



In Bad Taste

What Communities Can Do About Fruit- and Candy-Flavored Tobacco Products



The popularity of cheap, flavored cigars has exploded in recent years.

They're sold in an endless array of flavors like apple, chocolate, grape, peach, and strawberry. They're packaged in colorful, shiny wrappers. They're often available for less than a dollar. But these products aren't candy. Rather, they're flavored tobacco products, and they're becoming increasingly common in communities throughout California. Parents and public health experts are concerned that these products encourage children to start using tobacco. This fact sheet describes the risks that flavored tobacco products pose to youth and young adults and the steps that communities can take to regulate them.

What Types of Tobacco Products Are Flavored?

Tobacco companies have developed and marketed several types of flavored tobacco products:

- **Cigars** are the second most common form of tobacco used by youth,¹ and many of the brands that are popular among teens are available in flavors such as apple, chocolate, grape, and peach.²
- **Smokeless tobacco products**, including chewing tobacco, snuff, and snus, come in flavors such as mint, wintergreen, berry, cherry, and apple.³
- **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.⁴
- **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.⁵



Unlike cigarettes, cigars can be sold in fruit and candy flavors.



Electronic smoking devices, including e-hookah, are available in sweet flavors such as passion fruit.

Why Are Communities Concerned About These Products?

Because of their sweet flavors and bright packaging, flavored tobacco products are especially appealing to children. These products are easier for new tobacco users to take up because the flavorings disguise the natural harshness of tobacco.⁶ Indeed, young people are much more likely to use candy- and fruit-flavored tobacco products than adults.⁷ As a result, both the U.S. Food and Drug Administration (FDA) and the surgeon general have stated that flavored tobacco products help new tobacco users establish habits that can lead to long-term addiction.⁸



Flavors such as mint and wintergreen have been used in smokeless tobacco to appeal to novice users.



Electronic cigarette cartridges are sold in menthol, vanilla, and cherry flavors at a drugstore. Electronic cigarette use recently doubled among youth.



Like candy, tobacco products are sold cheaply in a wide array of flavors.

What Does Federal Law Cover?

Under the federal Family Smoking Prevention and Tobacco Control Act (“Tobacco Control Act”), it is illegal for manufacturers to make *cigarettes* that contain “characterizing flavors” other than that of tobacco, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee.⁹ The FDA has issued a number of warning letters to retailers who sell flavored cigarettes. Menthol cigarettes were excluded from the flavored cigarette ban, though the FDA is reviewing whether to take additional action regarding menthol.

The Tobacco Control Act’s restriction on flavorings covers only cigarettes and their component parts, including the tobacco, filter, and paper. As a result, sales of other flavored tobacco products (OTPs) include cigars, cigarillos, smokeless tobacco, electronic smoking devices, and shisha. Manufacturers have exploited this loophole by creating and marketing flavored OTPs that are similar to cigarettes. Despite the 2009 ban on flavored cigarettes, in 2011 more than two-fifths of U.S. middle and high school smokers reported using flavored little cigars or flavored cigarettes.¹⁰ Some students who reported using flavored cigarettes after the ban were likely using flavored little cigars, which often closely resemble cigarettes, except that they are wrapped in paper that contains tobacco.¹¹

What Can States, Counties, and Cities Do?

Although the federal Tobacco Control Act established a product standard for flavored cigarettes, the law has not deprived states and localities of their legal authority to regulate sales of tobacco products within their boundaries. Therefore, states and localities may complement the federal ban on flavored cigarettes by adopting laws that restrict sales of flavored OTPs within their jurisdictions. Both New York City and Providence, R. I., have done just that.

In 2009, **New York City** passed an ordinance restricting sales of all flavored OTPs,¹² with an exception allowing these products to be sold in “tobacco bars,” which are businesses that generate a significant percentage of revenue from tobacco sales. 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.¹³

In 2012, **Providence** passed a nearly identical law¹⁴ that was challenged by several tobacco companies. An appellate court upheld the city’s flavored tobacco restrictions, finding that the law was reasonably related to the city’s goal of reducing youth access to tobacco products.¹⁵

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 to adopt restrictions that are more stringent than federal law.

At the state level, **Maine** and **Illinois** have passed laws regarding flavored OTPs, though their laws do not cover as many products as the New York City or Providence ordinances. Maine’s law prohibits sales of flavored cigars (excluding certain premium cigars).¹⁶ Illinois’ law prohibits sales of flavored rolling papers and blunt wraps.¹⁷

ChangeLab Solutions’ Model Ordinance

ChangeLab Solutions has developed a model ordinance to help California communities restrict retailers within a city or county from selling flavored OTPs. The ordinance contains definitions that explain which products cannot be sold. Communities can use enforcement options that already exist within the municipal



Nicotine solutions, which are used in electronic smoking devices, are sold in dozens of flavors that appeal to youth, such as tutti frutti.

or county code to address violations by retailers who sell flavored OTPs, or they can include penalties that are tailored specifically to the ordinance. The model flavored tobacco products ordinance is available for download at www.changelabsolutions.org/tobacco-control. Contact us for assistance if you would like more information about your community's options for curbing sales of flavored OTPs.

Additionally, communities with a tobacco retailer licensing (TRL) program can amend their TRL law to require licensed retailers to comply with a flavored tobacco restriction. Amending the TRL law to include restrictions on flavored OTPs strengthens a community's enforcement options. Communities that use this approach can utilize the enforcement options in the TRL law—such as suspending a license—if a licensed retailer offers flavored OTPs for sale. For additional TRL resources, see our Model California Ordinance Requiring a Tobacco Retailer License and accompanying Plug-in Policies at www.changelabsolutions.org/publications/model-TRL-Ordinance.

ChangeLab Solutions is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

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- ¹ Centers for Disease Control and Prevention. 2012. "Youth Risk Behavior Surveillance—United States, 2011," *Morbidity and Mortality Weekly Report (MMWR)* 61(4).
- ² U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 205, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.
- ³ Chen C, Isabelle LM, Pickworth WB, et al. 2010. "Levels of Mint and Wintergreen Flavorants: Smokeless Tobacco Products vs. Confectionery Products." *Food and Chemical Toxicology*. 48(2): 755–763.
- ⁴ Morris DS, Fiala SC, and Pawlak R. 2012. "Opportunities for Policy Interventions to Reduce Youth Hookah Smoking in the United States." *Preventing Chronic Disease*. <http://dx.doi.org/10.5888/pcd9.120082>.
- ⁵ Cameron JM, Howell DN, White JR, et al. 2013. "Variable and Potentially Fatal Amounts of Nicotine in E-cigarette Nicotine Solutions." *Tobacco Control*. [Electronic publication ahead of print], <http://tobaccocontrol.bmj.com/content/early/2013/02/12/tobaccocontrol-2012-050604.full>; U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 549, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.
- ⁶ King BA, Dube SR, and Tynan MA. 2013. "Flavored Cigar Smoking Among U.S. Adults: Findings from the 2009–2010 National Adult Tobacco Survey." *Nicotine & Tobacco Research*. 15(2): 608–614; Nelson DE, Mowery P, Tomar S, et al. 2006. "Trends in Smokeless Tobacco Use Among Adults and Adolescents in the United States." *American Journal of Public Health*. 96(5): 897–905.
- ⁷ King BA, Dube SR, and Tynan MA. 2013. "Flavored Cigar Smoking Among U.S. Adults: Findings from the 2009–2010 National Adult Tobacco Survey." *Nicotine & Tobacco Research*. 15(2): 608–614; Villanti AC, Richardson A, Vallone DM, et al. 2013. "Flavored Tobacco Product Use Among U.S. Young Adults." *American Journal of Preventive Medicine*. 44(4): 388–91.
- ⁸ Food and Drug Administration. 2011. *Fact Sheet: Flavored Tobacco Products*, www.fda.gov/downloads/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/UCM183214.pdf; U.S. Department of Health and Human Services. 2012. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta: U.S. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, p. 539, www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf.
- ⁹ 21 U.S.C. § 387g.
- ¹⁰ King BA, Tynan MA, Dube SR, et al. 2013. "Flavored-Little-Cigar and Flavored-Cigarette Use Among U.S. Middle and High School Students." *Journal of Adolescent Health*. [Article in press], www.jahonline.org/article/S1054-139X%2813%2900415-1/abstract.
- ¹¹ *Id.*
- ¹² New York, N.Y., Admin. Code §§ 17-713 *et seq.*
- ¹³ U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428 (2d Cir. 2013).
- ¹⁴ Providence, R.I., Code of Ordinances §§ 14-308 *et seq.*
- ¹⁵ Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, 731 F.3d 71 (1st Cir. 2013).
- ¹⁶ Me. Rev. Stat. Ann. tit. 22, § 1560-D.
- ¹⁷ 720 Ill. Comp. Stat. Ann. 685/4.