



Episode Details:

Date of Publication: February 24, 2020

Title: Episode 13: A Look at the Federal Flavor Ban & Tobacco 21

Description: Over the past few months, we've seen a lot of changes to the regulatory environment surrounding tobacco products. This episode highlights the new federal flavor ban and Tobacco 21 law, as well as what some states and local jurisdictions have done to advance tobacco control and what *your locality* could do to support strong tobacco control.

Transcription:

I'm Allie Rothschild and you're listening to the Counter Tobacco podcast.

Over the past few months, we've seen a lot of changes to the regulatory environment surrounding tobacco products. Some of these new measures happened expeditiously. Some were underwhelming. Some were downright confusing. I'm here to help break them down for you. In this episode, I'll be talking about the new federal Tobacco 21 law and flavor ban. I'll also include a bit of information about states that have taken matters into their own hands as well as what we recommend states and local jurisdictions do and pay attention to moving forward.

I want to jump right in to talking about the federal move towards Tobacco 21. So prior to the federal law that was passed on December 20, 2019, 19 states and over 530 cities and counties had passed their own Tobacco 21 laws, which are also referred to as T21 laws. As a little background, T21 laws are proven effective in reducing youth access to tobacco products; this is key since over 80% of adults who smoke started before age 18, and nearly 95% started before the age of 21. And today's youth, despite the great strides in tobacco control made over the years, still use tobacco products, especially e-cig, at an alarming rate. According to the National Youth Tobacco Survey, in 2019, 1 in 3 high school students reported using a tobacco product in the past 30 days.

The federal legislation that was signed into law aims to tackle these rates of youth use by raising the minimum legal sale age for all tobacco products from 18 to 21 nationwide. The law, which serves as an amendment to the Tobacco Control Act, removes any state-level exemptions, including for those serving in the military.

When this law was passed in December, the US Federal Drug Administration, or FDA, was tasked with updating the regulation within 180 days and starting enforcement 90 days after this revision period. At the time of this recording, February 2020, the FDA is technically not yet enforcing the new federal T21 law; however, the law is still in effect meaning retailers must still comply with the legal change, even if their state hasn't adopted new regulations of their own raising the minimum age to 21 or barring exemptions for military service members.

Now states and local governments aren't required to pass their own Tobacco 21 policies to align with the federal age limit, but doing so is highly encouraged for enforcement purposes, which are key to policies being effective. Enforcement for the national T21 law will be carried out by the FDA. States and localities that currently are and remain 18+ will not be allowed to enforce T21 at the state or local level since it is technically not the written 'law' in



these jurisdictions, despite an age limit of 21 being mandated by the federal government. So passing policies to align with the federal age limit allows agencies at the state and local level to carry out compliance checks and enforcement efforts.

While we encourage states and local jurisdictions to take this action towards T21, we think it's important to plug a reminder to be vigilant. Big Tobacco supported this federal change as a way to try to get off the hook. At state and local levels, they will likely try to influence preemptive language, attempt to penalize youth for purchase and possession of tobacco products, and aim to impose modifications that would undermine any public health gains that have occurred at the state and local level.

Now another regulation recently put into effect as a means of reducing youth use is the flavor ban. Multiple studies have evidenced that flavored tobacco products attract youth and are associated with initiation of tobacco products. In terms of e-cigarettes, studies have shown that teens who use flavored vaping products are more likely to continue vaping long-term and inhale more during each smoking session.

So back in September when President Trump announced a crackdown on flavored tobacco products, the public health sphere, and actually much of the public in general, were initially encouraged by this statement and the possibility of kid-friendly flavors being taken off the market. However, after months of discussion and industry lobbying efforts, a [parsed down](#) federal ban was issued at the beginning of 2020. On the 2nd of January, the FDA formally released a [guidance document](#) detailing enforcement priorities of the new federal rule.

According to the document, retailers would have 30 days starting on February 1 to sell off their products and at that point would then be prohibited from selling all flavors, except for menthol and tobacco flavors, of cartridge-based electronic nicotine delivery systems (also called ENDS). ENDS are noncombustible tobacco devices that heat a liquid to create an aerosol that the user then inhales. ENDS can be vapes, e-cigs, or hookah pens. But the ones we're talking about here with the ban are devices that have an enclosed pre-filled cartridge or pod filled with the liquid that is then heated and aerosolized. To put a product image to this, Juul devices are considered ENDS with pre-filled replaceable pods.

Unfortunately, as the regulation is currently written, multiple popular flavored tobacco products, that are widely used among youth and other communities targeted by the tobacco industry, are exempt from this ban. And it's a major concern among public health practitioners and the medical community that youth will simply transition from the flavored replaceable pre-filled pods like Juuls that are now banned to these products that are exempt from the new regulation.

The first exempt products are self-contained, disposable vaping devices; these devices are generally cheaper than refillable pods and are being used more and more by teens. Some popular brands that you might see of these in the retail environment are Stiiig, Puff Bar, Blu and Mojo. These differ from the cartridge-based ENDS in that the entire device is to be disposed of once used up. According to the [2019 National Youth Tobacco Survey](#), disposable vapes are the most popular e-cigarette devices among high school students after Juul, so the fact that they remain on the market is really hazardous.

Also missing from the ban are flavored e-liquids that are designed for customizable, refillable e-cigarette pods, which are often referred to as 'tank systems' or 'mod systems' or 'open pod systems'. Some of the popular brands of these are Suorin and Smok. The difference between these devices and the ones like Juul with enclosed pods is that the pods for these are refillable by the consumer. These devices and the e-liquids used in them are the ones most commonly sold in vape shops, though they're also sold in convenience stores and gas stations as well; e-liquids come



in varying levels of nicotine content, as well as over 15,000 (yes, 15,000) kid-friendly flavors like ice cream cake, sugar cookie, and popcorn. I have up a popular vaping site up and just a brief look at the categories for e-liquids shows me that there are options for candy, fruit, dessert, beverage, creamy, and sour.

Another important thing to mention is that the ban still allows pre-filled pods like Juul in menthol and tobacco flavors. It also does not include anything in regards to flavored cigars and cigarillos or menthol cigarettes and other combustible tobacco products.

The ban, as it stands, does little to tackle tobacco-related health inequities or combat youth use. Menthol flavored tobacco products whether it's cigarettes, e-liquids, or vape pods are designed to provide the user with a cooling sensation that masks the harshness of the tobacco smoke and taste. Menthol products are known to be linked to [higher rates](#) of tobacco use initiation. As well, menthol cigarettes are disproportionately [marketed](#) to, and consequently smoked by, African-Americans, other communities of color, women and youth. Evidence has shown that [over half of smokers](#) ages 12-17 smoke menthol cigarettes, with this percentage being even higher in African-American youth. Research has also evidenced that banning menthol flavored tobacco products would help to protect the health of the public.

As well, allowing flavored disposable vapes and the refillable e-cigarette pods to continue to be sold will most likely do little to hinder youth use. According to the [2019 National Youth Tobacco Survey](#), nearly 70% of youth who currently used tobacco products reported using at least one flavored product. Evidence also suggests that when youth are restricted from their '[preferred flavors](#)' (so let's say the now-banned mango-flavored Juul), they will turn to alternative flavored products to quell their nicotine addiction.

I want to point out too that the wording of the new regulation leaves the definition of 'flavored' very ambiguous, which opens up loopholes for sneaky industry strategies. And the tobacco industry is notorious for finding loopholes and using them to their advantage. For instance, when the Tobacco Control Act banned the wording 'light' on cigarette packaging, the industry simply color-coded its 'light' range so consumers could still associate certain products with seemingly "light" qualities; ultimately, the tactic here was to continue to convince consumers that some cigarettes are less harmful, though this is not the case.

Also we've seen in instances where local jurisdictions have banned flavors, the industry has simply changed their products with names of typical flavor profiles, like "mango" or "blueberry", to these ambiguous, conceptual names like "Pirate's Cove" and "Blue Mist" to circumvent the policy banning flavors.

Various public health agencies and public interest groups have voiced their opposition to this scaled back policy. We feel that the policy falls drastically short in protecting the public and especially youth from the harmful effects of flavored tobacco products. We hope in the future the federal ban will be expanded to include all flavored tobacco products, including e-cigarettes, traditional cigarettes, and other tobacco products as well as conceptual flavors, typical flavors, and menthol. But for the time being we encourage states and local jurisdictions to put forth effort and action to enact their own comprehensive bans that will help remove all flavored tobacco products from retailer shelves.

Before I sign off here, I want to mention a few states that have taken some major action on their own to protect the public, and especially youth, from the dangers of tobacco. In December, Massachusetts became the first state to pass a permanent ban on the sale of all flavored tobacco and nicotine vaping products, including menthol cigarettes, by signing into law a bill titled "An Act Modernizing Tobacco Control". Extending the ban to menthol cigarettes was particularly monumental because these products have generally been exempt from past restrictions, even though they are disproportionately smoked by youth and minority populations in part due to the industry's targeted



marketing of menthol to these specific populations. It goes without saying that the tobacco industry is vehemently opposed to a ban on their revenue-generating menthol products.

The new Massachusetts law also places a 75% excise tax on nicotine vaping products and expands [coverage](#) for tobacco cessation products and counseling. As a stipulation to this new law however, flavored tobacco products can still be sold at licensed smoking bars such as cigar bars and hookah lounges, though consumption of these products must occur on-site. The restriction on the sale and consumption of flavored vaping products began immediately after the law was passed, but the ban on menthol cigarettes will begin June 1, 2020.

The next state I want to mention is New Jersey. In January, New Jersey signed into law a ban on the sale of all flavored vaping products, except for tobacco flavored vape products. The law takes 90 days to go into effect, but this means that pods, e-liquids, and disposable e-cigs in menthol as well as the countless other tantalizing flavors will soon be banned in the state. The law does not prohibit possession of these items, but it did establish a set of financial penalties for retailers that violate the law.

Lastly, just this month, the Maryland Comptroller, Peter Francho, instructed his field enforcement division to stop the sale of flavored disposable e-cigarettes. In his statement, he mentioned that while sales of disposable e-cigs fare proportionally pretty small when compared to the thousands of flavored e-cigs and menthol cigarettes sold, the sale of these disposable flavored products has skyrocketed since the federal government began cracking down on other products that have been targeted towards teens.

It's great to see state-level action around these issues and we're looking forward to seeing comprehensive tobacco bills being passed in more and more states and localities. If you are looking for more resources on these topics, you can check out CounterTobacco.org. There are evidence summaries there on flavored tobacco, e-cigarettes at the point of sale, and tobacco 21 as well as articles on the two new federal regulations just discussed. These sites will all be linked in the show notes for this episode. Other resources, including a great one from the Public Health Law Center, will be linked there as well.

Thanks so much for listening to the Counter Tobacco podcast. I look forward to you joining me again next time!