA"] The preemption language in FCLAA only covers advertising for cigarettes. Accordingly, the preemption analysis does not include flavored smokeless tobacco or cigar products.

75 Lorillard Tobacco v. Reilly, 533 U.S. 525 (2001); *see also* Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (noting that FCLAA preempts state failure-to-warn claims against cigarette manufacturers).

76 Lorillard Tobacco, 533 U.S. at 546-52 (2001); *but see id.* at 592-98 (Stevens, J., concurring) (Justice Stevens addressing the FCLAA preemption claim and concluding that the restrictions at issue should not be preempted).

77 Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001).

78 People v. R.J. Reynolds Tobacco Co., 124 P.3d 408 (Cal. 2005); *see also* Mangini v. R.J. Reynolds Tobacco Co., 875 P.2d 73 (Cal. 1994) (noting that FCLAA did not preempt state enforcement action against cigarette advertising allegedly targeting minors).

79 *See, e.g.*, R. J. Reynolds Tobacco Co. v. McKenna, 445 F. Supp.2d 1252 (W.D. Wash. 2006) (finding that the FCLAA preempted a ban on the free distribution of cigarettes); R.J. Reynolds Tobacco Co. v. Seattle-King County Dept. of Health, 473 F. Supp.2d 1105 (W.D. Wash. 2007) (finding preemption); Rockwood v. City of Burlington, 21 F. Supp.2d 411 (D. Vt. 1998) (finding preemption).

80 *See, e.g.*, Lindsey v. Tacoma-Pierce County Health Dept., 195 F.3d 1065 (9th Cir. 1999), amended, 203 F.3d 1150 (2000) (finding that FCLAA preempts local law banning outdoor tobacco ads); Greater New York Metropolitan Food Council, Inc. v. Giuliani, 195 F.3d 100 (2d Cir.)(1999) (finding that FCLAA preempts city ordinance restricting tobacco ads in size, number and appearance); Vango Media, Inc. v. City of New York, 34 F.3d 68 (2d Cir. 1994) (finding that FCLAA preempts city law requiring at least one public health message per four tobacco ads); Chiglo v. City of Preston, Minn., 909 F. Supp. 675 (D. Minn. 1995) (finding that FCLAA preempts local law restricting number of point-of-sale tobacco ads because law attempts to regulate content based on health effects of smoking).

81 Maine is among twenty-three states with a law requiring that cigarettes sold in the state meet certain fire safety standards. *See* Me. Rev. Stat. Ann. tit. 22 § 1555-E (West 2008); *see also* Coalition for Fire-Safe Cigarettes, www. firesafecigarettes.org (last visited Dec. 15, 2008), for a current list of states that have passed fire safe cigarette legislation. The so-called "fire safe" cigarette legislation stands as the first tobacco product regulation that requires manufacturers to alter the way in which their cigarettes are produced. The flavored bill is of this same genre such that states with fire safe cigarette laws may be the best states in which advocates could pursue flavored tobacco legislation.

82 *See* E-mail from the Honorable Peter Mills, Maine State Senator, to Kathleen Dachille (Oct. 11, 2007) (on file with author).

83 *See Banning Flavored Cigars and Cigarettes*, Maine Coalition on Smoking or Health (Jan. 2007), *available at* http://www.lungme.org/atf/cf/%7BBAAA022C-B072-4CEF-BBBB-82CC2836F3DB%7D/FAQFlavors_000.pdf (last visited Dec. 15, 2008).

84 *See* Gregory Connolly, *The Marketing of Nicotine Addiction by One Oral Snuff Manufacturer*, 4 Tobacco Control 73, 74-5 (1995).

85 *See id.*

86 *See* Barry Knishkowi & Yona Amitai, *Water-Pipe (Narghile) Smoking: An Emerging Health Risk Behavior*, 116 Pediatrics e113, e115 (July 2005).

87 *Id.*

88 H. 2435, 78th Leg., Reg. Sess. (W. Va. 2007).

89 H. 2552, 81st Leg., Reg. Sess. (Kan. 2006); *see also* S. 1400, 212th Leg., 1st Reg. Sess. (N.J. 2006) (containing similar definition of flavored tobacco products); S. 1116, 147th Leg., 1st Reg. Sess. (N.C. 2005) (prohibiting a variety of flavors including "strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee").

90 Me. Rev. Stat. Ann. tit. 22 § 1560-(1)(A), (D) and (E).

91 S. 1169, 24th Leg., 1st Reg. Sess. (Haw. 2007). The exception for clove flavor is not an imperative. Indeed, the current proposed FDA bill does not exempt clove flavor despite attempts by some legislators to the contrary. In some states, clove cigarettes are already banned. *See, e.g.*, Md. Code Ann., Crim. Law § 10-106 (West 2008).

92 For an example of such a proposal, see H. 2936, 79th Leg., Reg. Sess. (Tex. 2005) (prohibiting the sale of cigarettes that are "advertised or marketed as having or producing a flavor, taste, or aroma other than tobacco or menthol"). A twist on this approach is found in a recent proposal in Illinois, which provides that a "public statement or claim by the manufacturer . . . that a product has or produces a flavor, taste or aroma . . . shall constitute proof that the tobacco product has a characterizing flavor." S. 1701, 95th Gen. Ass., Reg. Sess. (Ill. 2007).

93 *See* Banthin, *supra* note 57.

94 *See* Carrie M. Carpenter et al., *New Cigarette Brands With Flavors That Appeal to Youth: Tobacco Marketing Strategies*, 24 Health Affairs 1601, 1608 (2005) (finding that "[r]egulatory action is an appropriate response to the serious public health concerns raised by the introduction of new product delivery technologies, such as the flavor pellet. . . .").

95 Letter from Linda Lingle, Governor of Hawaii, to Andrew Schindler, Executive Chairman of Reynolds (Aug. 3, 2004) (on file with author).

96 *Id.*

97 Press Release, Massachusetts Department of Public Health, MDPH Calls on Tobacco Manufacturers to Halt Marketing of Candy Flavored Cigarettes in Massachusetts (May 20, 2004) (on file with author).

98 Mass. Dep't of Public Health, *supra* note 9.

99 Press Release, American Legacy Foundation, Truth Advertising Campaign, Shards O' Glass, Takes Home Emmy (Oct. 25, 2005), *available at* http://www.americanlegacy.org/581.aspx.

100 Carpenter et al., *supra* at note 94 (noting that "[c]ommunity groups must also be vigilant and fight back against manufacturers who target high-risk groups with flavored brands"); *see also* Califano, *supra* note 32, at A27 (noting that "[t]o us, hawking candy-flavored cigarettes is child abuse. It's time for the public, parents, and state and local governments to demand an end to it.").

About the Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is a network of legal programs supporting tobacco control policy change throughout the United States. Drawing on the expertise of its collaborating legal centers, the Consortium works to assist communities with urgent legal needs and to increase the legal resources available to the tobacco control movement. The Consortium's coordinating office, located at William Mitchell College of Law in St. Paul, Minnesota, fields requests for legal technical assistance and coordinates the delivery of services by the collaborating legal resource centers. Our legal technical assistance includes help with legislative drafting; legal research, analysis and strategy; training and presentations; preparation of friend-of-the-court legal briefs; and litigation support.

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