

**California's Unflavored Tobacco List and its implementing regulations
close gaps in federal and state regulation of flavored tobacco products
to better protect health and facilitate compliance and enforcement**

**Comment concerning proposed emergency regulations implementing Assembly Bill 3218
OAL File Number 2025-0814-01E**

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August 18, 2025

On August 6, 2025, California Attorney General Rob Bonta announced that his office plans to file proposed emergency regulations that would implement AB 3218's provisions for the Unflavored Tobacco List (UTL). AB 3218 went into effect on January 1, 2025 and closed loopholes in California's statewide flavor law that prohibits the sale of most flavored tobacco products. In addition to strengthening and streamlining enforcement of the flavor ban, the UTL was created in response to the tobacco industry's attempts to evade the ban by introducing so-called "non-menthol" products that did not contain menthol, but imparted cooling sensations like menthol and were marketed in packaging resembling menthol products.

We applaud the Attorney General's strong actions to counter the tobacco industry's efforts to circumvent the law designed to protect the public health by removing flavored tobacco products from the market. AB 3218 and the proposed implementing regulations help to close the gaps in federal regulation that have left many flavored e-cigarettes, nicotine pouches, and other flavored tobacco products on the market. For decades the tobacco industry has deliberately

targeted African Americans,^{1, 2, 3} youth,^{4, 5} and other groups⁶ with menthol cigarettes, and has flooded the market with youth-enticing candy, dessert, and other novelty flavors that lead to nicotine addiction among children who otherwise would not have initiated smoking. Data from the 2024 NYTS show that almost 87.6% of middle and high school students who use e-cigarettes use a flavored product.⁷ In California, 88.1% of current tobacco product users reported using flavored tobacco products in the past 30 days, with sweet flavors used most often among adolescents otherwise at low risk of tobacco use, and e-cigarette users commonly reporting use of candy and cooling flavors.⁸

California's statewide flavor law prohibiting flavored tobacco product sales resulted in declines in e-cigarette and cigarette sales in the state.⁹ The new law and regulations will strengthen the original flavor law by providing that only unflavored tobacco products that lack characterizing flavors can be included on the UTL, and only products on the UTL can be legally

¹ Mills SD, Henriksen L, Golden SD, Kurtzman R, Kong AY, Queen TL, et al. Disparities in retail marketing for menthol cigarettes in the United States, 2015. *Health Place*. 2018;53:62-70.

² Gardiner PS. The African Americanization of menthol cigarette use in the United States. *Nicotine Tob Res*. 2004;6 Suppl 1:S55-65.

³ Anderson SJ. Marketing of menthol cigarettes and consumer perceptions: a review of tobacco industry documents. *Tob Control*. 2011;20 Suppl 2(Suppl_2):ii20-8.

⁴ Jackler R, et al. Advertising Created & Continues to Drive the Menthol Tobacco Market: Methods Used by the Industry to Target Youth, Women, & Black Americans 8 (SRITA Research Paper, Oct. 4, 2022). Available: <https://newsroom.heart.org/news/report-tobacco-industry-continuing-decades-long-targeting-of-black-communitieswomen-youth-with-menthol-products> (accessed May 10, 2024).

⁵ Klausner K. Menthol cigarettes and smoking initiation: a tobacco industry perspective. *Tob Control*. 2011;20 Suppl 2(Suppl_2):ii12-9.

⁶ Fallin, A., Goodin, A. J., & King, B. A. (2015). Menthol cigarette smoking among lesbian, gay, bisexual, and transgender adults. *American journal of preventive medicine*, 48(1), 93–97. <https://doi.org/10.1016/j.amepre.2014.07.044>

⁷ Park-Lee E, Jamal A, Cowan H, et al. Notes from the Field: E-Cigarette and Nicotine Pouch Use Among Middle and High School Students — United States, 2024. *MMWR Morb Mortal Wkly Rep* 2024;73:774–778. DOI: <https://dx.doi.org/10.15585/mmwr.mm7335a3>

⁸ Donaldson CD, Couch ET, Hoeft KS, Wilkinson ML, Guerra C, Gansky SA, Zhang X, Chaffee BW. Flavored Tobacco and Nicotine Use Among California Adolescents: Preferences by Use Experience and Survey Format Effects. *J Adolesc Health*. 2023 Oct;73(4):753-760. doi: 10.1016/j.jadohealth.2023.05.012. Epub 2023 Jun 29. PMID: 37389531; PMCID: PMC10528341.

⁹ Ali, Fatma Romeh M., et al. "Changes in E-Cigarette and Cigarette Sales in California and Neighboring States Following a Law Prohibiting Flavored Tobacco Product Sales." *American Journal of Public Health* 0 (2025): e1-e5.

sold in California, making it easier for retailers to comply with the law and for state and local authorities to enforce the law. By clarifying the definition of “characterizing flavor” to include products that impart a cooling sensation similar to mint and menthol, as well as other flavors distinguishable by an ordinary consumer, the law makes it more difficult for manufacturers to evade the law.¹⁰ Flavor researchers have described these elements of California’s law as “visionary” that should be a model for other states.¹¹

1. We enthusiastically support the creation of the Unflavored Tobacco List

We enthusiastically support the creation of the UTL and generally support the proposed regulations implementing. The proposed regulations will greatly simplify compliance with and enforcement of California’s expansive flavor ban because:

- a. The law applies not only to cigarettes and cigars, but also to e-cigarettes, nicotine pouches, and other nicotine products, and explicitly applies to synthetic as well as tobacco-derived nicotine products. This means it is more expansive than the FDA’s proposed menthol rule (which was never finalized).
- b. The UTL will contain only tobacco products that lack characterizing flavors, so any product that is not on the UTL would be deemed a prohibited flavored tobacco product and illegal for sale in California. This makes it easier for retailers to understand and comply with the law, and makes it easier for state and local enforcement efforts.

¹⁰ Jordt, Sven-Eric, et al. "Synthetic cooling agents and nicotine analogs in new tobacco products: tobacco industry strategies to bypass regulation." (2024).

¹¹ : Jordt SE, Jabba SV. California's Visionary Tobacco Bill-Will the FDA Follow? JAMA. 2025 Jan 28;333(4):285-286. doi: 10.1001/jama.2024.22986. PMID: 39621329; PMCID: PMC12132922.

- c. Requiring manufacturers and importers to apply for inclusion on the UTL may reduce the opportunities for them to evade California's flavor ban.
- d. Publishing a list of products that are legal to sell makes it easier for retailers to know what they may legally sell.
- e. By authorizing the AG to seek civil penalties against sellers and make products that are not on the UTL subject to seizure, the regulations help ensure compliance with the flavored tobacco ban and aids enforcement efforts by state and local law enforcement agencies.
- f. The UTL states which products are permitted to be sold (i.e., only those that are unflavored), rather than stating which products are prohibited (e.g., a list of flavored tobacco products). This positive framing is important because it: (1) makes it more difficult for the industry to come up with new products not specifically identified on a prohibited list (under previous law, anything which was not forbidden was allowed, which made it easier to evade); and (2) makes it easier for retailers to understand and comply.

2. We offer some suggestions for tightening up the regulations

While we generally support the proposed regulations, we offer a few suggestions on how to tighten up the regulations to further accomplish the legislative goals of AB 3218:

- 1. Modify the definition of "applicant" in §942(a) to explicitly include vape shops that make their own flavors, which means they essentially become "manufacturers."

2. Require UTL applicants to provide proof of the actual nicotine strength under §945(c)(6)(G), since often labels do not accurately reflect the nicotine content.¹²
3. Remove the term “approval” in all instances of the proposed regulations where it is used in the context of FDA authorization of new tobacco products (e.g., §945(c)(9)). FDA never “approves” tobacco products; rather, it grants manufacturers permission to market tobacco products. It is important to eliminate this term because a product deemed “FDA-approved” often leads consumers, especially youth, to misbelieve that the FDA has determined that the product is “safe.”¹³
4. In addition to certification under penalty of perjury that a product does not have a characterizing flavor, §947 should require all applicants to provide rigorous scientific evidence that their products are not flavored as a condition of placement on the UTL. The regulations should make it clear that the law shifts the burden to the applicant (to demonstrate with evidence that the product is not flavored and therefore legal to sell), rather than put the burden on the Attorney General (to prove that the product is flavored and therefore illegal to sell).
5. Following the example of San Francisco Health Code sections 19R¹⁴ and 19S,¹⁵ §948 should prohibit any product that has not obtained FDA marketing authorization from being listed on the UTL.

¹² Douglas AE, Childers MG, Felicione NJ, Milstred AR, Blank MD. Electronic Cigarette Device and Liquid Characteristics: Comparison of Self-Reports to User-Provided Pictures. *Subst Use Misuse*. 2024;59(13):1990-1998. doi: 10.1080/10826084.2024.2392517. Epub 2024 Aug 19. PMID: 39161043; PMCID: PMC11459410.

¹³ Olivia A Wackowski, Michelle Jeong, Stefanie K Gratale, Caitlin Weiger, Julia Chen-Sankey, Andrew A Strasser, Cristine D Delnevo, The Impact of Exposure to Food and Drug Administration E-cigarette Authorization Messages on Product Perceptions and Interest—An Experiment With Adults Who Smoke and Youth, *Nicotine & Tobacco Research*, Volume 26, Issue 12, December 2024, Pages 1666–1675, <https://doi.org/10.1093/ntr/ntae141>

¹⁴ https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_health/0-0-0-3378

¹⁵ https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_health/0-0-0-60597

6. Require all applicants to submit examples of packaging under §949(b) as a condition of placement on the UTL.
7. Prohibit flavoring agents to be added to packaging since these substances can diffuse into the tobacco product.¹⁶
8. In addition to posting a public notice on the AG's website that a product has been removed from the UTL under §950(e), send notices that products are removed from the UTL to all licensed tobacco product retailers.
9. Make scientific information submitted by applicants under §953(7)(d) publicly available (may be redacted to protect confidential proprietary information) to ensure transparency and the ability of scientists and researchers to confirm the unflavored determination.
10. Provide a starting point and/or range for determining the amount assessed for penalty citations and violations under §955(b).

3. Conclusion

California's Unflavored Tobacco List and its implementing regulations are substantiated by scientific evidence and will help to protect the health of Californians, in particular youth and other populations targeted by the tobacco industry, by closing gaps in federal and state regulation of flavored tobacco products. The proposed implementing regulations will facilitate compliance and enforcement by state and local authorities. We enthusiastically support the proposed regulations and offer a few suggestions for making them even stronger.

¹⁶ Oliveira da Silva AL, Lempert LK, Glantz SA. More than a "characterizing flavor": Menthol at subliminal levels in tobacco products. *Drug Alcohol Depend.* 2024 Aug 1;261:111346. doi: 10.1016/j.drugalcdep.2024.111346. Epub 2024 May 29. PMID: 38870568; PMCID: PMC11251543.