

This document is for guidance purposes only.

## **FLAVOR ENFORCEMENT**

Amended on 4/12/22

### **BACKGROUND**

Both the state law and the state regulation read that no tobacco or vape product may be sold in Massachusetts unless the brand is listed in a manufacturer's letter as a non-flavored product. The retailer must have a copy of that letter, on the manufacturer's corporate letterhead (distributors are not manufacturers) and that letter must list the brand. Please note that distributors are NOT manufacturers.

### **INSPECTION**

If you think a retailer is selling a flavored product, ask them for the applicable manufacturer's letter that they should have. If they have it and the product is listed, exactly as on the package, as non-flavored, that is fine, unless you have reason to believe otherwise (indications on websites, for example), or you have reason to believe it is flavored.

If the retailer does not have the letter or has a letter where the product in question is not listed as non-flavored or an exact match, tell them that they need to obtain a letter listing the product in question within X days. Reinspect them and see if they have corrected the problem with a correct manufacturer's letter. It is your call whether to have the retailer remove the product while waiting for the letter.

If at your reinspection, the new letter does not list the product as non-flavored or there is no new letter produced by the retailer, you can (1) issue a fine per state law and have them remove the product or (2) not issue a fine and have them remove the product from the sales floor.

### **FLAVOR DISPUTE**

If the product is indeed listed as non-flavored, but you beg to differ with the manufacturer and retailer, buy one and give it a smell test right there. If you think it is flavored, do not fine them on the spot but buy a second one and bring it back to your board of health to do the same smell test. This way, the board can determine whether the product is flavored and what course of action you should take. The Board might leave this determination to you as their authorized agent.

No special training is required for the sniff test. The Appeals Court in the Yarmouth case stated "the Regulation does not state or intimate anywhere [in the Regulation] ... that any particular training or expertise is required to make that determination" that a tobacco or vape product is flavored or not.

When conducting a sniff test, your BOH Members only need to determine whether the product has a characterizing taste or aroma other than tobacco. The BOH does not need to determine what the flavor is. To guide the BOH through the process, instruct them to limit competing smells (e.g., drinking coffee, chewing gum, food). BOH members who are impaired from smelling (e.g., bad cold) should not participate in a sniff test. If possible, when conducting a sniff test, purchase new products and use an unflavored tobacco product (e.g., Marlboro Red) for comparison. As stated above, the board might leave this determination to you as their authorized agent. If so, make sure you let the board know what your determination is before you act on it.