

## STATE AND LOCAL ACTION TO PROHIBIT FLAVORED OTHER TOBACCO PRODUCTS

There is already a federal ban on flavored cigarettes; and Maine and New York City have laws prohibiting the sale of tobacco products other than cigarettes.<sup>1</sup> Numerous states and localities are considering their own legislation to prohibit other tobacco products with youth-attracting flavors. But the tobacco industry is aggressively opposing these efforts. Here are some possible ways to rebut the tobacco companies' arguments and overcome their opposition.<sup>2</sup>

### **Responses to Common Industry Arguments Against Flavored Tobacco Product Bills**

**False Claim:** The new FDA tobacco law prohibiting flavored cigarettes preempts states and localities from banning any flavored tobacco products.

**Rebuttal:** States and localities are preempted only from regulating those tobacco products over which FDA has asserted jurisdiction in those areas where FDA has taken action. But the new FDA tobacco law does not block states and localities from banning tobacco products or any different types of tobacco products, such as flavored tobacco products. Simply banning flavored tobacco products is not product regulation; so it is not preempted. [Nevertheless, to ensure that their bans of flavored tobacco products are not seen as product regulation, the state or local laws banning flavored tobacco products should not say anything about what is in the tobacco products but just ban those products that have or produce a distinguishable or characterizing flavor other than tobacco and any other permitted flavors.] Moreover, FDA has not yet asserted jurisdiction at all over any tobacco products other than cigarettes or smokeless tobacco, and has asserted jurisdiction re flavor-related product regulation only for cigarettes. Accordingly, even if banning flavored tobacco products was somehow seen as product regulation, states still would not be preempted from banning flavored cigars or pipe tobacco or even flavored smokeless tobacco.<sup>3</sup>

**False Claim:** By prohibiting flavored tobacco products the legislation would ban all tobacco products because even non-flavored tobacco products use various flavorings as ingredients for other purposes.

**Rebuttal:** Unless drafted poorly, state and local flavored tobacco product legislation will not ban any ingredients or constituents but will only ban those tobacco products that produce directly or through their smoke a distinguishable, distinctive, or characterizing taste or aroma, either before or during use. Accordingly, any and all flavorings or ingredients put into tobacco products would still be allowed unless they actually produced a distinguishable, distinctive, or characterizing taste or aroma (other than tobacco or any other allowed flavor). Bottom line: We don't care what is in the tobacco products; we just want to prohibit those that produce an obvious flavor or taste that attracts kids.

**False Claim:** By prohibiting any tobacco product that is marketed or advertised as having or producing a flavor, taste, or aroma (other than tobacco or any other allowed flavor), the legislation is preempted by the Federal Cigarette Labeling and Advertising Act and is prohibited by the 1st Amendment.

**Rebuttal:** The FCLAA preemption applies only to cigarettes, and there is no similar federal preemption regarding ads for any other types of tobacco products.<sup>4</sup> Moreover, prohibiting flavored tobacco products is a product ban not an advertising restriction; so it cannot be prohibited by the First Amendment. It is well

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<sup>1</sup> NYC Administrative Code, Title 17, Chapter 8, §17-701 et seq. Maine Revised Statutes, Title 22, §1560-D, <http://www.mainelegislature.org/legis/statutes/22/title22sec1560-D.html>. For a state flavored cigarette ban, see New Jersey Permanent Statutes, Title 2A, 2A-170-51.5, 51.6, <http://www.njleg.state.nj.us/legislativepub/help.asp#laws>. For model legislation to prohibit flavored tobacco products, contact [factsheets@tobaccofreekids.org](mailto:factsheets@tobaccofreekids.org).

<sup>2</sup> Because of the upcoming FDA ban on flavored cigarettes (other than those with tobacco or menthol flavors), states and localities can focus their efforts on banning the flavored versions of other types of tobacco products. By not trying to ban flavored cigarettes, states can entirely avoid having to deal with any attacks based on false claims of FCLAA preemption (which applies only to cigarettes) or on bogus claims that flavored cigarette bans violate international trade agreements because they ban clove cigarettes.

<sup>3</sup> To eliminate any chance of preemption, the state/local ban on flavored OTPs can allow their sale in certain restricted locations (e.g., permanent adult-only tobacconists). That way, the law is only restricting where the products may be sold, not regulating the ingredients nor banning the product. NYC's ban, for example, allows sales in a handful of "tobacco bars."

<sup>4</sup> The new FDA tobacco law sharply reduced the scope of FCLAA preemption so that states and localities are no longer preempted from restricting or regulating the time, place or manner of cigarette ads. But FCLAA still preempts the states from restricting or regulating the content of cigarette ads if it is done for health purposes.

established that states have a right to ban commercial products or products with certain characteristics -- especially to protect consumers and children from harm. For example, state laws banning bidi cigarettes have not been struck down as unconstitutional, nor have state laws banning products containing mercury as an added ingredient. Other state and local product bans that have been upheld in the courts include bans on assault rifles (despite the added 2nd Am. "right to bear arms" issue) and bans on sex toys (despite the added privacy right issue). A dozen or so states even successfully banned all cigarettes for a while in the late 1890's and early 1900's. So banning flavored tobacco products is clearly constitutional.

Similarly, defining flavored tobacco products to include a tobacco product that is labeled, advertised or marketed as having or producing a flavor, taste, or smell (other than tobacco or other allowed flavors) does not turn a legitimate product prohibition into an advertising restriction that infringes on corporate free speech which could be blocked by the 1<sup>st</sup> Amendment. For example, the legitimate state laws banning products containing mercury as an added ingredient would not become constitutionally invalid if they defined such products to include products advertised or marketed as containing mercury as an added ingredient. There, as in the flavored tobacco products legislation, no advertising or speech is being restricted or regulated -- the advertising is just being used to help identify the products that fall under the prohibition. In any case, if an advertising promotes a product as having a prohibited flavor and the ad is accurate, it is advertising an illegal product for sale -- and advertising illegal products is not constitutionally protected speech. And if the advertising promotes a product as having a prohibited flavor and the product actually does not have that flavor, then the ad is lying to consumers -- and false or misleading advertising is not protected speech.

Even if a prohibition on flavored tobacco products (or defining them as products described or marketed as having certain flavors) were somehow seen to be a restriction of corporate free speech, states are allowed to implement reasonable restrictions on corporate speech when they have a compelling state interest -- and preventing kids from becoming lifetime tobacco addicts is without question a well-established compelling state interest. First Amendment law is, of course, more complicated than that; but it is perfectly clear that the 1<sup>st</sup> Am. does not prohibit (but only limits) state restrictions on tobacco product advertising or marketing.

**Model Legislation.** For model legislative text for new state or local laws to prohibit flavored tobacco products that attract kids -- or for help amending proposed or pending legislation -- please contact the Campaign for Tobacco-Free Kids at [factsheets@tobaccofreekids.org](mailto:factsheets@tobaccofreekids.org).

***Ways to Overcome Significant Opposition to Flavored Tobacco Product Legislation from Smokeless Tobacco and Cigar Manufacturers (Without Dropping Either of Them Out of the Bill):***

1. **Add a few more permissible non-youth flavors beyond just tobacco for tobacco products other than cigarettes**, such as wintergreen and mint for smokeless. If necessary, exempt the actual top two or three flavors or any flavors that have more than ten percent of the total smokeless or cigar market (even if they are kid flavors) -- but grandfather in that exemption so no new products or brands with those flavors may enter the market and so that the exemptions disappear after three to five years. In a NJ study, 62% of the total smokeless market was flavored smokeless, with 38% unflavored. Wintergreen accounted for 30% of the smokeless market, with mint at 13%. Cherry, at less than 6%, was third).  
[See: [http://www.state.nj.us/health/as/ctcp/documents/cigars\\_smokeless\\_tobacco\\_brief06.pdf](http://www.state.nj.us/health/as/ctcp/documents/cigars_smokeless_tobacco_brief06.pdf).]
2. **Grandfather in the ban on flavored smokeless tobacco or cigars.** Allow established cigar or smokeless tobacco brands with prohibited flavors that are already being sold in the state (or that already have at least three percent of the smokeless market in the state) to stay on the market for, say, five more years -- but completely prohibit any new flavors or any other new products or brands with any prohibited flavors from being distributed or sold in the state.
3. **At least stop the problem from getting worse.** If it is the best that can be done, it would still be worthwhile to pass legislation that would allow all existing flavored cigars and smokeless tobacco products and brands to stay on the market but would prohibit any and all new flavors, brands, or products not already being sold (or not already accounting for at least three percent of the market) from entering the market. To avoid last-minute market entries to avoid the prohibition, such legislation would, ideally, forbid any new flavors or flavored products or brands not on the market as of the date the legislation was introduced or some earlier date.
4. **Allow existing flavored cigars and smokeless tobacco products to be sold only in adult-only tobacco retail outlets.** If a total ban is not politically possible, it would still be extremely helpful to get legislation passed to restrict the sale of flavored tobacco products to only permanent adult-only retail

facilities that regularly sell tobacco products (and forbid their sale in any locations that allow children). Any such legislation would need to be drafted carefully not to allow flavored tobacco product sales in bars or clubs (which restrict entrance to adults) but only allow such sales in established tobacco-selling retail establishments that do not allow minors to enter, such as tobacconists. A fall-back position, however, would be to allow such sales in any adult-only facility.

5. **Put a special tax or fee on all flavored tobacco products.** Another approach short of a total ban would be to subject all kid-flavored tobacco products to an extra tax or fee, with the revenues used to stop tobacco product sales to kids and otherwise prevent youth tobacco use in the state. Any such tax or fee could be collected along with the regular state tobacco taxes.
6. **Distinguish between expensive premium cigars (flavors allowed) and all other cigars (no flavors allowed).** If cigar industry opposition is too powerful to overcome, try exempting expensive premium cigars from the flavored ban while still banning flavors among all other cigars (including the cigarillos, blunts, and other small and cheaper cigars most attractive to kids). One way to do that is to exempt hand-rolled cigars or ban flavors only among cigars that have a wholesale price of less than \$2.50 each.

### **Other Resources re the Flavored Tobacco Products Problem**

Tobacco Control Legal Consortium, *Pick Your Poison: Responses to the Marketing and Sale of Flavored Tobacco Products*, February 2009, <http://tclconline.org/documents/flavored-tobacco.pdf>.

American Lung Association reports: 1) *From Joe Camel to Kauai Kolada – the Marketing of Candy-Flavored Cigarettes*; and 2) *Alcohol-Flavored Cigarettes – Continuing the Flavored Cigarette Trend*, <http://slati.lungusa.org/alerts.asp>.

Campaign for Tobacco-Free Kids special report on candy-flavored cigarettes with advertising examples: <http://tobaccofreekids.org/reports/targeting>.

Campaign for Tobacco-Free Kids Tobacco Ad Gallery – pictures of tobacco industry advertising, including for flavored cigarettes/tobacco products: <http://tobaccofreekids.org/adgallery>. [Or just go to your local convenience store, or online, and buy some examples of flavored tobacco products.]

National Cancer Institute, *Young Adults and Flavored Cigarettes: A Bad Combination*, *NCI Cancer Bulletin*, March 14, 2006, [http://www.cancer.gov/ncicancerbulletin/NCI\\_Cancer\\_Bulletin\\_031406/page4](http://www.cancer.gov/ncicancerbulletin/NCI_Cancer_Bulletin_031406/page4).

### **Related Studies**

Klein, SM et al., “Use of flavored cigarettes among older adolescent and adult smokers: United States, 2004–2005,” *Nicotine & Tobacco Research* 10(7): 1209-14, July 2008, <http://www.ncbi.nlm.nih.gov/pubmed/18629731>.

Crawford, GE, “Flavored tobacco products with marijuana names,” *Tobacco Control*, February 2007, <http://tobaccocontrol.bmj.com/cgi/content/full/16/1/70>.

Ashare RL et al., “Smoking Expectancies for Flavored and Non-flavored Cigarettes Among College Students,” *Addictive Behaviors*, 2006, <http://dx.doi.org/10.1016/j.addbeh.2006.08.011>.

Lewis MJ, Wackowski O, “Dealing with an Innovative Industry: A Look at Flavored Cigarettes Promoted by Mainstream Brands,” *American Journal of Public Health* 96:244-251, February, 2006, <http://www.ajph.org/cgi/content/abstract/96/2/244>.

Carpenter CM, et al, “New Cigarette Brands with Flavors That Appeal to Youth: Tobacco Marketing Strategies,” *Health Affairs* 24(6):1601-10, Nov-Dec, 2005, <http://content.healthaffairs.org/cgi/content/abstract/24/6/1601>.

Nadel, J. et al., Letter, “Disparities in Global Tobacco Harm Reduction” [showing higher tar, nicotine and carbon monoxide levels in clove-flavored cigarettes compared to non-flavored cigarettes], *American Journal of Public Health* 95(12): 2120, December 2005, <http://www.ajph.org/cgi/reprint/95/12/2120>.

Primack, B. et al., “An Old Custom, A New Threat to Tobacco Control,” *Am J Public Health* June 29, 2006, <http://www.ajph.org/cgi/content/extract/96/8/1339>. [Flavored tobacco & hookahs.]

Delnevo CD, “Smokers Choice: What explains the steady rise of cigar use in the US?,” *Public Health Reports* 2006; 121(2): 116-119; and Delnevo CD, et al, “Trading tobacco: are youth choosing cigars over cigarettes?,” *Am J Public Health*. 2005; 95(12): 2123, <http://www.ajph.org/cgi/content/full/95/12/2123>. [Shows that cigar use by youth must also be addressed.]