



August 1, 2022

Commissioner Robert M. Califf, M.D.
c/o Dockets Management Staff (HFA-305)
U.S. Food and Drug Administration
5630 Fishers Lane, Room 1061
Rockville, Maryland 20852

RE: Docket No FDA-2021-N-1349 for "Tobacco Product Standard for Menthol in Cigarettes"

Dear Commissioner Califf:

On behalf of the Public Health Law Center, a national non-profit organization that works with states and localities to support and advance public health and commercial tobacco regulation, we are providing jurisdiction-specific data on how four U.S. communities have recently taken steps to restrict sales of flavored tobacco products (often including menthol). We are submitting these four case studies to support the FDA's proposed rule to issue a tobacco product standard to prohibit menthol in cigarettes, cigarette components, and parts.

States and local communities play a critical role in ensuring that commercial tobacco policies are drafted and implemented to address health disparities. Flavored tobacco product sales policies, such as the FDA's proposed rule, need to be centered on health equity and on reducing harm to populations disparately impacted by the use of flavored products (often populations of color and of lower socioeconomic status).

Several U.S. communities have moved forward in recent years to restrict sales of flavored tobacco products, including Chicago, San Francisco, Massachusetts, and Edina, Minnesota. The following case studies from these four jurisdictions describe different challenges and experiences throughout the policy process and are included to demonstrate the value of partnering with target communities and of working to ensure that an equity lens is applied from the time a flavor policy is formulated, developed, and adopted through its implementation, enforcement, and evaluation.

Given the significant number of lives the proposed product standard for menthol cigarettes will save by reducing tobacco use and nicotine addiction and by advancing health equity among those disparately impacted by the use of flavored products, the Public Health Law Center urges the FDA to implement the proposed rule quickly.

Sincerely,

A handwritten signature in black ink that reads "Joelle M. Lester".

Joelle Lester
Director of Commercial Tobacco Programs

Chicago's Flavored Tobacco Products Policy

Overview

In December 2013, Chicago became the first city in the U.S. to restrict the sale of all flavored commercial tobacco products,¹ including menthol.² Part of Chicago's campaign to curb youth smoking, the ordinance restricted the sale of menthol flavored cigarettes and other flavored tobacco products within 500 feet of any school located in Chicago, except for retail tobacco stores dedicated primarily to the sale of tobacco.³

Laying the Groundwork for Action

Before Chicago instituted its flavor ban in 2013, studies found that 10.7 percent of Chicago high school students reported smoking.⁴ Although this statistic reflected a 3 percent decrease from a similar survey conducted in 2011,⁵ the number of high school students who smoke remained high and steeply skewed when it came to the popularity of menthol products among first-time smokers, Black individuals, and other racial and ethnic populations within the city.⁶ In Illinois overall, 14.1 percent of high school students reported smoking in 2012.⁷ At that time, nearly 10,600 Illinois kids were becoming new regular daily smokers each year.⁸

Chicago's Mayor Rahm Emanuel, who had tobacco control experience at the federal level, championed the City's efforts to address the youth menthol tobacco problem.⁹ Following the FDA's report on the impact of menthol, Mayor Emanuel called for the Chicago Board of Health and Department of Public Health to work quickly to identify "winnable" and "community driven" policy solutions to curb flavored tobacco use among youth in July 2013.¹⁰

By September 2013, Chicago public health officials had connected with more than twenty-four community organizations and several local policy makers, and had reached out to populations disproportionately affected by menthol cigarette use.¹¹ Four town hall meetings were held in neighborhoods with large Black, Latinx, and LGBTQ+ populations.¹² Spanish interpreters assisted at two of these meetings.¹³ Several hundred Chicagoans attended the meetings, including youth, health care workers, social service providers, faith leaders, and elected officials.¹⁴ Partnerships were formed with both traditional organizational stakeholders (such as the American Cancer Society) and with allies new to tobacco control (including the Coalition for Asian Substance Abuse Prevention, the Chicago Hispanic Health Coalition, the LGBT Advisory Council, and others).¹⁵

The City framed the menthol tobacco problem not just as a public health concern, but as a social justice issue,¹⁶ emphasizing that the tobacco industry had targeted communities and youth of color with its menthol marketing.¹⁷ Because of structural health care access barriers, this tactic targets youth who are more likely to become life-long smokers.¹⁸

Chicago's Menthol Ban

In the fall of 2013, the Chicago Board of Health and Department of Public Health released a comprehensive report that summarized its community engagement work and policy recommendations.¹⁹ One policy recommendation was a ban on the sale of all flavored tobacco products, *including menthol*, within a 500-foot radius of schools.²⁰ This policy was strongly endorsed by Mayor Emanuel and was ultimately adopted by the city council by a wide margin, though not without challenge.²¹

Preparing for Opposition

The flavor ban faced opposition from 377 tobacco retailers who would be impacted by the law.²² These retailers argued that including menthol cigarettes in the ban was unnecessary given that these products were already subject to all the same regulations as all cigarettes and because the disproportionate level of youth menthol use was due to enabling adults who purchase for minors, and the result of illicit (black market) sales.²³

Furthermore, because menthol product sales make up a significant share of the tobacco market, litigation was anticipated.²⁴ To prepare, Chicago attorneys conducted legal research to establish that the City had authority to regulate flavored tobacco products.²⁵ A 2009 First Circuit appellate decision upholding New York City's flavor ordinance (which exempted menthol products and tobacco retailers) and a 2013 appellate decision from the Second Circuit affirming a similar flavor restriction in Providence, Rhode Island were encouraging.²⁶ Neither ordinance was found to be preempted by the federal Family Smoking Prevention and Tobacco Control Act.²⁷ Although this case law is not legally binding in Illinois's Seventh Circuit, and although both precedent ordinances did not include menthol products, the City of Chicago concluded that these rulings provided strong support for the role of state and local governments in restricting the sale and distribution of tobacco products more stringently than provided by federal law.²⁸

In building its case for the inclusion of menthol in its flavor restriction, Chicago emphasized its goal of reducing youth tobacco use.²⁹ Restricting menthol allowed the City to target products that are the source of addiction of *nearly half of all teen smokers*.³⁰ Also, by addressing tobacco retailers located around schools, the City was focusing on neighborhoods where youth (including a high number of youth of color) were exposed to marketing that promoted menthol cigarettes and other flavored tobacco products and helped ensure their disproportionate popularity.³¹

The Ordinance Itself

The [flavor ban ordinance](#), introduced in November 2013, was passed by a 48 to 2 vote in December of that year.³² The ordinance prohibited anyone from selling, giving away, bartering, exchanging or otherwise dealing in "flavored tobacco products, samples of such products, or accessories for such products at any location that has a property line within 500 feet of the property line of any public, private, or parochial elementary, middle or

secondary school located in the City of Chicago.”³³ (Five hundred feet is approximately 1.5 times the length of a football field or roughly two city blocks.)

All flavored tobacco products, including menthol cigarettes, electronic nicotine delivery devices, as well as cigars, pipe tobacco, and smokeless tobacco are covered by the ordinance.³⁴ Although existing retailers are not grandfathered in, an exception does exist for “retail tobacco” stores dedicated primarily to the sale of tobacco.³⁵ If a retailer fails to comply with the ordinance, penalties could include the revocation or suspension of its retail license, as well as fines.³⁶

Implementation

While the flavor restriction ordinance passed in 2013, it was not set to take effect until July of 2014.³⁷ To prepare for the effective date, the City held public hearings in early 2014 to educate the community, specifically tobacco retailers about the ordinance.³⁸ In June, the Department of Public Health promulgated regulations to implement the new ordinance and letters were sent to all tobacco retailers in Chicago, informing them of the recent changes in tobacco law, and notifying affected retailers that they needed to stop selling flavored tobacco products.³⁹ In September, a citywide PSA campaign in collaboration with the Campaign for Tobacco-Free Kids was launched.⁴⁰

Challenges

Although the ordinance took effect in 2014, tobacco retailers were provided a grace period that extended into 2016.⁴¹ This was to allow retailers time to spend down their inventory.⁴² Beyond that, the City underestimated the amount of time needed to prepare for the implementation of such a complex law.⁴³ Creating the list of nearly 12,000 restricted products proved time-consuming, as did identifying the City’s vast number of private and charter schools and the surrounding retailers.⁴⁴

In addition, and as expected, the ordinance was challenged in court. In the fall of 2014, opponents of the ordinance filed two lawsuits challenging the ordinance’s constitutionality. The first case was brought by a group of convenience store owners while the second suit was filed by a trade association representing Chicago-based gasoline service stations.⁴⁵ In both cases, the plaintiffs sought to delay enforcement of the ordinance, contending that federal law preempted the City from passing this type of law and arguing, among other things, that the law would cause their businesses economic harm.⁴⁶ In June 2015, a judgment was rendered in favor of the City and both cases were dismissed with prejudice (meaning that neither plaintiff may refile their case).⁴⁷ The court found that the ordinance was not preempted by federal law because it did not entirely prohibit the sale of flavored products.⁴⁸

Epilogue

In 2016, the flavor restriction ordinance was relaxed to only include retailers within 500 feet of a public, private, or parochial secondary school – an action that reinstated the ability

of retailers near elementary and middle schools to offer menthol and other flavored products.⁴⁹ The partial repeal of the ban was urged by retailers, several of whom testified before the city council stating that the flavor ban had forced them to lay off workers and had damaged their profit margins.⁵⁰ Under the modified flavor ban, 154 retailers are still prohibited from offering menthol and other flavored tobacco products. A 2017 study found that only 57 percent of these retailers were compliant with the ordinance and did not offer menthol cigarettes.⁵¹

Despite setbacks regarding the expansiveness of the flavor ban, Chicago has seen youth cigarette use drop to historic lows. In 2019, only 3.9 percent of Chicago high school students reported smoking cigarettes.⁵² This rate is lower than Illinois' overall rate of high school smokers (4.7 percent), suggesting that Chicago's tobacco control efforts are paying off.⁵³

The work, however, is not done. While cigarette smoking among Chicago youth is on the decline, e-cigarette use poses a new threat. In 2019, 16.2 percent of Chicago high schools reported using some sort of tobacco product (cigarettes, vape products, etc.), representing a 12 percent increase in general youth tobacco use since 2017.⁵⁴ To address this problem, [Chicago banned the sale of flavored vaping products](#), including menthol, in September 2020.⁵⁵ This action is a continuance of Chicago's demonstrated commitment to addressing the public health threat that menthol and other flavored tobacco products pose.

Lessons Learned

Although Chicago's menthol and flavor restriction policy was a historic first, many other localities have since followed suit and have implemented policies that have drawn more praise from tobacco control advocates. When analyzing Chicago's flavor ban, it is important to both recognize how it paved the way for other cities to follow in its footsteps and to acknowledge the policy's limitations. Consider these important lessons learned:

- **Understand the political and legal landscape.**
Thoroughly research the issue including statistics relevant to the locality. Consult with legal professions to ensure that the appropriate authority to implement the policy exists and to anticipate legal challenges. Foster strong support from public health leaders and legislative champions.
- **Engage stakeholders from diverse sectors of the community.**
Reach out to the groups who are most affected by flavored tobacco products in your community both to create awareness and to amplify the voices of those populations. Consider creating multi-lingual resources on the matter. Use compelling ad campaigns to reach youth and other disaffected communities. Emphasize that this is a social justice issue.
- **Build a network of traditional and nontraditional partners.**
Engage traditional partners at the local, state, and national levels. Get buy-in from local coalition partners, even if they are new to tobacco control. Educate and cultivate engagement among community members to build local capacity.
- **Ensure the legislation is clear, complete, and well-drafted.**

Clearly describe the regulatory restrictions and responsibilities of all relevant parties and define all terms. Identify how the policy will be enforced and clarify the appeals process. Seek out legal assistance when needed.

- **Set up a well-planned implementation process.**
Develop an implementation plan that includes a process for publicizing the policy and educating the community. Create an avenue for retailers to make their voices heard and identify a procedure for responding to complaints in a timely manner.⁵⁶ Allow sufficient time to establish necessary procedures for implementation and enforcement and notify affected businesses.
- **Continue community engagement and education efforts after the policy has gone into effect.**
Use public education and evidence-based, culturally relevant cessation resources, particularly in underserved communities, to maximize public health gain. Ensure there are adequate resources to evaluate the policy and be transparent about its effectiveness and related health outcomes.
- **Use simple, comprehensive measures.**
Chicago's policy applied only to certain retailers who fell within a specific radius of a school. Consider adopting a policy that can be evenly applied throughout an entire locality. Comprehensive regulation is often easier to implement (e.g., removes the need to determine which retailers must be compliant) and goes much further toward the ultimate goal of reducing flavored tobacco availability.
- **Consider unintended impacts up front and plan for addressing them.**
Chicago rolled back its menthol sales restriction in response to retailers' concerns over the profitability of their businesses under the new regulation. Prior to implementation, consider potential consequences of the new policy and estimate their magnitude. Invite those who will be affected to the table and discuss what can be done to help mitigate negative impacts without compromising the effectiveness of the policy.

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. Comparatively, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit <http://www.keepitsacred.itcmi.org>. When the word "tobacco" is used throughout this document, a commercial context is implied and intended.

² Tobacco Control Legal Consortium, *Chicago's Regulation of Menthol Flavored Tobacco Products – Case Study*, Public Health Law Center 1 (Mar. 2016), <https://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-Chicago-Regulation-of-Menthol-Case-Study-Update-2016.pdf> [hereinafter *Case Study*].

³ *Id.*

⁴ Mayor's Press Off., *Mayor Emanuel Announces Record Drop in Chicago Youth Smoking Rates*, CITY OF CHI. (April 15, 2014), https://www.chicago.gov/city/en/depts/mayor/press_room/press_releases/2014/apr/mayor-emanuel-announces-record-drop-in-chicago-youth-smoking-rat.html.

⁵ *Id.*

⁶ *State and County QuickFacts – Chicago*, U.S. CENSUS BUREAU (2013), <http://quickfacts.census.gov/qfd/states/17/1714000.html>.

⁷ *The Burden of Tobacco: Prevalence, Impact and Cost – 2013*, ILL. DEP'T OF HEALTH (2013), <https://dph.illinois.gov/content/dam/soi/en/web/idph/files/publications/tobacco-burden-2013-050216.pdf>.

⁸ *Key State-Specific Tobacco-Related Data & Ranking*, CAMPAIGN FOR TOBACCO-FREE KIDS (2014), <http://www.tobaccofreekids.org/research/factsheets/pdf/0176.pdf> (Data derived from Youth Risk Behavioral Survey).

⁹ Tobacco Control Act, § 907(a)(1)(A), 123 Stat. at 1799 (codified at 21 U.S.C. 387g(a)(1)(A)).

¹⁰ Letter from Rahm Emanuel, Mayor, City of Chicago, to Carolyn C. Lopez, President, Chicago Board of Health (July 25, 2013).

¹¹ Chi. Board of Health, *Healthy Chicago: Transforming the Health of Our City*, Mayoral Report, CITY OF CHI. (Nov. 2013), http://www.cityofchicago.org/content/dam/city/depts/cdph/CDPH/Mentholpercent20Reportpercent20_Final_percent20Jan292014.pdf.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Case Study*, *supra* note 2, at 3.

¹⁶ *Id.* at 4.

¹⁷ See, e.g., Lisa Henriksen et al., *Targeted Advertising, Promotion, and Price for Menthol Cigarettes in California High School Neighborhoods*, 14 NICOTINE & TOBACCO RESEARCH 11- 21 (2012); see also Tobacco Control Legal Consortium, "Pressing the FDA on Menthol" (national webinar) (2012), <http://publichealthlawcenter.org/webinar/pressing-fda-menthol>; Cheryl Heaton, *Tobacco as a Social Justice Issue*, AM. LEGACY FOUND. (Nov. 27, 2001), <https://escholarship.org/uc/item/72h608mq>.

¹⁸ *Healthy Chicago: Transforming the Health of Our City*, *supra* note 11.

¹⁹ *Id.*

²⁰ Chi., Ill., Ordinance No. 02013-9185 (2014),

<http://www.cityofchicago.org/content/dam/city/depts/bacp/tobacco/flavoredtobaccord04212014.pdf>.

²¹ *Case Study*, *supra* note 2, at 4-5.

²² E-mail from Melissa Buenger, Policy Analyst, Chicago Dep't Public Health to Kerry Cork, Staff Attorney, Tobacco Control Legal Consortium (Mar. 9, 2016, 04:55 p.m. CST) (on file with author). These numbers are subject to change as retailers and schools open or close and the City identifies other retailers to notify.

²³ Ashely Hickey, *Parents OK With Emanuel's Push Against Menthol Smoking, Against Criminalization*, CHI. BUREAU (Oct. 22, 2013), <http://www.chicago-bureau.org/parents-ok-with-emanuels-push-against-menthol-smoking-against-criminalization>.

²⁴ *Case Study*, *supra* note 2, at 5.

²⁵ *Id.*

²⁶ N.Y.C., N.Y. ADMIN. CODE § 17-715; PROVIDENCE, R.I., CITY CODE § 14-309.

²⁷ U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428 (2d Cir. 2013) (rejecting preemption challenge to New York City ordinance governing sale of flavored tobacco products); Nat'l Assoc. Tobacco Outlets, Inc. v. City of Providence, 731 F.3d 71 (1st Cir. 2013) (rejecting preemption challenge to Providence ordinance prohibiting most retail sales of flavored tobacco products other than cigarettes).

²⁸ *See, e.g., U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d at 428 (“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.”)

²⁹ *Case Study*, *supra* note 2, at 6.

³⁰ *See, e.g., Gary Giovino et al., Differential Trends in Cigarette Smoking in the USA: Is Menthol Slowing Progress?*, 10 TOBACCO CONTROL 1136/051159 (2013) (concluding that of the more than 16,000 youth nationally who become new daily smokers every year, roughly half begin by smoking menthol cigarettes).

³¹ The tobacco industry has a history of using urban culture and language to promote menthol cigarettes; sponsoring hip-hop bar nights, where samples of specialty menthol cigarettes are distributed; and targeting community members with direct mail promotions. *Smoking & Tobacco Use: Tobacco Industry Marketing*, CTRS. FOR DISEASE CONTROL & PREVENTION

http://www.cdc.gov/tobacco/data_statistics/fact_sheets/tobacco_industry/marketing/index.htm#marketing (last visited Jul. 18, 2022).

³² Chi., Ill., Ordinance No. 02013-9185 (2014).

³³ *Id.*

³⁴ *Id.*

³⁵ Under the Chicago Clean Indoor Air Act, a “tobacco retail establishment” is defined as “a retail establishment that derives more than 80 percent of its gross revenue from the sale of loose tobacco, plants, or herbs and cigars, cigarettes, pipes, and other smoking devices for burning tobacco and related smoking accessories and in which the sale of other products is merely incidental.” CHI. ILL., MUN. CODE 4-64, §7-32-010, https://codelibrary.amlegal.com/codes/chicago/latest/chicago_il/0-0-0-2641927#JD_7-32-010.

³⁶ CHI., ILL., MUN. CODE § 4-64-240; Chi., Ill., Ordinance No. 02013-9185, §§ 4-64-100, 4-64-101, 4-64-180, 4-64-181, 4-64-190, 4-64-200, 4-64-205, 4-64-210 and 4-64-220; CHI., ILL., MUN. CODE § 4-64-330.

³⁷ *Case Study, supra* note 2, at 6, 8.

³⁸ *Id.* at 7-8.

³⁹ *Id.* at 8.

⁴⁰ *Id.* at 9.

⁴¹ Lauren Czaplicki et al., *Compliance with the City of Chicago's Partial Ban on Menthol Cigarette Sales*, 28 TOBACCO CONTROL 161-167 (2018).

⁴² *Case Study, supra* note 2, at 8.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 9.

⁴⁶ 76 Enterprises, Inc. et al. v. City of Chicago, Case No: 14 C 08306 (2014); *Indeps. Gas & Serv. Stations Ass'ns, Inc. v. City of Chicago*, 112 F. Supp 3d 749 (N.D. Ill. 2015).

⁴⁷ *Indeps. Gas & Serv. Stations*, 112 F. Supp. 3d 749.

⁴⁸ *Id.*

⁴⁹ CHI., ILL., MUNICIPAL CODE § 4-64-515.

⁵⁰ Hal Dardick, *Retailers Want Mayor, Aldermen to Allow Menthol Cigarette Sales Near Schools*, CHI. TRIBUNE (Dec. 9, 2016), <https://www.chicagotribune.com/politics/ct-chicago-menthol-tobacco-sales-near-schools-met-1210-20161209-story.html>; Heather Cherone, *Relax Ban on Tobacco Sales Near Elementary Schools: Finance Committee*, DNA INFO: WICKER PARK & BUCKTOWN (Dec. 12, 2016), <https://www.dnainfo.com/chicago/20161212/wicker-park/relax-ban-on-tobacco-sales-near-elementary-schools-finance-committee>.

⁵¹ *Compliance with the City of Chicago's Partial Ban on Menthol Cigarette Sales, supra* note 41.

⁵² Chi. Dep't of Public Health, *Healthy Chicago Data Brief 2019 Youth Tobacco Use*, CITY OF CHI. (2019), https://www.chicago.gov/content/dam/city/depts/cdph/statistics_and_reports/27114_1_Youth_Tobacco_Use_Flyer_C.2.pdf.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Mayor's Press Off., *City Council Passes Ordinance Banning the Sale of Flavored Vaping Products as The City Takes Another Important Step to protect the Health of Young People*, CITY OF CHI. (Sep. 9, 2020), https://www.chicago.gov/city/en/depts/cdph/provdrs/healthy_living/news/2020/september/city-council-passes-ordinance-banning-the-sale-of-flavored-vapin.html.

⁵⁶ See Lauren M. Czaplicki, *Behind the Point of Sale: A Case Study of Chicago's Menthol Cigarette Sales Ban from the Perspective of the Retail Store* (Aug. 7, 2018) (Ph.D. dissertation, Johns Hopkins University) (finding that retailers felt the communication from the City of Chicago regarding the menthol ban was one-sided).

San Francisco's Flavored Tobacco Products Policy

Overview

In June of 2017, the San Francisco Board of Supervisors unanimously passed the City's first law prohibiting the sale of menthol and all flavored commercial tobacco¹ products.² This law grew out of fervent advocacy and organizing from both local and national partners.³ Before the law took effect as scheduled in 2018, R.J. Reynolds Tobacco Company forced a referendum on the law, suspending its implementation, and at the same time funding a significant campaign urging San Francisco residents to vote it down.⁴ Defying the odds, however, San Francisco voters upheld the flavor ban, with 68 percent of voters supporting the law.⁵ Formal enforcement of the law began in 2019.⁶

Laying the Groundwork for Action

A study completed in 2016, prior to the passage of San Francisco's flavored tobacco ban, found that 11.6 percent of adults in California and 10.11 percent of adults in San Francisco smoked.⁷ Additionally, 5.8 percent of California residents reported using e-cigarettes, a number significantly higher than the national average at the time of 3.7 percent.⁸ Studies also found that, in 2016, 34.9 percent of California residents who smoked typically smoked menthol cigarettes, again higher than the then national average of 25 to 30 percent of adults who used menthol products.⁹ Adolescent, Black, and LGBTQ+ Californians, populations often targeted in tobacco marketing campaigns, disproportionately smoked menthol products. As a result, over 55 percent of Black California residents who smoked used menthol cigarettes.¹⁰ Based on the prevalence of menthol smokers, it was estimated that 35 percent of the packs of cigarettes sold within the City of San Francisco are menthol cigarettes.¹¹

The move to restrict the sale of all flavored tobacco products in San Francisco was a community-driven effort. The San Francisco Tobacco-Free Coalition, for instance, included San Francisco community members and local, state, and national organizations, including the San Francisco Community Health Center, American Lung Association, Breathe California, the African American Tobacco Control Leadership Council, California LGBTQ Tobacco Partnership, and the University of San Francisco Center for Tobacco Control Research and Education, and many other groups. This coalition united to foster community engagement and raise awareness about the menthol tobacco product problem.¹² The coalition also collaborated in drafting the language that would become the flavor restriction ordinance.¹³

In building support for San Francisco's flavor ban, the coalition employed the Community Action Model of community engagement (CAM).¹⁴ CAM uses a **five-step framework** to empower community members to become effective agents of change.¹⁵ The first step is to **train** community advocates on the history of tobacco control and to identify the problem the group is working to resolve, which – in this case – was the sale and use of flavored tobacco products.¹⁶ Then community advocates conduct qualitative and quantitative

research to **diagnose** the community's strengths and needs.¹⁷ The next step is to **analyze** the research to narrow the focus of the selected issue and to develop possible actions and activities to address that issue.¹⁸ Fourth, the community **implements** the selected action, which was the adoption of a city ordinance.¹⁹ Finally, the community advocates seek to **enforce** the action to ensure the longevity of the change.²⁰

Applying the CAM methodology, the coalition reached out to local community-based organizations and held meetings with predominantly Black, Asian Pacific Islander, and other communities disproportionately impacted by flavored tobacco use. The coalition's goal was to provide information about the harmful impacts of menthol and flavored tobacco products and to generate ideas about what could be done to mitigate those harms.²¹ Surveys, assessments, data analysis, and talking points were used to further engage the community to generate support for the ordinance.²²

This type of outreach continued even after the ordinance was passed with the coalition continuing to provide community education about the health impact of tobacco and the flavor ban.²³ One way that the coalition, in combination with the broader [San Francisco Tobacco-Free Project](#) organization, provides ongoing support to flavored tobacco product users is by offering tobacco cessation services. Between 2018 and 2021, two media campaigns were developed and implemented: "SF Quits!" and "Connect to Quit."²⁴ The Connect to Quit campaign consisted of online, print, and television ads along with a website and a hotline, all of which were informed by focus groups comprised of individuals from populations most affected by flavored products (Black, Asian and Pacific Islander, LGBTQ+, and Latinx populations).²⁵ Although the SF Quits! and Connect to Quit campaigns have since ended, cessation resources are still available for San Francisco residents through [Kick It California](#).

In advocating for the ordinance's passage, the coalition paid particular attention to San Francisco's youth population through coalition partner Breathe CA, which engaged youth in conversations about access to tobacco products and product use.²⁶ This component of the community engagement strategy was particularly important given that, in 2016, 70-80 percent of middle and high school students who used tobacco products were found to have used at least one flavored product within 30 days of being surveyed.²⁷ More than that, coalition's commitment to amplifying the voices of youth and marginalized community members most heavily impacted by menthol and flavored tobacco products illustrated how the flavored tobacco problem was framed during the campaign: as a social justice issue.²⁸

San Francisco's Menthol Ban

In June of 2017, the San Francisco Board of Supervisors voted unanimously to pass the flavor ban ordinance,²⁹ a clear payoff for the coalition- and community-led efforts to curb flavored tobacco use in the City. The ordinance prohibited the sale of any flavored "tobacco product."³⁰ The City's definition of "tobacco product" includes any product made or derived from tobacco *or* nicotine that is designed for consumption by any means, meaning that cigarettes, cigars, smokeless tobacco, and e-cigarettes (ENDS or "electronic nicotine devices) are all included.³¹

The ordinance was originally scheduled to take effect in January 2018, but the effective date was pushed back to April of that year to allow for store owners to sell down their flavored product inventory and to provide the City with time to implement programs to assist retailers with compliance.³²

Putting it to a Vote

Before the ordinance could take effect, R.J. Reynolds did its best to squash the ordinance. The tobacco company launched a ballot campaign to overturn the law, relying on the residents of San Francisco to reject it in a referendum.³³ R.J. Reynolds paid individuals \$5 each to sign a petition, which required 5,000 signatures for the proposed referendum to be placed on the ballot.³⁴ Yet that was just the beginning of R.J. Reynolds' spending to oppose the ordinance. In total, R.J. Reynolds invested over \$11.6 million in the San Francisco ballot campaign.³⁵ As the manufacturer of Newport cigarettes, the best-selling menthol brand, and the second most popular cigarette brand at the time among young people who smoked,³⁶ R.J. Reynolds had a clear motive for promoting and bankrolling such a costly campaign: to ensure youth could continue to access menthol and other flavored products.³⁷ One study found that 81 percent of youth who have ever tried tobacco started with a flavored product, meaning that flavored tobacco is often what hooks the next generation of smokers.³⁸ R. J. Reynolds, on the other hand, unsuccessfully argued that a flavored tobacco ban was analogous to prohibition or the "War on Drugs," claiming a ban would fail to curb usage and only foster a black market for flavored products.³⁹ R.J. Reynolds also relied on California's recent passage of a T21 law, a measure which raised the legal age to purchase tobacco products within the state to 21, stating that under the new law a flavor ban was not needed to keep tobacco products out of the hands of children.⁴⁰

Tobacco control advocates rallied in support of the flavor ordinance and launched a campaign of their own to encourage San Franciscans to vote to uphold the law. Notably, the Tobacco-Free Kids Action Fund, the American Cancer Society, the American Heart Association, and New York City Mayor Michael Bloomberg all contributed funds to support efforts to keep the ordinance in place (amounting to about \$5 million⁴¹) and the now-established coalition continued its community engagement efforts.⁴² History was made on June 5, 2018, when, despite R.J. Reynolds' significantly expensive opposition, 68 percent of San Francisco residents voted to uphold the ordinance.⁴³

Implementation

From September to December in 2018, the San Francisco Department of Public Health (SFDPH) collaborated with the coalition in a volunteer-run outreach program for tobacco retailers that educated them about the law and gave them an opportunity to ask questions or have their concerns addressed.⁴⁴ In addition, the coalition mailed informational flyers to each affected retailer and made online training materials available.⁴⁵ If retailers were uncertain about whether a product was prohibited under the ordinance, volunteer trainers photographed the item in question and sent the photos to the Department of Public Health for follow-up.⁴⁶

After the training period in December of 2018 and continuing through March of 2019, the Department of Public Health conducted compliance checks in retail locations around the City. These checks served as an official part of each retailer's permit file.⁴⁷ Routine enforcement of the ordinance began in April 2019.⁴⁸ If retailers were found to be offering flavored products, they were given 72 hours to remove the product from their shelves.⁴⁹ If the product was not removed within that time, the Department issued a Notice of Violation, with the likelihood of a Tobacco Permit suspension.⁵⁰

Epilogue

Between January and December of 2019, approximately 80 percent of San Francisco retailers were compliant with the ordinance, a significant increase from the 17 percent of retailers who were found to be compliant before the ban.⁵¹ Beyond compliance metrics, other studies have examined the effects of the flavor ordinance, with mixed results.

In 2021, an academic article released in the *Journal of the American Medical Association* (JAMA), purported to find that the San Francisco flavor ban had caused an increase in ENDS usage among individuals aged 18 to 24 within the City. This study relied exclusively on 2011 to 2019 data from the Youth Risk Behavior Surveillance System Survey (YRBSS), presuming the 2019 data reflected the post-ban environment.⁵² This study has since been found to be flawed as the 2019 YRBSS data only includes information gathered in 2018, before the ban was implemented.⁵³ While this study has been widely discredited, the study's author has continued to attest to her findings, something that the tobacco industry is quick to support, making it incredibly important to ensure accurate information is also widely available.⁵⁴

Fortunately, additional studies on the matter have accurately reflected the ordinance's impact. One such study, which examined how the ban affected weekly tobacco retail sales, reported that, following the ban, flavored tobacco sales in San Francisco decreased by 96 percent and general tobacco sales decreased by 25 percent.⁵⁵ Another study, conducted in late 2019, looked at young people who smoked and had been living in San Francisco since at least 2018 and found that the prevalence of tobacco product use among individuals in both the 18-24 and 25 to 34 age groups decreased significantly following the flavor ban.⁵⁶ It was also found that nearly 21 percent of those sampled who had exclusively been using flavored ENDS products before the ban quit using tobacco products entirely.⁵⁷ However, it is important to note that while the use of flavored e-cigarettes was found to be significantly lower than before the ban, the prevalence of using cigarettes and cigars remained stable.⁵⁸ Moreover, it was found that the use of online retailers to obtain tobacco products increased following the ban, suggesting that more work must be done to combat the menthol and flavored tobacco problem.⁵⁹

Lessons Learned

San Francisco's flavor ban was historic both because it was the first citywide, comprehensive flavor ban, including menthol, in the nation and because San Francisco

residents chose to uphold it by a wide majority when it came down to a vote.⁶⁰ With respect to flavored tobacco restrictions, San Francisco's story also offers some valuable lessons:

- **Prioritize community engagement.**
Engage partners at the local, state, and national level. Focus on developing connections to organizations that represent a diverse array of perspectives and interests. Create a formal working group or coalition to encourage accountability.
- **Make use of existing knowledge and tools.**
Connect with on-the-ground organizers and ask them what works in their community. Consider expanding successful, established community engagement strategies to include a tobacco control focus (if not already incorporated). If a community has no time-tested engagement methods, check out the [CAM](#) or reach out to a technical assistance provider.
- **Use community volunteers.**
Offer ways for individuals to become informed and involved in advocating for a policy in which they believe. Encourage collaboration between local policy enforcement agencies and community member volunteers to facilitate communication with local retailers.
- **Use straightforward language and provide a path to clear up ambiguity.**
When drafting a policy, use clear and unambiguous language, and consult with an attorney familiar with the laws of your jurisdiction or reach out to the attorneys at the Public Health Law Center. As much as possible, exclude or limit exceptions to the policy that muddy the water on what is allowed.
- **Consider a thoughtful implementation and robust enforcement process.**
During policy implementation and enforcement, provide ongoing education and training opportunities and offer avenues for affected entities or individuals to ask questions and have their concerns addressed.
- **Maintain a focus on social justice.**
Emphasize that the negative impacts of menthol and flavored tobacco products are disproportionately felt by youth and marginalized community members due largely to the tobacco industry's marketing strategies. Contextualize the regulation of flavored tobacco within the broader social justice policy landscape.

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. Comparatively, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit <http://www.keepitsacred.itcml.org>. When the word "tobacco" is used throughout this document, a commercial context is implied and intended.

² Priyanka Vyas et al., *Compliance with San Francisco's Flavored Tobacco Sales Prohibition*, 30 TOBACCO CONTROL 227, 227 (2021); Y. Tony Yang & Stanton Glantz, *San Francisco Voters*

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³ See Vyas et al., *supra* note 2, at 227-28.

⁴ *Id.* at 228.

⁵ *Id.*; Yang & Glantz, *supra* note 2, at 708.

⁶ Vyas et al., *supra* note 2, at 228.

⁷ S.F. OFF. OF ECON. ANALYSIS, BANNING THE SALE OF FLAVORED TOBACCO PRODUCTS: ECONOMIC IMPACT REPORT 5 (2017), https://sfcontroller.org/sites/default/files/Documents/Economic%20Analysis/170441_economic_impact_final.pdf.

⁸ *Id.* at 4.

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.* at 7.

¹² Tobacco-Free Coalition, <https://sanfranciscotobaccofreeproject.org/coalition/> (last visited June 17, 2022).

¹³ *San Francisco Restriction on the Sale of Menthol and All Other Flavored Tobacco Products*, COUNTERTOBACCO.ORG, [https://countertobacco.org/resources-tools/stories-from-the-field/san-francisco-menthol-restriction/#:~:text=What percent20is percent20the percent20policy percent3F,of percent20San percent20Francisco percent2C percent20without percent20exemption](https://countertobacco.org/resources-tools/stories-from-the-field/san-francisco-menthol-restriction/#:~:text=What%20is%20the%20policy%20of%20San%20Francisco%20without%20exemption) (last visited June 17, 2022).

¹⁴ *Id.*

¹⁵ *Community Action in Public Health Policy: Lessons Learned from Twenty Years of Community Capacity Building in San Francisco through the Community Action Model*, S.F. TOBACCO-FREE PROJECT (Sep. 2016), <https://sanfranciscotobaccofreeproject.org/wp-content/uploads/CAM-Case-Study-Final-9.12.16-to-TFP.pdf>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *San Francisco Restriction on the Sale of Menthol and All Other Flavored Tobacco Products*, *supra* note 13.

²² *Id.*

²³ *Id.*

²⁴ VANETTA THOMAS, S.F. TOBACCO-FREE PROJECT, OBJECTIVE 1 MENTHOL AND OTHER FLAVORED TOBACCO PRODUCTS BRIEF EVALUATION REPORT 2017-2021 7 (2021), <https://sanfranciscotobaccofreeproject.org/wp-content/uploads/BER-2021-Menthol-and-Flavored-Tobacco.pdf>

²⁵ *Id.*

²⁶ *San Francisco Restriction on the Sale of Menthol and All Other Flavored Tobacco Products*, *supra* note 13.

²⁷ S.F. OFF. OF ECON. ANALYSIS, *supra* note 7, at 5.

- ²⁸ *San Francisco Restriction on the Sale of Menthol and All Other Flavored Tobacco Products*, *supra* note 13.
- ²⁹ Vyas et al., *supra* note 2 at 227.
- ³⁰ S.F., CAL., HEALTH CODE §19Q.3 (2022).
- ³¹ S.F., CAL., HEALTH CODE §19H.2 (2022).
- ³² Vyas et al., *supra* note 2 at 228; *San Francisco Restriction on the Sale of Menthol and All Other Flavored Tobacco Products*, *supra* note 13 (referencing retailer technical assistance programing by the Healthy Retail SF program).
- ³³ Yang & Glantz, *supra* note 2, at 708.
- ³⁴ *San Francisco Restriction on the Sale of Menthol and All Other Flavored Tobacco Products*, *supra* note 13.
- ³⁵ Matthew L. Meyers, *Putting Profits Before Kids, R.J. Reynolds Spends Over \$11.6 Million in Effort to Overturn San Francisco Ban on Flavored Tobacco Products*, CAMPAIGN FOR TOBACCO-FREE KIDS (May 30, 2018), https://www.tobaccofreekids.org/press-releases/2018_05_30_sanfrancisco.
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- ³⁹ Yang & Glantz, *supra* note 2, at 708
- ⁴⁰ *Id.*
- ⁴¹ Vyas et al., *supra* note 2, at 228.
- ⁴² *Id.*; Yang & Glantz, *supra* note 2, at 709; *San Francisco Restriction on the Sale of Menthol and All Other Flavored Tobacco Products*, *supra* note 13.
- ⁴³ Vyas et al., *supra* note 2, at 228.
- ⁴⁴ *Id.*
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*
- ⁴⁷ *Id.*
- ⁴⁸ *Id.*
- ⁴⁹ *Id.*
- ⁵⁰ *Id.*
- ⁵¹ *Id.*
- ⁵² Abigail S. Friedman, *A Difference-in-Differences Analysis of Youth Smoking and a Ban on Sales of Flavored Tobacco products in San Francisco, California*, 175 JAMA PEDIATRICS 863 (2021).
- ⁵³ See Jessica Liu et al., *Youth Tobacco Use Before and After Flavoured Tobacco Sales Restrictions in Oakland, California and San Francisco, California*, TOBACCO CONTROL (2022).
- ⁵⁴ *Tobacco Industry Uses Flawed Study to Oppose Flavored Tobacco Restrictions*, TRUTH INITIATIVE (Apr. 21, 2022), <https://truthinitiative.org/research-resources/emerging-tobacco-products/tobacco-industry-uses-flawed-study-oppose-flavored>.

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⁵⁶ Yong Yang et al., *The Impact of a Comprehensive Tobacco Product Flavor Ban in San Francisco Among Young Adults*, 11 ADDICTIVE BEHAVIOR REPORTS 1, 3 (2020).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 4.

⁶⁰ *U.S. State and Local Issues: Ending the Sale of Flavored Tobacco Products*, CAMPAIGN FOR TOBACCO-FREE KIDS (Apr. 11, 2022), <https://www.tobaccofreekids.org/what-we-do/us/flavored-tobacco-products>.

Massachusetts' Flavored Tobacco Products Policy

Overview

In 2019, Massachusetts became the first state in the nation to pass a statewide restriction on the sale of menthol and other flavored commercial tobacco¹ and e-cigarette products.² The sweeping legislation, which took effect in 2020, prohibits the sale (and not the possession of) flavored tobacco products by every establishment other than certain licensed smoking bars for consumption on site only within the state.³ The Massachusetts ban came on the heels of a cluster of vaping-related lung injuries both in the state and throughout the nation. While the landmark policy has served as a guide for other states pursuing flavored tobacco product control initiatives, it has also been widely criticized for its perceived economic impact.

Background and Laying the Groundwork for Action

In 2017, before the flavor ban was implemented, 13.7 percent of adult Massachusetts residents smoked.⁴ This rate, however, was even higher for Massachusetts residents of color, with 15.7 percent of Black adults and 18.3 percent of Hispanic adults smoking regularly.⁵ In the same year, 3.3 percent of adults reported using e-cigarettes, though it was found that e-cigarette usage was highly skewed toward young people who smoke with 7.8 percent of adults aged 18-24 reporting regular e-cigarette use within the state.⁶ A similar trend was observed in Massachusetts high school youth. Over 20 percent of youth reported using e-cigarette products and 6.4 percent reported smoking cigarettes.⁷

Months before the flavor ban passed, Massachusetts Governor Charlie Baker declared a public health emergency in response to the outbreak of severe lung disease resulting from vaping product use both within the state and beyond.⁸ At the time the public health emergency was declared, the Centers for Disease Control and Prevention had confirmed 530 cases of lung injury within 38 states and the Massachusetts Department of Public Health reported being notified of 61 potential cases within state borders.⁹ Highlighting that flavored vaping products are particularly enticing to youth and that use of e-cigarettes among Massachusetts high schoolers was six times higher than use among adult residents, Governor Baker called for a four-month statewide ban on the sale of flavored and non-flavored vaping products in both retail stores and online.¹⁰ The emergency ban, which took effect at the end of September 2019, applied to all vaping products, including tobacco and marijuana, and was to continue through January 25, 2020.¹¹

While the developing vaping health crisis certainly set the stage for major tobacco policy change in the state, tobacco control advocates also played a role in urging Massachusetts to restrict menthol and flavored products. A number of organizational stakeholders, including the Campaign for Tobacco Free Kids, Health Resources in Action, Tobacco Free Mass., the African American Tobacco Control Leadership Council, and many other organizations (both national, state and local) banded together to create the [Fight All Flavors](#) campaign.¹² The

campaign emphasized that for generations, tobacco companies have targeted menthol tobacco products towards youth, Black communities, and other communities of color.¹³ As a result of this marketing strategy, menthol cigarettes, which are easier to smoke and harder to quit, are often what hook the next wave of tobacco users.¹⁴ Using its social justice-oriented strategy, the Fight All Flavors campaign helped educate and mobilize partners around the state, and particularly Black, Latinx, and LGBTQ+ communities, to support the statewide menthol and flavor ban.¹⁵ Campaign-trained youth and adult community members spoke at press conferences, reached out to media outlets, and encouraged legislators and the governor to take action on the flavored tobacco problem.¹⁶

Massachusetts' Flavor Ban

The Massachusetts flavor ban, also known as [An Act Modernizing Tobacco Control](#), was signed into law in November of 2019.¹⁷ In December of that year, the state's Public Health Council approved the new regulations imposed by the law, an action that marked the official end to the governor's previous emergency ban on the sale of tobacco and vape products that was due to lapse in January.¹⁸

Effective immediately, the law restricted the sale of flavored nicotine vaping products and non-flavored nicotine products with a nicotine concentration of 35 milligrams per milliliter or higher to only licensed, adult-only retail tobacco stores and smoking bars and only allowed consumption on-site in smoking bars.¹⁹ Beginning June 1, 2020, the law restricted the sale of flavored combustible cigarettes and other tobacco products, including menthol, to licensed smoking bars for on-site consumption only.²⁰ Also in June 2020, a 75 percent excise tax on the wholesale cost of nicotine vaping products was enforced on top of Massachusetts' 6.25 percent sales tax.²¹

Celebrating a Victory

Massachusetts' menthol and flavor ban made history as the first statewide restriction of flavored tobacco products and was a huge victory for tobacco control advocates.²² To celebrate this critical achievement, forty public health and social justice groups collaborated to place a [full-page advertisement](#) in the Boston Globe newspaper to thank the state for passing the landmark legislation.²³ The ad highlighted many of the organizational partners that contributed to this historic win against Big Tobacco and it emphasized that this measure would serve to protect the state's youth and populations of color.²⁴

Implementation

Because Massachusetts tobacco retailers were already subject to restrictions on the sale of vaping products following the governor's emergency order, the vaping-related provisions of the flavor ban law went into effect immediately. Before the portion of the law impacting combustible cigarettes and other tobacco products took effect, however, a public comment period was held.²⁵ Responding to comments made during this period, the Public Health Council voted to incorporate several changes to the new tobacco regulations, effective March 6, 2020.²⁶ Some of these changes included adding the phrase "regardless of nicotine

content” to the definition of “tobacco product,” specifying that locations that are permitted to sell flavored e-cigarette products may *only* do so for on-site consumption, and including a specific acknowledgement that the legislation does not preempt, or prevent, local authorities from adopting non-conflicting rules.²⁷

The final regulation laid out specific implementation requirements regarding signage (including health warnings, age restrictions, and cessation resources), advertising limitations, penalties for non-compliance, and enforcement authority.²⁸ Tobacco retailers who are found to be in violation of Massachusetts’ tobacco laws may be subject to fines up to \$5,000, the temporary prohibition of the sale of tobacco products on their premises, or both.²⁹

Epilogue

In 2020, the year in which the Massachusetts flavor ban took effect, a study found that 11.1 percent of Massachusetts adults smoked.³⁰ This number is both 4 percent fewer than the 2020 national average and is 2 percent fewer than the number of Massachusetts adults who reported smoking prior to the implementation of the ban.³¹ Because Massachusetts’ tobacco legislation is so recent, other updated statistics are not currently available. Several studies, however, have looked to evaluate the impact of the flavor ban within the state. One such study, published by the *Journal of the American Medical Association* (JAMA), found that Massachusetts’ comprehensive flavor ban was associated with a statistically significant decrease in state-level menthol and all cigarette sales.³² The study, however, did find that nonflavored cigarette sales increased after the ban, suggesting that some may be replacing menthol products with flavorless options.³³

A Renewal of Opposition

In 2022, two years after the passage of Massachusetts flavor ban, the law is facing renewed opposition. Opponents of the ban argue that although cigarette sales are down within the state, tobacco-product use remains consistent and that people who use tobacco products are simply sourcing their products from neighboring states as a means of skirting the ban and the associated excise taxes.³⁴ However, most neighboring states did not see increases in overall tobacco sales. New Hampshire saw an initial increase in menthol sales, but this increase was not sustained.³⁵ Some argue that this outsourcing deprives Massachusetts of tax revenue from tobacco sales while leaving the state to continue covering tobacco-related healthcare expenses.³⁶ It was estimated that Massachusetts would see between \$93-\$120 million in revenue loss in 2021 because of the ban, while the number of cigarette tax stamps sold throughout the Northeastern region of the U.S. held steady.³⁷

These arguments against the menthol and flavored tobacco ban have resulted in a legislative attempt to repeal the portion of the Act Modernizing Tobacco Control that prohibits the sale of menthol cigarettes while leaving the ban on flavored e-cigarette products in place.³⁸ The attempted partial repeal, “An Act to Repeal the State Menthol Ban,” has been proposed in the current (192nd) General Court (see [H.2406](#) and [S.1433](#)).³⁹ These

bills were sent to “study” in February 2022, which means they were dismissed without further discussion.

Others Following Suit

Despite criticism of the law, including from within the Massachusetts legislature, the state’s comprehensive flavor ban remains in place and has inspired other states to pursue similar action. In 2020, New Jersey, New York, and Rhode Island enacted statewide bans on flavored e-cigarettes, including menthol, but did not extend the regulation to menthol cigarettes or other combustible products.⁴⁰ Also in 2020, California became the second state in the nation to pass a comprehensive menthol and flavored tobacco restriction; however, the law was promptly put on hold following a proposed referendum.⁴¹ The referendum qualified for the ballot in early 2021 and will be voted on during the state’s General Elections in November 2022.⁴²

Massachusetts remains a leader within tobacco control and its landmark passage and implementation of a comprehensive, statewide menthol and flavored tobacco product restriction serves as a helpful guide for states seeking to follow in its footsteps.

Lessons Learned

As the first U.S. state to pass a statewide menthol and flavor ban, Massachusetts’ process represents a useful learning opportunity. Below are a few lessons learned from Massachusetts’ experience:

- **Capitalize on opportunities that present themselves.**
Governor Baker’s emergency order that temporarily prohibited the sale of vaping products served as a steppingstone for the larger, statewide flavor ban. Build on engagement and efforts that already exist in the community. Make the most out of instances when the public’s attention is drawn to tobacco control efforts.
- **Take time to celebrate victories.**
It is important to celebrate victories, even small ones, when they occur. Acknowledge the contributions of partner organizations, large and small. Maintain the focus of work on social justice outcomes.
- **Acknowledge unintended impacts.**
Consider how a flavor restriction may impact retailers, state tax revenue sums, or other interested parties. Be prepared to justify the restriction in the face of such criticism and question the criticism when justified. Where appropriate, engage and educate oppositional stakeholders.
- **Empower your neighbor.**
Make an active effort to call for similar tobacco control efforts from neighboring cities, counties, or states. Share resources and offer guidance or assistance when possible. Make clear that any given locality is benefited when those surrounding it are engaging in similar tobacco control efforts.

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. Comparatively, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit <http://www.keepitsacred.itcni.org>. When the word “tobacco” is used throughout this document, a commercial context is implied and intended.

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¹⁰ *Id.*

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¹⁴ Laura Bach, *Impact of Menthol Cigarettes on Youth Smoking Initiation and Health Disparities*, CAMPAIGN FOR TOBACCO-FREE KIDS (May 16, 2022), <https://www.tobaccofreekids.org/assets/factsheets/0390.pdf>.

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³⁰ *Tobacco Use in Massachusetts 2021*, TRUTH INITIATIVE, <https://truthinitiative.org/research-resources/smoking-region/tobacco-use-massachusetts-2021#:~:text=Of percent20this percent20C percent20the percent20state percent20allocated,and percent20Prevention percent27s percent20annual percent20spending percent20target.&text=Smoking percent20caused percent20health percent20care percent20costs percent3A percent20 percent244.08 percent20billion percent20per percent20year.&text=Smoking percent20caused percent20losses percent20in percent20productivity percent3A percent20 percent242.40 percent20billion percent20per percent20year> (last visited Jun. 29, 2022).

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³⁴ Ulrik Boesen, *Massachusetts Flavored Tobacco Ban Has Severe Impact on Tax Revenue*, TAX FOUNDATION (Jan. 19, 2021), <https://taxfoundation.org/massachusetts-flavored-tobacco-ban/>; Ulrik Boesen, *Massachusetts Flavored Tobacco Ban: No Impact on New England Sales*, TAX FOUNDATION (Feb. 3, 2022), <https://taxfoundation.org/massachusetts-flavored-tobacco-ban-sales-jama-study/>; Amanda Katchmar et al., *Effect of Massachusetts House Bill No. 4196 on Electronic Cigarettes Use: A Mixed Methods Study*, 18 HARM REDUCTION J. 1, 12 (2021); Patrick Gleason, *One State's Flavored Tobacco & Vape Ban is a Cautionary Tale for the Nation*, FORBES (Jan. 31, 2021), <https://www.forbes.com/sites/patrickgleason/2021/01/31/one-states-flavored-tobacco-vape-ban-is-a-cautionary-tale-for-the-nation/?sh=780506d55303>.

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Edina's Flavored Tobacco Products Policy

Overview

On June 16, 2020, Edina – a suburb in Minneapolis, Minnesota – passed a citywide prohibition on the sale of menthol and all flavored commercial tobacco¹ products. The passage of the law was the result of direct efforts by the City's Public Health Department. Despite being a relatively small city,² Edina faced significant opposition when tobacco industry giant R.J. Reynolds legally challenged the City's flavor restriction ordinance a day after its enactment. Litigation is ongoing.

Background and Laying the Groundwork for Action

In 2019, one in four eleventh-grade Minnesotans (26.4 percent) reported current e-cigarette use, up 9.3 percent from 2016.³ Similarly, e-cigarette use also increased among eighth and ninth grade students by 5 to 7 percent to 11.1 percent and 16.3 percent respectively.⁴ While the prevalence of e-cigarette use was rapidly increasing among youth in the state, combustible tobacco use dropped slightly to 5.3 percent in 2019, down from 8.4 percent in 2016.⁵ In 2019, 67.4 percent of Minnesota high school students and 56.6 percent of middle school students who reported tobacco use reported using menthol or other flavored products.

The dramatic uptick in teen vaping within only a few short years – a phenomenon spurred on by menthol and flavored product availability – is one reason Edina public health officials began advocating for a comprehensive flavor ban.⁶ Beyond addressing the rising rate of youth vaping and the outbreak of vaping related injuries within the City, Public Health Department officials claimed that the ban demonstrated Edina's commitment to the health of its residents, particularly its low-income population, youth, and residents of color who are targeted in flavored tobacco marketing campaigns.⁷

Before implementing its menthol and flavor ban, the City of Edina had already established itself as a tobacco control leader within the state. In July 2017, Edina became the first Minnesota city to [raise the age limit for purchasing tobacco products from 18 to 21](#).⁸ While Edina was not the first in the state to institute a flavor ban that included menthol (Minneapolis, Edina's largest neighbor, was the first to vote to expand its flavor restriction to include menthol in 2017, effective 2018),⁹ Edina's comprehensive flavor regulation continues to position the City as a leader in Minnesota tobacco control work.

Edina's Menthol Ban

In December 2019, the Edina Community Health Commission prepared a report, recommending that the City Council develop a menthol and flavored tobacco ban.¹⁰ The flavor restriction was also outlined as a 2020 community health initiative in the Community Health Commission's [Community Health Workplan](#).¹¹ The City met this goal, largely due to the dedicated efforts of the City's Community Health Commission.¹² Although

Edina's process was ultimately successful, it is important to consider how engaging community—particularly marginalized communities that are disproportionately impacted by menthol and flavored tobacco products—in both the drafting and advocacy process can result in more effective policies.

In developing Edina's flavor restriction policy language, Edina's public health officials sought technical assistance from the Public Health Law Center in drafting a policy with clear and simple language.¹³ In addition to providing flavor policy specific technical assistance, the Public Health Law Center offered clarifying updates to Edina's other existing tobacco regulations for the City to consider.

The end result was a blanket ban of the sale and distribution of any tobacco or tobacco-related product or device that contains any taste or smell other than that of tobacco, including menthol, within the City.¹⁴ On June 16, 2020, all four of Edina's City Council members and Edina's Mayor unanimously voted to pass Edina's [flavor restriction ordinance](#).¹⁵

Implementation

On September 1, 2020, Edina's flavor ban took effect. Prior to this date, retailers were provided notice via the mail that explained the restriction and when enforcement would begin.¹⁶ Although Edina's City Code specifies that retailers found in violation of the City's tobacco laws may be subject to administrative penalties including fines and loss of licensure,¹⁷ the Edina Public Health staff worked collaboratively with retailers during the first several weeks after the provision took effect to allow for any remaining flavored inventory to be sold down without penalty.¹⁸

Immediate Opposition

Ordinance opponents, however, did not wait for the flavor ban to take effect before making their voices heard. Less than one day after the City Council approved the ordinance, two local convenience retailers, along with tobacco industry giant R.J. Reynolds (RJR), sued the city. The convenience store plaintiffs argued that the comprehensive flavor ban jeopardized their business models, which rely on tobacco sales to adults.¹⁹ The store owners claimed that the blanket sales prohibition, coupled with the COVID-19 pandemic and civil unrest in the Twin Cities area following the murder of George Floyd, were too much for their businesses to handle.²⁰ The store owners suggested that a better compromise would have been restricting the sale of flavored e-cigarettes alone, citing that the rate of combustible tobacco use among Edina eleventh graders is only one fifth (5 percent) of the number who report e-cigarette usage (approximately 25 percent).²¹

The Legal Challenge

The complaint brought by RJR and the store owners alleged, among other things, that the City's ordinance was preempted by the federal [Tobacco Control Act \(TCA\)](#), which prohibits local and state governments from setting tobacco product standards.²² RJR filed for a

preliminary injunction to halt the implementation of the ordinance, while the City filed a motion to dismiss the lawsuit.²³

On August 31, 2020, the Minnesota district court denied RJR's motion for a preliminary injunction and granted the City's motion to dismiss.²⁴ While this outcome mirrored outcomes in other flavor restriction litigation around the country, the court's reasoning differed from preceding decisions. Most courts around the U.S. have held that flavored tobacco sales restrictions are not product standards under the TCA because they do not regulate how a product is made; rather, the restrictions only apply to the final product.²⁵ The Minnesota district court, however, found that the flavor regulation was a product standard, concluding that there was no difference between prohibiting the addition of flavor to tobacco products and prohibiting the addition of any other ingredient.²⁶ Although the Minnesota court determined that Edina's ordinance was a product standard and thus was preempted, it ultimately held that the clause was valid under the TCA's savings clause, finding it a "requirement[] relating to the sale . . . of . . . tobacco products by individuals of any age . . ."²⁷ The district court also found that the implied preemption argument failed and noted that the FDA's failure to regulate menthol products did not prevent states or localities from doing so.²⁸

On September 4, 2020, RJR appealed the district court's decision to the U.S. Court of Appeals for the Eighth Circuit. In addition to the briefs submitted by the parties, the Public Health Law Center, along with twenty-four other national public health and medical organizations, filed an amicus brief²⁹ with the court on behalf of the City of Edina.³⁰ The Center's brief argues that the TCA preserves local authority over tobacco product sales and that the long history of state and local tobacco regulation, dating back over a century, supports a narrow interpretation of the TCA's preemption provision.³¹ The brief points out that the prohibition on the sale of flavored tobacco is not a "product standard," as determined by the lower court, because it does not pertain to the manufacture of tobacco products, but only to tobacco sales.³² This position, though contradictory to the Minnesota district court in this case, is in line with *every other judicial interpretation* of a state or local flavor restriction nationwide.³³ Finally, the Center's brief argues that Edina's flavor ban is not impliedly preempted because local or state laws that provide stricter standards than those imposed nationally do not pose an obstacle to the federal regulatory scheme.³⁴

As of July 2022, the Edina litigation is ongoing and remains on appeal in the Eighth Circuit. [Oral arguments](#) heard on May 12, 2021.

Epilogue

Drawing on the City's experience passing a Tobacco 21 law, Edina Community Health Commission officials predicted that other cities within the state would follow suit and restrict menthol and other flavored tobacco products within their borders.³⁵ Edina's prediction has proven accurate. When Edina passed its flavor ban, it joined sixteen Minnesota cities to impose restrictions on flavored tobacco sales.³⁶ In 2022, twenty-five localities within the state were found to have imposed a flavor restriction, eighteen of which include menthol products in their restrictions.³⁷

Because Edina’s flavor ordinance passed so recently, data describing its effectiveness is limited at this time. The City, however, continues to contract with the Bloomington Public Health Department to connect Edina residents with health education and promotion resources, including resources around tobacco cessation.³⁸ Bloomington’s Public Health Department offers direct links to the Minnesota Department of Health’s [Quit Partner](#) (formerly Quit Plan) service and provides a list of other state and national organizations and programs that assist with cessation.³⁹

Lessons Learned

Although Edina’s menthol and flavored tobacco ban story is still ongoing, Edina’s process and the opposition it has faced offer some valuable lessons for states and cities looking to follow Edina’s example:

- **Forge organizational partnerships.**
Edina’s flavor restriction was almost exclusively developed within its Public Health Department. Consider reaching out to local and national organizations that have expertise in tobacco control advocacy or a presence in community early in the process. Draw on the experience of these organizations both when drafting policy language and in advocating for the policy’s passage.
- **Engage community stakeholders.**
Think of the flavor restriction policy as an equal partnership between government and community. Hold listening sessions and trainings with community members—particularly from populations specifically targeted by the tobacco industry (Black, Asian Pacific Islander, Native American, LGBTQ+, and youth)—to amplify their voices and educate them on the importance of a flavor restriction measure.
- **Seek legal technical assistance.**
Consult with legal technical assistance organizations, like the Public Health Law Center, when devising new tobacco control policy language. Consider taking the opportunity to revisit related existing tobacco control laws to clarify confusing or contradictory language.
- **Devise an implementation strategy that supports retailers and informs the community.**
Ensure a robust plan is in place following the passage of a flavor sales restriction. Create an enforcement timeline and develop an accessible way for retailers to ask questions and receive timely answers. Continue community engagement and education efforts to increase community understanding as to why the flavor ban is important and to foster support. Also, while making use of established statewide tobacco cessation resources is important, communities like Edina should consider developing more cessation resources that are tailored for their residents and that are locally available, particularly as surrounding communities follow their lead and prohibit the sale of flavored and menthol tobacco products.
- **Build momentum.**

Capitalize on any recent tobacco control successes and keep the ball rolling. Prior to implementing its flavor ban, Edina had received attention as the first city in the state to raise the legal age to purchase tobacco products to 21. Look to neighboring communities and learn from those that have already adopted flavor restriction policies and encourage others to begin the process.

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. Comparatively, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit <http://www.keepitsacred.itcmi.org>. When the word “tobacco” is used throughout this document, a commercial context is implied and intended.

² In 2020, Edina’s population was found to be 53,494. *Quick Facts: Edina City, Minnesota*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/edinacityminnesota/BZA110220> (last visited Jul. 15, 2022).

³ *Tobacco Data Highlights from the 2019 Minnesota Student Survey*, MINN. DEP’T OF HEALTH (Oct. 9, 2019), https://www.health.state.mn.us/communities/tobacco/data/docs/2019_mss_data_highlights.pdf.

⁴ *Id.*

⁵ *Id.*

⁶ Josh Skluzacek, *Edina Bans Sale of Flavored Tobacco Products, Including Menthol*, KSTP.COM EYEWITNESS NEWS (Jun. 17, 2020), <https://kstp.com/kstp-news/local-news/edina-bans-sale-of-flavored-tobacco-products-including-menthol>.

⁷ Jennifer Bennerotte, *City Council Bans Sale of Flavored Tobacco: Sept. 1 Ban Aimed to Curb Youth Vaping*, 7 EDITION: EDINA 1,3 (Jul. 2020), <https://www.edinamn.gov/ArchiveCenter/ViewFile/Item/627>.

⁸ Dan Gunderson, *Edina Poised to Become First Minn. City to Make Tobacco Buying Age 21*, MPR NEWS (May 2, 2017), <https://www.mprnews.org/story/2017/05/02/edina-raise-tobacco-age-21-18>; Tim Nelson, *Edina Raises Age to Buy Tobacco to 21*, MPR NEWS (May 3, 2017), <https://www.mprnews.org/story/2017/05/03/edina-raises-age-buy-tobacco-21>.

⁹ Linda M. Bosma et al., *Restricting Sales of Menthol Tobacco Products: Lessons Learned from Policy Passage and Implementation in Minneapolis, St. Paul, and Duluth, Minnesota*, 5 HEALTH EQUITY, 439 (2021).

¹⁰ Minutes of the Regular Meeting of the Edina City Council, Sec. IX.B. Ordinance 2020-08; Amending Ch. 12 of the Edina City Code Concerning Tobacco – First Reading Held (Jun. 2, 2020), <https://edina.novusagenda.com/AgendaPublic/meetings.aspx> (search “6/2/2020” in date range; then choose “City Council Meeting Legal Minutes”).

¹¹ CITY OF EDINA, MINN., COMMUNITY HEALTH: 2020 DRAFT COMMISSION WORK PLAN TEMPLATE 1 (Jan. 27, 2021), <https://www.edinamn.gov/DocumentCenter/View/9855/Community-Health-Work-Plan-PDF?bidId=>.

- ¹² *Community Health Commission*, CITY OF EDINA, MINN., <https://www.edinamn.gov/1543/Community-Health-Commission> (last visited Jul. 11, 2022).
- ¹³ Public Health Law Center, <https://www.publichealthlawcenter.org/> (last visited Jul. 11, 2022).
- ¹⁴ EDINA, MINN., CODE OF ORDINANCES ch. 12, art. VI, § 12-189 (2020).
- ¹⁵ Minutes of the Regular Meeting of the Edina City Council, Sec. IX.D. Ordinance 2020-08; Amending Ch. 12 of Edina City Code Concerning Tobacco – Adopted (Jun. 16, 2020), <https://edina.novusagenda.com/AgendaPublic/meetings.aspx> (search “6/16/2020” in date range; then choose “City Council Meeting Legal Minutes”).
- ¹⁶ Telephone Interview with Jeff Brown, RS, Community Health Administrator, City of Edina (Jul. 21, 2022).
- ¹⁷ EDINA, MINN., CODE OF ORDINANCES ch. 12, art. VI, § 12-282 (2017).
- ¹⁸ Telephone Interview with Jeff Brown, RS, Community Health Administrator, City of Edina (Jul. 21, 2022).
- ¹⁹ Anita Lang & Mark Olson, *Letter: Edina’s Flavored Tobacco Ban Left No Choice but to Sue*, SUN CURRENT (Jul. 1, 2020), https://www.hometownsource.com/sun_current/community/edina/letter-edinas-flavored-tobacco-ban-left-no-choice-but-to-sue/article_d6a1b4a8-bba5-11ea-a646-6ff133edd865.html.
- ²⁰ *Id.*
- ²¹ *Id.*
- ²² *R.J. Reynolds Tobacco Company, et al. v. City of Edina et al.* (2020), Public Health Law Center, <https://www.publichealthlawcenter.org/litigation-tracker/rj-reynolds-tobacco-company-et-al-v-city-edina-et-al-2020> (last visited Jul. 13, 2022) [hereinafter *Litigation Tracker*].
- ²³ *Id.*
- ²⁴ *Id.*; *R.J. Reynolds Tobacco Co. v. City of Edina*, 482 F. Supp. 3d 875, 876 (D. Minn. 2020).
- ²⁵ *Litigation Tracker*, supra note 22.
- ²⁶ *R.J. Reynolds*, 482 F. Supp. 3d at 879.
- ²⁷ *Id.* at 880 (quoting 21 U.S.C. § 387p(a)(2)(B)).
- ²⁸ *Id.* at 883-84.
- ²⁹ An amicus brief, often termed a “friend-of-the-court brief,” is a brief filed by a person or entity who is not a named party in a case in support of one side’s argument. See Brief, Black’s Law Dictionary (11th ed. 2019).
- ³⁰ *Litigation Tracker*, supra note 22.
- ³¹ Brief for Public Health Law Center et al. as Amici Curiae Supporting Defendants-Appellees at 6-7, *R.J. Reynolds Tobacco Co. v. City of Edina*, No. 20-2852 (8th Cir. Dec. 2, 2020).
- ³² *Id.* at 14.
- ³³ *Id.* at 17.
- ³⁴ *Id.* at 24-25.
- ³⁵ Andrew Wig, *Edina Bans Sale of Flavored Tobacco Products, is Promptly Sued*, SUN CURRENT (Jun. 19, 2020), https://www.hometownsource.com/sun_current/community/edina-bans-

sale-of-flavored-tobacco-products-is-promptly-sued/article_34ee86b8-b268-11ea-af28-c76a7bf122b0.html.

³⁶ *Id.*

³⁷ Laura Bach, *States & Localities That Have Restricted the Sale of Flavored Tobacco Products*, CAMPAIGN FOR TOBACCO-FREE KIDS (Jun. 16, 2022), <https://www.tobaccofreekids.org/assets/factsheets/0398.pdf>.

³⁸ *Public Health*, CITY OF EDINA, MINN., <https://www.edinamn.gov/217/Public-Health> (last visited Jul. 14, 2022).

³⁹ *Quitting Smoking*, CITY OF BLOOMINGTON PUBLIC HEALTH DIV., <https://www.bloomingtonmn.gov/ph/quitting-smoking> (last visited Jul. 14, 2022).