Tobacco Control Legal Consortium

Attorneys supporting tobacco control policy change.
Presenters

Mike Freiberg
*Tobacco Control Legal Consortium*

Laura Oliven
*Minnesota Department of Health*

Melissa Buenger
*Chicago Department of Public Health*

Lara Pratt
*Minneapolis Dept. of Health & Family Support*
Agenda

• Federal legal and policy developments
• State and local policy landscape
• State and local examples
  – Minnesota Health Department
  – City of Chicago
  – Minneapolis Department of Health
• Q & A
The Problem with Menthol

- Menthol cigarettes are smoked by approximately 19 million Americans – more than a quarter of the U.S. cigarette market.
- Used disproportionately by youth
- Used disproportionately in communities of color
The Problem with Menthol

If menthol were prohibited in cigarettes:

• Between 2010 and 2020, more than 2.2 million people would not start smoking.

• By 2050, 9 million fewer people would smoke.

*Tobacco Products Scientific Advisory Committee Report (2011)*
Mentholated Cigarettes . . .

• Increase initiation of smoking

• Increase likelihood of addiction in youth

• Increase the prevalence of smoking in general population and in minority communities

• Enhance the appeal of smoking

• Decrease the likelihood of tobacco cessation
Menthol Timeline

- **2009**: Congress adopts Family Smoking Prevention and Tobacco Control Act, exempts menthol from flavor ban

- **March 2011**: TPSAC report concludes that “removal of menthol cigarettes from the marketplace would benefit public health in the United States.”

- **April 2013**: Tobacco Control Legal Consortium files Citizen Petition asking FDA to prohibit menthol as a characterizing flavor in cigarettes
Menthol Timeline, cont’d

- **July 23, 2013**: Second FDA report concludes that menthol use is associated with youth smoking initiation and greater addiction.

- **July 23, 2013**: FDA issues an Advance Notice of Proposed Rulemaking (ANPRM) to take public input on menthol in cigarettes.

- **November 2013**: Docket closes.

- **July 2014**: D.C. District Court rules three TPSAC members had conflicts of interest.

- **January 2016**: Court of Appeals for D.C. Circuit reverses D.C. District Court decision.
State and Local Authority

- Preservation Clause
- Preemption Clause
- Savings Clause
State and Local Authority

Preservation Clause

Preserves authority of state & local governments to adopt tobacco control measures related to –

- Sale *(including prohibition of sale)*
- Distribution, advertising, promotion
- Information reporting
- Taxation of tobacco products
- Related policies.

21 U.S.C. § 387p(1)
State and Local Authority

Preemption Clause

Prohibits state and local governments from adopting tobacco product standards and a few related policies.

21 U.S.C. § 387p(2)
State and Local Authority

Savings Clause

State and local governments can adopt regulations relating to -

- Sale, distribution, possession, information reporting,
- Exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age
- Fire safety standards for tobacco products

New York City & Providence, RI
Local Flavor Regulations

“It shall be unlawful for any person to sell or offer for sale any flavored tobacco product except in a tobacco bar.”

*New York City Administrative Code § 17–715*

- “Tobacco product” does not include cigarettes
- Eight establishments meet definition of “tobacco bar.”
- “Flavored” excludes “the taste or aroma of tobacco, menthol, mint or wintergreen”

“It shall be unlawful for any person to sell or offer for sale any flavored tobacco product to a consumer, except in a smoking bar.”

*Providence, Rhode Island, City Code § 14-309*

- “Tobacco product” does not include cigarettes
- “Smoking bar” requires tobacco revenues > 50%
- “Flavored” excludes “the taste or aroma of tobacco, menthol, mint or wintergreen.”
“While [the Tobacco Control Act] prohibits the FDA from banning entire categories of tobacco products throughout the country, ... the FSPTCA nowhere extends that prohibition to state and local governments. To the contrary, the preservation clause ... expressly preserves localities’ traditional power to adopt any measure relating to or prohibiting the sale of tobacco products.”"

“As a regulation limiting the businesses at which flavored tobacco may be sold, the city ordinance establishes a ‘requirement[] relating to the sale ... of ... tobacco products’ within the plain meaning of the saving clause.”

“...given Congress’ explicit decision to preserve for states a robust role in regulating, even banning, sales of tobacco products, we adopt a broad reading of the saving clause...”

*U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428 (2nd Cir. 2013)
“...the FSPTCA’s preemption provision relates to tobacco product standards, not the sale and/or distribution of tobacco products prohibited by Section 14-309 of the Flavor Ordinance.”

Selected Policies and Legislation

• Chicago, Illinois, buffer zone ordinance
• Berkeley, California, buffer zone ordinance (adopted 9/15/15, effective 1/1/17)
• Hawaii legislation to prohibit sale of menthol cigarettes, HF 1522 (2014, not adopted)
• Many flavored tobacco ordinances that exempt menthol
  – Minneapolis (MN)
  – Santa Clara County (CA)
  – St. Paul (MN)
  – Many communities in Massachusetts
Resources

http://publichealthlawcenter.org/menthol

- Information on Federal Regulation of Menthol
  - Citizen Petition
  - Comments to FDA

- International Regulation of Menthol

- Law Review Article, Menthol Bibliography

- Chicago Case Study

- Sample Ordinance Language

- Model Resolution Calling on FDA to Prohibit Menthol

- Fact Sheets, Poster

- Webinar
Contact us

Mike Freiberg
michael.freiberg@mitchellhamline.edu
(651) 290-7517
www.publichealthlawcenter.org
Menthol Tobacco Use and Health Equity

LAURA OLIVEN, MPP
Tobacco Control Manager
Minnesota Department of Health
MN has wide menthol use disparities

Percent of Minnesota Smokers who use menthol

- High School Student Smokers*: 44%
- Adult African American Smokers**: 74%
- Overall Adult Smokers**: 25%

* Minnesota Youth Tobacco Survey, 2014
** Minnesota Adult Tobacco Survey, 2014
Menthol attracts and addicts youth

- Masks irritation from smoking
- Makes experimentation easier
- Intensifies addiction to nicotine
Menthol makes quitting harder

A higher nicotine dependence and smoking urge \( \rightarrow \) A harder time quitting
African Americans are a target market

Published in Ebony magazine, June 1977, Vol 32, No. 8

From the collection of Stanford Research into the Impact of Tobacco Advertising
(tobacco.stanford.edu)
Menthol is a health equity issue

**Triple Aim of Health Equity**

- Implement a Health in All Policies Approach With Health Equity as the Goal
- Expand Our Understanding of What Creates Health
- Strengthen the Capacity of Communities to Create Their Own Healthy Future

- Strengthen Community Capacity
- Implement Health in All Policies
- Expand Understanding of Health
Menthol Cigarette Intervention Grant

MDH: Award Grant to Community Health Board (CHB)

CHB: Partner with Community-Based Organization (CBO)

CBO: Engage Community
LAURA OLIVEN, MPP
Tobacco Control Manager
Laura.Oliven@state.mn.us

www.health.mn.gov/menthol
Regulating Flavored Tobacco Products

The Chicago Experience

Melissa Buenger, MPH
Tobacco Policy Analyst
February 24, 2016
Overview

• Chicago’s restrictions
• What products?
• Implementation timeline
• Barriers to implementation
• Lessons learned
Chicago’s Restrictions

• Prohibits flavored tobacco sales within 500 feet of schools

• First jurisdiction to include menthol

• Exempts retail tobacco stores—at least 80% of gross revenue from tobacco

• Impacts about 15% of tobacco retailers
Moving Forward with Implementation and Enforcement

• Delayed for lawsuits and rulemaking

• New rules promulgated

• Retailers notified

• Objections received

• Hearings scheduled

• Enforcement to start soon
Legal Challenges

- 3 lawsuits filed against the City starting in September 2014, arguing:
  - Federal preemption
  - Unconstitutionally vague under 14th Amendment
  - Violation Due Process Clause of Illinois Constitution

- 2 were decided in our favor in June 2015, the judge issued one opinion:
  - FSPTCA preserves local authority to regulate sale of tobacco products
  - Not vague or “unforeseeable” whether a retailer is 500 feet from a school what constitutes a school
  - Tobacco licenses are conditional, not a vested right
  - No new legal consequences to events completed before enactment

- 1 was thrown out in August 2015 for plaintiffs’ failure to file appearances
Refining Flavor Determination Process

It was initially unclear how determinations would be made about flavors

- Clarifying language indicates terms that refer to a characterizing flavor other than tobacco it will be considered
  - Terms like “sweet” or “spicy” constitute a flavor
  - “Bold” or “mild” will not

- Statements or claims include copy from marketing materials, a review of a product, or images on packaging

- Will no longer use sensory testers

- Retailers can email flavoredtobacco@cityofchicago.org for assistance
Product List

• The first set of rules said this would be an exhaustive list, updated quarterly.

• New rules make the list non-exclusive and allow us to update the list.

• We added hundreds of new products by searching wholesaler and manufacturer websites and industry newsletters.

• Our list is available on Chicago’s open data portal as well as a searchable website www.flavoredtobaccosearchengine.org
Locations

• Measuring distance accurately
  o GIS software like Esri ArcMap can be useful tool for narrowing the list of impacted retailers, but overestimates distances
  o Google Maps is more effective for accurate measurement from property line to property line and is free, used to verify all measurements

• Verifying schools
  o Ordinance language defines schools as elementary, middle, or high school with active enrollment, excludes pre-schools and day cares
  o Called all private schools to verify grade levels and enrollment
Lessons Learned and Recommendations

• Need to have reliable school and retailer data

• Strong partnerships

• Be prepared for legal challenges

• Share knowledge and resources with other jurisdictions
Minneapolis Flavored Tobacco Ordinance

Lara Pratt
Minneapolis Health Department

February 24, 2016
Adoption—Phases and Factors

• Incremental approach
  • Tobacco presentation in 2014, including youth (May ‘14)
  • Updated tobacco use policy on City property (Oct ‘14)
  • Updated clean air ordinance to include e-cigs (Dec. ‘14)
  • Passed flavor/price ordinance (July ‘15)

• Youth engagement

• Inside-outside
• approach
Ordinance details

• Limits sales of flavored products to tobacco products shops.

• Prohibits entry of people younger than 18 in tobacco products shops.

• Sets Minimum Price: $2.60 per stick up to $10.40 for packs of 4 +

• Exempts menthol and mint flavored products
Enforcement so far

• Before enforcement
  • Developed and sent compliance guide
  • Adopted Chicago’s list of flavored products

• Since enforcement began January 1, 2016
  • All new product lines in the stores
  • Confusion over “sweet”
  • Calls from manufacturers and distributors
  • Burdensome for inspectors
  • Suspended enforcement
Moving forward

• How we’re addressing
  • Shrinking list to only ambiguously titled products
  • Revamping inspectors’ protocol

• Lessons learned
  • Create list before passing ordinance
  • Accompany ordinance with rules
  • Keep your “eye on the prize”
Reasons for excluding menthol

• Timing
• Youth focus
• Insufficient community engagement
• Political readiness

Groundwork was laid
• Policymaker breakfast
• Comments in public testimony
Menthol: What’s Next

• What’s happening in Minneapolis re: menthol
  • Minnesota Menthol Coalition meeting bi-monthly
  • Summer 2015: 5 community conversations
  • State menthol grant to Hennepin County for metro area engagement

• Role of Minneapolis Health Department
  • Part of coalition
  • Community engagement and leadership development with African American and American Indian youth
  • Education and surveillance
Considerations for others

- Price + flavored
- Incremental approach or all-at-once
- Scope of flavored ordinances
- “Ducks in a row”
- Burden on enforcement
For more information:

Lara Pratt, MPH
Minneapolis Health Department
612.673.3815
lara.pratt@minneapolis.mn.gov
Contact us

Mike.Freiberg@mitchellhamline.edu
(651) 290-7517

Joelle.Lester@mitchellhamline.edu
(651) 695-7603

www.publichealthlawcenter.org