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

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, and many of the brands that are popular among teens are available in flavors such as apple, chocolate, grape, and peach.

- **Smokeless tobacco products**, including chewing tobacco, snuff, and snus, come in flavors such as mint, wintergreen, berry, cherry, and apple.

- **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.

- **Nicotine solutions**, which are consumed via electronic smoking devices such as e-hookah, are sold in dozens of flavors that are attractive to youth, such as cotton candy and bubble gum.

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. Indeed, young people are much more likely to use candy- and fruit-flavored tobacco products than adults. 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.
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. 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 are not regulated by the act. Examples of these other 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. 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.

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, 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.

In 2012, Providence passed a nearly identical law 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.

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). Illinois’ law prohibits sales of flavored rolling papers and blunt wraps.

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.

11 id.
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).