



STAFF REPORT

Meeting Date: August 7, 2018
To: Honorable Mayor & City Council
From: Logan Phillippo, Senior Management Analyst 
Subject: Health and Safety Commission Recommendation on Proposed Ordinance to Prohibit the Sale of Flavored Tobacco Products in Beverly Hills

Attachments:

1. Proposed Ordinance
2. Local Tobacco Policies in the Retail Environment
3. Flavored Tobacco Products Fact Sheet
4. Menthol and Cigarettes Fact Sheet

INTRODUCTION

In October 2017, Los Angeles County Health Department staff recommended the City consider prohibiting the sale of flavored tobacco products in Beverly Hills, indicating that predatory marketing tactics target youth and minority populations.

On November 30, 2017, the City Council Health and Safety Commission Liaisons, consisting of Mayor Gold and Councilmember Bosse, met with a County Health Department representative to discuss the dangers of tobacco products and the possibility of restricting their sale in Beverly Hills. The Liaisons requested the Health and Safety Commission study the topic, seek public input, and return to the full City Council for discussion.

At the February 26, 2018 Health and Safety Commission Regular Meeting, the Commission voted (5-0) in support of a draft ordinance that would prohibit the sale of flavored tobacco products. The recommendation also includes prohibiting the sale of menthol cigarettes.

Staff is seeking City Council input and direction on the proposed ordinance.

The following attachments are included to provide additional background information.

Attachment 1: includes the proposed ordinance.

Attachment 2: published by the American Lung Association, includes a summary of California municipalities' policies regarding flavored tobacco sales.

Meeting Date: August 7, 2018

Attachment 3: published by the California Department of Public Health, provides information regarding the types of flavored tobacco products and consumption patterns in the United States.

Attachment 4: published by the California Department of Public Health provides information regarding menthol cigarettes and consumption patterns in the United States.

DISCUSSION

Background on Flavored Tobacco Products

Flavored tobacco products include come in a variety of flavors such as chocolate, berry, cherry, apple, wintergreen, and peach and are sold in colorful packaging, which can make them especially appealing to young people. The flavored products apply to cigars, cigarillos, smokeless tobacco, shisha or hookah tobacco, and liquid nicotine solutions used in electronic smoking devices. According to the National Cancer Institute, cigarettes usually differ from cigars in size and in the type of tobacco used.

Cigarettes: Cigarettes are uniform in size and contain less than 1 gram of tobacco each. U.S. cigarettes are made from different blends of tobaccos and are wrapped with paper.

Cigars: Most cigars are composed primarily of a single type of tobacco and they have a tobacco wrapper. They can vary in size and shape and contain between 1 gram and 20 grams of tobacco.

In 2009, the United States Food and Drug Administration ("FDA") banned cigarettes with characterizing flavors other than menthol (e.g., cherry, chocolate).

Currently, the FDA does not ban flavors from other tobacco products, although, according to the FDA, research suggests flavors may also make these products more enticing to youth and young adults. Data from FDA's Population Assessment of Tobacco and Health found that nearly 80 percent of youth ages 12-17 and nearly 75% of young adults ages 18-25 who were current tobacco users in 2014 reported that the first tobacco product they ever used was flavored.

While the FDA bans flavored cigarettes, menthol products are not included. The proposed ordinance, however, includes prohibiting the sale of menthol cigarettes.

According to the FDA, menthol is a flavor additive with a minty taste and aroma that is widely used in consumer and medicinal products due to its reported cooling or painkilling properties. When used in cigarettes, menthol may reduce the irritation and harshness of smoking.

Additionally, according to the FDA:

- 19.7 million people are current smokers of menthol cigarettes;
- 84.6% of African American smokers, 44.4% of Hispanic smokers, 37.5% of Asian smokers, and 28.5% of White smokers smoke menthol cigarettes;
- Youth who smoke are more likely to smoke menthol cigarettes than older smokers. More than half of smokers ages 12-17 smoke menthols; and
- Menthol is also used in other tobacco products, such as cigars, hookah tobacco, smokeless tobacco, e-cigarettes, and other electronic nicotine delivery systems

Meeting Date: August 7, 2018

Proposed Policy Background

Restricting the **sale of tobacco products** differs from **City smoking restrictions**. The following two paragraphs distinguish these two concepts.

City Smoking Restrictions. In order to promote healthy living, the City has long supported no-smoking policies. Most recently in 2017, the City prohibited smoking in the public-right-of-way, increased the open air dining no-smoking buffer zone from five feet to 20 feet, and adopted a new ordinance to prohibit smoking in multi-unit residences. These policies address the locations where smoking is prohibited. This includes the smoking of traditional tobacco products, electronic cigarette products, and marijuana products.

Sale of Tobacco Products. While the City prohibits smoking in many locations, the sale of tobacco products, is permitted in the City. BHMC Section 4-2-2102 defines a tobacco product as “any manufactured substance made from the tobacco plant, including, but not limited to, cigarettes, cigars, pipe tobacco, snuff, chewing tobacco and smokeless tobacco, or products prepared from tobacco and designed for smoking or ingestion.”

The County Health Department has indicated support for policies that restrict the sale of **flavored tobacco products**, which is not a product type specifically addressed in the Beverly Hills Municipal Code. The City already has a process for permitting tobacco retailers, through an ordinance that was adopted in 2010. Since 2010, tobacco retailers in Beverly Hills have been required to obtain a tobacco retailer's permit for each location where tobacco products are sold. This is in addition to State licensing requirements. There are approximately 30 licensed tobacco product retailers in Beverly Hills.

According to an April 2018 report from the American Lung Association, more than 100 California communities have adopted policies to regulate the sale of tobacco in the retail environment. 15 California communities have included flavored tobacco restrictions. 10 of these communities have included menthol products in the ban.

	<u>Municipality</u>	<u>Date Passed</u>	<u>Menthol Products Included</u>
1.	Hayward	July 2014	Yes
2.	Sonoma	June 2015	No
3.	Berkeley	September 2015	Yes
4.	El Cerrito	October 2015	Yes*
5.	Manhattan Beach	December 2015	No
6.	Yolo County	October 2016	Yes
7.	Santa Clara County	November 2010	Yes
8.	Novato	January 2017	No
9.	Los Gatos	May 2017	Yes
10.	San Francisco	June 2017	Yes
11.	Contra Costa County	July 2017	Yes
12.	Oakland	September 2017	Yes
13.	Palo Alto	October 2017	Yes
14.	San Leandro	October 2017	No
15.	Cloverdale	January 2018	No

* Does not include menthol cigarettes.

Meeting Date: August 7, 2018

San Francisco Flavored Tobacco Restrictions

On June 27, 2017, the City and County of San Francisco adopted an ordinance prohibiting the sale and distribution of all flavored tobacco products. The ordinance does not contain any exceptions to the ban.

After the ordinance was adopted, a referendum was brought to stop the implementation of the ordinance. Under the San Francisco Charter, a resident can require that the City Council place an ordinance on the ballot by, prior to the ordinance's effective date, gathering enough signatures (at least 10% of the number of votes cast for all candidates for mayor in the last preceding general municipal election for mayor) supporting the referendum. The Referendum Against the City and County of San Francisco's Ordinance Prohibiting the Sale of Flavored Tobacco Products, Including Menthol Cigarettes qualified for the June 2018 ballot. The referendum effectively placed the ordinance on the ballot for voter consideration so that voters could decide whether the ban on the sale of flavored tobacco products should become law. The referendum did not raise any legal challenges to the ordinance.

On June 5, 2018, 68% (164,844) of votes were in favor of the ordinance prohibiting local tobacco retailers from selling flavored tobacco products. The ban is now in effect, but the City of San Francisco has not yet commenced enforcement.

Summary of California Attorney General Opinion

In March 2016, the California Department of Public Health published a report, funded by the Center for Disease Control and written by California's deputy attorney general, discussing the legality of local bans of flavored tobacco products. The report, titled "Focus on Flavors," primarily discussed the federal Family Smoking Prevention and Tobacco Control Act ("FSPTCA") and three subsequently enacted flavored-tobacco ordinances that were challenged and upheld by courts. The report concludes that "no court, to date, has been required to consider the validity of a complete prohibition of sales and distribution of all types of [flavored] tobacco products [...]. There does not, however, appear to be a legal barrier to a state or local government enacting a complete sales prohibition on the sale of menthol cigarettes, flavored tobaccos products, and/or flavored electronic cigarettes."

The FSPTCA gave the Food and Drug Administration ("FDA") the authority to regulate cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, and any other tobacco products that the FDA deems to be under its authority. See 21 U.S.C. § 387a(b). The FSPTCA expressly preserves the power of local governments to enact additional or more stringent regulations related to or prohibiting "the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products," which may be in addition to or more stringent than the requirements of the Act (the "Preservation Clause"). [21 U.S.C. § 387p(a)(1).] Local governments, however, are preempted from regulating in the areas of "tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products [e.g. nicotine gum and patches]," (the "Preemption Clause"). See 21 U.S.C. § 387p(a)(2)(A). The Preemption Clause is followed by an exception (the "Savings Clause"), which states that local regulation of the sale, distribution, or possession of tobacco products by individuals of any age is not preempted. See 21 U.S.C. § 387p(a)(2)(B). While the Preservation Clause and Savings Clause may at first glance appear to be redundant, the Savings Clause in fact allows local authorities to enact a regulation regarding the sale,

Meeting Date: August 7, 2018

distribution, or possession of tobacco products even if such a regulation can be said to relate to a product standard or other preempted area.

The report examined three different local ordinances that banned flavored tobacco products and that were upheld in court. The first case to examine a post-FSPTCA flavored tobacco ban is *U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York* (2d Cir. 2013) 708 F.3d 428. In that case, New York City prohibited the sale of all flavored tobacco products—except for menthol, mint, and tobacco-flavored products in all establishments besides “tobacco bars.” The plaintiffs argued that the ordinance, on its face regulated sales of tobacco products and was therefore a preempted product standard regulation because of the effect it would have on tobacco manufacturers. The court rejected this argument, drawing a distinction between a sales regulation that incentivizes manufacturers to create certain products, versus a regulation that would require a manufacturer to “alter the construction, components, ingredients, additives, constituents and properties of their products.” Furthermore, the court held that even if the ordinance did indirectly set a product standard, the FSPTCA’s Savings Clause in fact allows local governments to enact sales regulations relating to product standards. The plaintiffs countered by asserting that the Savings Clause does not save from preemption outright bans related to product standards, pointing out that while the Preservation Clause expressly allows “prohibitions,” the Savings Clause only mentions “requirements relating to the sale” of tobacco products. [Ibid.] The court rejected this argument as well, reasoning that the ordinance, while severe, was not an outright ban because it allowed the sale of some flavors (menthol, tobacco) in some places (tobacco bars). The court therefore explicitly declined to opine on whether the plaintiffs’ interpretation of the Savings Clause was correct.

Months after the Second Circuit upheld New York City’s ordinance, the First Circuit upheld a very similar ordinance enacted by Providence, Rhode Island. In *Nat’l Ass’n of Tobacco Outlets, Inc. v. City of Providence, R.I.* (1st Cir. 2013) 731 F.3d 71, Providence adopted an ordinance prohibiting all retailers besides “tobacco bars” from selling flavored tobacco products, except for menthol, mint, and tobacco flavors. The plaintiffs in this case made many of the same preemption arguments as the Smokeless Tobacco plaintiffs, and the First Circuit agreed with the Second Circuit’s reasoning for rejecting those arguments in every instance.

In 2013, Chicago adopted an ordinance that banned the sale of all flavored tobacco products, including menthol, within 500 feet of a school—except at shops that derive over 80% of their revenue from tobacco products, i.e. “tobacco shops.” *Indeps. Gas & Serv. Stations Associations, Inc. v. City of Chicago* (N.D. Ill. 2015) 112 F. Supp. 3d 749, 751. The district court fully adopted the Second Circuit’s reasoning in rejecting all of the Independents Gas plaintiffs’ preemption arguments.

The collective takeaway from these cases is that courts in three distinct jurisdictions have all subscribed to the same reasoning in holding that cities have the power to enact severe restrictions on the sale of flavored tobacco products—including, in one case, menthol-flavored products. While a court has not yet affirmed that cities may enact a comprehensive ban of flavored tobacco products, the FSTCPA itself states that a city may enact a regulation “prohibiting the sale [...] of tobacco products [to] individuals of any age.” 21 U.S.C. § 387p(a)(1).

Summary of Outreach Activity to Tobacco Retailers

The policy was initially discussed at the November 30, 2017, City Council Health and Safety Commission Liaison meeting. Several groups, primarily representatives from the

Meeting Date: August 7, 2018

tobacco industry outside of Beverly Hills, expressed opposition to any policy that would prohibit the sale of flavored tobacco products.

The policy was additionally discussed at two Health and Safety Commission meetings on January 22, 2018 and on February 26, 2018. At these two meetings, several residents and local Beverly Hills High School students attended and expressed support for a policy that would prohibit the sale of flavored tobacco products. One local business owner attended and expressed opposition. Staff notified existing City-permitted tobacco retailers of public meetings to consider policies restricting the sale of flavored tobacco products. For the January 22, 2018 Commission Regular Meeting, this included outreach by telephone and email. For the February 26, 2018 Commission Regular Meeting, this included outreach by email and post-office mail. For this August 7, 2018 Study Session Meeting, Staff provided outreach by email and post-office mail. Staff has additionally updated the website to provide updates of the ongoing policy discussions.

Tobacco retailers have indicated that if a ban on flavored products were to go into effect, that the City should allow for an implementation period in order to exhaust existing stock reduce any financial strains on business owners.

Key Details of the Proposed Ordinance

The proposed ordinance includes five modifications to Article 21 of Chapter 2 of Title 4 of the Beverly Hills Municipal Code. The proposed ordinance:

1. Adds to the definition of 'Tobacco Product';
2. Defines 'Characterizing Flavor', **which includes menthol**;
3. Defines 'Flavored Tobacco Product';
4. States that it shall be unlawful for any Tobacco Retailer to sell or offer for sale any Flavored Tobacco Product; and
5. Establishes a timeline of three months before the City shall enforce violations of the ordinance.

Typically, ordinances go into effect 31 days after adoption by City Council. After Health and Safety Commission deliberation, the ordinance includes a three-month implementation period after the effective date of the ordinance. This allows time for the City to notify tobacco retailers in Beverly Hills as well as time for tobacco retailers to sell their existing inventory of flavored tobacco products and comply with the ban. Tobacco retailers have indicated that they could face a financial strain if an ordinance were to go into effect immediately, especially since the restrictions apply to menthol cigarettes that are more commonly sold. If City Council were to proceed with adoption of the ordinance as presented, the implementation timeline would be as follows.

- August 7, 2018: First Reading of Ordinance
- August 21, 2018: Second Reading
- September 21, 2018: Ordinance Takes Effect
- December 21, 2018: Enforcement Takes Effect

Enforcement

BHMC 4-2-2115 already sets forth the enforcement provisions of the existing City's Tobacco and Electronic Cigarette Retailer Permitting Regulations. The proposed ordinance would be subject to these same enforcement provisions. Additionally, the Municipal Code includes a provision for compliance monitoring that allows a "youth decoy" to participate in compliance checks supervised by a peace officer or code

Meeting Date: August 7, 2018

enforcement official of the City. On an annual basis, the Police Department conducts sting operations with a youth decoy to monitor compliance.

The City intends to continue in this manner with already established enforcement mechanisms. This includes escalating fines civil penalties. A first violation is \$250. A second violation within a five-year period is \$750 and suspends the retailer permit for 90 days. A third violation within a five-year period is \$1,000 and revokes the permit.

FISCAL IMPACT

Costs associated with the implementation of the ordinance would include outreach and enforcement. Outreach is expected to include the dissemination of notices to existing tobacco retailers and development of an informational flyer. Because of the small number of tobacco retailers in the City, Staff does not anticipate significant costs beyond already budgeted expenditures. There is currently no request for additional funding or staffing. Staff will evaluate impacts on Code Enforcement and the Police Department as the proposed regulations go into effect and return to City Council with an update if additional resources are needed.

The City has received Proposition 56 grant funding through the California Department of Justice in the amount of \$305,810. A portion of these funds can be used over a two-year period for tobacco and anti-smoking program outreach, education, and enforcement purposes. On June 19, 2018, City Council approved a Memorandum of Understanding with the Department of Justice related to this grant program. In addition to assisting the City with outreach and enforcement of this particular proposed ordinance the grant funding will be use to:

1. Develop and implement a comprehensive no-smoking awareness campaign to increase compliance through outreach and education;
2. Develop and implement a comprehensive no-smoking signage program by installing up to 100 signs at sidewalks, alleyways, parks, and other municipal facilities; and
3. Expand the City's existing Ambassador Program to include one (1) Ambassador fully dedicated to soft enforcement and outreach of City tobacco and no-smoking restriction.

In addition to receiving grant funding, the City provides grant funding to the Cedars-Sinai Medical Care Foundation to offer free one-on-one smoking cessation counseling with a clinical pharmacist. This is open to all Beverly Hills residents and employees.

RECOMMENDATION

On November 30, 2017, the City Council Health and Safety Commission Liaisons, consisting of Mayor Gold and Councilmember Bosse, met with the County Health Department to discuss the dangers of tobacco products and the possibility of restricting their sale in Beverly Hills. The Liaisons requested the Health and Safety Commission to study the topic, seek public input, and return to the full City Council for discussion.

At the February 26, 2018 Health and Safety Commission Regular Meeting, the Commission voted (5-0) in support of a draft ordinance that would prohibit the sale of flavored tobacco products, including menthol cigarettes.

Given these considerations, Staff recommends City Council adoption of the ordinance as presented and is seeking City Council input and direction.

Meeting Date: August 7, 2018

The following options are available for consideration.

- (1) City Council supports the regulations as presented: The proposed ordinance has been placed on this evening's (August 7, 2018) Formal Session Consent Agenda for City Council. Once adopted, Staff would notify existing tobacco retailers and monitor the implementation.
- (2) City Council supports the regulations with modifications: If City Council directs that Staff modify the proposed ordinance as a result of Study Session discussions, the proposed ordinance will be modified accordingly and introduced on a Formal Session Consent Agenda at a later date.
- (3) City Council does not support the ordinance: City Council may direct Staff not to proceed with further development of the policy or direct Staff consider other options.

Pamela Mottice Muller 
Approved By

Attachment 1

ORDINANCE NO. 18-O-_____

**AN ORDINANCE OF THE CITY OF BEVERLY HILLS
AMENDING ARTICLE 21 OF CHAPTER 4 OF TITLE 5 OF
THE BEVERLY HILLS MUNICIPAL CODE TO PROHIBIT
THE SALE OF FLAVORED TOBACCO PRODUCTS**

WHEREAS, tobacco use causes death and disease and continues to be an urgent public health threat, as evidenced by the fact that 480,000 people die prematurely in the United States from smoking-related diseases every year, making tobacco use the leading cause of preventable death. Tobacco use can cause disease in nearly all organ systems and is responsible for 87 percent of lung cancer deaths, 79 percent of all chronic obstructive pulmonary disease deaths, and 32 percent of coronary heart disease deaths. The World Health Organization estimates that tobacco accounts for the greatest cause of death worldwide accounting for nearly 6 million deaths per year.

WHEREAS, the federal Family Smoking Prevention and Tobacco Control Act (FSPTCA), enacted in 2009, prohibits cigarettes with characterizing flavors other than tobacco and menthol, largely because these flavored products are marketed to youth and young adults, and younger smokers are more likely than older smokers to try these products. When Congress enacted the FSPTCA, it found that the use of tobacco products by the nation's children is a pediatric disease of "considerable proportions" that results in new generations of tobacco dependent children and adults. Congress further found that virtually all new users of tobacco products are under the minimum legal age to buy the products.

WHEREAS, although the manufacture and distribution of flavored cigarettes (excluding menthol) are banned by federal law, neither federal law nor California law restricts the sale of menthol cigarettes or flavored non-cigarette tobacco products, such as cigars, cigarillos, smokeless tobacco, hookah tobacco, electronic smoking devices, and the solutions used in these devices.

WHEREAS, the 2014 California Tobacco Advertising Study found that flavored tobacco products are very common in California tobacco retailers as evidenced by the following:

- 97.4% of stores that sell cigarettes sell menthol cigarettes;
- 94.5% of stores that sell little cigars sell them in flavored varieties;
- 84.2% of stores that sell electronic smoking devices sell flavored varieties; and
- 83.8% of stores that sell chew or snus sell flavored varieties.

WHEREAS, according to a 2010 Surgeon General's report, menthol and flavored products have been shown to be "starter" products for youth who begin using tobacco and that these products help establish tobacco habits that can lead to long-term addiction.

WHEREAS, young people are much more likely than adults to use menthol, candy, and fruit-flavored tobacco products, including cigarettes, cigars, cigarillos, and hookah tobacco.

WHEREAS, according to a 2015 report, 70% of middle school and high school students who currently use tobacco report using flavored products that taste like menthol, alcohol, candy, fruit, chocolate, or other sweets.

WHEREAS, data from the National Youth Tobacco Survey indicate that more than two-fifths of US middle school and high school smokers report using flavored little cigars or flavored cigarettes.

WHEREAS, the California Attorney General has stated that electronic cigarette companies have targeted minors with fruit-flavored products.

WHEREAS, between 2004 and 2014 use of non-menthol cigarettes decreased among all populations, but overall use of menthol cigarettes increased among young adults (ages 18 to 25) and adults (ages 26 and older).

WHEREAS, in an undercover operation conducted in 2017, close to half of the tobacco retailers that are operating in Beverly Hills, sold tobacco products to persons under the age of 21 in violation of both State law and Beverly Hills Municipal Code section 4-2-109.

WHEREAS, it is the intent of the City Council of the City of Beverly Hills to provide for the public's health, safety, and welfare by protecting youth from commencing the inherently dangerous activity of smoking.

THE CITY COUNCIL OF THE CITY OF BEVERLY HILLS DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. Code Amendment. Section 4-2-2102 (DEFINITIONS) of Article 21 (TOBACCO AND ELECTRONIC CIGARETTE RETAILER PERMITTING REGULATIONS) of Chapter 2 (REGULATORY BUSINESS PERMITS) of Title 4 (REGULATION OF CERTAIN TYPES OF BUSINESSES AND ACTIVITIES) of the Beverly Hills Municipal Code is hereby amended to add the definitions of "Characterizing Flavor" and "Flavored Tobacco Product" in alphabetical order, and to amend the definition of "Tobacco Product" as follows with all other provisions of Section 4-2-2102 remaining in effect without amendment:

"Characterizing Flavor": A taste or aroma, other than the taste or aroma of tobacco, imparted either prior to or during consumption of a Tobacco Product or any byproduct produced by the Tobacco Product, including, but not limited to, tastes or aromas relating to menthol, mint, wintergreen, fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, or spice.

"Flavored Tobacco Product": Any Tobacco Product that imparts a Characterizing Flavor. A public statement or claim made or disseminated by the manufacture of a Tobacco Product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such Tobacco Product, that such Tobacco Product has or produces a Characterizing Flavor shall constitute presumptive evidence that the Tobacco Product is a Flavored Tobacco Product.

“Tobacco Product”: Includes (1) any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, including, but not limited to, cigarettes, cigars, pipe tobacco, snuff, chewing tobacco, and smokeless tobacco; (2) any electronic cigarette; and (3) any component, part, or accessory intended or reasonably expected to be used with a Tobacco Product, whether or not sold separately. “Tobacco Product” does not include drugs, devices, or combination products authorized for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug and Cosmetic Act.

Section 2. Code Amendment. Section 4-2-2109 (REQUIREMENTS FOR OPERATION) of Article 21 (TOBACCO AND ELECTRONIC CIGARETTE RETAILER PERMITTING REGULATIONS) of Chapter 2 (REGULATORY BUSINESS PERMITS) of Title 4 (REGULATION OF CERTAIN TYPES OF BUSINESSES AND ACTIVITIES) of the Beverly Hills Municipal Code is hereby amended to add a new subsection “H” to read as follows:

“H. It shall be unlawful for any Tobacco Retailer or any of the Tobacco Retailer’s agents or employees to sell or offer for sale any Flavored Tobacco Product. This regulation is not intended to impose any requirement which is different from, or in addition to, any requirement under the provisions of the Family Smoking Prevention and Tobacco Control Act relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.”

Section 3. Code Amendment. Section 4-2-2115 (ENFORCEMENT) of Article 21 (TOBACCO AND ELECTRONIC CIGARETTE RETAILER PERMITTING REGULATIONS) of Chapter 2 (REGULATORY BUSINESS PERMITS) of Title 4 (REGULATION OF CERTAIN TYPES OF BUSINESSES AND ACTIVITIES) of the Beverly Hills Municipal Code is hereby amended to add a new subsection “G” to read as follows:

“G. The City shall not enforce a violation of Section 4-2-2109 subsection H against any Tobacco Retailer that is lawfully operating in the City until [insert date that is three months after the ordinance goes into effect].”

Section 4. CEQA. The City Council hereby finds that it can be seen with certainty that there is no possibility the adoption of this Ordinance will have a significant adverse effect on the environment because the Ordinance only prohibits the sale of Flavored Tobacco Products. It is therefore exempt from California Environmental Quality Act review pursuant to Title 14, Section 15061(b)(3) of the California Code of Regulations.

Section 5. Severability. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance for any reason is held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

Section 6. Publication. The City Clerk shall cause this Ordinance to be published at least once in a newspaper of general circulation, published and circulated in the city within fifteen

(15) days after its passage in accordance with Section 36933 of the Government Code, shall certify to the adoption of this Ordinance and shall cause this Ordinance and the City Clerk's certification, together with proof of publication, to be entered in the Book of Ordinances of the Council of this city.

Section 7. Effective Date. This Ordinance shall go into effect and be in full force and effect at 12:01 a.m. on the thirty-first (31st) day after its passage.

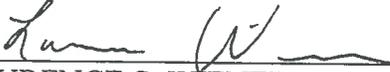
Adopted:
Effective:

JULIAN A. GOLD, M.D.
Mayor of the City of Beverly Hills

ATTEST:

(SEAL)
BYRON POPE
City Clerk

APPROVED AS TO FORM:



LAURENCE S. WIENER
City Attorney

APPROVED AS TO CONTENT:

MAHDI ALUZRI
City Manager

Attachment 2

Matrix of Local Ordinances Restricting the Sale of Flavored Tobacco Products



APRIL 2018

The tobacco industry has a long history of using flavored tobacco to target youth and communities of color. The majority of youth who start experimenting with tobacco begin with flavored tobacco.¹ These products come in a variety of candy-like flavors including bubble gum, grape, menthol and cotton candy and include e-cigarettes, hookah tobacco, cigars, smokeless tobacco, and even flavored accessories such as blunt wraps.

Since 2009, the United States Food and Drug Administration (FDA) has banned flavored cigarettes nationwide. However, this ban included an exemption for menthol flavored cigarettes and doesn't extend to non-cigarette tobacco products. There are currently no state laws in California restricting the sale of flavored tobacco products. It is up to local communities to take action to protect their youth from the lure of enticing flavored tobacco.

The first community to restrict the sale of flavored tobacco in California was Santa Clara County in 2010. Since then, fourteen communities have passed similar policies.

What products may be included?

- 1. E-Cigarettes** – Restricts the sale of flavored electronic cigarettes.
- 2. Menthol** – Restricts the sale of tobacco products labelled as menthol, including cigarettes, smokeless tobacco, little cigars, etc.
- 3. Little Cigars** – Restricts the sale of flavored little cigars, which are small, usually filtered cigars wrapped in brown paper containing tobacco leaf. Little cigars became a popular alternative following the FDA's ban on flavored cigarettes.
- 4. Smokeless Tobacco** – Restricts the sale of flavored smokeless tobacco such as chewing tobacco, dip, snus and snuff.

5. Components & Accessories – Restricts the sale of flavored accessory products such as blunt wraps and e-juice additives. These products cannot be smoked alone and serve as a delivery system for smoked products.

6. Products Marketed as Flavored – Tobacco companies sometimes try to circumvent flavor restrictions by marketing products as flavored without directly labelling them as such. This policy option allows communities to broaden the definition of flavored tobacco to include these products.

What exemptions are allowed?

- 1. Adult-Only Stores Exempted** – Adult-only retailers are limited to customers who are 21 and over. This limits sales of flavored tobacco to stores that youth do not have access to.
- 2. Grandfathered Retailers Exempted** – Allows retailers that were in operation prior to a specified date to continue selling flavored tobacco products.
- 3. Limited to Youth-Populated Areas** – Retailers are required to be a certain distance away from schools, parks, or other youth-oriented locations. Since many flavored tobacco products target youth, including buffer zones is a way to limit their access to flavored products.

Resources

The Center has additional resources on tobacco retailer licensing ordinances, plug-in policies, and ordinances restricting menthol tobacco available at: <http://center4tobaccopolicy.org/tobacco-policy/tobacco-retail-environment/>. ChangeLab Solutions has model ordinance language available for ordinances restricting flavored tobacco at: <http://changelabsolutions.org>.

City/County Date Passed	Products Included						Exemptions		
	E-Cigs	Menthol	Little Cigars	Smokeless	Components & Accessories	Products marketed as flavored	Adult-Only Stores Exempted	Grandfathered Retailers Exempted?	Limited to Youth-Populated Areas?
Cloverdale Jan 2018	X		X	X		X			
San Leandro Oct 2017	X		X	X	X	X			
Palo Alto Oct 2017	X	X	X	X	X	X			
Oakland Sep 2017	X	X			X	X	X		
Contra Costa County July 2017	X	X	X	X	X	X			X 1000 ft
San Francisco ** June 2017	X	X	X	X	X	X			
Los Gatos May 2017	X	X	X	X	X	X	X		
Novato Jan 2017	X		X	X	X	X			
Santa Clara County Oct 2016	X	X	X	X	X	X	X		
Yolo County Oct 2016	X	X	X	X	X				
Manhattan Beach Dec 2015	X		X	X	X		X		X 500 ft
El Cerrito Oct 2015	X	X*	X	X	X	X			X 500 ft
Berkeley Sept 2015	X	X	X	X	X	X			X 600 ft
Sonoma June 2015	X		X	X***	X				
Hayward July 2014	X	X	X	X	X	X		X	X 500 ft

* Does not include menthol cigarettes

** Policy is suspended pending June 2018 referendum vote brought about by opposition

*** Doesn't apply to pipe tobacco

¹ Ambrose, B.K., et al., Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014. JAMA, 2015: p.1-3.

Attachment 3



Fact Sheet

Overview: In the United States (U.S.), consumption of flavored tobacco products such as cigars, cigarillos, smokeless tobacco, shisha or hookah tobacco, and liquid nicotine solutions (used in electronic smoking devices) have increased in recent years [1]. These products come in a variety of flavors including chocolate, berry, cherry, apple, wintergreen, and peach [2] and are sold in colorful packaging, which make them especially appealing to young people. There is growing concern that flavored tobacco products help users develop habits that can lead to long term nicotine addiction [3].

Types of Flavored Products

Cigars

There are three types of cigars sold in the U.S.: little cigars, which are the same size and shape as cigarettes; cigarillos, which are a slimmer version of large cigars and usually do not have a filter; and large cigars, which are larger and weigh more than little cigars and cigarillos [4].

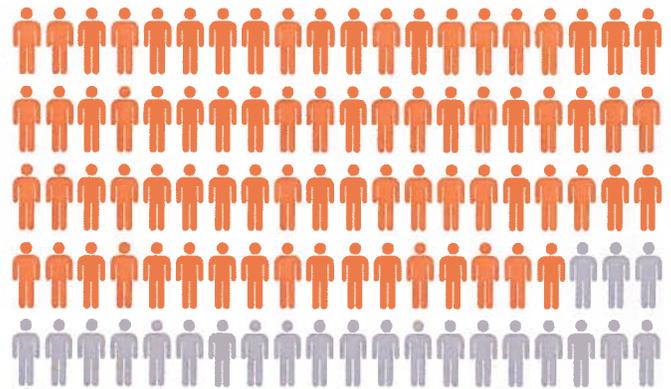


Cigars are the second most common form of tobacco used by youth [5]. Many of the brands that are popular among youth come in flavors such as apple, chocolate, grape, and peach [6], while other less traditional flavors are branded with appealing names like "Fruit Squirts," "Waikiki Watermelon," "Tutti Frutti," "Blue Water Punch," "Oatmeal Cookie," and "Alien Blood" [7].

A recent study found that more than 87 percent of adolescents who used cigarillos in the past 30 days used flavored cigarillos [8].

Regular cigar smoking is associated with increased risk for lung, larynx, oral cavity, and esophagus cancer [9]. Heavy cigar use and deep inhalation has also been linked to elevated risk of heart disease and chronic obstructive pulmonary disease [10].

Cigars contain higher levels of nitrosamines—which are compounds that cause cancer—more tar, and higher concentrations of toxins than cigarettes [11].



87% of adolescents who used cigarillos in the past 30 days used flavored cigarillos.

Smokeless Tobacco



Smokeless tobacco products include chewing tobacco, dip, snuff, and snus and come in flavors such as mint, wintergreen, berry, cherry, and apple [12].

These products contain at least 28 carcinogens [13] and have been shown to cause gum disease and cancers of the mouth, lip, tongue, cheek, throat, stomach, pancreas, kidney, and bladder [14].

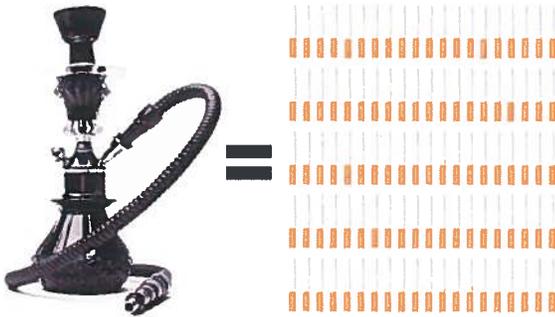
Smokeless tobacco products increase the risk of developing oral cancer by 80 percent, and esophageal and pancreatic cancer by 60 percent [15].

Shisha or Hookah Tobacco

Shisha is also known as hookah, water pipe, narghile, or goza tobacco and is available in an array of fruit, alcoholic beverage, and herbal flavors [12].

Hookah smoking has been associated with lung cancer, respiratory illness, and periodontal disease [9].

Many young adults falsely believe that hookah smoking is safer than cigarette smoking [16]. However, smoking hookah for 45 to 60 minutes can be equivalent to smoking 100 or more cigarettes [17].

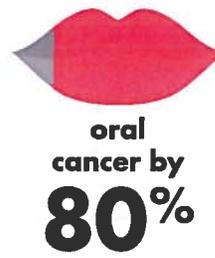


Smoking hookah for 45 to 60 minutes can be equivalent to smoking 100 or more cigarettes

One hookah session delivers approximately 125 times the smoke, 25 times the tar, 2.5 times the nicotine and 10 times the carbon monoxide as a single cigarette [18].

A 2014 study found that teens who use hookah are two-to-three times more likely to start smoking cigarettes or to become current smokers than teens who have not tried hookah [19].

Smokeless tobacco products increase the risk of developing



Liquid Nicotine Solution

Liquid nicotine solution, also called "e-juice" or "e-liquid," is used in electronic smoking devices such as e-cigarettes.

There are more than 7,000 e-liquid flavors [20] including cotton candy, gummy bear, and chocolate mint, as well as flavors named after brand name candy and cereal products such as Wrigley's Big Red Gum and Quaker Oats' Cap'n Crunch [21].



E-liquids, when heated, form an aerosol that emits toxic chemicals known to cause cancer, birth defects, and other reproductive harm [22].

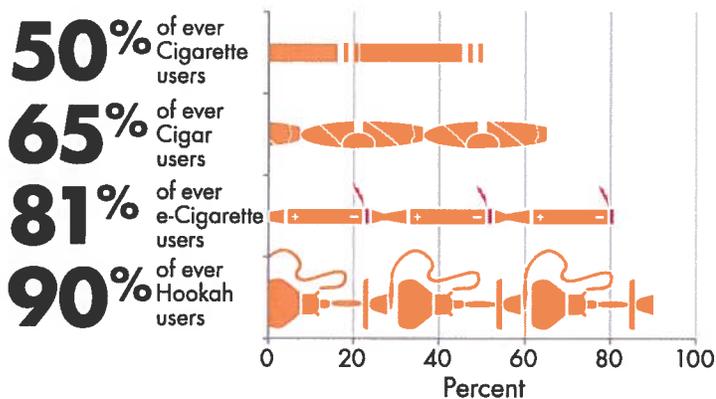
E-liquid solutions contain varying concentrations of nicotine, ranging from no nicotine to 100 mg per milliliter (a milliliter is approximately a fifth of a teaspoon). The lethal dose of nicotine is estimated to be 60 mg or less for an adult and 10 mg for a child. The toxicity of a 60 mg dose of liquid nicotine is similar to or even higher than that of cyanide [23].

Using Flavored Tobacco Products

Recent declines in the prevalence of cigarette smoking among youth have coincided with an increased use of e-cigarettes and hookah tobacco [24]. In the U.S., cigarettes are prohibited from containing flavors other than menthol; however, other tobacco products such as e-cigarettes and hookah tobacco are exempt from this regulation.

A 2015 study of adolescents ages 12 to 17 found that among those who self-reported ever experimenting with tobacco, the majority started with a flavored product. It also found that most current youth tobacco users reported use of flavored products [25].

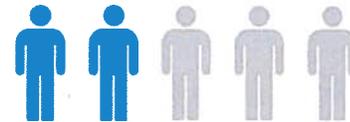
Teens report that their tobacco use typically started with a flavored tobacco product. One study reported that almost 90 percent of ever hookah users, 81 percent of ever e-cigarette users, 65 percent of ever users of any cigar type, and 50 percent of ever cigarette smokers said the first tobacco product they used was flavored [25].



said the first tobacco product they used was flavored

A study conducted by the Centers for Disease Control and Prevention (CDC) found that more than two out of every five middle and high school students who smoke reported either using flavored little cigars or flavored cigarettes [26].

A 2014 CDC survey of U.S. youth found that 70 percent of U.S. middle and high school tobacco users have used at least one flavored tobacco product in the past 30 days [1].



Two out of every five middle and high school students who smoke reported either using flavored little cigars or flavored cigarettes

This survey also found that 18 percent of all high school students in the U.S. reported using at least one flavored tobacco product in the last 30 days [1]. Among current middle and high school tobacco users, more than 63 percent had used a flavored e-cigarette, more than 60 percent had used flavored hookah tobacco, and more than 63 percent had used a flavored cigar in the past 30 days [1].

Findings from the 2015 nationwide Monitoring the Future study found that about 40 percent of all students in 8th, 10th, and 12th grades who used vaporizers, such as e-cigarettes, said that they used them because the flavors tasted good, compared to the 10 percent that used them in an attempt to quit smoking combustible cigarettes [27].

Flavored Tobacco Products are Heavily Marketed to Young People [28] with Sweet Flavors and Colorful Packaging

Flavored tobacco products are very enticing to children and even share the same names, packaging, and logos as popular candy brands like Jolly Rancher, Kool-Aid, and Life Savers [29] and gaming systems like Wii and Gameboy.

Many of the flavoring chemicals used to flavor "cherry," "grape," "apple," "peach," and "berry" tobacco products are the same ones used to flavor Jolly Rancher candies, Life Savers, Zotz candy, and Kool-Aid drink mix [29].

Tobacco companies market their products to young people through the use of youthful models, celebrities, sex appeal, and peer oriented slogans [30].

Young people are much more likely to use candy-and fruit-flavored tobacco products than adults [31].

Bright packaging and product placement at the register, near candy, and often at children's eye-level, make tobacco flavored products very visible to kids [32].



Flavors Make it More Enticing to Smoke Tobacco and More Difficult to Quit

Flavorings help mask the naturally harsh taste of tobacco, making flavored tobacco products more appealing to youth and easier for youth to initiate and sustain tobacco use [31].

Studies show that individuals who begin smoking at a younger age are more likely to develop a more severe addiction to nicotine than those who start later [6].

Both the U.S. Food and Drug Administration (FDA) and the Surgeon General have warned that flavored tobacco products help new users establish habits that can lead to long-term addiction [3, 6].

Not only do flavors make it easier for new users to begin smoking, but the presence of flavors like menthol in tobacco products also make it more difficult for tobacco users to quit [33].

Flavors in tobacco products:

make it more appealing for new users to buy and smoke

mask the harsh taste of tobacco

help users establish habits that can lead to long-term addiction



Flavored Tobacco Products are Cheaper and Sold in Smaller Packages than Cigarettes

“

The tobacco industry has promoted little cigars, which are comparable to cigarettes with regard to shape, size, and packaging, as a lower cost alternative to cigarettes [34].

”

While cigarettes must be sold in packs of 20, other tobacco products, like little cigars, can be purchased in quantities of one or two at a time, often for less than a dollar [32].

Price discounting has become the tobacco industry's leading method of attracting users and accounts for the largest percentage of marketing expenditures [35].

Price discounts disproportionately affect vulnerable populations including young people, racial/ethnic minorities, and persons with low incomes, as these groups are more likely to purchase tobacco products through a discount [36, 6].



Little Cigar



Cigarette

Many Young Adults Falsely Believe that Flavored Tobacco Products are Safer than Non-Flavored Tobacco Products

Flavored tobacco products are not only just as harmful as combustible or smokeless tobacco products, but they are also just as addictive [3].

A recent study found that people younger than 25 years of age were more likely to say that hookahs and e-cigarettes were safer than cigarettes [37].

Many studies indicate that cigar smokers misperceive cigars as being less addictive, more “natural,” and less harmful than cigarettes [38]. The misperception among young people that other tobacco products are less harmful than cigarettes, as well as the fact that these products are less harsh to smoke and taste good, may contribute to the increase in the use of other tobacco products by youth.

A 2015 study found that only 19 percent of 8th graders believe that there is a great risk of people harming themselves with regular e-cigarette use, compared to 63 percent of 8th graders who think that there is a great risk of people harming themselves by smoking one or more packs of cigarettes a day [27].

Other tobacco products than cigarettes (OTP’s) such as little cigars, cigarillos, and hookah, like all tobacco products, contain the addictive chemical nicotine which makes them very hard to quit [39] and increases the risk of developing serious health problems including lung cancer, heart disease, and emphysema [40].

Flavoring Chemicals in E-Cigarettes Have Been Linked to Severe Respiratory Disease

Certain chemicals used to flavor liquid nicotine, such as diacetyl, 2,3-pentanedione, and acetoin, are present in many e-liquids at levels which are unsafe for inhalation [41].

Diacetyl, 2,3-pentanedione, and acetoin are used in the manufacture of food and e-liquid flavors such as butter, caramel, butterscotch, piña colada, and strawberry [7].

Diacetyl, when inhaled, is associated with the development of the severe lung condition bronchiolitis obliterans, also known as “popcorn lung,” which causes an irreversible loss of pulmonary function and damage to cell lining and airways [42].



2,3-pentanedione, a chemically similar substitute to diacetyl, caused proliferation of fibrosis connective lung tissue and airway fibrosis in an inhalation study performed on rats [43].

A 2015 study by the Harvard School of Public Health detected



Works Cited

1. Corey, C.G., et al., *Flavored tobacco product use among middle and high school students—United States, 2014*. MMWR Morbidity and Mortality Weekly Report, 2015. **64**(38): p. 1066-1070.
2. Chen, C., et al., *Levels of mint and wintergreen flavorants: Smokeless tobacco products vs. confectionery products*. Food and chemical toxicology, 2010. **48**(2): p. 755-763.
3. Food and Drug Administration, Fact Sheet: *Flavored Tobacco Products*. 2011.
4. National Cancer Institute, *Cigar Smoking and Cancer*, National Institutes of Health, Editor. 2010.
5. Eaton, D.K., et al., *Youth risk behavior surveillance—United States, 2011*. Morbidity and Mortality Weekly Report. Surveillance Summaries (Washington, DC: 2002), 2012. **61**(4): p. 1-162.
6. U.S. Department of Health and Human Services, *Preventing tobacco use among youth and young adults: a report of the Surgeon General*. Atlanta, GA: US Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2012. **3**.
7. Joseph G. Allen, et al., *Flavoring Chemicals in E-Cigarettes: Diacetyl, 2,3-Pentanedione, and Acetoin in a Sample of 51 Products, Including Fruit, Candy, and Cocktail-Flavored E-Cigarettes*. Environmental Health Perspectives, 2015.
8. Miech, R.A., Johnston, L. D., O'Malley, P. M., Bachman, J. G., & Schulenberg, J. E., *Cigarillo use increases estimates of teen smoking rates by half*, University of Michigan News Service, Editor. December 16, 2015: Ann Arbor, MI.
9. Akl, E.A., et al., *The effects of waterpipe tobacco smoking on health outcomes: a systematic review*. International Journal of Epidemiology, 2010. **39**(3): p. 834-857.
10. Centers for Disease Control and Prevention, *Cigars Fact Sheet*, Centers for Disease Control and Prevention, Editor. 2015.
11. National Cancer Institute. *Cigar Smoking and Cancer*. 2010.
12. Changelab Solutions, *In Bad Taste: What Communities Can Do About Fruit and Candy-Flavored Tobacco Products*. 2014, Changelab Solutions.
13. U.S. Department of Health and Human Services, *Reducing tobacco use: A report of the Surgeon General*. Atlanta, GA: US Department of Health and Human Services, Centers for Disease Control and Prevention. National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2000.
14. Mayo Clinic. *Health risks of chewing tobacco and other forms of smokeless tobacco*. Healthy Living: Quit Smoking 2014 November 15, 2014.
15. Boffetta, P., et al., *Smokeless tobacco and cancer*. The Lancet Oncology, 2008. **9**(7): p. 667-675.
16. Morris, D.S., S.C. Fiala, and R. Pawlak, *Peer Reviewed: Opportunities for Policy Interventions to Reduce Youth Hookah Smoking in the United States*. Preventing Chronic Disease, 2012. **9**.
17. World Health Organization Study Group on Tobacco Product Regulation, *Advisory note: waterpipe tobacco smoking: health effects, research needs and recommended actions by regulators—2nd ed*. 2015: World Health Organization.
18. Primack, B.A., et al., *Systematic Review and Meta-Analysis of Inhaled Toxicants from Waterpipe and Cigarette Smoking*. Public Health Reports, January-February 2016. **131**(1): p. 76-85.
19. Soneji, S., et al., *Associations between initial water pipe tobacco smoking and snus use and subsequent cigarette smoking: results from a longitudinal study of US adolescents and young adults*. JAMA Pediatrics, 2014.
20. Zhu, S.-H., et al., *Four hundred and sixty brands of e-cigarettes and counting: implications for product regulation*. Tobacco control, 2014. **23**(suppl 3): p. iii3-iii9.
21. Daniels, M., *The New Joe Camel in Your Pantry: Marketing liquid nicotine to children with candy and cereal brands*. 2015, First Focus: Washington DC.
22. Goniewicz, M.L., et al., *Levels of selected carcinogens and toxicants in vapour from electronic cigarettes*. Tobacco Control, 2014. **23**(2): p. 133-139.
23. Mayer, B., *How much nicotine kills a human? Tracing back the generally accepted lethal dose to dubious self-experiments in the nineteenth century*. Archives of toxicology, 2014. **88**(1): p. 5-7.
24. Arrazola, R.A., et al., *Tobacco use among middle and high school students—United States, 2011-2014*. MMWR Morbidity and Mortality Weekly Report, 2015. **64**(14): p. 381-5.
25. Ambrose, B.K., et al., *Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014*. JAMA, 2015: p. 1-3.
26. King, B.A., et al., *Flavored-little-cigar and flavored-cigarette use among US middle and high school students*. Journal of Adolescent Health, 2014. **54**(1): p. 40-46.
27. Miech, R.A., Johnston, L. D., O'Malley, P. M., Bachman, J. G., & Schulenberg, J. E., *Most youth use e-cigarettes for novelty, flavors - not to quit smoking*, University of Michigan News Service, Editor. December 16, 2015: Ann Arbor, MI.
28. Carpenter, C.M., et al., *New cigarette brands with flavors that appeal to youth: tobacco marketing strategies*. Health Affairs, 2005. **24**(6): p. 1601-1610.
29. Brown, J.E., et al., *Candy flavorings in tobacco*. New England Journal of Medicine, 2014. **370**(23): p. 2250-2252.
30. Kostygina, G., S.A. Glantz, and P.M. Ling, *Tobacco industry use of flavours to recruit new users of little cigars and cigarillos*. Tobacco Control, 2014.
31. King, B.A., S.R. Dube, and M.A. Tynan, *Flavored cigar smoking among US adults: findings from the 2009–2010 National Adult Tobacco Survey*. Nicotine & Tobacco Research, 2013. **15**(2): p. 608-614.
32. Oregon Public Health Division, *Flavored Tobacco: Sweet, Cheap, and Within Kids' Reach, in CD Summary*. 2014, Oregon Health Authority: Oregon.
33. Delnevo, C.D., et al., *Smoking-cessation prevalence among US smokers of menthol versus non-menthol cigarettes*. American Journal of Preventive Medicine, 2011. **41**(4): p. 357-365.
34. Delnevo, C.D. and M. Hrywna, *"A whole 'nother smoke" or a cigarette in disguise: How RJ Reynolds reframed the image of little cigars*. American Journal of Public Health, 2007. **97**(8): p. 1368.
35. Campaign for Tobacco Free Kids, *Tobacco Marketing that Reaches Kids: Point-of-Sale Advertising and Promotions*, Campaign for Tobacco Free Kids, Editor. 2012.
36. White, V.M., et al., *Cigarette promotional offers: who takes advantage?* American Journal of Preventive Medicine, 2006. **30**(3): p. 225-231.
37. Wackowski, O.A. and C.D. Delnevo, *Young Adults' Risk Perceptions of Various Tobacco Products Relative to Cigarettes Results From the National Young Adult Health Survey*. Health Education & Behavior, 2015.
38. Cullen, J., et al., *Seven-year patterns in US cigar use epidemiology among young adults aged 18–25 years: a focus on race/ethnicity and brand*. American Journal of Public Health, 2011. **101**(10): p. 1955-1962.
39. U.S. Food and Drug Administration, *FDA Parental Advisory on Flavored Tobacco Products - What You Need To Know*. 2015, U.S. Food and Drug Administration.
40. U.S. Food and Drug Administration, *Flavored Tobacco Product Fact Sheet*. 2011, U.S. Food and Drug Administration.
41. Tierney, P.A., et al., *Flavour chemicals in electronic cigarette fluids*. Tobacco Control, 2015: p. tobaccocontrol-2014-052175.
42. Farsalinos, K.E., et al., *Evaluation of electronic cigarette liquids and aerosol for the presence of selected inhalation toxins*. Nicotine & Tobacco Research, 2015. **17**(2): p. 168-174.
43. Morgan, D.L., et al., *Bronchial and bronchiolar fibrosis in rats exposed to 2, 3-pentanedione vapors: implications for bronchiolitis obliterans in humans*. Toxicologic Pathology, 2012. **40**(3): p. 448-465.

Attachment 4



What is Menthol and How is it Used?

- Menthol is a naturally occurring compound derived from mint plants and is also synthetically produced. [1] Because of its cool, minty candy-like flavor and fresh odor, it is used as an additive in many products including tobacco, lip balm, cough medication, mouthwash, toothpaste, chewing gum, and candy, as well as in beauty products and perfumes. [2]
- Menthol's anesthetizing effect makes the smoke "smooth" and easier to inhale while masking the harshness of tobacco, making menthol cigarettes more appealing to young and beginner smokers. [1]
- Menthol allows smokers to inhale more deeply and for harmful particles to settle deeper inside the lungs. [2] By reducing airway pain and irritation, continuous menthol smoking can mask the early warning symptoms of smoking-induced respiratory problems. [3]
- Menthol decreases the metabolism of nicotine and increases the amount of the addictive substance in the blood, making cigarettes even more dangerous and difficult to quit. [4]
- Many menthol-only smokers underestimate the dangers of menthol in cigarettes and believe that menthol cigarettes are less harmful than regular cigarettes as compared to non-menthol-only smokers. [5]
- Menthol cigarettes are not safer than regular cigarettes. Menthol cigarettes only mask the harshness of tobacco smoke, making it easier for new smokers to start and more challenging to quit. [6]
- Menthol smokers show greater signs of nicotine dependence and have higher rates of quit attempts, [7] but are less likely to successfully quit smoking than other smokers. [8]
- Menthol cigarettes are not safer than regular cigarettes. Menthol cigarettes have been shown to increase youth initiation, inhibit cessation, and promote relapse. [9] Scientific studies have shown that because of its sensory effects and flavor, menthol may enhance the addictiveness of cigarettes. [10]
- Menthol cigarettes account for approximately 25 percent of all cigarette sales in the U.S. [11] Moreover, more than 90 percent of all tobacco cigarettes contain menthol, regardless of being marketed as a mentholated cigarette. [12]

Menthol smokers

show greater signs of nicotine dependence

— have
higher
rates
of quit
attempts

— but are less
likely to
successfully
quit
smoking
than other
smokers



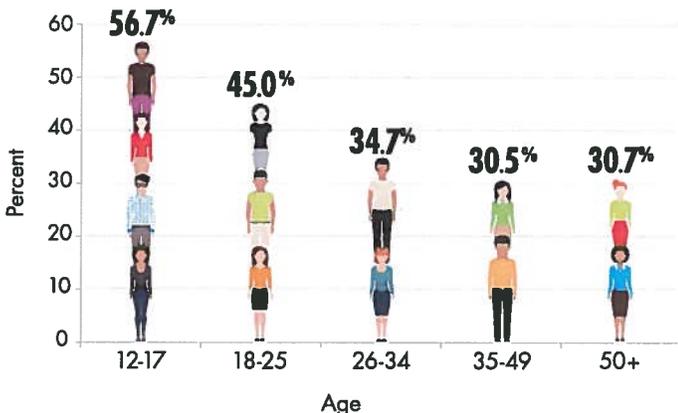
90%

of all tobacco cigarettes contain some menthol, regardless of being marketed as a mentholated cigarette [12]

[7, 8]

Who Smokes Menthol Cigarettes?

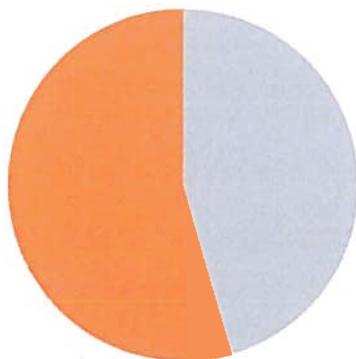
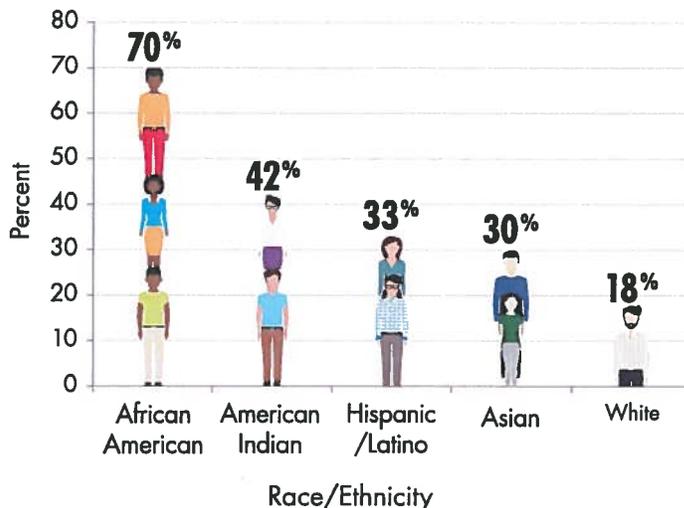
Menthol Cigarette Smoker Use by Age ^[13]



- Nearly half of all lesbian, gay and bisexual adult cigarette smokers in California smoke menthol cigarettes while only 28 percent of straight smokers smoke menthol cigarettes. [16]
- Generally, menthol smokers tend to be female, younger, members of ethnic minorities, have only a high school education, and buy packs rather than cartons. [17]
- Menthol cigarettes are used disproportionately in communities of color. In California, 70 percent of African American, 42 percent of American Indian, 33 percent of Hispanic/Latino, and 30 percent of Asian, adult cigarette smokers smoke menthol cigarettes compared to only 18 percent of white adult cigarette smokers. [16]

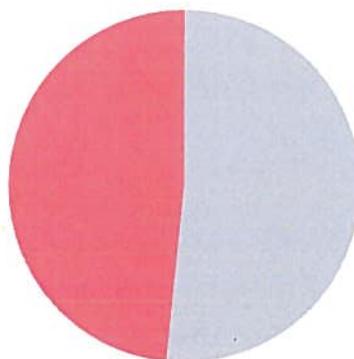
- A national 2013 study found that, among cigarette smokers, menthol cigarette use was more common among 12-17 year olds (56.7 percent) and 18-25 year olds (45 percent) than among older persons (30.5-34.7 percent). [13]
- Approximately 19 million Americans smoke menthol cigarettes, including 1.1 million adolescents. [14]
- More than 50 percent of menthol cigarette smokers are female (52.2 percent) and nearly 30 percent of all menthol smokers are African American (29.4 percent). [15]
- Although the use of cigarettes is declining in the United States (U.S.), sales of menthol cigarettes have steadily increased in recent years, especially among young people and new smokers. [14]

Menthol Cigarette Smoker Use by Race/Ethnicity in California ^[16]



54.5%
of high school

and

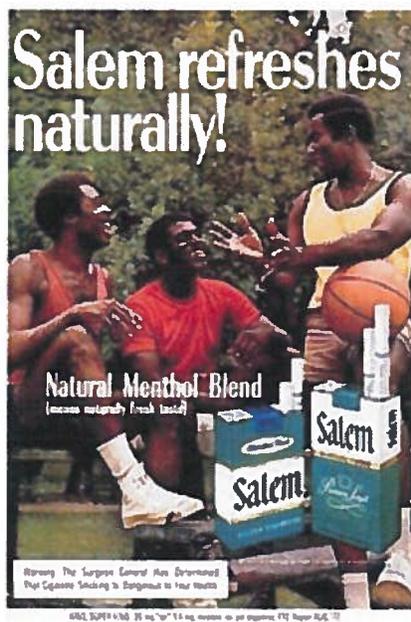
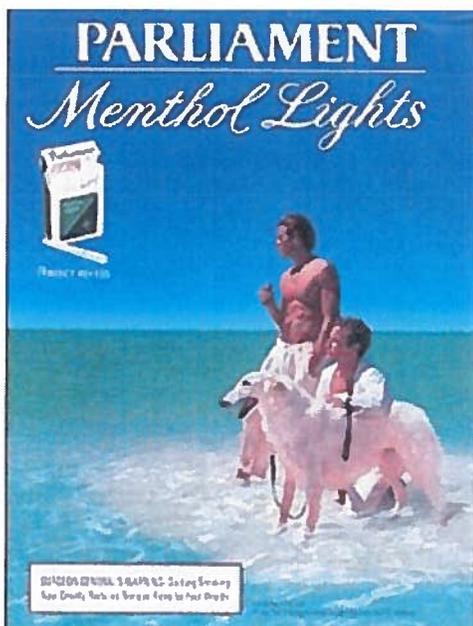


48.4%
of middle school

current tobacco users smoked menthol cigarettes in the U.S. ^[18]

Predatory Marketing Tactics Target Young, Female, and Minority Populations

- Menthol cigarettes were originally developed for and promoted to women. In order to appeal to women, menthol cigarette advertisements often contain images of romantic couples, flowers, and springtime. [20]
- Cigarette packaging design and color are carefully chosen by the tobacco industry to create specific associations. An example of this is the green packages for mentholated cigarettes which suggest coolness and freshness. [19]
- Tobacco retailers in low income, urban communities having high menthol sales are more likely to place larger exterior tobacco advertisements and have more menthol advertisements on their store fronts. [1]
- Tobacco retailers in low income, urban communities offer higher discount rates on mentholated cigarette brands, including between \$1.00 and \$1.50 off per pack or buy one (1) get one (1) free promotions, while more affluent white neighborhoods see discounts on menthols of only about \$0.50 off per pack or buy two (2) get one (1) free offers. [9]
- Camel brand smokers and menthol smokers (Newport and KOOL), who are more often young adults and African Americans, are much more likely to use promotional offers than those who smoke other brands. [21]
- Young adults and African Americans are also less likely to switch from menthol to non-menthol cigarettes regardless of higher product price. [22]

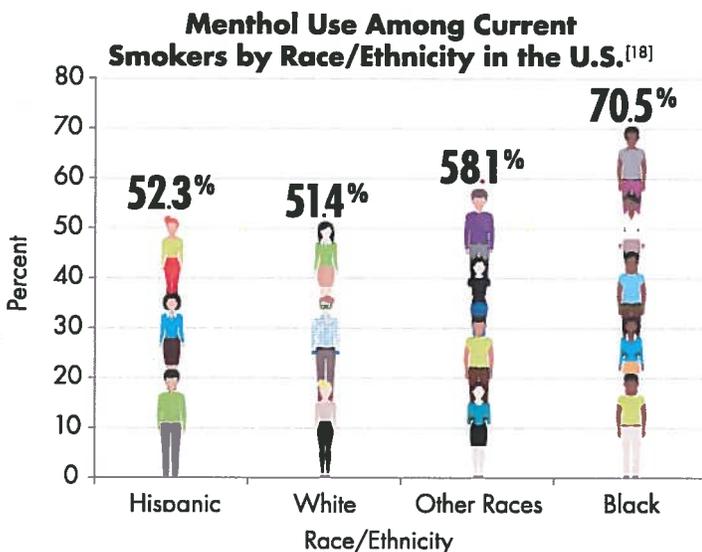


Menthol brands like Newport have specifically targeted adolescents and young adults with their marketing messages^[20], through “youthful imagery, messages promoting an appealing sensory experience, and peer group acceptance.”^[6]

Why Mentholated Tobacco Products Matter to the Health of the African American Community

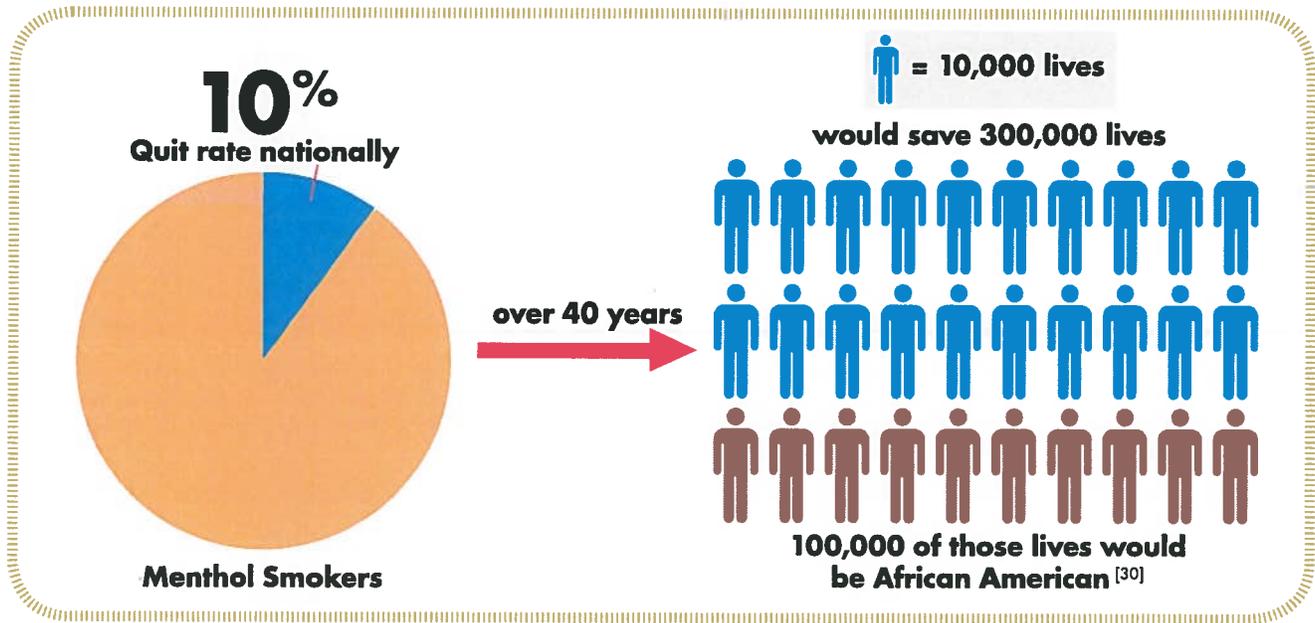
According to the Food and Drug Administration's Tobacco Products Scientific Advisory Committee, by 2020 the African American population will have suffered more than 4,700 excess deaths due to menthol in cigarettes, and more than 460,000 more African Americans will have started smoking due to the impact of menthol. [23]

- African Americans have been one of the main target groups of menthol cigarette advertising. [24] Tobacco industry documents reveal aggressive menthol tobacco product marketing in urban, low-income, African American neighborhoods through marketing; such as advertising more desirable menthol promotions; dedicating a greater store display space for menthol products; and allowing more menthol interior and exterior signage in stores. [25]
- Historically, African Americans have been exposed to hundreds of tobacco advertisements and the tobacco industry has placed proportionately more menthol cigarette advertisements in African American magazines than in mainstream magazines. [26] Many of these targeted advertisements incorporate elements of African American culture, music, and messages related to racial identity and urban nightlife. [32]
- Today, menthol cigarettes are the overwhelming favorite tobacco product among African Americans. A 2015 CDC report found that among current cigarette smokers in the U.S., 70.5 percent of African Americans reported menthol cigarette use; about 20 percentage points higher than whites and Hispanics. [18]
- The tobacco industry has been highly influential in the African American community for decades, providing funding and other resources to community leaders and emphasizing publicly its support for civil rights causes and groups, while ignoring the negative health effects of its products on those it claims to support. Tobacco industry support for African American communities is estimated to be as high as \$25 million per year. [27]
- For decades, the tobacco industry has donated generous amounts of money to members of the Congressional Black Caucus Foundation, the National Urban League, the National Association for the Advancement of Colored people and the United Negro College Fund. [28]
- Many African American organizations opposing the ban on menthol in tobacco products continue to receive money from the tobacco industry. In 2014, Lorillard Tobacco donated campaign cash to half of all African American members of Congress, making African American lawmakers (all but one of whom are Democrats) 19 times as likely as their Democratic peers to get a donation. [29]



ACCORDING TO THE CENTERS FOR DISEASE CONTROL AND PREVENTION, smoking-related illnesses kill more Black Americans than AIDS, car crashes, murders and drug and alcohol abuse combined.

Menthol and Cessation



- A leading model of smoking in the U.S. predicts that a 10 percent quit rate nationally among menthol smokers would save thousands of lives, preventing more than 4,000 smoking-attributable deaths in the first ten years, and that more than 300,000 lives would be saved in over 40 years. Approximately 100,000 of those lives saved would be African American. [30]
- Another model predicts that if menthol were prohibited, between 2010 and 2020, over 2.2 million people would not start smoking. By 2050, the number of people who would not start smoking would reach 9 million. [6]
- Among African American smokers, menthol cigarette smoking is negatively associated with successful smoking cessation. [31]
- Quitting menthol cigarettes is particularly difficult, because menthol smokers have to get over their dependence on nicotine as well as positive associations with menthol itself such as the minty taste, cooling sensation, and sensory excitation. [9]
- Youth who initiate smoking with menthol cigarettes are more likely to become regular, addicted smokers and are more likely to show higher measures of dependence than youth who initiate with non-menthol cigarettes. [32]
- Menthol smokers in the U.S. who report consuming 6-10 cigarettes per day show greater signs of nicotine dependence (i.e., shorter time to first cigarette in the day) than comparable non-menthol smokers. [33]
- Menthol smokers in general and African American smokers in particular, have a difficult time quitting despite smoking significantly fewer cigarettes per day compared to non-menthol smokers. [26], [34] Compared to non-menthol African American light smokers, menthol smokers are younger and have less confidence to quit smoking. [35]

“More than half of Americans support a ban on menthol^[36], and a national study found that 44.5 percent of African Americans and 44 percent of females would quit smoking if menthol cigarettes were prohibited.^[23]”

Food and Drug Administration Regulation of Menthol Tobacco Products

- In 2009, Congress passed the Family Smoking Prevention and Tobacco Control Act (FSPTCA) granting the FDA with regulatory authority over tobacco products. [37]
- Effective September 22, 2009, the FSPTCA banned artificial or natural flavorings, as well as herbs or spices, which produce characterizing flavors in cigarettes. This included flavors such as strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, and coffee. Menthol, however, was exempt from the ban. [38]
- The FDA has the ability to prohibit menthol as an ingredient in cigarettes and other tobacco products. Tobacco Products Scientific Advisory Committee (TPSAC) was established and charged with developing a report assessing the impact of the use of menthol in cigarettes on public health and proposing recommendations to the FDA on whether menthol should be regulated or not. [37]
- The TPSAC report and recommendations were submitted to the FDA on March 23, 2011. The TPSAC report found that the availability of menthol cigarettes has an adverse impact on public health in the U.S. and recommended removal of menthol cigarettes from the marketplace. [37]
- On April 12, 2013, 20 leading national organizations and advocates filed a formal Citizen Petition urging the FDA to prohibit menthol as a characterizing flavoring in cigarettes. More than 1,000 public comments were submitted to the FDA. [37]
- In July of 2013, the FDA released a preliminary scientific review that found that menthol made it easier to start smoking and allowed for a faster progression to regular use of cigarette smoking; it also found that menthol made it harder to quit smoking, especially among African American menthol smokers. The FDA solicited public comment on the "potential regulation" of menthol cigarettes. [39]
- In July of 2014, a Federal District Court Judge, Justice Richard Leon, issued a decision requiring the FDA to appoint new members to the TPSAC and to prohibit the agency from using the 2013 scientific review prepared by the TPSAC. The judge ruled that the new TPSAC members must be unbiased and impartial, following a 2011 lawsuit by Lorillard Tobacco Company and R.J. Reynolds Tobacco Company against the FDA. The lawsuit sought a court order to require the FDA to reconstitute the TPSAC's membership, alleging that three TPSAC members had conflicts of interest because of their ongoing work as expert witnesses against tobacco companies in tobacco litigation and due to their consulting fees paid by pharmaceutical companies in connection with certain smoking cessation products. The FDA was ordered to reconstitute the advisory panel's membership and refrain from using the prior advisory panel's report on menthol cigarettes. [39]
- In September of 2014, the U.S. Department of Justice filed an appeals motion on behalf of the FDA in response to Circuit Court Justice Leon's ruling in favor of the Tobacco Industry. [40]
- In January 2016, a panel for the U.S. Court of Appeals for the District of Columbia Circuit overturned the lower Federal District Court ruling, holding that Lorillard and R.J Reynolds Tobacco Companies lacked standing to bring the case to the courts. The court found that the injuries alleged by the plaintiffs were "too remote and uncertain...insufficiently imminent" and that the inclusion of the three members of the TPSAC committee with an alleged conflict of interest "by no means rendered the risk of eventual adverse FDA action substantially probable or imminent." [41]
- The FDA has still not made a recommendation on whether to ban or limit menthol cigarettes. [39]



References

1. Kreslake, J.M., et al., *Tobacco industry control of menthol in cigarettes and targeting of adolescents and young adults*. American Journal of Public Health, 2008. **98**(9): p. 1685.
2. Kreslake, J.M. and V.B. Yerger, *Tobacco industry knowledge of the role of menthol in chemosensory perception of tobacco smoke*. Nicotine & Tobacco Research, 2010. **12**: p. 98-101.
3. Garten, S. and R.V. Falkner, *Continual smoking of mentholated cigarettes may mask the early warning symptoms of respiratory disease*. Preventive Medicine, 2003. **37**(4): p. 291-296.
4. Benowitz, N.L., B. Herrera, and P. Jacob, *Mentholated cigarette smoking inhibits nicotine metabolism*. Journal of Pharmacology and Experimental Therapeutics, 2004. **310**(3): p. 1208-1215.
5. Unger, J.B., et al., *Menthol and non-menthol cigarette use among Black smokers in Southern California*. Nicotine & Tobacco Research, 2010.
6. Tobacco Product Scientific Advisory Committee (TPSAC), *Menthol cigarettes and the public health: Review of the scientific evidence and recommendations.*, US Department of Health and Human Services Food and Drug Administration, Editor. 2011: Rockville, MD.
7. Levy, D.T., et al., *Quit attempts and quit rates among menthol and nonmenthol smokers in the United States*. 2011.
8. U.S. Food and Drug Administration, *Preliminary scientific evaluation of the possible public health effects of menthol versus nonmenthol cigarettes*. July 2013.
9. Gardiner, P. and P.I. Clark, *Menthol cigarettes: moving toward a broader definition of harm*. Nicotine & Tobacco Research, 2010. **12**: p. 85-93.
10. Henningfield, J.E., et al., *Does menthol enhance the addictiveness of cigarettes? An agenda for research*. Nicotine & Tobacco Research, 2003.
11. Giovino, G.A., et al., *Epidemiology of menthol cigarette use*. Nicotine & Tobacco Research, 2004. **6**: p. 67-81.
12. Wickham, R., *Focus: Addiction: How Menthol Alters Tobacco-Smoking Behavior: A Biological Perspective*. The Yale Journal of Biology and Medicine, 2015. **88**(3): p. 279.
13. Giovino, G.A., et al., *Differential trends in cigarette smoking in the USA: is menthol slowing progress?* Tobacco Control, 2013.
14. Substance Abuse and Mental Health Services Administration, *The NSDU Report: Use of Menthol Cigarettes*. 2009: Rockville, MD.
15. Rock, V.J., et al., *Menthol cigarette use among racial and ethnic groups in the United States, 2004–2008*. Nicotine & Tobacco Research, 2010. **12**: p. 117-124.
16. *Behavioral Risk Factor Surveillance System 2013-2015*. Sacramento, CA: California Department of Public Health.
17. Fernander, A., et al., *Are age of smoking initiation and purchasing patterns associated with menthol smoking?* Addiction, 2010. **105**(1): p. 39-45.
18. Corey, C.G., et al., *Flavored tobacco product use among middle and high school students—United States, 2014*. Morbidity Mortality Weekly Report, 2015. **64**(38): p. 1066-1070.
19. Davis, R.M., et al., *The role of the media in promoting and reducing tobacco use*. 2008.
20. Sutton, C.D. and R.G. Robinson, *The marketing of menthol cigarettes in the United States: populations, messages, and channels*. Nicotine & Tobacco Research, 2004. **6**(1): p. 83-91.
21. White, V.M., et al., *Cigarette promotional offers: who takes advantage?* American Journal of Preventive Medicine, 2006. **30**(3): p. 225-231.
22. Tauras, J.A., et al., *Menthol and non-menthol smoking: the impact of prices and smoke-free air laws*. Addiction, 2010. **105**(1): p. 115-123.
23. Tobacco Control Legal Consortium et al., *Citizen Petition to Food and Drug Administration, Prohibiting Menthol As A Characterizing Flavor in Cigarettes* (April 12, 2013).
24. Gardiner, P.S., *The African Americanization of menthol cigarette use in the United States*. Nicotine & Tobacco Research, 2004. **6**(1): p. 55-65.
25. Cruz, T.B., L.T. Wright, and G. Crawford, *The menthol marketing mix: targeted promotions for focus communities in the United States*. Nicotine & Tobacco Research, 2010. **12**(suppl 2): p. S147-S153.
26. American Heart Association, *Tobacco industry's targeting of youth, minorities and women*.
27. Yerger, V.B. and R.E. Malone, *African American leadership groups: smoking with the enemy*. Tobacco Control, 2002. **11**(4): p. 336-345.
28. Myron Levin, *Lorillard, other tobacco companies use politics to protect menthol brands*, in *Fairwarning*. November 18, 2015, News and Record: Greensboro, North Carolina.
29. Levin, M., *Racial Politics Flavor Debate Over Banning Menthol Cigarettes*, in *Fair Warning* November 17, 2015.
30. Pearson, J.L. and K. Blackman, *Modeling the future effects of a menthol ban on smoking prevalence and smoking-attributable deaths in the United States*. American Journal of Public Health, 2011. **101**(7): p. 1236.
31. Stahre, M., et al., *Racial/ethnic differences in menthol cigarette smoking, population quit ratios and utilization of evidence-based tobacco cessation treatments*. Addiction, 2010. **105**(1): p. 75-83.
32. Nonnemaker, J., et al., *Initiation with menthol cigarettes and youth smoking uptake*. Addiction, 2013. **108**(1): p. 171-178.
33. Fagan, P., et al., *Nicotine dependence and quitting behaviors among menthol and non-menthol smokers with similar consumptive patterns*. Addiction, 2010. **105**(1): p. 55-74.
34. Trinidad, D.R., et al., *Menthol cigarettes and smoking cessation among racial/ethnic groups in the United States*. Addiction, 2010. **105**(1): p. 84-94.
35. Okuyemi, K.S., et al., *Relationship between menthol cigarettes and smoking cessation among African American light smokers*. Addiction, 2007. **102**(12): p. 1979-1986.
36. Hartman, A.M. *What menthol smokers report they would do if menthol cigarettes were no longer sold*. in *FDA Tobacco Products Scientific Advisory Committee Meeting*. 2011.
37. Public Health Law Center. *Federal Regulation of Menthol Tobacco Products*.
38. *Family Smoking Prevention And Tobacco Control Act.*, in *Public Law No. 111-31, 123 Stat. 1776 (codified, in relevant part, at 15 U.S.C.A. §§ 1333-34 and 21 U.S.C.A. § 301 et seq.)*. 2009.
39. Sabrina Tavernise, *F.D.A. Closer to Decision About Menthol Cigarettes*, in *The New York Times*. July 23, 2013.
40. *FDA Appeals Court Ruling on TPSAC Conflict of Interest*, in *American Thoracic Society News*. September 22, 2014.
41. Stern, M.B., et al., *R.J. Reynolds Tobacco Company, et al. v. United States Food and Drug Administration, et al.*, in *14-5226*, United States Court of Appeals for the District of Columbia Circuit, Editor. January 15, 2016.