



ChangeLab Solutions

Law & policy innovation for the common good.

Model California Ordinance **Restricting the Sale of Menthol Cigarettes and Other Flavored Tobacco Products**

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Developed by ChangeLab Solutions

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Introduction and Report

This Model California Ordinance Restricting the Sale of Menthol Cigarettes and Other Flavored Tobacco Products (Model Ordinance) is one potential policy intervention to reduce the consumption of tobacco products. It is based on ChangeLab Solutions' legal research and analysis, as well as the research and evidence base regarding consumption of tobacco products and the rising popularity of flavored tobacco products. The Model Ordinance should complement other policy and programmatic efforts to reduce tobacco use.

This version of the Model Ordinance (revised in June 2017) includes the following changes from the previous version: (1) It prohibits the sale of flavored cigarettes (including menthol cigarettes), and (2) it provides an optional provision to grandfather certain businesses, which exempts those businesses from complying with the flavored tobacco prohibition for a limited period of time.

The Introduction and Report section summarizes our nonpartisan analysis of the health, equity, and policy issues related to the use and sale of menthol cigarettes and other flavored tobacco products, and it outlines why it is important to restrict the sale of such products. It should be distributed broadly to the public and local groups to help people understand the relevant data and the purpose of developing a policy restricting the sale of menthol cigarettes and other flavored tobacco products.

This Model Ordinance, including this Introduction and Report, is based on our independent and objective analysis of the relevant law, evidence, and available data. It allows readers to draw their own conclusions about the merits of this Model Ordinance.

The Model Ordinance offers a variety of options. In some instances, blanks (e.g., [____]) prompt you to customize the language to fit your community's needs. In other cases, the ordinance offers you a choice of options (e.g., [choice one / choice two]). Some of the options are followed by a comment that describes the legal provisions in more detail. Some degree of customization is always necessary to make sure that the ordinance is consistent with a community's existing laws. Your city attorney or county counsel will likely be the best person to check this for you.

Background

In 2009, the federal Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) banned the manufacture of flavored cigarettes. However, the law contains an exception for menthol cigarettes and does not restrict flavored non-cigarette tobacco products, such as smokeless tobacco. Moreover, California doesn't have any state laws that regulate the sale of menthol cigarettes or flavored non-cigarette tobacco products.

Flavored tobacco products are considered “starter” products that help establish long-term tobacco use, and they are particularly appealing to youth.¹ These products also pose significant barriers to achieving health equity. Thanks to tobacco companies’ marketing efforts, youth, communities of color, low-income populations, and members of LGBTQ communities are significantly more likely to use flavored tobacco products, particularly menthol cigarettes, and disproportionately bear the burden of tobacco-related harm.

This Model Ordinance restricts the sale of all flavored tobacco products, including the following:

- (1) Flavored cigarettes already prohibited by the Tobacco Control Act;
- (2) Menthol cigarettes;
- (3) Flavored other tobacco products (OTPs), such as cigars, little cigars, cigarillos, smokeless tobacco, shisha (hookah tobacco), electronic smoking devices (ESDs), and the solutions used in ESDs; and
- (4) Flavored components, parts, and accessories, such as flavored rolling papers, filters, and blunt wraps.

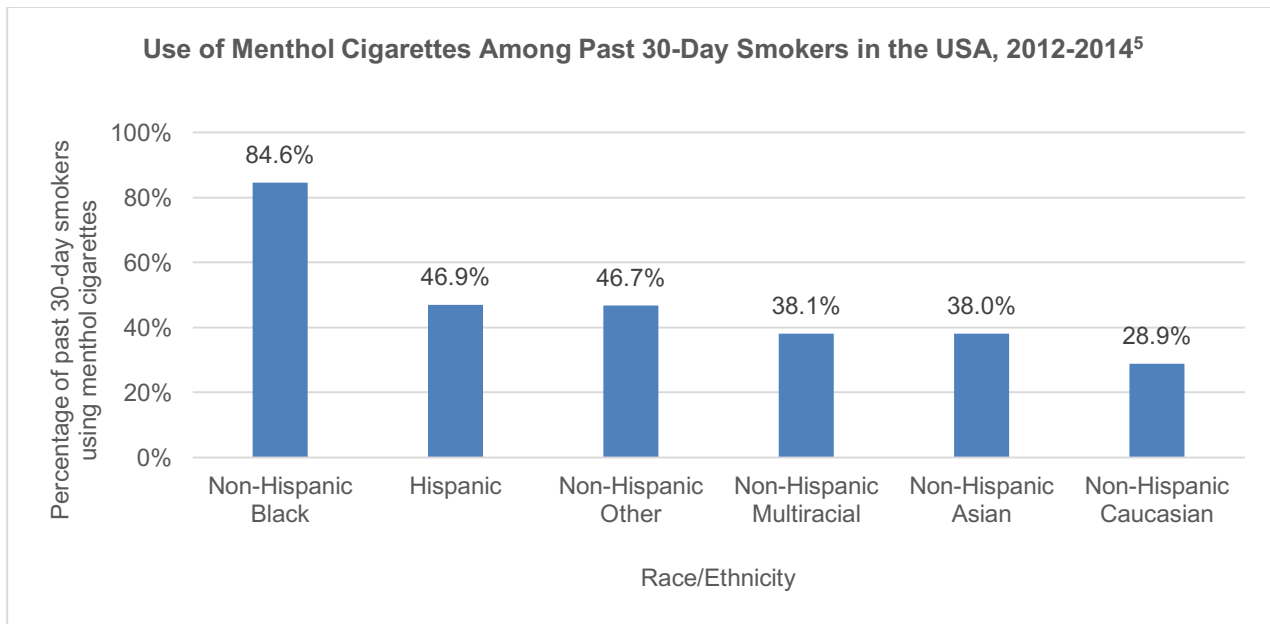
Menthol Cigarettes

For decades, tobacco companies have added menthol—a crisp, minty flavoring—to their products. By adding menthol to cigarettes, tobacco companies mask the natural harshness and taste of tobacco. The minty flavor makes tobacco products more mild, and therefore easier to use and more appealing to youth and new users.^{2,3}

Tobacco companies have manipulated the amount of menthol in cigarettes to encourage many people—particularly youth and populations targeted by the tobacco industry—to start and continue using tobacco.^{4,1} Smoking menthol cigarettes is associated with increased use of cigars and smokeless tobacco products,⁵ and it reduces the likelihood of successfully quitting smoking.^{3,6} Indeed, despite decreases in overall cigarette use in recent years, the proportion of cigarette smokers who use menthol cigarettes continues to rise.⁵ In 2014, more youth smokers used menthol cigarettes than non-mentholated cigarettes.⁵ Moreover, a 2017 study reported an increase in menthol cigarette use among youth cigarette smokers following the 2009 federal ban on flavored non-menthol cigarettes.⁷

Scientific reviews by the Tobacco Products Scientific Advisory Committee (TPSAC) and the US Food and Drug Administration (FDA) found that the marketing of menthol cigarettes likely increases the prevalence of smoking among the entire US population, and especially among youth, African Americans,³ and possibly Hispanic and Latino populations.⁶ Indeed, these groups bear the burden of menthol cigarette use: 84.6% of non-Hispanic Black smokers in the US reported smoking menthol cigarettes in the last month, in addition to 46.9% of Hispanic smokers, 38.1% of non-Hispanic multiracial smokers, 38% of non-Hispanic Asian smokers, and 46.7% of other smokers with non-Hispanic, non-Caucasian racial/ethnic backgrounds.⁵ Members of LGBTQ communities and young

adults with mental health conditions also struggle with disproportionately high rates of menthol cigarette use.^{8,9}



Tobacco companies have helped create and exacerbate these disparities. The tobacco industry has a well-documented history of developing and marketing menthol tobacco products to communities of color and youth.^{10,11} One analysis of cigarette advertising, promotions, and pack prices at stores near California high schools found that “for each 10 percentage point increase in the proportion of Black students, the proportion of menthol advertising increased by 5.9% ... the odds of a Newport [a leading brand of menthol cigarettes] promotion were 50% higher ... and the cost of Newport was 12 cents lower.”¹² There was no such association found for non-mentholated cigarettes.¹² Similarly, a New York study found that promotions that reduce the price of menthol cigarettes are disproportionately targeted to youth.¹³

Other Flavored Tobacco Products

In addition to selling menthol cigarettes, tobacco companies have developed flavored OTPs that have the same youth-friendly characteristics as the banned flavored cigarettes. For example, many of the cigar brands that are popular among teens are available in flavors such as apple, chocolate, grape, and peach.¹⁴ In fact, cigars follow only ESDs and cigarettes as the third most common form of tobacco used by youth.¹⁵ Smokeless tobacco products, including chewing tobacco, snuff, and snus, come in flavors such as mint, wintergreen, berry, cherry, and apple¹⁶ to mask the harsh taste of tobacco.^{14,17} Hookah tobacco (shisha) is available in an array of fruit, herbal, and alcoholic beverage flavors, and there is a strong—and false—perception among young people that smoking hookah is safer than smoking cigarettes.¹⁸ Nicotine solutions, also known as e-liquids and which are consumed via ESDs such as electronic

cigarettes, are sold in dozens of flavors that are attractive to youth, such as cotton candy and bubble gum.¹⁹

Consumption of flavored tobacco products has grown in recent years. From 1995 to 2008, sales of little cigars increased by 316%,²⁰ and in 2014, “flavored cigars accounted for more than half of all cigar sales (53.3%).”²¹ A 2009-2010 survey found that 42.9% of adult cigar smokers used flavored cigars,² and a 2014 survey found that 66.4% of people who smoked little cigars or cigarillos used flavored products.²² In 2014, nearly two-thirds of US middle school and high school cigar smokers reported using flavored cigars, and more than 1.5 million students reported using a flavored ESD within the past 30 days.²³ Moreover, a 2013-2014 survey found higher rates of flavored cigar use among vulnerable populations, including “cigar smokers with lower income, with less education and those who were lesbian, gay or bisexual.”²⁴

Like menthol, flavorings such as chocolate or apple help mask the naturally harsh taste of tobacco, making it easier for young people to start and continue using tobacco products.² In fact, a 2013-2014 survey found that “80.8 percent of 12-17 year olds who had ever used a tobacco product initiated tobacco use with a flavored product.”^{25,26} Policy interventions that target youth tobacco use are particularly critical because most individuals start using tobacco as minors or young adults.²⁷ In California, 64% of smokers start smoking by age 18, and 96% start smoking by age 26.²⁸ Compared with individuals who start smoking later in life, individuals who start smoking at a young age are at increased risk for severe addiction to nicotine.¹⁴

OTPs pose a threat to public health for several reasons. One major concern is that many users, especially young people, assume that OTPs do not pose significant health risks. Research shows that cigar smokers have misconceptions about the safety of cigars; for example, they often believe cigars are less harmful and less addictive than cigarettes.²⁰ Studies have found that young people believe smoking hookah is safer than smoking cigarettes, and incorrectly believe that hookah smoke is less toxic than cigarette smoke.^{29,30} Moreover, 58.8% of 12th-grade students report that they *don't* believe regular use of smokeless tobacco presents a great risk of harm.²⁷ The misperception among many young people that OTPs do not present significant health risks, coupled with the fact that many OTPs are flavored, may contribute to increased use of these products among young people.

Despite these misconceptions, the FDA has stated that “[a]ll tobacco products, including flavored tobacco products, are as addictive and carry the same health risks as regular tobacco products.”³¹ Regular cigar smoking is associated with increased risk for lung, larynx, oral cavity, and esophagus cancers.³² Hookah use has been associated with lung cancer, respiratory illness, and periodontal disease.³³ Smokeless tobacco contains at least 28 carcinogens, and there is strong evidence that users have an increased risk of developing oral cancers.¹⁴ The Surgeon General has reported that e-cigarettes “contain harmful ingredients that are dangerous to youth” and that e-cigarette aerosol “can contain

harmful and potentially harmful constituents.”³⁴ Moreover, multiple studies have confirmed that e-cigarette vapor contains toxic substances.^{35–37} To reduce the health impacts of menthol cigarette use and OTP use, communities can adopt policy interventions to regulate tobacco industry efforts that encourage youth, low-income populations, and communities of color to use mentholated and flavored products.

Considerations When Regulating Flavored Tobacco Products

A combination of strategies can protect youth from using tobacco and reduce industry-driven health inequities. Many communities are exploring programmatic and policy approaches to address the chronic health conditions associated with tobacco use. Some viable approaches are requiring local tobacco retailer licenses, limiting tobacco retailer density, setting minimum package sizes, and restricting the distribution of free or low-cost tobacco products. ChangeLab Solutions has developed this Model Ordinance as one tool to help communities reduce tobacco use, particularly among young people and vulnerable populations.

Policies that regulate the sale of flavored tobacco products can raise tensions between the government’s duty to protect individual liberty and its duty to promote and protect public health and well-being. Tobacco industry representatives and retailer associations have argued that there are already laws that prohibit the sale of tobacco products to youth. However, despite youth access laws, young people continue to buy and use tobacco products. Indeed, overall youth tobacco use didn’t change significantly between 2011 and 2015, with a 2015 survey reporting that nearly one-third (31.4%) of high school students used cigarettes, cigars, smokeless tobacco, or ESDs in the 30 days preceding the survey.¹⁵ In particular, young people are using a variety of OTPs:

- In 2015, 10.3% of high school students reported using cigars, cigarillos, or little cigars.¹⁵
- Youth hookah use increased more than 75% from 2011 to 2015, and youth ESD use increased more than tenfold during the same period.³⁸
- The percentage of high school students using smokeless tobacco products increased from 6.4% in 2012³⁹ to 7.3% in 2015.¹⁵
- A significant percentage of youth cigarette smokers concurrently use OTPs, increasing their risk for addiction and other health problems.¹⁴
- In a 2013-2014 survey, more than two-thirds of youth who used a non-cigarette tobacco product within the past 30 days reported doing so “because they come in flavors I like.”²⁶

Due to industry practices, individuals from communities of color, particularly young adults of color, are also more likely to use OTPs, such as little cigars.⁴⁰ In addition, a study found that daily menthol cigarette users are significantly more likely than occasional, non-menthol smokers to use flavored little cigars and cigarillos.⁴¹ African Americans and other communities of color are burdened with

disproportionately high rates of menthol cigarette use; this data, coupled with the findings from the study mentioned above, suggest that these populations are also more likely to use flavored little cigars and cigarillos. Many of these disparities are likely the result of tobacco companies' efforts to make these products more available, more heavily advertised, and cheaper in African American communities.⁴² Accordingly, interventions such as a flavored tobacco restriction, may be necessary to regulate the marketing and sale of flavored tobacco products, including menthol cigarettes, to youth and in communities of color.

Tobacco industry representatives have asserted that laws restricting the sale of flavored tobacco products overreach because they strip adults of the ability to buy lawful flavored products that they may prefer to non-flavored products. Additionally, retailer associations have asserted that laws restricting flavored tobacco products will result in lost revenues for local businesses. Local policymakers have discretion to assess whether the public health risks presented by flavored tobacco products are significant enough that the sale of these products should be regulated, even if such a regulation restricts the ability of adults to purchase these products or results in reduced tobacco sales for local retailers.

Congress grappled with this issue in enacting the Tobacco Control Act. They ultimately determined that the government couldn't meet the Act's goals of reducing the use of, dependence on, and social costs associated with tobacco products by allowing unrestrained access to all tobacco products. For that reason, Congress banned flavored cigarettes except menthol-flavored cigarettes (eg, fruit- and candy-flavored cigarettes), finding that a ban was appropriate given the strong youth appeal of these products.⁴³

Similarly, the US Court of Appeals for the Second Circuit found that New York City's flavored tobacco law advanced the Tobacco Control Act's goals of reducing the use of tobacco products and the harms resulting from such use.⁴⁴ Restricting the sale of flavored tobacco products is also consistent with the California legislature's decision in 2001 to ban the sale of *bidis*—hand-rolled filterless cigarettes that were sold in a variety of candy flavors. Although tobacco industry groups argued that the California bill overreached by prohibiting bidi sales to adults, state lawmakers decided to ban bidis based on the need to “reduce youth access to a particularly harmful and addictive form of tobacco.”⁴⁵

Legal Issues

Below we discuss some of the key legal issues associated with this Model Ordinance.

Federal Preemption

Preemption is a legal doctrine that provides that a higher level of government may limit, or even eliminate, the power of a lower level of government to regulate a certain issue. Under the US Constitution's “Supremacy Clause,” federal law governs over state or local law. So, if a state or local law conflicts with a federal law, the federal law trumps the lower-level law.

Tobacco industry groups and manufacturers have argued that the Tobacco Control Act, which prohibits the manufacture of flavored cigarettes (except menthol), preempts local regulation of flavored tobacco products. However, US cities have implemented ordinances restricting the sale of flavored tobacco products, including menthol cigarettes and/or flavored OTPs, and these ordinances have survived preemption challenges.

In 2009, New York City passed an ordinance restricting the sale of flavored OTPs. A smokeless tobacco manufacturer filed a lawsuit arguing that the Tobacco Control Act preempts localities from passing their own laws regulating flavored tobacco products. An appellate court upheld the ordinance, finding that federal law did not preempt New York City's ordinance because the ordinance regulated *the sale* of tobacco products, not the manufacture of those products.⁴⁴

In January 2012, Providence, RI, passed a similar law restricting the sale of flavored OTPs. Tobacco industry groups and manufacturers filed a lawsuit claiming that the Tobacco Control Act preempted the ordinance. A federal district court upheld the Providence law. The court found that the Tobacco Control Act does not preempt local laws related to the sale of tobacco products, such as Providence's ordinance restricting the sale of flavored OTPs. On September 30, 2013, the US Court of Appeals for the First Circuit affirmed the district court's decision.⁴⁶

In December 2013, Chicago passed a law prohibiting the sale of all flavored tobacco products, including menthol cigarettes, within 500 feet of any school. A trade group sued Chicago over the law, claiming that the Tobacco Control Act preempted the ordinance. On June 29, 2015, a US District Court in Illinois upheld the law, finding that the Tobacco Control Act does not preempt local laws that restrict the sale of menthol cigarettes and flavored OTPs.⁴⁷

Taken together, the decisions from Chicago, New York City, and Providence reaffirm the authority of state and local governments to enact laws regulating the sale of tobacco products and to adopt restrictions that are more stringent than federal law.

First Amendment

The First Amendment of the US Constitution protects the right to freedom of speech. Courts have determined that advertising and marketing are forms of expressive conduct—they communicate information about products to consumers. Thus, advertising, or commercial speech, is considered a type of speech under the First Amendment. For this reason, advertising has some degree of protection against government regulation; laws that attempt to restrict marketing, promotional content, or similar types of communication may not be permissible.

Under this Model Ordinance, a tobacco product is presumed to be flavored and cannot be sold if the text or images on its labeling or packaging indicate that the product imparts a flavor, taste, or aroma other

than that of tobacco. In Providence, tobacco industry groups argued that a similar provision in the city's ordinance was a marketing restriction that implicated the First Amendment. The Providence ordinance provides that a public statement made by a manufacturer that a tobacco product has a characterizing flavor constitutes presumptive evidence that the product is a flavored tobacco product. A federal court rejected the industry's First Amendment argument, finding that the use of a public statement made by a manufacturer to determine whether a product is flavored does not amount to a prohibition against speech.

The court noted that the sale of a flavored tobacco product in Providence is illegal, regardless of whether the product is specifically described as a flavored tobacco product. In other words, the court found that manufacturers are still free to describe their products as having a characterizing flavor, even though their flavored tobacco products cannot be sold in Providence. Thus, challenges to flavored tobacco regulations on First Amendment grounds have not been successful thus far.

Conclusion

Research has shown that cigarette and OTP use have serious health consequences. Young people are much more likely than adults to use menthol-, candy-, and fruit-flavored tobacco products, including cigarettes and OTPs. These products are considered “starter” products that help establish long-term tobacco use. Moreover, flavored tobacco products, particularly menthol cigarettes, pose significant barriers to achieving health equity. Thanks to tobacco companies' marketing efforts, communities of color, low-income populations, and LGBTQ communities are significantly more likely to use menthol cigarettes and disproportionately bear the burden of tobacco-related harm. Policy interventions designed to regulate products that get people hooked on tobacco, such as restrictions on the sale of flavored tobacco products, can directly address the public health and equity consequences associated with tobacco use.

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AN ORDINANCE OF THE [CITY / COUNTY] OF [____] RESTRICTING THE SALE OF MENTHOL CIGARETTES AND OTHER FLAVORED TOBACCO PRODUCTS AND AMENDING THE [____] MUNICIPAL CODE

The [City Council of the City / Board of Supervisors of the County] of [____] does ordain as follows:

COMMENT: This is introductory boilerplate language that should be adapted to the conventional form used in the jurisdiction.

SECTION I. [See **Appendix A: Findings**]

COMMENT: A draft ordinance based on this Model Ordinance should include findings of fact—data, statistics, relevant epidemiological information, for instance—that support the purposes of this legislation. The findings section is part of the ordinance and legislative record, and it contains information explaining the health and equity issues that the law would help address. A list of findings supporting this Model Ordinance appears in “Appendix A: Findings” on page 22. Jurisdictions may select findings from that list to insert here, along with additional findings on local or regional conditions, outcomes, and issues that help make the case for the law.

SECTION II. [Article / Section] of the [____] Municipal Code is hereby amended to read as follows:

Sec. [____ (*1)]. DEFINITIONS. The following words and phrases, whenever used in this [article / chapter], shall have the meanings defined in this section unless the context clearly requires otherwise:

COMMENT: Some terms defined in this Model Ordinance may already be defined in the jurisdiction’s municipal code. Include only the definitions that are necessary, and review all definitions for consistency. For example, the definition of Tobacco Product below covers a broad range of tobacco products (including electronic smoking devices), and may be more expansive than an existing definition in the municipal code. In restricting the sale of flavored tobacco products, jurisdictions with an existing definition of Tobacco Product need to decide whether to use this Model Ordinance’s definition or rely on their current definition. A jurisdiction is allowed to use different definitions of Tobacco Product in separate sections of its municipal code. However, to avoid confusion, the jurisdiction should make clear which sections of the municipal code are governed by a particular definition.

- (a) “Characterizing Flavor” means a taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a Tobacco Product or any byproduct produced by the Tobacco Product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice; provided, however, that a Tobacco Product shall not be determined to have a Characterizing Flavor solely because of the use of additives or flavorings or the provision of ingredient information.
- (b) “Flavored Tobacco Product” means any Tobacco Product that imparts a Characterizing Flavor.

COMMENT: This definition of Flavored Tobacco Product includes cigarettes. Federal law already prohibits the manufacture of flavored cigarettes, but it excludes menthol cigarettes from its prohibition. This Model Ordinance is more restrictive than federal law because it prohibits both the sale of menthol cigarettes and the sale of other flavored tobacco products. Below are some examples of the types of products prohibited by this Model Ordinance.

- Menthol cigarettes, roll-your-own tobacco, and components (eg, menthol flavored rolling papers and filters intended for use with roll-your-own cigarettes)
- All other flavored cigarettes, roll-your-own tobacco, and components (eg, flavored rolling papers and filters intended for use with roll-your-own cigarettes)
- Flavored cigars and little cigars
- Flavored smokeless tobacco
- Flavored electronic smoking devices
- Flavored non-cigarette components, parts, and accessories (eg, flavored blunt wraps and flavored additives for e-liquids)

- (c) “Labeling” means written, printed, or graphic matter upon any Tobacco Product or any of its Packaging, or accompanying such Tobacco Product.
- (d) “Manufacturer” means any person, including any repacker or relabeler, who manufactures, fabricates, assembles, processes, or labels a Tobacco Product; or imports a finished Tobacco Product for sale or distribution into the United States.
- (e) “Packaging” means a pack, box, carton, or container of any kind or, if no other container, any wrapping (including cellophane) in which a Tobacco Product is sold or offered for sale to a consumer.

- (f) “Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.
- (g) “Tobacco Paraphernalia” means any item designed or marketed for the consumption, use, or preparation of Tobacco Products.
- (h) “Tobacco Product” means:
 - (1) any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff;
 - (2) any electronic device that delivers nicotine or other substances to the person inhaling from the device, including, but not limited to an electronic cigarette, electronic cigar, electronic pipe, or electronic hookah.
 - (3) Notwithstanding any provision of subsections (1) and (2) to the contrary, “Tobacco Product” includes any component, part, or accessory intended or reasonably expected to be used with a Tobacco Product, whether or not sold separately. “Tobacco Product” does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where such product is marketed and sold solely for such an approved purpose.

COMMENT: This definition of Tobacco Product is designed to cover a wide variety of tobacco products, including cigarettes, cigars, smokeless tobacco, shisha (hookah tobacco), electronic smoking devices, and the solutions and component parts that are used in these devices. The definition includes electronic smoking devices with or without nicotine. The definition also includes any component, part, or accessory normally used with a Tobacco Product.

- (i) “Tobacco Retailer” means any Person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, Tobacco Products or Tobacco Paraphernalia. “Tobacco Retailing” shall mean the doing of any of these things. This definition is without regard to the quantity of Tobacco Products or Tobacco Paraphernalia sold, offered for sale, exchanged, or offered for exchange.

Sec. [____ (*2)]. SALE OF FLAVORED TOBACCO PRODUCTS PROHIBITED

- (a) It shall be a violation of this [article / chapter] for any Tobacco Retailer or any of the Tobacco Retailer's agents or employees to sell or offer for sale, or to possess with intent to sell or offer for sale, any Flavored Tobacco Product.

COMMENT: Some communities have created “buffer zones” by prohibiting the sale of flavored tobacco products within a specific distance of youth-populated areas, such as schools. For example, Berkeley, CA, and Chicago, IL prohibit the sale of flavored tobacco products, including menthol cigarettes, within 600 feet of any school and within 500 feet of any high school, respectively. Although these buffer zones are an important intervention, they're not comprehensive prohibitions on flavored tobacco product sales.

Communities can consider similar policies, but they should weigh the benefits and drawbacks of implementing a non-comprehensive flavored tobacco prohibition. A buffer zone approach may not provide the same public health benefits as a comprehensive, communitywide flavored tobacco restriction. Moreover, local jurisdictions that create buffer zones will likely face increased costs for implementation and potential enforcement challenges. For example, before a community can implement a buffer zone, it must conduct mapping surveys to determine the location of schools and tobacco retailers and measure the distances between them. Communities must routinely update the maps to reflect changes that affect where flavored tobacco products may be sold (eg, if a school opens, closes, or relocates). Developing and updating these maps may require significant resources.

Local jurisdictions must also educate tobacco retailers and the general public on how to determine whether a store is located within a buffer zone that prohibits the sale of flavored tobacco. This may include developing appropriate tools and resources for tobacco retailers to determine whether their store is within a buffer zone.

Despite these considerations, buffer zones remain a viable policy option for communities. If your community is interested in adopting a flavored tobacco product buffer zone, contact ChangeLab Solutions for assistance. This is introductory boilerplate language that should be adapted to the conventional form used in the jurisdiction.

- (b) There shall be a rebuttable presumption that a Tobacco Retailer in possession of four or more Flavored Tobacco Products, including but not limited to individual Flavored Tobacco Products, packages of Flavored Tobacco Products, or any combination thereof, possesses such Flavored Tobacco Products with intent to sell or offer for sale.
- (c) There shall be a rebuttable presumption that a Tobacco Product is a Flavored Tobacco Product if a Tobacco Retailer, Manufacturer, or any employee or agent of a Tobacco Retailer or Manufacturer has:

- (1) made a public statement or claim that the Tobacco Product imparts a Characterizing Flavor;
- (2) used text and/or images on the Tobacco Product's Labeling or Packaging to explicitly or implicitly indicate that the Tobacco Product imparts a Characterizing Flavor; or
- (3) taken action directed to consumers that would be reasonably expected to cause consumers to believe the Tobacco Product imparts a Characterizing Flavor.

-----OPTIONAL PROVISION-----

[(d) A Tobacco Retailer lawfully operating as of the date this ordinance is adopted is exempt from subsection (a) for a period of up to [6 months] from the effective date of this ordinance, provided that all of the following requirements are met:

- (1) Within [thirty (30) days] of the effective date of this ordinance, the Tobacco Retailer submits to the [City Manager / County Manager] written notice that it seeks temporary exemption from subsection (a) and documentation that demonstrates: (i) the Tobacco Retailer was lawfully operating as of the date this ordinance was adopted; (ii) [seventy percent (70%)] or more of gross sales receipts are derived from Tobacco Products, Tobacco Paraphernalia, or both, or [fifty percent (50%)] or more of completed sales transactions include Tobacco Products, Tobacco Paraphernalia, or both; and (iii) the amortization period afforded by the [6-month] period for the effectiveness of the ordinance adopting this section is insufficient to allow the Tobacco Retailer to sell, return to the distributor or wholesaler, or otherwise obtain the benefit of, property which has no lawful use by virtue of the ordinance adopting this section. The submission shall include all information and documentation the [City Manager / County Manager] may request to determine the Tobacco Retailer's qualifications for this exemption.
- (2) The [City Manager / County Manager] determines the Tobacco Retailer meets the qualifications set forth in [subsection (d)(1)].
- (3) The Tobacco Retailer submits all information and documentation requested by the [City Manager / County Manager] to determine continued qualification for this exemption. This exemption to subsection (a) shall not apply if the [City Manager / County Manager] determines that the Tobacco Retailer no longer meets the qualifications set forth in [subsection (d)(1)].]
- (4) The [City Manager / County Manager] shall offer the Tobacco Retailer an opportunity for an oral or paper hearing and render a written decision on the record of that hearing.

That decision shall be final as to the [City / County] and subject to judicial review pursuant to Code of Civil Procedure section 1094.5.]

COMMENT: This Model Ordinance provides a 6-month delay between when a jurisdiction adopts the ordinance and when the flavored tobacco prohibition goes into effect (see “SECTION IV. Effective Date” on page 21). This delay provides all tobacco retailers with a 6-month period to sell their remaining inventory of flavored tobacco products. The delay also provides the local government with time to plan for implementation and enforcement.

The optional provision above (subsection (d)) temporarily grandfathers certain tobacco retailers, which exempts them from having to comply with the flavored tobacco prohibition in subsection (a) for an additional limited period of up to 6 months. Thus, a local jurisdiction that includes the optional subsection (d) above is granting certain tobacco retailers a period of 12 months in which to comply with the prohibition following the adoption of the ordinance (6 months is allowed for all tobacco retailers pursuant to SECTION IV on page 21, and an additional 6 months is allowed for certain tobacco retailers pursuant to subsection (d) above). The exemption in subsection (d) applies only to tobacco retailers that primarily sell tobacco products and/or tobacco paraphernalia, as specified above (we refer to these businesses informally as “significant tobacco retailers”). To qualify for the exemption in subsection (d), a retailer must meet the following requirements.

Requirements to Qualify for the Exemption:

- (1) The Tobacco Retailer submits a written notice indicating a request for temporary exemption and documentation that demonstrates the following:
 - (a) The Tobacco Retailer was lawfully operating on the date the ordinance was adopted;
 - (b) 70% or more of gross sales receipts are derived from the sale of Tobacco Products, Tobacco Paraphernalia, or both, or 50% or more of completed sales transactions are derived from the sale of Tobacco Products, Tobacco Paraphernalia, or both; and
 - (c) The amortization period (see explanation below) provided between the date of adoption and the effective date is insufficient to allow the Tobacco Retailer to sell or return its inventory of prohibited Flavored Tobacco Products.
- (2) The government determines the Tobacco Retailer meets these qualifications and grants it an additional 6 months to comply with the prohibition.

Importantly, this exemption lapses if at any time the government determines the tobacco retailer no longer meets these qualifications. The government’s decision is not subject to an internal appeal, but it can be reviewed in court under the administrative mandamus statute.

Jurisdictions seeking the maximum public health impact from this Model Ordinance should not insert this optional provision. Many public health laws take effect immediately and apply to all existing businesses without exception. The findings in this Model Ordinance (page 22) explain how a flavored tobacco prohibition protects public health, and in particular, how it protects youth from the significant harms of tobacco use. Exempting businesses, even temporarily, can slow progress and undermine the benefits of this Model Ordinance.

Takings

Sometimes government staff ask whether applying a prohibition on flavored tobacco sales to existing businesses is a taking. A taking is a restriction on private property—which, in this case, is flavored tobacco products—that is so burdensome that a court determines that the government must pay just compensation for the property (because the government has effectively “taken” the property). Whether a law amounts to a taking is case-specific—it depends on the business—and the burden of proof falls on the business. In most settings, allowing the regulated business a reasonable time (typically a few months) to amortize the value of any investment in property—selling any remaining flavored tobacco products, for instance—that cannot be used after the prohibition takes effect prevents a taking.

An amortization period gives certain existing businesses a period of time to do business as usual before they must make changes to comply with a new law. Amortization periods are constitutional ways for local governments to balance the public interest and any financial impact on a private business. These periods are often short, measured in months, not years. It is important to note that the financial impact is less severe for a business that sells many other products in addition to tobacco products (eg, convenience stores and grocery stores), and that inventory can be returned to the wholesaler or resold for retail sale outside the city or county adopting the prohibition. Moreover, the time between adoption of an ordinance and its effective date is sufficient to amortize minor investments in inventory and signage. For these reasons, the optional temporary grandfathering provision applies only to tobacco retailers that sell a significant amount of tobacco products and/or tobacco paraphernalia; these businesses may be most affected by a flavored tobacco prohibition. Nevertheless, a flavored tobacco prohibition does not require businesses to close, or even to stop selling all tobacco products. It is a reasonable restriction on a type of tobacco product that is particularly harmful, especially to youth. Examples of reasonable amortization periods in different contexts include the following.

- An amortization period of 1 to 4 years is sufficient for a billboard removal ordinance. *Metromedia, Inc. v. City of San Diego*, 28 Cal.3d 848, 882 (1980), reversed on other grounds, 453 U.S. 490 (1981).
- An amortization period of 32 months is sufficient to amortize a billboard. *People ex. rel. Department of Pub. Wks. v. Adco Advertisers*, 35 Cal.App.3d 507 (1979). (Note: Amortization is often litigated in the context of billboards.)
- An amortization period of 18 months is sufficient to terminate operation of an automobile wrecking yard. *People v. Gates*, 41 Cal. App. 3d 590 (1974).
- An amortization period of 20 months is sufficient to change or relocate an adult entertainment business. *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004).
- An amortization period of 24 months is sufficient to terminate operation of a cement batching plant that invested \$98,000 (1950 dollars) in the business. *Livingston Rock & Gravel Co. v. Los Angeles County*, 43 Cal. 2d 121 (1954).

Notably, a federal district court upheld a San Francisco law prohibiting the sale of all tobacco products in pharmacies and requiring that pharmacies comply by the effective date of the ordinance. In other words, the law didn’t grant an amortization period. The court explained that

the ordinance “merely regulates the sale of tobacco products; it does not force Plaintiff to engage in a certain type of business.” The court further concluded that “although Plaintiff has alleged it has a vested property right in its [tobacco retailer] permits, it cannot overcome the fact that the enactment of the amended ordinance was a reasonable and permissible use of Defendants’ police power.” *Safeway Inc. v. City & Cty. of San Francisco*, 797 F. Supp. 2d 964 (N.D. Cal. 2011).

-----END OPTIONAL PROVISION-----

Sec. [____ (*3)]. ENFORCEMENT.

- (a) The remedies provided by this [article / chapter] are cumulative and in addition to any other remedies available at law or in equity.

COMMENT: The subsections below offer a variety of enforcement options to the drafter and the enforcing agency. Drafters may choose to include some or all of these options. Once the ordinance is enacted, the enforcing agency has the discretion to choose which enforcement tools to use in each case. As a practical matter, these enforcement options would not be applied simultaneously, although multiple remedies might be used against a particularly egregious violator over time.

The enforcement options included in this Model Ordinance penalize Tobacco Retailers who sell or offer to sell Flavored Tobacco Products. In other words, this Model Ordinance does *not* penalize individuals for purchasing, attempting to purchase, possessing, or using Flavored Tobacco Products. Well-enforced laws targeting retailers are more effective and provide greater public health benefits than laws penalizing users. Moreover, laws penalizing purchasers and users raise significant equity concerns because their enforcement often disproportionately affects communities of color.

Some communities face challenges in enforcing their Flavored Tobacco Product ordinances. For example, enforcement officials may have trouble determining when a Tobacco Product qualifies as a Flavored Tobacco Product, particularly when the packaging and marketing materials do not explicitly identify a Characterizing Flavor (eg, Tobacco Products using “concept flavors” like “Arctic” and “Lightning”). Communities should consider potential challenges and develop guidelines for staff enforcement. If your community is concerned about enforcement, please contact ChangeLab Solutions for assistance.

- (b) Violations of this [article / chapter] are subject to a civil action brought by the [City Prosecutor / District Attorney] or the [City Attorney / County Counsel], punishable by a civil fine not less than [two hundred fifty dollars (\$250)] and not exceeding [one thousand dollars (\$1,000)] per violation.

COMMENT: This provision outlines the civil fines for violations of the ordinance. It requires the

city or county file a traditional civil suit. The fine amounts can be adjusted but cannot exceed \$1,000 per violation. Government Code section 36901.

- (c) Violations of this [article / chapter] may, at the discretion of the [City Prosecutor / District Attorney], be prosecuted as infractions or misdemeanors when the interests of justice so require.

COMMENT: Sometimes called a “wobbler,” this provision affords the prosecuting attorney discretion to pursue a violation as an infraction (like a parking ticket) or a misdemeanor (a crime punishable by up to a \$1,000 fine and/or 6 months in a county jail). Alternatively, violations can be set as either an infraction or a misdemeanor in all circumstances. Fines and other criminal penalties are established by the Penal Code and are typically reflected in the general punishments provision of a local code.

SECTION III. SEVERABILITY. If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of this Ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases of this Ordinance, or its application to any other person or circumstance. The [City Council / Board of Supervisors] of the [City / County] of [] hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases hereof be declared invalid or unenforceable.

COMMENT: This is standard language. Often this “boilerplate” is found at the end of an ordinance, but its location is irrelevant.

SECTION IV. EFFECTIVE DATE. This Ordinance shall take effect and be in force from and after [6 months after date of enactment].

COMMENT: This section specifies the effective date of the ordinance, and it should be tailored to give the enforcing agency adequate time to educate tobacco retailers and the general public. The agency should also use this time to determine enforcement protocols for flavored tobacco products. General law cities and counties in California must provide a minimum of 30 days between an ordinance’s adoption and its effective date.

Appendix A: Findings.

The [City Council of the City / Board of Supervisors of the County] of [____] hereby finds and declares as follows:

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), enacted in 2009, prohibited candy- and fruit-flavored cigarettes,¹ largely because these flavored products were marketed to youth and young adults,² and younger smokers were more likely than older smokers to have tried these products;³ and

WHEREAS, although the manufacture and distribution of flavored cigarettes (excluding menthol) are banned by federal law,⁴ neither federal law nor California law restricts the sale of menthol cigarettes or flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, electronic smoking devices, and the solutions used in these devices; and

WHEREAS, flavored tobacco products are very common in California tobacco retailers as evidenced by the following:

- 97.4% of stores that sell cigarettes sell menthol cigarettes;⁵
- 94.5% of stores that sell little cigars sell them in flavored varieties;⁶
- 84.2% of stores that sell electronic smoking devices sell flavored varieties;⁷ and
- 83.8% of stores that sell chew or snus sell flavored varieties;⁸ and

WHEREAS, more than 1 in 4 stores located within 1,000 feet of California schools sell tobacco, and more than 3 out of 4 of these tobacco retailers sell flavored tobacco products (not including mentholated cigarettes);⁹ and

WHEREAS, mentholated and flavored products have been shown to be “starter” products for youth who begin using tobacco¹⁰ and that these products help establish tobacco habits that can lead to long-term addiction;¹¹ and

WHEREAS, at least one study has found that the majority of smokeless tobacco users reported that the first smokeless product they used was mint-flavored (such as ice, mint, spearmint, or wintergreen flavors), and almost two-thirds who transitioned to daily use of smokeless tobacco products first used a mint-flavored product;¹² and

WHEREAS, young people are much more likely than adults to use menthol-, candy-, and fruit-flavored tobacco products, including cigarettes, cigars, cigarillos, and hookah tobacco;¹³ and

WHEREAS, 70% of middle school and high school students who currently use tobacco, report using flavored products that taste like menthol, alcohol, candy, fruit, chocolate, or other sweets;¹⁴ and

WHEREAS, data from the National Youth Tobacco Survey indicate that more than two-fifths of US middle school and high school smokers report using flavored little cigars or flavored cigarettes;¹⁵ and

WHEREAS, much of the growing popularity of small cigars and smokeless tobacco is among young adults and appears to be linked to use of flavored products;¹⁶ and

WHEREAS, the Centers for Disease Control and Prevention has reported a more than 800% increase in electronic cigarette use among middle school and high school students between 2011 and 2015;¹⁷

WHEREAS, nicotine solutions, which are consumed via electronic smoking devices such as electronic cigarettes, are sold in dozens of flavors that appeal to youth, such as cotton candy and bubble gum;¹⁸ and

WHEREAS, the California Attorney General has stated that electronic cigarette companies have targeted minors with fruit-flavored products;¹⁹ and

WHEREAS, between 2004 and 2014 use of non-menthol cigarettes decreased among all populations, but overall use of menthol cigarettes increased among young adults (ages 18 to 25) and adults (ages 26+);²⁰ and

WHEREAS, people ages 12 and older from communities of color are more likely to smoke mentholated cigarettes, as evidenced by the following percentages of people who smoke cigarettes reported smoking mentholated cigarettes in the last month:²¹

- 82.6% of Black or African American individuals;
- 53.2% of Native Hawaiians or Other Pacific Islanders;
- 36.9% of individuals with multiracial backgrounds;
- 32.3% of Hispanic or Latino individuals;
- 31.2% of Asian individuals;
- 24.8% of American Indians or Alaska Natives; and
- 23.8% of White or Caucasian individuals; and

WHEREAS, adding menthol and other flavorings to tobacco products, such as cigarettes, little cigars, cigarillos, and smokeless tobacco, can mask the natural harshness and taste of tobacco, making these

products easier to use and increasing their appeal among youth;²² and

WHEREAS, the tobacco industry has been manipulating the dose of menthol in cigarettes to ensure the uptake and continued use of tobacco, especially by young people and vulnerable populations for many years;²³ and

WHEREAS, smoking mentholated cigarettes reduces the likelihood of successfully quitting smoking;²⁴ and

WHEREAS, the tobacco industry has a well-documented history of developing and marketing mentholated brands to communities of color and youth;²⁵ and

WHEREAS, a review of advertising, promotions, and pack prices near California high schools found that “for each 10 percentage point increase in the proportion of Black students, the proportion of menthol advertising increased by 5.9% ... the odds of a Newport [a leading brand of mentholated cigarettes] promotion were 50% higher ... and the cost of Newport was 12 cents lower.” There was no such association found for non-mentholated cigarettes;²⁶ and

WHEREAS, a New York study found that price reduction promotions for menthol cigarettes are disproportionately targeted to youth markets;²⁷ and

WHEREAS, scientific reviews by the Tobacco Products Scientific Advisory Committee (TPSAC) and the FDA found marketing of menthol cigarettes likely increases the prevalence of smoking among the entire population, and especially among youth, African Americans,²⁸ and possibly Hispanic and Latino individuals;²⁹

WHEREAS, scientific studies on the impact of a national ban on menthol in cigarettes found 36.5% of menthol cigarette users would try to quit smoking if menthol was banned³⁰ and between 300,000 and 600,000 lives would be saved by 2050;³¹ and

WHEREAS, an evaluation of New York City’s law, which prohibits the sale of all flavored tobacco, excluding menthol, found that as a result of the law, youth had 37% lower odds of ever trying flavored tobacco products and 28% lower odds of ever using any type of tobacco.³²

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8. *Id.*
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