FLAVORED TOBACCO SALES PROHIBITIONS

Enforcement Options

This publication examines options for local jurisdictions to enforce prohibitions on the sale of flavored commercial tobacco products,[1] potential legal and enforcement challenges, and recommended best approaches.

To date, over 360 jurisdictions across the United States have restricted flavored tobacco product sales,[2] taking a wide range of approaches that mirror national policy trends in flavored tobacco sales prohibitions.[3] This document is intended to assist policymakers, city and county attorneys, and public health advocates in determining the best enforcement approaches for flavored tobacco policies.

Questions about enforcing these flavor sales restrictions are becoming more widespread and increasingly complex as tobacco manufacturers design new products or change the way they market or label existing products to get around flavor restrictions put in place by federal, Tribal, state, and local governments. One prevalent example is the use of "concept" flavors,

where the manufacturer will make no changes to the flavored product itself, but will rename the product and change the packaging to signal that the product is still flavored without using actual flavor descriptors. For example, a product that was previously labeled as "grape" could now be called "purple."[4]

Model Language

One key way to ensure that a flavored tobacco prohibition can be effectively enforced is to start with strong ordinance language. The Public Health Law Center stands ready to work with any jurisdiction looking to update an existing ordinance or adopt a new flavored tobacco ordinance. Our model ordinance language includes the following definition of flavored tobacco product:

> "Flavored Tobacco Product" means any tobacco product that imparts a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to, or during the consumption of, a tobacco product, including, but not limited to, any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, molasses, or any candy, dessert, alcoholic beverage, herb, or spice.

Establishing that the taste or smell can be "distinguishable by an ordinary consumer" is strongly preferred for enforcement because it makes clear this is a reasonable person test and requires no special technical ability to be able to enforce. The extensive list of flavors — including broad categories like fruit, candy, herb, or spice — also is helpful for enforcement by demonstrating the breadth of possible flavored products, while making clear this is a non-exhaustive list.

The prohibition language in the model ordinance is straightforward, with no room for ambiguity: "It shall be unlawful for any tobacco retailer to sell any flavored tobacco product."

The model ordinance also includes the following presumption:

> A public statement or claim made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such tobacco product, that such tobacco product has a taste or smell other than tobacco shall constitute presumptive evidence that the tobacco product is a flavored tobacco product.

This language is important for enforcement because it puts the burden on the manufacturer to prove that a product is **not** flavored if there is a statement or claim to the contrary (such as a description of a flavor on a manufacturer's website or in advertising materials).

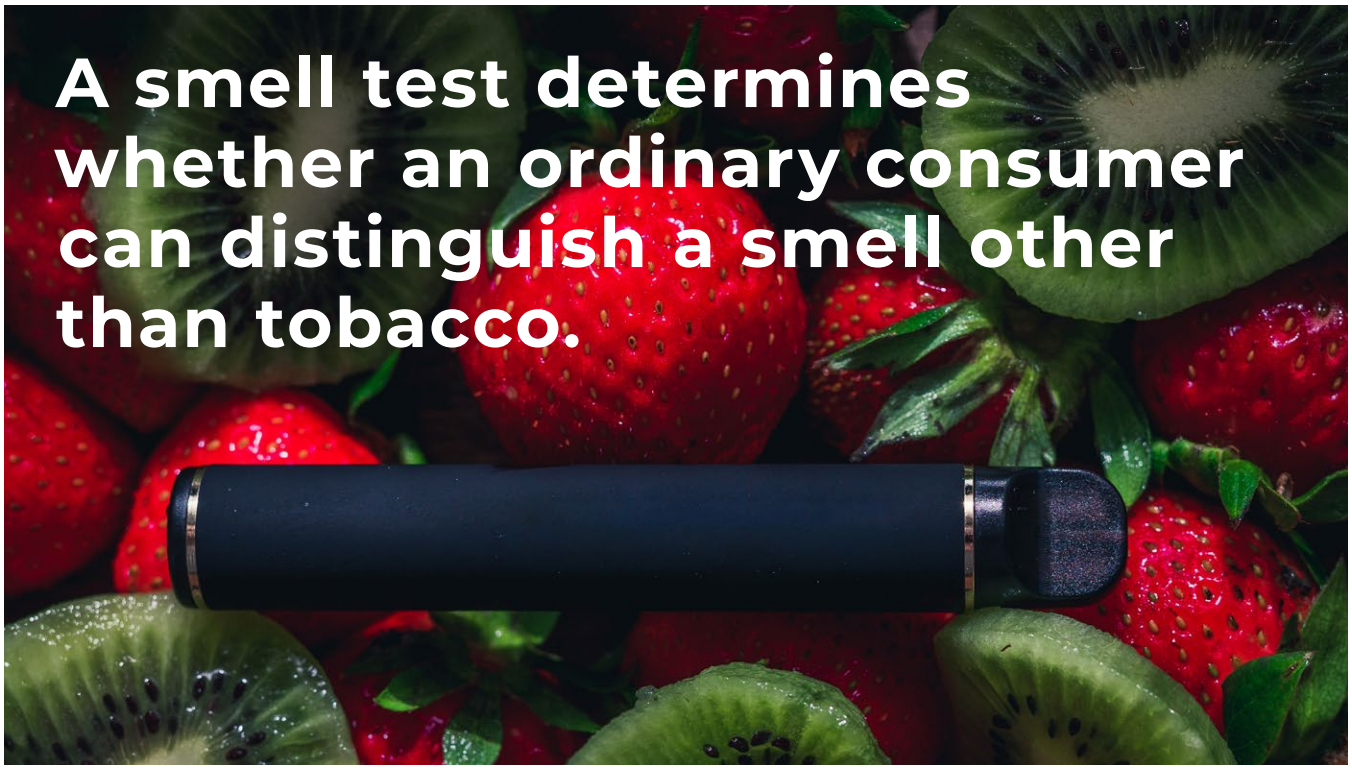
Flavor Enforcement Options

Some flavored tobacco ordinance enforcement decisions will be apparent from the face of the product. Any product that includes a flavor in its name or product description (e.g., menthol cigarette, berry blend pouch) or in an image on the package (such as the picture of a fruit) are easily identified by retailers as prohibited under the ordinance. For instance, San Francisco's guidance to retailers instructs them to look first at the product packaging for "unflavored" or "unsweetened" as an indication that it is not a flavored product and to look for any explicit flavor language like honey or clove. Chicago's guidance lists terms like "sweet" and "spicy" as presumptive flavored language, but other terms like "mild" and "strong" as examples of language that does not necessarily indicate flavored products because it could refer solely to the taste or aroma of tobacco. Los Angeles County's guidance lists 43 terms such as "sweet," "Arctic Ice," and "fresh" as a non-exhaustive list of examples of tobacco flavors. New York City's guidance agrees that "sweet" and "spicy" are probably flavored products and adds that "ice" flavored e-cigarettes or tobacco products named for foods or beverages are also flavored. While the guidance between jurisdictions may vary, the conclusions about many products that are plainly flavored on their face is likely to be similar across jurisdictions.

A second source of information guiding enforcement is public statements made about the product that indicate the product is flavored. For instance, in Alameda County, California, the Public Health Department checks the websites of the manufacturers and distributors to look for flavor descriptions. San Francisco's FAQs for flavored products encourage retailers to "[r]ead websites, advertisements, and customer comments about the tobacco product." If retailers do not include flavor language on a package, they may try to send consumers a message about flavor in their products by advertisement. Customer online reviews stating that a product is flavored could be another source of information (e.g., YouTube, TikTok, Reddit, etc.). A Massachusetts court upheld the relevance of both advertisements and online video reviewer statements describing a product as flavored against a challenge from tobacco retailers.[5]

Another option some jurisdictions have pursued is to call or email a manufacturer's customer service center to ask whether a particular product is flavored. This can be helpful evidence of what manufacturers are representing about their products to average consumers.

When collecting evidence that a product is flavored, such as from a website or customer review, it's important to preserve the evidence for potential use to defend against potential litigation. An example would be taking a screen shot of a product description on a manufacturer's website and documenting the time and date, web address, and individual who recorded the picture.



Enforcement becomes more difficult when tobacco companies attempt to obscure that they are selling flavored products by removing flavor descriptions from packaging and advertising, or by using concept flavor names like "jazz" or "blue" that are designed to be associated with a flavor without being explicit. Tobacco manufacturers are constantly innovating and developing new products, often with the intent to avoid regulation, including flavor prohibitions. The options discussed below are designed to address these more difficult situations where a flavor is not clear from the product packaging or from public statements.

Smell Test

An extremely effective way to make flavor determinations on ambiguous products is to use a smell test. Using a layperson's sense of smell, a smell test determines whether an ordinary consumer can distinguish a smell other than tobacco for a product. This is consistent with the model policy described above. If a local flavor sales prohibition uses different language, it is still likely that a smell test may be used to determine whether a product is flavored.

The smell test approach has been used to the greatest extent in Massachusetts. The Massachusetts Association of Health Boards, in collaboration with the Massachusetts Health Officers Association, the Massachusetts Municipal Association, and the Public Health

Advocacy Institute, developed a recommended approach that jurisdictions can use in a smell test, including the following steps:

1. Purchase the brand suspected of being flavored; keep sealed in airtight bag or container and conduct the test within a few days of purchasing the product.
2. Smell the product in a room where there are no other odors, like perfume, coffee, paint, or food.
3. Do not conduct the test if congested or if you have eaten or drunk anything flavored recently.
4. Smell a non-flavored product like Marlboro Red (should also be newly purchased and opened upon testing).
5. Open and smell the product.
6. Determine if it smells like tobacco.
7. Keep package sealed and in a secure location in case needed for litigation.

The Massachusetts smell test approach has survived industry litigation. A convenience store chain sued a local Board of Health to challenge its determination that products like Black and Mild "Jazz" cigars were flavored. In 2020, the Massachusetts Court of Appeals upheld the jurisdiction's use of the smell test, finding that the test was reasonable evidence to support a conclusion that a product was flavored.[6] The retailer had argued that the smell test was unreliable because there were no "uniform criteria" and because the testers were all "lay volunteers with no relevant expertise in sensory evaluation."[7] The court rejected this argument, finding that the retailer had not shown that any scientific or technical knowledge was needed to make the smell test reliable.[8] In pursuing a smell test, jurisdictions should develop a protocol to be followed for consistency, similar to the court-upheld approach from Massachusetts.

Prohibited Product Lists

One enforcement approach that several jurisdictions across the country have used is to maintain a non-exclusive list of prohibited flavored tobacco products. The appeal of this approach is understandable, as having a list can help provide some clarity to retailers as well as to enforcement staff. However, a list can be difficult to maintain given the constantly evolving market of tobacco products and specific attempts by manufacturers to design projects to evade flavor regulation. Keeping a list up-to-date can require a significant investment of staff time and resources. Also, some retailers may be tempted to view a list as permission to sell unlisted flavored products if it is not clearly communicated to retailers that products may still be prohibited even if not listed. Enforcement staff also may rely too much on the list if not properly

trained to independently analyze new products they encounter. Finally, a lengthy list of products can be unwieldy and time-consuming for enforcement staff to use during compliance checks.

Chicago was one of the first jurisdictions to assemble a non-exclusive prohibited product list. The list grew to 1,857 products before the city stopped updating it in 2015. Chicago attempted to be more comprehensive than the lists from many other jurisdictions. For example, Chicago's list includes products with obvious names like "pink lemonade" electronic cigarettes, while some other jurisdictions focus on products that are more ambiguously labeled.

San Francisco currently maintains a public non-exclusive list of prohibited flavored tobacco products. The city's most recent list was updated in February 2022 and contains 47 products or categories of products. San Francisco notes that the list includes products determined to be flavored based on their labeling, packaging, or marketing. The San Francisco flavor enforcement determinations have been upheld both in administrative hearings and at the San Francisco Board of Appeals. The city's goal with the list was to include the most egregious flavored products it was seeing on the market, and the list has evolved over time to include new products.[9]

New York City maintains a public, non-exclusive list, last updated in November 2021, that currently contains 59 prohibited flavored products, excluding menthol, mint, and wintergreen flavored products. It notes that products not on the list may also be prohibited and encourages retailers to look at the labels, packaging, and marketing for signs of flavors, noting: "Flavor may be shown by words, colors or pictures."

Los Angeles County maintains a public, non-exclusive list of both prohibited and permitted products, last updated in July 2022. The list currently includes 17 prohibited products and 26 permitted products.

One question that comes up regarding lists is whether a jurisdiction can rely on them or on evidence collected from another jurisdiction. Seeing a product identified as flavored by a different jurisdiction can be helpful context, but it is important for each jurisdiction to make an individual determination based on its own ordinance language, which may differ between jurisdictions. Relying on evidence from another jurisdiction may be appropriate if the evidence can support a determination based on the local jurisdiction's ordinance language. For example, a screen shot of a manufacturer's website describing a product as flavored could be helpful evidence that jurisdictions may wish to share with each other (particularly since companies have been known to scrub this content when used for enforcement). The time and location of where the picture was taken should be appropriately documented, as well as who took the picture, in case it needs to be entered into evidence in a later administrative or court proceeding. Another option would be to use information from another jurisdiction to focus on a potentially suspect product, then conduct an additional evaluation of the product, such as through a smell test.

National List

Another possibility to help local jurisdictions effectively enforce flavored tobacco ordinances would be for the U.S. Food and Drug Administration (FDA) to develop a national flavored product list. In 2016, the FDA issued a rule deeming all existing and future products containing tobacco or nicotine derived from tobacco subject to the agency's jurisdiction (and this was later expanded to include all products containing nicotine from any source). Under the Family Smoking Prevention and Tobacco Control Act, the FDA also has authority to determine which tobacco products should be allowed on the market through a process known as premarket review. To date, very few products have received marketing authorization from the FDA. As part of their premarket review process, the FDA collects data and research from manufacturers about their products, which it could use to assemble a flavored product list if it chooses.

In the meantime, the FDA has been increasingly more active in restricting flavored product sales. In 2020, the FDA took a small step with flavored e-cigarettes, prohibiting all sales of cartridge-based e-cigarettes that are not flavored with menthol or tobacco. This left large gaps for disposable e-cigarettes and menthol flavored e-cigarettes and did not apply to flavored cigars.

In April 2022, the FDA proposed two important tobacco product standards, one to ban menthol in cigarettes and one to ban all flavors in cigars. As of this writing, both standards are in the lengthy process of being finalized.

In June 2022, the FDA denied authorization to market all Juul products, including both flavored and unflavored pods. Juul sued the FDA, and the D.C. Circuit court issued a temporary administrative stay of the FDA's denial to allow time for the court to review Juul's lawsuit.

While the FDA is taking increasing steps to target flavored tobacco products, so far it has not indicated that it will pursue a national flavored product list of the type that would be usable for local communities.

Manufacturer Certification

One option some jurisdictions have pursued is to put the burden on the manufacturers to certify that their products are unflavored before they can be sold. This can make enforcement simpler because an inspector can ask retailers for the certifications for the products they are selling.

In Massachusetts, for example, regulations implementing the state's flavored product sales prohibition require that retailers obtain a certification verifying that products they are selling are not flavored.[10] The manufacturer letters must certify the products do not meet the Massachusetts code definition for flavored tobacco products, must be signed by a corporate officer or managing owner, and must state that the letters are true and accurate.[11]

Massachusetts instructs their inspectors to ask retailers for these certification letters to ensure that brands not included in a manufacturer's letter are not offered for sale.

Short of certification, some jurisdictions write to manufacturers regarding specific ambiguous products asking if they are flavored or not. As with certification, a benefit of this approach is that, when responding, a manufacturer will have to go on record as to whether its product is flavored. This approach, however, does not have the same legal heft as the Massachusetts approach of requiring a certification signed by a corporate officer.

Another approach is to encourage retailers to contact the manufacturers directly. For instance, San Francisco's FAQs suggest: "W]hen there is doubt about a product, retailers should refuse to sell the product until they receive a letter from the product manufacturer on business letter head that the product has no additives or flavors."

With any manufacturer certification or verification approach, a significant drawback is that this requires relying on the word of the tobacco industry, which has a notorious history for falsehoods and deception. So, it would be important to verify any manufacturer claim for accuracy, such as by reviewing public statements regarding the products or using the smell test described above.

Chemical Testing

Some local jurisdictions have contemplated, or even attempted, doing limited chemical testing of constituents in tobacco products to determine if they are flavored. This is not recommended at the local level for several reasons.

First, there is a significant cost and practicality challenge in testing the many new tobacco products that come on the market, particularly with the constant evolution of products from tobacco manufacturers.

Second, ingredients such as cocoa or licorice are often included in products to enhance palatability, but don't rise to a distinguishable taste or smell.[12] Licorice may be added to enhance the sweetness, but the product will not taste or smell like licorice, for instance. This makes it difficult to determine — based on chemical analysis alone — what an ordinary consumer will experience as a flavor, and could implicate products that would not otherwise be considered flavored.

Third, there is a risk that someone looking to challenge a flavor prohibition would argue that evaluating ingredients to determine whether a product is flavored transforms the sales restriction into a tobacco product standard that is preempted by federal law. Under the Family

Smoking Prevention and Tobacco Control Act, states and local governments are preempted from enacting any requirements different from or additional to federal requirements "relating to tobacco product standards." 21 U.S.C. § 387p(a)(2)(A). Tobacco product standards are not explicitly defined in this context, but the phrase is used elsewhere in the Tobacco Control Act to refer to "the construction, components, ingredients, additives, constituents … and properties of the tobacco products." 21 U.S.C. § 387g(a)(4)(B)(i).[13]

Therefore, the Public Health Law Center's model policy steers clear from any evaluation of product components or ingredients in determining whether a product is flavored, and instead explicitly focuses on how a consumer experiences the product. Other models have used the "characterizing flavor" concept to achieve a similar result.[14] Courts have consistently upheld these types of approaches for determining whether a product is flavored as not preempted under the Tobacco Control Act.[15] The distinction is nuanced, but courts have upheld that local governments can restrict the **sale** of commercial tobacco products without preemption.[16] While a jurisdiction could still argue that using chemical testing is designed only to determine what could be sold and not to control what manufacturers include in their products, it is likely a cleaner preemption argument with less litigation risk to focus on the flavor imparted to the consumer and not the ingredients in the products.

Conclusion

For many flavored products, the packaging, marketing, or public consumer reviews or statements will be enough to make flavor determinations. For more ambiguous products, though, local jurisdictions will need additional options.

In making flavor determinations for any ambiguous products, the Public Health Law Center recommends using a smell test. This approach has withstood legal challenge in Massachusetts, and when a consistent protocol is established, can be a reliable approach to evaluating product flavors based on local ordinance language.

A smell test can also pair well with requiring manufacturers to certify that products are unflavored to be able to sell into a local market. This can result in easier local enforcement, while verifying any manufacturer claim.

Maintaining a non-exclusive flavored product list as a local jurisdiction can pose a significant challenge in light of limited resources and the constantly evolving tobacco market. Nonetheless, some jurisdictions have attempted this to try to provide more clarity to retailers and enforcement staff, typically focusing on the highest priority products that are most commonly sold or most ambiguous.

The Center does not recommend attempting chemical testing, both because of the expense and because of the risk of preemption for appearing too close to a Tobacco Control Act product standard.

We encourage jurisdictions with questions about developing flavor restriction ordinance language, working through enforcement options, and addressing other challenges to contact the Center.

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Endnotes

1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. In comparison, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit http://keepitsacred.itcmi.org. When the word "tobacco" is used throughout this digest, a commercial context is implied and intended.

2 Campaign for Tobacco Free Kids, *States and Localities that Have Restricted the Sale of Flavored Tobacco Products*, (2022), https://www.tobaccofreekids.org/assets/factsheets/0398.pdf.

3 Public Health Law Center, *U.S. Sales Restrictions on Flavored Tobacco Products* (2022), https://www.publichealthlawcenter.org/sites/default/files/resources/US-sales-restrictions-flavored-tobacco-products.pdf.

4 California Dep't of Public Health, *Challenges in Enforcing Local Flavored Tobacco Restrictions* (2019), https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/CTCB/CDPH%20Document%20Library/Policy/FlavoredTobaccoAndMenthol/ChallengesinEnforcing_LocalFlavoredTobaccoRestrictions.pdf.

5 *Cumberland Farms, Inc. v. Bd. of Health of Yarmouth*, 97 Mass. App. Ct. 1111 at *5 (Mass. App. Ct. 2020).

6 *Id.* at *8.

7 *Id.* at *4.

8 *Id.*

9 Call with Janine Young, San Francisco Dep't of Public Health (June 6, 2022).

10 105 Mass. Code Regs. 665.010 ("Prior to the sale of a tobacco product, a retail establishment other than a smoking bar shall obtain documentation from the product's manufacturer or the manufacturer's agent in a form and manner specified by the Department, certifying such tobacco product does not meet the definition of a flavored tobacco product or tobacco product flavor enhancer, and that the product lacks any characterizing flavor").

11 Letter to Tobacco Retailers, Mass, Tobacco Cessation and Prevention Program (Jan. 4, 2021), https://www.mass.gov/doc/dph-flavor-guidance-letter-1-2021/download.

12 For example, Los Angeles County lists "Camel Classic Blue" as an unflavored product permitted for sale. On the R.J. Reynolds cigarette ingredients website, the "Camel Blue 99s Hard Pack" includes in its ingredient list both cocoa and licorice, as do "Camel Blue Hard Pack" and "Camel Blue Soft Pack."

13 For further discussion, see Brief for the Public Health Law Center as Amicus Curiae, *R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542 (9th Cir. 2022), https://www.publichealthlawcenter.org/sites/default/files/case/LA-County-Amicus-Brief.pdf.

14 *See, e.g.*, N.J. Rev. Stat. § 2A:170-51.12(2)(e) (2022); Alameda County, Cal. Code § 3.58.020 (2022); Boulder, Colo. Code § 6-4.5-1 (2022).

15 *See R.J. Reynolds Tobacco Co.*, 29 F.4th at 552 ("it would be a mistake to read 'tobacco product standards' in the TCA's preemption clause so broadly as to encompass the type of sales ban challenged in this case"); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 82 (1st Cir. 2013); *U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York*, 708 F.3d 428, 434-35 (2d Cir. 2013); *Indep. Gas & Serv. Stations Ass'n v. Chicago*, 112 F. Supp. 3d 749, 754 (N.D. Ill., 2015) (Chicago's ordinance not preempted because it "regulates flavored tobacco products without regard for how they are manufactured"); *but see R.J. Reynolds Tobacco Co. v. City of Edina*, 482 F. Supp. 3d 875 (D. Minn. 2020) (appeal pending) (noting in dicta that "there is little difference between the government telling a manufacturer that it may not add an ingredient that imparts a flavor to a tobacco product and the government telling a manufacturer that it may not sell a tobacco product if it has added an ingredient that imparts a flavor," but upholding the city's flavor ordinance as not preempted under the TCA's savings clause).

16 Brief for the Public Health Law Center as Amicus Curiae, p.14, *R.J. Reynolds Tobacco Co. v. Cnty. of Los Angeles*, 29 F.4th 542 (9th Cir. 2022) ("The preemption of local 'product standards' therefore prevents local mandates that require manufacturers to create particular products or follow particular processes, not local decisions to prohibit sales of any existing products").