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RECOMMENDATIONS FOR ENFORCING THE RESTRICTION ON FLAVORED TOBACCO AND VAPES

Amended 3/10/22

Flavored tobacco and vapes encourage underage nicotine addiction. Historically, many municipalities prohibited the sale of flavored tobacco and vapes. Effective June 1, 2020, state law prohibits the sale of flavored tobacco and vapes including menthol and mint. Now, the only smell any tobacco or vape sold in Massachusetts should have is the smell of tobacco or no smell at all. This applies to vapes regardless of whether they contain nicotine or tobacco.

Only two types of retailers are exempted. Smoking bars licensed by the MA Department of Revenue may sell flavored tobacco and vapes, BUT ONLY for consumption onsite. Second, state-approved marijuana retailers' marijuana products are exempt from this law. All other retailers are prohibited from selling flavored tobacco or vapes.

STEP ONE: LOCATING FLAVORED TOBACCO AND VAPE BRANDS:

- Educate your board of health members on the flavor restriction and the process for smell testing tobacco or vapes suspected of being flavored.
- Start your retailer inspection by reviewing manufacturers' letters. Retailers must have these letters. A retailer may not sell any brand of tobacco or vape unless it is listed in writing as unflavored by the manufacturer. If the brand is not listed, no smell test is required. That brand cannot be offered for sale.
- You are not required to provide the letter. It is the retailer's responsibility to obtain it.
- You have some options if a retailer is missing a letter for a particular brand.
 - OPTION 1: Give the retailer a few days to get the letter that lists the brand as non-flavored. The brand should not be offered for sale in the meantime. It should be removed from the shelves, stored in a box taped closed with the inspector's signature and date written on the tape, and stored in a back room.
 - OPTION 2: Issue a violation order and instruct the retailer to get the letter that lists the brand. In the meantime, instruct the retailer to box and store the brand as in OPTION 1.
 - OPTION 3: If you suspect a brand is flavored, you do not need to wait for the letter. Instead, you may start the next step of enforcement described below, the smell test. Product packaging, online reviews, communications with colleagues in tobacco control may provide the basis for your suspicions that a brand is flavored.
- When a brand is clearly flavored because its packaging says so, document the packaging by either taking a picture or purchasing a package, and then issue a violation order. For example, if the packaging says the brand is menthol, then it is flavored. You do not need to wait for the manufacturer's letter. No smell test is needed.

- When a brand's packaging is not clear and they do not have a manufacturer's letter permitting the sale, and you believe it to be flavored, you may choose to enforce against it. You may need to conduct a smell test to confirm your suspicions and to build a case for penalty issuance.

STEP TWO: CONDUCTING A SMELL TEST:

- Start by purchasing one package of the brand suspected of being flavored. This is for your onsite smell test. If that confirms your suspicions buy a second package. Issue the retailer a violation order if you determine the brand is flavored. Alternatively, you may choose to have your board of health members conduct the smell test before you issue the ticket. The second package is in case your board of health members will be conducting a smell test. Keep it in an air-tight container like a Ziploc bag. Your board of health will want a fresh package to open right before the smell test.
- What does the smell test require? An MA Appeals Court stated a tobacco flavor restriction "does not [require] ... any particular training or expertise . . . to make [the] . . . determination" that a tobacco or vape is flavored or not. The Court also stated a municipal board of health is "entitled to credit the perception of odor by its own members in concluding" the decision of a smell test. *Cumberland Farms v. Yarmouth Board of Health (2018)*

STEP THREE: SMELL TEST BY BOARD OF HEALTH MEMBERS:

- Your board of health members sometimes will conduct a smell test. They may prefer to conduct a smell test before you issue a violation order. If a retailer contests the violation order you issued, board members will need to conduct a smell test to uphold or reverse the order. In either case, the following is recommended:
 - Conduct the smell test at a regularly scheduled meeting.
 - Educate the board members about how to conduct a smell test. Run them through the process at the start of the meeting.
 - Have board of health members follow the same process for conducting a smell test outlined above in STEP TWO above.
 - Use a fresh package of the suspected flavored brand and a fresh package of a comparison non-flavored brand. This is why it is a good idea to purchase a second package of the suspected flavored brand when conducting your retailer inspection.
 - Attend and help the board of health members conduct their smell test.
 - Limit strong odors, wind, extreme temperatures and other factors that might interfere with the smell test.
 - Refrain from conducting the smell test when suffering serious nasal congestion or other substantial impairment of your sense of smell.
 - Refrain from chewing gum, drinking anything but water or eating during or within a short period of time before testing.

- Open and smell the package. Remember that mint and menthol are flavored products.
- It is advisable to use a non-flavored tobacco product as a comparison. An example of a non-flavored tobacco product is a Marlboro Red. Your comparison package should be newly purchased and unopened until testing.
- If you are testing more than one brand, take a break between the tests. After testing a brand, remove it from the testing area or seal it in a plastic container.
- You only need to determine whether the brand smells like tobacco or something else. If it smells like something else, it is flavored. You do not need to identify a broad category or a specific subcategory of flavor.
- Board members may ask for a list of flavored products. There is no list. Unless the board members previously determined a brand is flavored, a smell test is required.

STEP FOUR: Storage and Disposal of Flavored Product:

- Keep packages in individual air-tight containers like a Ziploc bag.
- Store product in a secure location preferable under lock. Consider maintaining a chain of custody spreadsheet to keep track of product.
- After any Board of Health hearings and any litigation, ensure that the packages are destroyed after the retailer has satisfied their penalty (such as paying fines and/or serving suspensions). For example, cut them up or saturate in water before disposal.

This document is for educational purposes only. The steps described herein are not legally required for enforcement. They are only recommendations. This was developed by the Public Health Advocacy Institute, Massachusetts Association of Health Boards, Massachusetts Municipal Association, and Massachusetts Health Officers Association.