



## Regulating Flavored Tobacco Products

The Tobacco Control Legal Consortium has created the Tips and Tools series of legal technical assistance guides to serve as a starting point for organizations interested in implementing certain tobacco control measures. We encourage you to consult with local legal counsel before attempting to implement these measures.<sup>1</sup> For more details about these policy considerations, please contact the Consortium.

### Flavored Tobacco Product Regulation

On September 22, 2009, the Food and Drug Administration (FDA), under authority granted by the [Family Smoking Prevention and Tobacco Control Act](#), prohibited the manufacturing, marketing and sale of cigarettes containing “characterizing flavors,” such as vanilla, chocolate, cherry, and coffee.<sup>2</sup> This prohibition extends to flavored *cigarettes* and flavored *cigarette* “component parts,” such as their tobacco, filter or paper.<sup>3</sup> However, the prohibition exempts the flavors of menthol and tobacco and does not apply to non-cigarette tobacco products.

Although the FDA and its scientific advisory committee have conducted two in-depth studies of menthol as a characterizing flavor in cigarettes, the agency has not indicated that a regulation of menthol is on the horizon.<sup>4</sup> In addition, the FDA’s recently proposed regulation asserting jurisdiction over non-cigarette tobacco products – also known as its proposed “deeming regulation” – would not extend the flavor restriction to non-cigarette tobacco products.<sup>5</sup> As a result, menthol cigarettes remain on the market, as do many other flavored tobacco products, such as electronic cigarettes, cigars, smokeless tobacco, hookah tobacco (“shisha”), little cigars, and dissolvable tobacco products (e.g., strips and orbs), as well as flavored component parts (e.g., blunt wraps). Federal law allows state and local governments to regulate the sale of tobacco products, including flavored tobacco products and their component parts.<sup>6</sup>



Studies show that flavored tobacco products appeal to youth, who are an enticing target market for the tobacco industry.<sup>7</sup> The younger individuals are when they begin to use tobacco, the more likely they will become addicted to nicotine. For example, among adults who smoke, 68 percent began smoking regularly at age 18 or younger.<sup>8</sup> Tobacco users (particularly youth) often mistakenly assume that flavored tobacco products are safer than other tobacco products.<sup>9</sup> The

presence of flavors such as menthol in tobacco products can also make it more difficult for adult tobacco users to quit.<sup>10</sup>

Given the significant threat to public health that flavored tobacco products pose, many local and state governments are considering ways to regulate their sale, pricing, marketing and advertising. This guide provides pointers that communities and policy makers might want to consider in drafting and implementing policies that regulate flavored tobacco products.

## Policy Options

- **Sales restrictions.** Some state and local governments have passed laws that restrict the sale of various flavored tobacco products. Providence, Rhode Island,<sup>11</sup> and several municipalities in Massachusetts<sup>12</sup> have enacted restrictions on the sale of flavored, non-cigarette tobacco products (including electronic cigarettes), with exceptions for menthol or tobacco-flavored products. New York City<sup>13</sup> has enacted restrictions on the sale of flavored, non-cigarette tobacco products, with exceptions for electronic cigarettes and menthol or tobacco-flavored products. The tobacco industry has challenged the New York City and Providence ordinances but both have been upheld by federal appeals courts as valid exercises of local authority to regulate the sale and distribution of tobacco products.<sup>14</sup> Moreover, the state of Maine has restricted the sale of flavored cigars.<sup>15</sup>

Communities might also consider prohibiting sales of flavored tobacco products at certain locations such as stores within a certain distance of schools or other youth-oriented facilities, gas stations, convenience stores, pharmacies or grocery stores. Chicago, for example, passed an ordinance prohibiting the sale of flavored tobacco products, including menthol products, within 500 feet of any city school.<sup>16</sup> Again, as with any sales prohibition, proponents should be able to show that these restrictions serve a legitimate government interest (e.g., by reducing youth access to tobacco products in the community).

- **Advertising and promotion restrictions.** Any community considering regulating tobacco ads needs to be aware of the First Amendment, which extends some protection to commercial speech, and the Federal Cigarette Labeling and Advertising Act (FCLAA), which limits the ability of state and local governments to place restrictions on the content of cigarette advertisements or promotions. Communities may be able to restrict the advertising or promotion of flavored tobacco products in several ways.<sup>17</sup>

The advertising of flavored tobacco products is often targeted at shoppers inside, outside, and on the property of convenience stores, drug stores, gas stations, and other retail sales outlets. To prevent children from being exposed to advertising and self-service racks, communities could consider restricting the placement of in-store tobacco advertisements. General restrictions on the quantity or size of signs that may appear in store windows or on sidewalks outside retail stores might also help reduce tobacco advertising, along with other kinds of advertising.<sup>18</sup> Such regulations need to be drafted carefully to avoid the risk of legal challenges related to First Amendment concerns.<sup>19</sup>

- **Graphic warnings.** Another way to regulate flavored tobacco products in the retail environment is to require tobacco retailers to place graphic warning signs at or near the point of sale to warn of the dangers of tobacco use. These signs should make clear that the warnings are issued by the government – not the tobacco industry or retailers – to counter potential arguments that the government is compelling speech in violation of the First Amendment.<sup>20</sup>
- **Restricting product access.** Communities seeking to restrict how products are distributed or sold could require all flavored tobacco products to be sold via face-to-face transactions, thus prohibiting vending machines and self-service racks. Such regulations need to be drafted carefully to avoid the risk of legal challenges related to First Amendment concerns.<sup>21</sup>
- **Regulating tobacco product pricing.** Studies have shown that youth are particularly sensitive to price, and that cheap tobacco products serve as a vehicle for youth tobacco initiation.<sup>22</sup> Consequently, local and state governments can consider regulating retail value-added promotions and other marketing techniques for flavored tobacco products. For example, some communities restrict and even prohibit price discounts provided by tobacco manufacturers or retailers, such as multi-pack offers (e.g., buy two packs, get one free), product giveaways, samples, or point redemption schemes.<sup>23</sup> Another price regulation option is to increase taxes on flavored tobacco products, or to ensure that taxes on non-cigarette products are equivalent to taxes on cigarettes.<sup>24</sup>

## Policy Elements

Well-crafted restrictions on flavored tobacco products are explicit about what they cover, and how communities will implement and enforce them. Here are a few elements found in such policies:

- **Timely findings and clear statements of purpose:** Findings are brief statements of fact or statistics that outline the issue being addressed, support the need for the policy, and help clarify the policy goal. Regulations on the sale, marketing and advertising of flavored tobacco products typically include evidence showing how the products create a problem within the community or state (e.g., documentation about the disproportionate use of flavored tobacco products by youth or how flavored products impede adult cessation efforts), and explain how the policy is designed to address this problem.

If a policy is challenged in court, a good set of findings can help to support it. For example, findings can explain that the local government’s authority to enact the policy comes from its responsibility to protect public health and welfare, and can explain how the policy furthers those goals.

- **Clear definitions and concise language:** Avoid confusion about what constitutes a “flavored tobacco product” by clearly defining critical terms. Because the Family Smoking Prevention and Tobacco Control Act prohibits the manufacture and sale of flavored cigarettes (except menthol and tobacco-flavored), be careful that the combination of the local law and the federal law will leave no gaps in covered products. For example, draft the definition of

“tobacco product” broadly so it encompasses menthol cigarettes as well as flavored cigars, little cigars,<sup>25</sup> electronic cigarettes, spit/chewing tobacco, dissolvable tobacco products, tobacco lozenges, and other emerging smokeless products. Also, because descriptions such as “mellow” or “arctic” can imply a flavor, and because testing for actual flavoring may be difficult or expensive, consider regulating all products that are marketed as having a distinguishable, distinctive or characterizing flavor or smell.

- **Clear scope of regulation:** Under the Family Smoking Prevention and Tobacco Control Act, the FDA (and not state or local governments) has the power to regulate tobacco product standards.<sup>26</sup> Although prohibiting the sale of a certain type of product, such as a flavored tobacco product, does not set a product standard, the tobacco industry has argued that such a law does resemble a product standard. As a result, a restriction on the sale of flavored tobacco products – often enacted to protect youth or to support adult quit attempts by reducing the number of locations where the products are available – might be easier to defend if it allows the products to be sold by a narrow class of businesses, such as limited types of adult-only facilities.
- **Robust enforcement options:** Regulating the advertising, promotion and sale of flavored tobacco products can be challenging unless clear procedures are established, including reasonable penalty provisions. Ensure that the penalties proposed are appropriate and legal within the jurisdiction and that they are sufficient to cover all administrative expenses. Use clear terms to specify what behavior is prohibited and to whom the policy applies. It may be useful for the enforcement agency to maintain an updated list of all products determined to violate the ordinance. Also carefully consider the means by which products are determined to be flavored (perhaps including chemical testing) and who will bear the costs associated with such determinations.

Effective enforcement of these policies often includes coordination among different enforcement agents, such as law enforcement agencies and administrative agencies, and adherence to consistent procedures throughout a community. The penalties section of the policy should clearly identify when people can be found in violation of the policy, and the penalties or fines imposed for first, second and subsequent violations. Ideally, this section would be part of a licensing system that would include a licensing suspension for a third violation and revocation for additional violations. Consider whether the ordinance will specify the assessment of re-inspection fees against repeat violators of the ordinance.

- **Well-planned implementation process:** Establish a process for publicizing the policy and educating the community, as well as procedures for receiving, tracking and responding to complaints. Make sure to set a realistic date for the policy to take effect, so responsible authorities have sufficient time to establish the necessary procedures for implementation and enforcement, and to notify affected business owners of their obligations under the policy. For instance, it may be helpful to create educational materials for distribution to tobacco retailers informing them of the ordinance’s key provisions, explaining how existing inventories may be treated (and allowing time for existing inventories to be depleted), and providing them an opportunity to ask questions.

## Policy Challenges

State and local governments have the authority to pass, implement and enforce laws that regulate the sale of tobacco products, and they can do so in a way that addresses local concerns. Still, due to the tobacco industry's interest in protecting its profits, even the most carefully drafted local tobacco regulation cannot avoid all risk of legal challenge. Communities considering measures to regulate flavored tobacco products should keep in mind that policies need to be drafted carefully and precisely, with an eye on potential legal issues, such as preemption, and that broad sweeping policies may be more vulnerable to legal challenge than narrow local policies.<sup>27</sup>

Also, communities considering raising taxes on flavored tobacco products will need to address criticism that tax increases have a disproportionate impact on people in poorer communities, where tobacco use rates are high, and that increased taxation serves only to create greater economic hardship. The counterpoint is that a tobacco product tax is not a tax on a necessity and the public health goals justifying the increased taxation of tobacco products far outweigh the potential for economic harm.

## Select Legislation and Policies

Below are examples of flavored tobacco product regulations and legislation around the U.S. If you consider adapting any language from these policies, take care to ensure the provision in question is practical and legal in your jurisdiction. Please note that the Consortium does not endorse or recommend any of the following policies. These examples are included simply to illustrate how various jurisdictions have approached similar issues.

Policy Type	Organization/ Jurisdiction	Statute/Regulation/ Directive	Select Excerpt of Law
<i>Prohibits manufacture, marketing &amp; sale of flavored cigarettes</i>	Food & Drug Administration	<a href="#">Family Smoking Prevention and Tobacco Control Act § 907: Tobacco Product Standards</a>	...a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke.



<i>Restricts sale of flavored tobacco products, including menthol, within 500 ft. of city schools</i>	Chicago	<a href="#">Chicago Municipal Code Sec. 4-64-098: Flavored Tobacco Products</a>	“Flavored tobacco product” means any tobacco product that imparts a characterizing flavor. As used in this definition, the term “characterizing flavor” means a distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a tobacco product, including, but not limited to, taste or aromas of menthol, mint, wintergreen, chocolate, vanilla, honey, cocoa, any candy, any dessert, any alcoholic beverage, any fruit, any herb, and any spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information.
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<i>Restricts sale of flavored cigars</i>	Maine	<a href="#">Maine Revised Statutes, Title 22 § 1560-D: Flavored cigars</a>	“Characterizing flavor” means a distinguishable taste or aroma of candy, chocolate, vanilla, fruit, berry, nut, herb, spice, honey or an alcoholic drink that is imparted to tobacco or tobacco smoke either prior to or during consumption. “Characterizing flavor” does not include a taste or aroma from tobacco. . . . Except as provided in subsection 5-A, a person may not sell or distribute or offer to sell or distribute in this State any flavored cigar unless the cigar is a premium cigar. . . . Any flavored cigar that the Attorney General determined had no characterizing flavor or was otherwise exempt under former subsection 5 is exempt from the prohibition on flavored nonpremium cigars in subsection 2 so long as no material change is made to the cigar’s flavoring, packaging or labeling subsequent
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			to the Attorney General's determination.
<i>Prohibits sale of many flavored tobacco products except in certain adult-only venues</i>	New York City	<a href="#">New York City Administrative Code: Title 17-713 to 718: Regulation of the sale of herbal cigarettes and flavored tobacco products</a>	“Flavored tobacco product” means any tobacco product or any component part thereof that contains a constituent that imparts a characterizing flavor . . . . “Characterizing flavor” means a distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. . . . It shall be unlawful for any person to sell or offer for sale any flavored tobacco product except in a tobacco bar. <sup>28</sup>
<i>Prohibits sale of many flavored tobacco products except in certain adult-only venues</i>	Providence, Rhode Island	<a href="#">Providence Code of Ordinances, Sections 14-308 to 14-310</a>	“Flavored tobacco product” means any tobacco product or any component part thereof that contains a constituent that imparts a characterizing flavor. . . . “Characterizing flavor” means a distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice <sup>29</sup> . . .

			<p>provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information. . . . It shall be unlawful for any person to sell or offer for sale any flavored tobacco product to a consumer, except in a smoking bar.</p>
<p><i>Prohibits sale of many flavored tobacco products in all locations</i></p>	<p>Sherborn, Massachusetts</p>	<p><a href="#">Sherborn Board of Health Regulation Restricting the Sale and Use of Tobacco and Nicotine Delivery Products</a></p>	<p>[“Flavored Tobacco Product and Flavored Nicotine Delivery Product” means any] tobacco product or nicotine delivery product including e-cigarettes defined herein, or component part thereof that contains a constituent that has or produces a characterizing flavor [excluding tobacco, menthol, mint or wintergreen]. A public statement, claim or indicia made or disseminated by the manufacturer of a tobacco product or nicotine delivery product, including e-cigarettes as defined herein, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such product, that such product has or produces a characterizing flavor shall constitute presumptive evidence that the product is a flavored tobacco product or nicotine delivery product, including e-cigarettes as defined herein. . . . No person shall sell or distribute or cause to be sold or distributed any flavored tobacco or nicotine delivery product.</p>



## Other Helpful Resources

The Consortium's parent organization, the [Public Health Law Center](#), has webpages containing information on [federal regulation of tobacco products](#), as well as [tobacco product regulation](#) at the state and local levels. Our site also provides several publications on regulating flavored tobacco products, including "Sample Language to Restrict the Sale of Flavored Non-Cigarette Tobacco Products," a Tips & Tools guide on [Regulating Waterpipe and Hookah Smoking](#), a law synopsis entitled, [Pick Your Poison: Responses to the Marketing and Sale of Flavored Tobacco Products](#) (2009), and a page devoted to [menthol tobacco products](#). Our site also has resources related to [tobacco product advertising, marketing, and pricing](#). In addition, the [Campaign for Tobacco-Free Kids](#) has information on flavored tobacco products, including dissolvables.

## Contact Us

Please feel free to contact the Tobacco Control Legal Consortium at [publichealthlaw@wmitchell.edu](mailto:publichealthlaw@wmitchell.edu) with any questions about the information included in this guide or to discuss local concerns you may have about implementing such a policy.

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## Notes

<sup>1</sup> The information contained in this document is not intended to constitute or replace legal advice.

<sup>2</sup> Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 § 102, 123 Stat. 1776 (codified as amended in scattered sections of 15 U.S.C. and 21 U.S.C. (2009)). According to the Act: ...a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice, including strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, or coffee, that is a characterizing flavor of the tobacco product or tobacco smoke. 21 U.S.C. § 387g(a)(1)(A) (2009). *See also* FOOD & DRUG ADMIN., DEP'T OF HEALTH & HUMAN SERVS., *Fact Sheet: Flavored Tobacco Products* (2010), available at <http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/ucm183198.htm>.

<sup>3</sup> FOOD & DRUG ADMIN., DEP'T OF HEALTH & HUMAN SERVS., *Guidance to Industry and FDA Staff: General Questions and Answers on the Ban of Cigarettes that Contain Certain Characterizing Flavors* (Ed. 2) (2009), available at <http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/ucm183228.htm>.

<sup>4</sup> In March 2011, the Tobacco Products Scientific Advisory Committee (TPSAC) issued a report on menthol cigarettes, concluding that they have "an adverse impact on public health in the United States" and that "[t]here are no public health benefits of menthol compared to non-menthol cigarettes." The report recommended to the FDA that "[r]emoval of menthol cigarettes from the marketplace would benefit public health in the United States." FOOD & DRUG ADMIN., DEP'T OF HEALTH & HUMAN SERVS., *Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations* 204, 208 (2011), available at <http://www.fda.gov/advisoryCommittees/CommitteesMeetingMaterials/tobaccoproductsScientificAdvisoryCommittee/default.htm>. In July 2014, however, a federal judge found that three members of TPSAC had a conflict of interest and that the report could not be used to influence FDA policy. *Lorillard, Inc. v. U.S. Food and Drug Admin.*, CV 11-440 (RJL), 2014 WL 3585883. The TPSAC report is not the only FDA report on menthol. In July 2013, the agency published an independent report entitled "Preliminary

Scientific Evaluation of the Possible Public Health Effects of Menthol Versus Nonmenthol Cigarettes.” This report concluded that “menthol use is likely associated with increased smoking initiation by youth and young adults,” “menthol in cigarettes is likely associated with greater addiction,” and “that menthol cigarettes pose a public health risk above that seen with nonmenthol cigarettes.” Food and Drug Admin., at 6,

<http://www.fda.gov/downloads/scienceresearch/specialtopics/peerreviewofscientificinformationandassessments/ucm361598.pdf>. For more background information about menthol tobacco product regulation, see Tobacco Control Legal Consortium, *Federal Regulation of Menthol Tobacco Products: Frequently Asked Questions* (2011), available at

[http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-mentholtobprods-qanda-2011\\_0.pdf](http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-mentholtobprods-qanda-2011_0.pdf). See also information on the FDA government website at

<http://www.fda.gov/TobaccoProducts/PublicHealthScienceResearch/Menthol/default.htm>.

<sup>5</sup> For more information on the “Deeming Regulation,” see materials on the Tobacco Control Legal Consortium’s [FDA Tobacco Action Center](#) web page.

<sup>6</sup> As discussed below, Chicago is the first jurisdiction to have tried to regulate the sale of menthol products, including menthol cigarettes. Amended Chicago Municipal Code Chapters 4-64 Concerning Flavored Tobacco Products (2013), available at

<http://www.cityofchicago.org/content/dam/city/depts/bacp/tobacco/flavoredtobaccord04212014.pdf>. It is anticipated that a pending court case related to Chicago’s ordinance will confirm that this authority extends to state and local sales restrictions related to menthol cigarettes.

<sup>7</sup> FOOD AND DRUG ADMIN., DEP’T OF HEALTH & HUMAN SERVS., *Fact Sheet: Flavored Tobacco Products* (2010), available at

<http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/ucm183198.htm>.

<sup>8</sup> U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, *Sustaining State Programs for Tobacco Control, State Data Highlights: 2006*, available at

[http://www.cdc.gov/tobacco/data\\_statistics/state\\_data/data\\_highlights/2006/pdfs/dataHighlights06rev.pdf](http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/pdfs/dataHighlights06rev.pdf).

<sup>9</sup> See U.S. Food & Drug Admin., *FDA Parental Advisory on Flavored Tobacco Products – What You Need to Know* (2013), available at

<http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/ucm183196.htm>.

<sup>10</sup> Cristine D. Delnovo, et al., *Smoking-Cessation Prevalence Among U.S. Smokers of Menthol Versus Non-Menthol Cigarettes*, 41 AM. J. PREVENTIVE MED. 357-65 (2011).

<sup>11</sup> Providence, R.I., Municipal Code art. XV, § 14-309 (2012), <https://www.providenceri.com/efile/2036>.

<sup>12</sup> See, e.g., Newton, Mass., Municipal Code art. 1, § 20:26(j); Sherborn, Mass., Municipal Code art. VI, § 8.0; Yarmouth, Mass., Municipal Code, § G.

<sup>13</sup> New York, N.Y., Municipal Code, § 17-715,

<http://www.nyc.gov/html/doh/downloads/pdf/smoke/flavored-law.pdf>.

<sup>14</sup> *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428 (2d Cir. 2013); *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71 (1st Cir. 2013).

<sup>15</sup> 2007 Me. Laws § 1560-D.

<sup>16</sup> See Amended Chicago Municipal Code Chapters 4-64, *supra* note 6. The ordinance exempts retail tobacco stores.

<sup>17</sup> See Tobacco Control Legal Consortium, *Restricting Tobacco Advertising – Tips and Tools* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-restricttobadvert-2011.pdf>. Also, note that the Comprehensive Smokeless Tobacco Health Education Act’s preemption provision could limit restrictions on advertising and marketing. 15 U.S.C. § 4406 (a) (b) (1986), available at <http://www.law.cornell.edu/uscode/text/15/4406>.

<sup>18</sup> See Tobacco Control Legal Consortium, *Placement of Tobacco Products – Tips and Tools* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-placementoftobprods-2011.pdf>.

<sup>19</sup> For an overview of constitutional issues that state and local governments need to consider when regulating tobacco product marketing and promotion, see Tobacco Control Legal Consortium, *Regulating Tobacco Marketing: “Commercial Speech” Guidelines for State and Local Governments* (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guidelines-speech-2010.pdf>. See also Tobacco Control Legal Consortium, *Regulating Tobacco Retailers: Options for State and Local Governments* (2010), available at [http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-retailers-2010\\_0.pdf](http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-retailers-2010_0.pdf).

<sup>20</sup> New York City adopted a requirement that cigarette retailers display signs graphically depicting the adverse health effects of smoking. New York, New York, Health Code art. 181, § 181.19. A federal court struck down this ordinance as violating the preemption clause of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334; *23-34 94<sup>th</sup> St. Grocery v. N.Y.C. Board of Health*, 685 F.3d 174 (2d Cir. 2012). However, because that case turned on preemption relative to cigarettes, it would not be directly relevant to an ordinance requiring point-of-sale warnings depicting the health effects of non-cigarette tobacco products. In addition, the court said that cigarette graphic warnings, if done differently, could be valid.

<sup>21</sup> See Tobacco Control Legal Consortium, *Restricting Tobacco Advertising*, *supra* note 17.

<sup>22</sup> Frank J. Chaloupka & Rosalie Liccardo Pacula, *The Impact of Price on Youth Tobacco Use*, 14 SMOKING AND TOBACCO CONTROL MONOGRAPH (1999), available at [http://cancercontrol.cancer.gov/brp/tcrb/monographs/14/m14\\_12.pdf](http://cancercontrol.cancer.gov/brp/tcrb/monographs/14/m14_12.pdf).

<sup>23</sup> For additional information about pricing options, see the Tobacco Control Legal Consortium, *Tobacco Coupon Regulations and Sampling Restrictions – Tips and Tools* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-tobcouponregsandsampling-2011.pdf>, and *Regulating Tobacco Product Pricing: Guidelines for State and Local Governments* (2010), available at <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-pricing-2010.pdf>. Some communities might want to consider minimum pricing laws as a complementary strategy, if they have the authority to pass such laws.

<sup>24</sup> See Tobacco Control Legal Consortium, *Taxation of Tobacco Products: An Introduction to Key Terms & Concepts* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-taxationterms-2011.pdf>.

<sup>25</sup> If it is not politically feasible to prohibit the sale of menthol cigarettes, and only flavored non-cigarette tobacco products are targeted by the local law, make sure that the language is precise so that products such as little cigars are not inadvertently exempted as well.

<sup>26</sup> See *supra* note 2, § 21 U.S.C. § 387p(a)(2)(A).

<sup>27</sup> See sources cited, *supra* note 19.

<sup>28</sup> The Second Circuit Court of Appeals noted that “there are only eight tobacco bars in New York City, all of which are in Manhattan and none of which sells flavored smokeless tobacco,” but upheld the ordinance nonetheless. 708 F.3d 428, 432.

<sup>29</sup> The ordinance originally included the language “and concepts such as spicy, arctic, ice, cool, warm, hot, mellow, fresh, and breeze.” However, a federal district court found this language to be unconstitutionally vague and struck it from the ordinance. See *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence*, No. 12-96-ML, 2012 WL 6128707 (D.R.I. Dec. 10, 2012).