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**Model California Ordinance**

**Restricting Sales of   
Flavored Tobacco Products**

Updated June 2015

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Developed by ChangeLab Solutions

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## **Introduction and Report**

This Model California Ordinance Restricting Sales of Flavored Tobacco Products (Model Ordinance) is based on ChangeLab Solutions’ legal research and analysis as well as the research and evidence base regarding youth consumption of tobacco products and the rising popularity of flavored tobacco products. It is one potential policy intervention to reduce young people’s consumption of tobacco products, and it is intended to complement other policy and programmatic efforts to reduce tobacco use.

The current version of the Model California Ordinance Restricting Sales of Flavored Tobacco Products (revised in June 2015) includes changes to the definition of Tobacco Product. The definition of Tobacco Product now includes electronic smoking devices whether or not they contain nicotine. Other related definitions have also been revised or deleted as a result of our change to the definition of Tobacco Product.

This Introduction and Report summarizes our nonpartisan analysis of the research on these issues and the rationale for restricting sales of flavored tobacco products as a possible policy intervention. It is intended for broad distribution to the public for the purpose of education and dissemination of information. Our presentation of this Model Ordinance, including this Introduction and Report, is based on our independent and objective analysis of the relevant law, evidence, and available data, and it should enable readers to draw their own opinions and conclusions about the merits of this Model Ordinance.

### **Public Health Concerns Presented by Flavored Tobacco Products**

This Model Ordinance restricts the sale of flavored tobacco products other than cigarettes. Some examples of these flavored other tobacco products, or OTPs, are cigars, little cigars, cigarillos, smokeless tobacco, shisha (hookah tobacco), and electronic smoking devices and the nicotine solutions used in these devices.

While the federal Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) banned the manufacture of flavored *cigarettes*, there is no federal or state law that regulates sales of flavored OTPs. As a result, tobacco companies have developed a number of flavored OTPs that have the same youth-friendly characteristics as the formerly available flavored cigarettes. For example, cigars are the second most common form of tobacco used by youth,[[1]](#endnote-1) and many of the popular brands among teens are available in flavors such as apple, chocolate, grape, and peach.[[2]](#endnote-2) Smokeless tobacco products, including chewing tobacco, snuff, and snus, come in flavors such as mint, wintergreen, berry, cherry, and apple[[3]](#endnote-3) to mask the harsh taste of tobacco.[[4]](#endnote-4) Shisha (hookah tobacco) is available in an array of fruit, herbal, and alcoholic beverage flavors, and there is a strong (and false) perception among young people that hookah smoking is safer than cigarettes.[[5]](#endnote-5) Nicotine solutions, which are consumed via electronic smoking devices such as electronic cigarettes, are sold in dozens of flavors that are attractive to youth, such as cotton candy and bubble gum.[[6]](#endnote-6)

The consumption of flavored tobacco has grown in recent years. From 1995 to 2008, sales of little cigars increased by 316 percent.[[7]](#endnote-7) Flavored brands make up nearly four-fifths of the market share.[[8]](#endnote-8) From 2009 to 2010, the prevalence of flavored cigar use among adult cigar smokers was 42.9 percent, with young adults having the greatest prevalence at 57.1 percent.[[9]](#endnote-9) Among youth, in 2011 more than two-fifths of U.S. middle and high school smokers reported using flavored little cigars or flavored cigarettes.[[10]](#endnote-10) Some students who reported using flavored cigarettes after the federal ban was enacted were likely using flavored little cigars, which often closely resemble cigarettes, except that they are wrapped in paper that contains tobacco.[[11]](#endnote-11)

Flavorings help mask the naturally harsh taste of tobacco, making it easier for youth to initiate and sustain tobacco use.[[12]](#endnote-12) Policy interventions that target youth and young adults are particularly critical because most individuals start using tobacco as minors or young adults.[[13]](#endnote-13) In California, 64 percent of smokers start smoking by age 18, and 96 percent start smoking by age 26.[[14]](#endnote-14) Further, young adults ages 18 to 24 have the highest smoking prevalence of any age group in the state.[[15]](#endnote-15) Individuals who begin smoking at an early age are more likely to develop a more severe addiction to nicotine than those who start later.[[16]](#endnote-16)

A public health concern presented by OTPs more generally is that many users, especially young people, assume that OTPs do not pose significant health risks. Several studies indicate that cigar smokers misperceive cigars as being less addictive, more “natural,” and less harmful than cigarettes.[[17]](#endnote-17) Studies have found that young people view hookah use as safer than cigarettes and incorrectly believe that hookah smoke is less toxic than cigarette smoke.[[18]](#endnote-18) Only 41.2 percent of 12th-grade students report that they believe there is a great risk of harm associated with the regular use of smokeless tobacco.[[19]](#endnote-19) In the context of cigarettes, research has shown that adolescents who believe that long-term health risks are not likely to result from smoking are more likely to begin smoking, compared with adolescents who believe that health risks are very likely to occur.[[20]](#endnote-20) The perception among many young people that OTPs do not present significant health risks, coupled with the fact that many of these products are flavored, may contribute to increased use of these products among young people.

Despite misperceptions that OTPs do not present significant health risks, the federal Food and Drug Administration has stated that “[a]ll tobacco products, including flavored products, are addictive and carry serious health risks.”[[21]](#endnote-21) Regular cigar smoking is associated with increased risk for lung, larynx, oral cavity, and esophagus cancer.[[22]](#endnote-22) Hookah use has been associated with lung cancer, respiratory illness, and periodontal disease.[[23]](#endnote-23) Smokeless tobacco contains at least 28 carcinogens, and there is strong evidence that users have an increased risk of developing oral cancers.[[24]](#endnote-24) To reduce the health impacts of OTP use, policy interventions are needed to prevent young people from starting to use these products.

### **Regulation of Flavored Tobacco Products as a Strategy to Reduce Tobacco Use Among Youth**

A combination of strategies is needed to prevent youth from initiating tobacco use. Many communities are exploring a range of programmatic and policy approaches to reduce chronic health conditions associated with tobacco use. Some viable approaches are media campaigns, requiring local tobacco retailer licenses, limiting tobacco retailer density, and restricting distribution of free or nominal-cost tobacco products. ChangeLab Solutions has developed this Model Ordinance as one tool to help communities reduce tobacco use, particularly among young people.

Policies that regulate sales of flavored OTPs can implicate 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 sales of tobacco products to minors. However, despite youth access laws, young people continue to use OTPs. Cigar use among high school students increased from 11.6 percent in 2011 to 12.6 percent in 2012.[[25]](#endnote-25) Among non-Hispanic black high school students, cigar use increased from 11.7 percent in 2011 to 16.7 percent in 2012.[[26]](#endnote-26) Hookah use among high school students increased more than 30 percent from 2011 to 2012.[[27]](#endnote-27) Electronic cigarette use among middle and high school students doubled from 2011 to 2012.[[28]](#endnote-28) Since 2003, the percentage of youth who regularly use smokeless tobacco has remained largely unchanged, hovering between 6.4 percent[[29]](#endnote-29) and 6.7 percent.[[30]](#endnote-30) Among youth who smoke cigarettes, the concurrent use of OTPs—particularly cigars and smokeless tobacco—has not declined since 2001.[[31]](#endnote-31) The use of multiple tobacco products may help promote and reinforce addiction and lead to greater health problems.[[32]](#endnote-32) Accordingly, additional interventions, including a flavored tobacco restriction, may be necessary to prevent youth from initiating use of OTPs.

Tobacco industry representatives have asserted that laws restricting sales of flavored OTPs overreach because they strip some adults of the ability to buy lawful products that they may prefer to non-flavored products. Additionally, retailer associations have asserted that laws restricting flavored OTPs will result in lost revenues for local businesses. Local policymakers have discretion to assess whether the public health risks presented by flavored OTPs are significant enough that sales of these products must 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 and ultimately determined that the Act’s goals of reducing the use of, dependence on, and social costs associated with tobacco products could not be served by allowing unrestrained access to all tobacco products. For that reason, Congress banned fruit- and candy-flavored cigarettes, finding that a ban was appropriate given the strong youth appeal of these products and the evidence that these products were not used regularly by a large number of addicted adult smokers.[[33]](#endnote-33) Similarly, the U.S. 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 and harmfulness of tobacco products, especially among young people, “without trenching on Congress’s competing goal of keeping tobacco products generally available to addicted adults.”[[34]](#endnote-34) Restrictions on sales of flavored OTPs are also consistent with the California legislature’s decision in 2001 to ban sales of bidis, hand-rolled filterless cigarettes that were sold in a variety of candy flavors. Although tobacco industry groups argued that the 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.”[[35]](#endnote-35)

## **Legal Issues**

Below we discuss some of the key legal issues that this Model Ordinance may raise.

### **Federal Preemption**

Tobacco industry groups and manufacturers have argued that local regulation of flavored OTPs is preempted by the federal Tobacco Control Act, which prohibits the manufacture of flavored cigarettes. However, ordinances restricting sales of flavored tobacco products have been implemented in other cities and survived preemption challenges.

In 2009, New York City passed an ordinance restricting sales of flavored OTPs. A smokeless tobacco manufacturer filed a lawsuit arguing that the federal Tobacco Control Act preempts localities from passing their own laws regarding flavored tobacco products. An appellate court upheld the ordinance, finding that New York City’s ordinance was not preempted by federal law because it regulated *sales*, not manufacturing, of tobacco products.[[36]](#endnote-36)

In January 2012, Providence, R.I., passed a similar law restricting sales of flavored OTPs. Tobacco industry groups and manufacturers filed a lawsuit claiming that the ordinance was preempted by the federal Tobacco Control Act. A federal district court upheld the law. The court found that local laws related to sales of tobacco products, such as Providence’s ordinance restricting sales of flavored OTPs, are not preempted by the Tobacco Control Act. On September 30, 2013, the U.S. Court of Appeals for the First Circuit affirmed the District Court’s decision.[[37]](#endnote-37)

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

### **First Amendment**

The First Amendment to the U.S. 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 to be a type of speech and has some degree of protection against government regulation that restricts that type of communication.

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 other than that of tobacco. Tobacco industry groups argued that a similar provision in the Providence ordinance was a marketing restriction that implicated the First Amendment. The 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.

## **Adopting the Model Ordinance**

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 other than that of tobacco. New York City and Providence, R.I., used a similar approach in enacting local ordinances to restrict the sale of flavored tobacco products. As described above, these ordinances were upheld by the courts.[[38]](#endnote-38)

In addition to enacting an ordinance to restrict sales of flavored OTPs, a locality with a tobacco retailer licensing program can amend its licensing ordinance to reference the flavored OTP restriction. By doing so, the locality can use the enforcement options included in the tobacco retailer licensing ordinance, such as suspension of the license, if a retailer sells or offers for sale flavored OTPs. This Model Ordinance contains language that can be used to enact a flavored tobacco restriction both as a standalone ordinance and as part of a tobacco retailer licensing ordinance.

This Model Ordinance is intended to address tobacco products that are particularly appealing to youth. Some communities may choose to provide an exemption to the flavored OTP restriction for tobacco stores, defined under state law as businesses that primarily sell tobacco products and do not permit minors to enter the premises. The Model Ordinance contains optional language that would provide an exemption for tobacco stores, but only for those businesses that are in operation as of the effective date of the ordinance.

The definition of “Flavored Tobacco Product” in the Model Ordinance is written to exclude cigarettes. The Model Ordinance does not address flavored cigarettes because, with the exception of menthol cigarettes, the federal Tobacco Control Act already regulates these products. Although the Tobacco Control Act did not ban menthol cigarettes, Congress tasked the U.S. Food and Drug Administration’s (FDA) Tobacco Products Scientific Advisory Committee with developing a report and recommendations on what FDA should do with regard to menthol in cigarettes. This Model Ordinance does not cover menthol cigarettes because it is uncertain whether or how FDA will regulate these products. As a result, the Model Ordinance, as written, could not be used by a community that wants to restrict sales of menthol cigarettes (although the Model Ordinance does restrict sales of menthol-flavored non-cigarette products). If your community is interested in strategies for addressing menthol cigarettes, contact ChangeLab Solutions for more information.

## **Conclusion**

Research has shown that OTP use has serious health consequences. Young people are much more likely to use flavored OTPs than adults, and these products are considered to be “starter” products that help establish long-term smoking habits. Policy interventions designed to reduce the number of youth who initiate tobacco use, including restrictions on sales of flavored OTPs, can lessen the public health consequences associated with tobacco use. Arguments have been made that flavored OTP restrictions are unnecessary because there are already laws that prohibit minors from purchasing and possessing OTPs, that these restrictions will prevent adults from accessing lawful tobacco products, and that these restrictions will reduce profits for local businesses. Although these arguments raise significant considerations, they should be considered alongside the negative health consequences of the continued use of OTPs among youth and young adults. In addition, restricting sales of flavored OTPs is a valid use of government authority. Based on this research and analysis, we conclude that restricting sales of flavored OTPs is a valuable policy intervention that can prevent youth from experimenting with tobacco products and developing a long-term tobacco addiction. Coupled with other policy and program interventions, this regulation can form part of a comprehensive strategy to prevent youth from using tobacco products.

### **AN ORDINANCE OF THE [ CITY / COUNTY ] OF [ \_\_\_\_ ] RESTRICTING SALES OF FLAVORED NON-CIGARETTE 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. 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 (FSPTCA), enacted in 2009, prohibited candy- and fruit-flavored cigarettes,[[39]](#endnote-39) largely because these flavored products were marketed to youth and young adults,[[40]](#endnote-40) and younger smokers were more likely to have tried these products than older smokers;[[41]](#endnote-41) and

WHEREAS, although the manufacture and distribution of flavored cigarettes (excluding menthol) is banned by federal law,[[42]](#endnote-42) neither federal nor California laws restrict sales of flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, and electronic smoking devices and the nicotine solutions used in these devices; and

WHEREAS, flavored non-cigarette tobacco products have become increasingly common and are available in a variety of flavors that appeal to children and young adults,[[43]](#endnote-43) including apple, cherry, chocolate, grape, peach, strawberry, and vanilla; and

WHEREAS, the U.S. Food and Drug Administration and the U.S. Surgeon General have stated that flavored tobacco products are considered to be “starter” products that help establish smoking habits that can lead to long-term addiction;[[44]](#endnote-44) and

WHEREAS, young people are much more likely to use candy- and fruit-flavored tobacco products, including cigars, cigarillos, and hookah tobacco, than adults;[[45]](#endnote-45) and

WHEREAS, data from the National Youth Tobacco Survey indicate that more than two-fifths of U.S. middle and high school smokers report using flavored little cigars or flavored cigarettes;[[46]](#endnote-46) and

WHEREAS, much of the growing popularity of small cigars and smokeless tobacco is among young adults and appears to be linked to flavored products;[[47]](#endnote-47) and

WHEREAS, adding flavorings to tobacco products such as 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;[[48]](#endnote-48) and

WHEREAS, tobacco companies have used flavorings such as mint and wintergreen in smokeless tobacco products as part of a “graduation strategy” to encourage new users to start with products with lower levels of nicotine and progress to products with higher levels of nicotine;[[49]](#endnote-49) 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 (including 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;[[50]](#endnote-50) and

WHEREAS, the U.S. Centers for Disease Control and Prevention has reported that electronic cigarette use among middle and high school students doubled from 2011 to 2012;[[51]](#endnote-51) and

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;[[52]](#endnote-52) and

WHEREAS, the California Attorney General has stated that electronic cigarette companies have targeted minors with fruit-flavored products;[[53]](#endnote-53) and

**comment:** Further findings could be added regarding the number or percentage of local tobacco retailers that sell flavored products, the types of flavored products that are sold locally, and the prevalence of flavored tobacco use among local youth.

**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:** If you incorporate a flavored tobacco restriction into your existing tobacco control laws, many terms may already be defined in the 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 and may be more expansive than some localities’ existing definitions of this term. In adopting a flavored tobacco products restriction, localities with existing definitions of “Tobacco Product” will need to decide whether to use the Model Ordinance’s definition or rely on their current definitions. A locality is not precluded from using different definitions of “Tobacco Product” in separate sections of its municipal code. However, to avoid confusion, the locality should make clear which sections of the municipal code are governed by a particular definition. Contact ChangeLab Solutions for assistance in reviewing definitions.

(a) “Characterizing Flavor” means a Distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted by a Tobacco Product or any byproduct produced by the Tobacco Product, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, 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.

**comment:** This definition of “Characterizing Flavor” includes menthol, mint, and wintergreen. When used in conjunction with the definition of “Flavored Tobacco Product” below, this definition of “Characterizing Flavor” would prohibit the sale of non-cigarette tobacco products that have menthol, mint, or wintergreen as a characterizing flavor. Examples of these products include wintergreen smokeless tobacco, menthol cigarillos, or menthol-flavored nicotine cartridges used in electronic smoking devices.

(b) “Constituent” means any ingredient, substance, chemical, or compound, other than tobacco, water, or reconstituted tobacco sheet, that is added by the Manufacturer to a Tobacco Product during the processing, manufacture, or packing of the Tobacco Product.

(c) “Distinguishable” means perceivable by an ordinary consumer by either the sense of smell or taste.

(d) “Electronic Smoking Device” means an electronic device that can be used to deliver an inhaled dose of nicotine, or other substances, including any component, part, or accessory of such a device, whether or not sold separately. “Electronic Smoking Device” includes any such device, whether manufactured, distributed, marketed, or sold as an electronic cigarette, an electronic cigar, an electronic cigarillo, an electronic pipe, an electronic hookah, or any other product name or descriptor.

(e) “Flavored Tobacco Product” means any Tobacco Product, other than cigarettes as defined by federal law, that contains a Constituent that imparts a Characterizing Flavor.

**comment:** This definition of “Flavored Tobacco Product” does *not* include cigarettes, because the manufacture of flavored cigarettes (excluding menthol) is already prohibited by federal law. Additionally, there is uncertainty regarding whether or how the U.S. Food and Drug Administration will regulate menthol cigarettes. Accordingly, this Model Ordinance does not address the sale of flavored cigarettes, including menthol cigarettes. Contact ChangeLab Solutions for more information on local strategies to address menthol cigarettes.

(f) “Labeling” means written, printed, or graphic matter upon any Tobacco Product or any of its Packaging, or accompanying such Tobacco Product.

(g) “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.

(h) “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.

(i) “Tobacco Paraphernalia” means any item designed for the consumption, use, or preparation of Tobacco Products.

(j) “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; and

(2) any Electronic Smoking Device.

(3) Notwithstanding any provision of subsections (1) and (2) to the contrary, “Tobacco Product” includes any component, part, or accessory of 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 cigars, smokeless tobacco, shisha (hookah tobacco), and electronic smoking devices and the nicotine solutions that are used in these devices. The definition also includes electronic smoking devices that do not contain nicotine. Localities with existing definitions of “Tobacco Product” will need to determine whether to use their existing definitions or the definition in this Model Ordinance. In either case, localities should adopt a definition of “Flavored Tobacco Product” for the flavored restriction, which, for reasons discussed above, excludes cigarettes.

If a locality wants to narrow the scope of products that are covered, the locality can focus on a specific category of Flavored Tobacco Products, such as cigars. Contact ChangeLab Solutions for assistance in amending the definitions in this ordinance to focus on a specific category of Flavored Tobacco Products.

(k) “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**

(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.

(b) There shall be a presumption that a Tobacco Retailer in possession of four or more Flavored Tobacco Products, which shall include 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) A Tobacco Product is presumed to be a Flavored Tobacco Product if a Manufacturer or any of the Manufacturer’s agents or employees has:

(1) made a public statement or claim that the Tobacco Product has or produces a Characterizing Flavor, including, but not limited to, text and/or images on the product’s Labeling or Packaging that are used to explicitly or implicitly communicate information about the flavor, taste, or aroma of a Tobacco Product; or

(2) taken actions directed to consumers that would be reasonably expected to result in consumers believing that the Tobacco Product imparts a Characterizing Flavor.

(d) Every Tobacco Retailer shall maintain on the premises the original Labeling and Packaging provided by the Manufacturer for all Tobacco Products that are sold or offered for sale by the establishment separately from the original Packaging designed for retail sale to the consumer. The original Labeling and Packaging from which the contents are sold separately shall be maintained during such time as the contents of the package are offered for sale, and may be disposed of upon the sale of the entire contents of such package.

**comment:** This provision is intended to assist localities in identifying flavored products when a retailer has removed a Tobacco Product from its original Packaging, such as a retailer who breaks apart a five-pack of cigarillos or a 20-pack of little cigars and sells these items individually. This provision applies only to packaging when a product is offered for sale to a consumer. It does not include packaging used solely for the purpose of mailing products to retailers. In addition to flavored tobacco restrictions, localities can impose a minimum pack size for cigars to prohibit retailers from breaking up packages of little cigars and cigarillos and selling them individually. Contact ChangeLab Solutions for more information.

(e) [ This section does not apply to the sale or offer for sale of Flavored Tobacco Products by a Tobacco Store as defined in California Business and Professions Code § 22962 if such Tobacco Store was in existence and operational as of the effective date of this [ article / chapter ]. ]

**comment:** This optional exemption would allow certain retailers that specialize in tobacco sales to continue to sell flavored products. The exemption references California Business and Professions Code section 22962, which defines a “Tobacco Store” as a retailer that primarily sells tobacco products; generates more than 60 percent of its gross revenues annually from tobacco products and tobacco paraphernalia; does not permit minors to enter the premises at any time unless accompanied by a parent or guardian; and does not sell alcoholic beverages or food for consumption on the premises. As written, only Tobacco Stores that are in existence as of the effective date of the flavored tobacco ordinance qualify for the exemption.

### 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:** In addition to, or instead of, the enforcement options discussed below, communities can use existing enforcement provisions within the municipal or county code to address violations of a Flavored Tobacco Products ordinance. For example, localities that have tobacco retailer licensing (TRL) laws can use the TRL’s enforcement provisions to issue fines to or suspend licenses of retailers that sell Flavored Tobacco Products. Sample language for amending a TRL law to cross-reference a flavored tobacco restriction is included on the following page.

The subsections below are designed to 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 will have the discretion to choose which enforcement tools to use in all cases or from case to 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.

(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 provides civil fines for violating the ordinance. It requires that 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 whether 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 six months in 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.

**Amendments to ChangeLab Solutions’ Model Licensing Ordinance**

**comment:** In addition to adopting a separate ordinance that restricts sales of Flavored Tobacco Products, a locality can amend its existing tobacco retailer licensing ordinance to reference the Flavored Tobacco Products ordinance, thereby strengthening its enforcement. A locality that adopts both the preceding Model Ordinance language and an amendment to its tobacco retailer licensing law would need to ensure consistency among the definitions set forth in the Model Ordinance and those in the licensing law. Please consult your local government attorney and/or ChangeLab Solutions for assistance in reviewing the definitions.

By amending the tobacco retailer licensing ordinance, the locality can use the enforcement options of the licensing ordinance, such as suspension of the license, if a retailer sells or offers for sale Flavored Tobacco Products. In other words, under the language below, a retailer that violates the Flavored Tobacco Products ordinance is also in violation of the local tobacco retailer licensing law, and therefore subject to the penalties of that law.

*In* **SECTION II:**

*In* **Sec. [ \_\_\_\_ (\*2) ]. REQUIREMENTS AND PROHIBITIONS,** *add the following subsections:*

(\_\_) SALE OF FLAVORED TOBACCO PRODUCTS. It shall be a violation of this [ article / chapter ] for any licensee or any of the licensee’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 as defined in [ Article / Section ] of the Municipal Code.

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