

3/8/2022

STAFF: ALYSON WILLIAMS & LISA WARD

POLICY ANALYSIS

HB22-1064: PROHIBIT FLAVORED TOBACCO REGULATE SYNTHETIC NICOTINE

Concerning tobacco products, and, in connection therewith, prohibiting the distribution of flavored cigarettes, tobacco products, or nicotine products, amending the definition of cigarette, tobacco product, or nicotine product to include products containing synthetic nicotine, and directing the prevention services division in the department of public health and environment to convene a working group to develop and implement a grant program to address the needs of communities disproportionately impacted by tobacco and nicotine marketing, sales, and use.

Details

Bill Sponsors:	House – <i>Mullica (D) and Bacon (D)</i> Senate – <i>Priola (R) and Fields (D)</i>
Committee:	House Health & Insurance
Bill History:	1/14/2022 – Introduced
Next Action:	3/9/2022- Hearing in House Health & Insurance Committee

Bill Summary

After July 1, 2022, the bill prohibits the sale, advertising, and marketing of flavored cigarettes, tobacco products, and nicotine products. The bill updates the definition of cigarettes, tobacco products, and nicotine products. A grant program is created to fund applicants who are able to provide evidence-informed and individualized wrap-around services in communities that are disproportionately affected by targeted tobacco and nicotine marketing and sales or by increased or minimally improved tobacco-use and nicotine-use prevalence rates.

Issue Summary

Nicotine Products

A "cigarette, tobacco product, or nicotine product" is a product that contains nicotine or tobacco, or is derived from tobacco that is ingested, inhaled, or applied to skin. These products include, but are not limited to: cigarettes, cigars, e-cigarettes, pipe tobacco, chewing tobacco and hookah tobacco. The nicotine in all of these products may impair prefrontal brain development in adolescents, which can lead to attention deficits.¹ Tobacco use remains the leading cause of preventable death and disease in the United States and in Colorado. For those that use cigarettes and other traditional tobacco products, smoking can cause cancer, heart disease, stroke, lung diseases, diabetes, and chronic obstructive pulmonary disease (COPD).² In Colorado, 25.7 percent of cancer deaths are attributable to smoking.³ Each year, approximately 5,100 Coloradan adults die from their own smoking.³ Additionally, secondhand smoke can lead to many of those same diseases and contributes to approximately 41,000 deaths among nonsmoking adults and 400 deaths in infants each year.³ Primarily due to the nicotine, electronic smoking devices (ESDs) and e-cigarettes are dangerous for development in youth and pregnant women.⁴

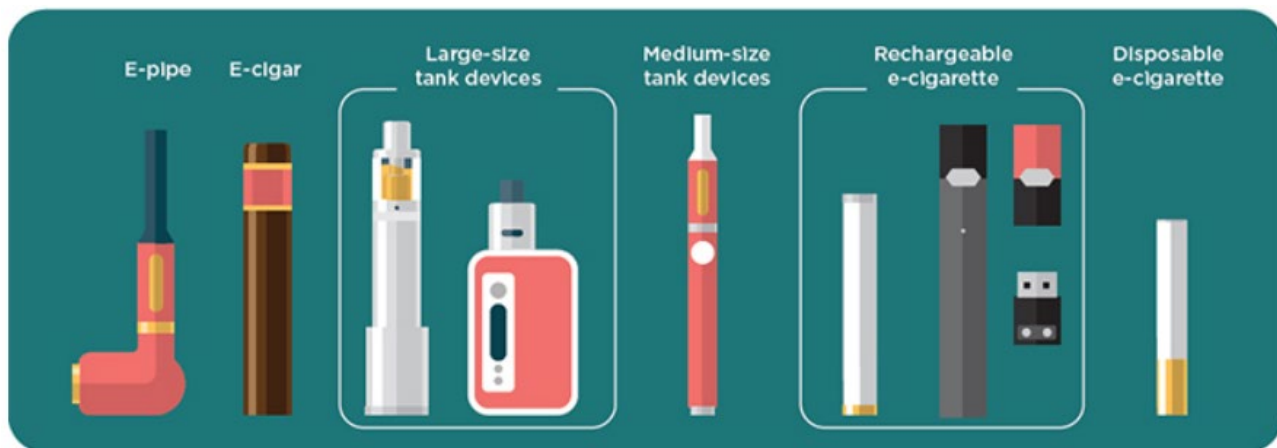
¹ Goriounova, N. A., & Mansvelder, H. D. (2012). Short- and long-term consequences of nicotine exposure during adolescence for prefrontal cortex neuronal network function. *Cold Spring Harbor perspectives in medicine*, 2(12), a012120. doi:10.1101/cshperspect.a012120

² Centers for Disease Control and Prevention (2018). *Health Effects*. Retrieved from https://www.cdc.gov/tobacco/basic_information/health_effects/index.htm

³ Campaign for Tobacco Free Kids (Jan. 15, 2020) *The Toll of Tobacco in Colorado*. Retrieved from <https://www.tobaccofreekids.org/problem/toll-us/colorado>

⁴ CDC. (Nov. 2018). *About Electronic Cigarettes (E-Cigarettes)*. Retrieved from https://www.cdc.gov/tobacco/basic_information/e-cigarettes/about-e-cigarettes.html

E-cigarettes and electronic smoking devices are battery-powered devices that come in a variety of shapes and sizes that produce an aerosol (or vapor) by heating a liquid that contains a variety of chemicals, which can include nicotine, ultrafine chemicals, flavorings, heavy metals, and other volatile compounds.⁵ Users inhale the aerosol into their lungs. Bystanders can also breathe in this aerosol when the user exhales into the air. The figure below from the Centers for Disease Control and Prevention (CDC) demonstrates the variability in the products.⁵



Adult Tobacco and Nicotine Product Use

In the United States, 4.5 percent of adults reported currently using e-cigarettes in 2016.⁶ Of those, 15 percent had never smoked a traditional cigarette. Of note, more than half, 51.2 percent, of the current e-cigarette users in the U.S. were under the age of 35. In 2017, 5.3 percent of Colorado adults reported currently using e-cigarettes⁷ and 14.6 percent currently using cigarettes.⁸ Between 2016 and 2017, 5.5 percent of Larimer County adults reported currently using e-cigarettes.⁶ From 2015 to 2017, 13.4 percent reported currently using traditional cigarettes.⁶ In recent years, one-third of U.S. adults perceive e-cigarettes as equally or more harmful than traditional cigarettes (up from approximately 10 percent in 2012).⁹

According to the FDA, data from the Population Assessment of Tobacco and Health (PATH) Study demonstrates that 86 percent of young adults who ever used tobacco (even once or twice in their lifetimes) reported that the first tobacco product they used was flavored.¹⁰ Another survey of young adults that consumed nicotine through electronic devices found that most began with flavored nicotine products, with fruit, mint, and menthol being the most common starting flavors.¹¹

⁵ CDC. (Nov. 2018). *About Electronic Cigarettes (E-Cigarettes)*. Retrieved from https://www.cdc.gov/tobacco/basic_information/e-cigarettes/about-e-cigarettes.html.

⁶ Mirbolouk, M., et al. (Oct. 2018). Prevalence and Distribution of E-Cigarette Use Among U.S. Adults: Behavioral Risk Factor Surveillance System, 2016. *Ann Intern Med* 169 (7): 429-438. doi: 10.7326/M17-3440

⁷ The survey used the wording "electronic vapor device"

⁸ CO Department of Public Health and Environment (n.d.) *VISION: Visual Information System for Identifying Opportunities and Needs*. Retrieved from <https://www.colorado.gov/pacific/cdphe/vision-data-tool>

⁹ Maheed, Ban A., et al. (2017). Changing Perceptions of harm of E-Cigarettes among U.S. Adults, 2012-2015. *American Journal of Preventative Medicine* 52 (3): 331-338.

¹⁰ FDA (July 18, 2018). *Flavors in Tobacco Products: What are the Potential Risks and Benefits to Public Health?* Retrieved from <https://www.fda.gov/tobacco-products/products-ingredients-components/flavors-tobacco-products-what-are-potential-risks-and-benefits-public-health>

¹¹ Nguyen, N., McKelvey, K., & Halpern-Felsher, B. (Aug. 1, 2019). Popular flavors used in alternative tobacco products among young adults. *Journal of Adolescent Health*. <https://doi.org/10.1016/j.jadohealth.2019.05.004>

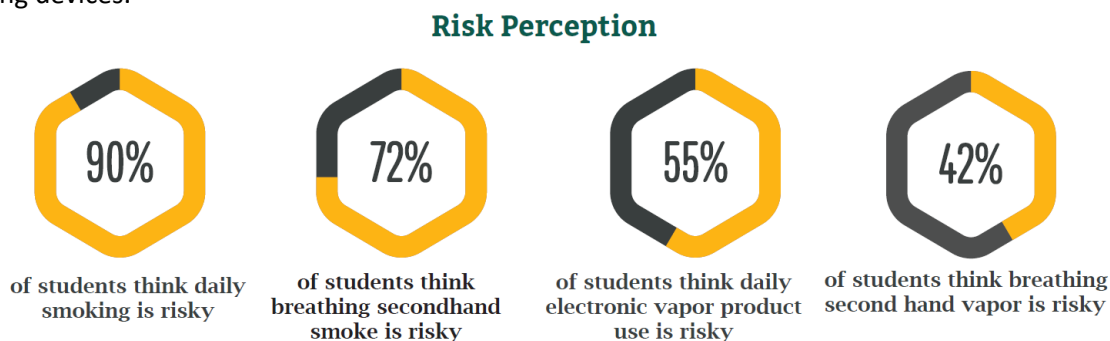
Youth Tobacco and Nicotine Use

The U.S. Food and Drug Administration (FDA) and the Centers for Disease Control and Prevention (CDC) recently released findings from the 2021 National Youth Tobacco Survey (NYTS).¹² The results show high numbers of middle and high school students using e-cigarettes. More than 2 million U.S. youth currently use e-cigarettes and among those youth 85 percent use flavored e-cigarettes. Youth that use electronic smoking devices are substantially more likely than adults to use a non-tobacco flavor and are significantly more likely to use more than one flavor, and to use flavor combinations that do not involve tobacco flavoring.¹³ According to the CDC, many young Americans that consume electronic smoking devices (i.e. e-cigarettes) also use traditional cigarettes and there is some evidence that young people that start with e-cigarettes are more likely to smoke in the future.¹⁴

The Surgeon General reports that current e-cigarette use increased 78 percent among high school students in one year, from 11.7 percent in 2017 to 20.8 percent in 2018.¹⁵ Nearly a third of U.S. youth thought that e-cigarettes were less harmful than traditional cigarettes.¹⁶ About two-thirds of U.S. youth believe that the harmful effects of e-cigarettes are dose-dependent. Research studies have found that youth are three times more sensitive to tobacco advertising than adults, while a third of underage experimentation with smoking is attributable to advertising and promotion by tobacco companies.¹⁷

Local Youth Tobacco and Nicotine Use

In 2019, 25.9 percent of high school students in Colorado reported currently using e-cigarettes and 5.7 percent were current cigarette smokers.¹⁸ In 2017, 32 percent of Larimer County high school students reported using electronic vapor products within the past 30 days.¹⁹ In comparison, 7 percent of all Larimer students reported using cigarettes. The following graphic from the Larimer County Department of Health and Environment illustrates the difference in risk perception of youth in regards to cigarettes and electronic smoking devices.



¹² US Food and Drug Administration (Jan. 10, 2021) *Youth Tobacco Use: Results from the National Youth Tobacco Survey*. Retrieved from <https://www.fda.gov/tobacco-products/youth-and-tobacco/youth-tobacco-use-results-national-youth-tobacco-survey>

¹³ Schneller, L. M., Bansal-Travers, M., Goniewicz, M. L., McIntosh, S., Ossip, D., & O'Connor, R. J. (2019). Use of Flavored E-Cigarettes and the Type of E-Cigarette Devices Used among Adults and Youth in the US-Results from Wave 3 of the Population Assessment of Tobacco and Health Study (2015-2016). *International journal of environmental research and public health*, 16(16), 2991. <https://doi.org/10.3390/ijerph16162991> Retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6720922/>

¹⁴ Centers for Disease Control (Dec. 2018). Quick Facts on the Risks of E-cigarettes for Kids, Teens, and Young Adults. Retrieved from https://www.cdc.gov/tobacco/basic_information/e-cigarettes/Quick-Facts-on-the-Risks-of-E-cigarettes-for-Kids-Teens-and-Young-Adults.html

¹⁵ U.S. Surgeon General (2018). *Surgeon General's Advisory on E-cigarette Use among Youth*. Retrieved from <https://e-cigarettes.surgeongeneral.gov/documents/surgeon-generals-advisory-on-e-cigarette-use-among-youth-2018.pdf>

¹⁶ Ambrose, Bridget K., et al. (2014). Perceptions of the Relative harm of Cigarettes and E-cigarettes among U.S. Youth. *American Journal of Preventative Medicine* 47 (2): 53-60.

¹⁷ Tobacco Free Kids (Jan. 15, 2020). *The Toll of Tobacco in the United States*. Retrieved from <https://www.tobaccofreekids.org/problem/toll-us>

¹⁸ CO Department of Public Health and Environment (n.d.) *Healthy Kids Colorado Survey* Retrieved from <https://cdphe.colorado.gov/hkcs>

¹⁹ Larimer County Department of Health & Environment. *Tobacco Data Brief*.

Menthol

Menthol is a chemical compound found in peppermint and other similar plants. The menthol chemical in nicotine products creates a cooling sensation in the throat, which companies market as “smoother.” As of 2018, sales of menthol cigarettes made up 36 percent of all cigarette sales in the nation; in comparison, the market share of menthol cigarettes was 26 percent in 2000.²⁰ During the period from 2011 to 2015, menthol cigarette sales increased, even while overall cigarette sales were decreasing.²¹ As of 2016, more than 19.5 million people are current smokers of menthol cigarettes.²² The same data found that 85.8 percent of African American smokers, 46 percent of Hispanic smokers, 39 percent of Asian smokers, and 28.7 percent of White smokers smoke menthol cigarettes. Further, more than half of smokers ages 12-17 smoke menthols.

The Food and Drug Administration (FDA) reports have concluded that removing menthol from all commercial tobacco products would benefit the public, avert millions of people from starting to smoke, and save thousands of lives, 33-50 percent of which would be African American.^{23,24} Studies have supported that the removal of menthol from cigarettes is likely to reduce youth smoking initiation, and improve smoking cessation outcomes in adult smokers.²⁵ Individuals with low levels of income or education are more likely to smoke menthol cigarettes than other cigarettes.²⁶

Federal Action

On September 22, 2009, the FDA prohibited cigarettes from containing any “characterizing flavor,” including candy, fruit, and alcohol flavors.²⁷ This prohibition only extends to cigarettes and their component parts (i.e. tobacco, filter, or paper); it does not apply to non-cigarette tobacco products.²⁸ In July 2017, the FDA announced a regulatory plan for tobacco products that prioritized restrictions on kid-attractive flavors, including menthol, and established an agency approach to nicotine.²⁹ On March 21, 2018, the FDA issued a nonbinding advance notice of proposed rulemaking (ANPRM) related to regulating flavors in tobacco products.³⁰ Over 525,000 comments were received in response to the ANPRM. On January 2, 2020 the FDA announced a policy banning certain flavored vaping products; the prohibition only prohibits the sale of flavored e-cigarette cartridges (excluding menthol and tobacco flavors) and does not address the sale of

²⁰ Federal Trade Commission (2019). *Cigarette Report for 2018*. Retrieved from <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-cigarette-report-2018-smokeless-tobacco-report-2018/p114508cigarettereport2018.pdf>

²¹ Kuiper, N. M., Gammon, D., Loomis, B., Flakey, K., Wang, T. W., King, B. A., & Rogers, T. (2018). Trends in Sales of Flavored and Menthol Tobacco Products in the United States During 2011-2015. *Nicotine & tobacco research : official journal of the Society for Research on Nicotine and Tobacco*, 20(6), 698–706. <https://doi.org/10.1093/ntr/ntx123> Retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5711620/>

²² FDA (Jan. 3, 2020). *Menthol and Other Flavors in Tobacco Products*. Retrieved from <https://www.fda.gov/tobacco-products/products-ingredients-components/menthol-and-other-flavors-tobacco-products#reference>

²³ Tobacco Products Scientific Advisory Committee (2011). *Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations*. Retrieved from <https://wayback.archive-it.org/7993/20170405201731/https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf>

²⁴ Food and Drug Administration (2013). *Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol versus Nonmenthol Cigarettes*. Retrieved from <https://www.fda.gov/media/86497/download>

²⁵ Villanti, A. C., Collins, L. K., Niaura, R. S., Gagosian, S. Y., & Abrams, D. B. (2017). Menthol cigarettes and the public health standard: a systematic review. *BMC public health*, 17(1), 983. <https://doi.org/10.1186/s12889-017-4987-z>. Retrieved from <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5747135/>

²⁶ Food and Drug Administration (2013). *Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol versus Nonmenthol Cigarettes*. Retrieved from <https://www.fda.gov/media/86497/download>

²⁷ Under authority granted by the Family Smoking Prevention and Tobacco Control Act (Pub.L. 111-31)

²⁸ Public Health Law Center (May 2019). *Regulating Flavored Tobacco Products*. Retrieved from <https://www.publichealthlawcenter.org/sites/default/files/resources/Regulating-Flavored-Tobacco-Products-2019-2.pdf>

²⁹ FDA (July 27, 2017). *FDA announces comprehensive regulatory plan to shift trajectory of tobacco-related disease, death*. Retrieved from <https://www.fda.gov/news-events/press-announcements/fda-announces-comprehensive-regulatory-plan-shift-trajectory-tobacco-related-disease-death>

³⁰ Regulations of Flavors in Tobacco, 83 FR 12294, March 21, 2018, Retrieved from <https://www.regulations.gov/document?D=FDA-2017-N-6565-0001>

flavored liquid nicotine sold in open tank systems.³¹ Therefore as of February 6, 2020, many flavored e-liquid pods, including Juul and Juul-compatible products, will no longer be sold legally in the United States.³²

This Legislation

Definitions

A "flavored cigarette, tobacco product, or nicotine product" means a cigarette, tobacco product, or nicotine product that, either before or during the consumption of the cigarette, tobacco product, or nicotine product, imparts a taste or smell other than the taste or smell of tobacco, including any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, honey, candy, dessert, alcohol beverage, herb, or spice. The term "synthetic nicotine" means nicotine derived from a source other than tobacco.

Prohibition Sale or Advertising of Flavored Nicotine

A retailer in the state of Colorado cannot sell, market, advertise, or display any cigarette, tobacco product, or nicotine product. Certain conduct by retailers or its employees creates a rebuttable presumption³³ that the product is a flavored nicotine or tobacco product:

- making a public statement or claim that the product imparts a taste or smell other than that of tobacco;
- using text and/or images, on the labeling or packaging of the product to indicate, explicitly or implicitly, that the product imparts a taste or smell other than that of tobacco;
- taking action directed to consumers that would be reasonably expected to cause consumers to believe that the product imparts a taste or smell other than that of tobacco.

This section is only enforceable against a retailer and not against a consumer who purchases, uses, or possesses a flavored product.

Updated Definition

The definition of a "cigarette, tobacco product, or nicotine product" is updated to the following. A product that contains, is made of, or is derived from nicotine, tobacco, or synthetic nicotine and is intended for human consumption, or is likely to be consumed, through ingestion or inhalation or by application to the skin of an individual. this includes any device that can be used to deliver tobacco, nicotine, synthetic nicotine, or any substance that contains nicotine or synthetic nicotine to the person inhaling from the device by aerosolizing or vaporizing, including: electronic cigarettes; electronic cigars; electronic cigarillos; or electronic pipe. Further, this includes any component, part, or accessory of a product that contains tobacco, nicotine, or synthetic nicotine, including filters, rolling papers, blunt or hemp wraps, hookahs, flavor enhancers, or pipes. A "cigarette, tobacco product, or nicotine product" does not include a device, drug, or some sort of combination that is approved by the FDA for sale.

Grant Program

By August 1, 2022, the Prevention Services Division is to convene a working group to develop, implement, and administer a grant program to provide resources to communities disproportionately impacted by the marketing and sales of tobacco and nicotine products and the prevalence of the use of those products. The working group must include representatives from: community-based organizations; public health organizations and institutions; health clinics that serve communities that are disproportionately impacted by tobacco marketing, sales, and use Colorado-based foundations; the kindergarten through twelfth grade

³¹ FDA (Jan. 2, 2020). *FDA finalizes enforcement policy on unauthorized flavored cartridge-based e-cigarettes that appeal to children, including fruit and mint*. Retrieved from <https://www.fda.gov/news-events/press-announcements/fda-finalizes-enforcement-policy-unauthorized-flavored-cartridge-based-e-cigarettes-appeal-children>

³² Public Health Law Center (2020). *Much Ado About Nothing: FDA's Lackluster Effort to Restrict Flavors*. Retrieved from <https://www.publichealthlawcenter.org/blogs/2020-01-08/much-ado-about-nothing-fda%E2%80%99s-lackluster-effort-restrict-flavors>

³³ A rebuttable presumption requires a judge to reach a certain conclusion before hearing any evidence unless the evidence later convinces the judge to reach a different conclusion.

education community; and advocacy organizations that work directly with communities disproportionately impacted by tobacco and nicotine marketing, sales, and use and that provide culturally competent services. The working group shall meet as necessary in order to develop and implement the grant program by January 15, 2023. The working group must develop the process for grant applicants to apply for a grant and the criteria to qualify for a grant. At a minimum, the grant criteria must include that the applicant serves communities and individuals that have been disproportionately impacted by targeted tobacco and nicotine marketing and use in the community; or increased or minimal improvements in tobacco-use and nicotine-use prevalence rates and a heightened need for support and resources to stop personal use; and provides evidence-informed and individualized wrap-around services. The working group shall review grant applications and make recommendations to the Division regarding grant awards, which must be awarded by April 15, 2023, and by each April 15 thereafter. For the 2022-23 state fiscal year, \$10 million dollars are to be awarded to CDPHE for this grant program. The Division shall award two-year grants to applicants based on the recommendations of the working group. The grant program must be reported on in the annual SMART Act hearing.

The bill is effective on July 1, 2022.

Reasons to Support

Ending the sale of flavored e-cigarettes eliminates a major source of e-cigarette demand among young people, and preserves the tobacco flavor for adults who wish to continue using e-cigarettes. Supporters assert that ending the sale of flavored tobacco products will help protect vulnerable populations long targeted by the tobacco industry. The “less harsh” sensation of menthol nicotine products is more appealing to new smokers and young people; prohibiting menthol products would help in stemming the creation of new nicotine product consumers, which may reduce the public health risk of such consumption in Colorado.

Supporters

- American Academy of Pediatrics
- American Federation of Teachers Colorado
- American Heart Association
- American Lung Association
- Blue Rising Together
- Boulder County
- Campaign for Tobacco-Free Kids
- Children’s Hospital Colorado
- Cigna
- City of Boulder
- City of Northglenn
- Colorado Academy of Family Physicians
- Colorado Alliance of Boys and Girls Clubs
- Colorado Association for School Based Health Care
- Colorado Association of Health Plans
- Colorado Association of Local Public Health Officials (CALPHO)
- Colorado Association of School Boards
- Colorado Association of School Executives
- Colorado Chapter- College of Emergency Physicians
- Colorado Dental Hygienists Association
- Colorado League of Charter Schools
- Colorado Medical Society
- Colorado Nurses Association
- Colorado Rural Health Center
- Colorado Society of Osteopathic Medicine
- Counties and Commissioners Acting Together (CCAT)
- CVS Health
- Denver Health
- Denver Public Schools
- Healthier Colorado
- Kaiser Foundation Health Plan
- Kaiser Permanente
- National Jewish Health
- ONE Colorado
- SCL Health
- Stand for Children
- Tobacco Free Kids
- Transform Education Now

- Young Invincibles

Reasons to Oppose

Some may argue that removing all flavors, including menthol, would reduce the use of e-cigarettes by adults as a tool to quit smoking. There is some evidence that restricting e-cigarette access by youth can increase their uptake of cigarettes.³⁴ Additionally, some may say that since adults also like flavors, such a ban punishes law-abiding adults. Some assert that prohibiting menthol products unfairly singles out Black tobacco users. If the sale of flavored tobacco products is prohibited, local black markets may emerge to fulfill demand via illegal sales.

Opponents

- 7- Eleven
- Albertsons/Safeway
- Altria
- Cigar Association of America
- Colorado Petroleum Marketers Association
- Colorado Wyoming Petroleum Marketers
- JUUL Labs
- Kum & Go
- RJ Reynolds America
- Rocky Mountain Smoke-Free Alliance
- Smoker Friendly
- Swedish Match
- Swisher International
- VaporSource

About this Analysis

This analysis was prepared by Health District of Northern Larimer County staff to assist the Health District Board of Directors in determining whether to take an official stand on various health-related issues. The Health District is a special district of the northern two-thirds of Larimer County, Colorado, supported by local property tax dollars and governed by a publicly elected five-member board. The Health District provides medical, mental health, dental, preventive and health planning services to the communities it serves. This analysis is accurate to staff knowledge as of date printed. For more information about this analysis or the Health District, please contact Lisa Ward, Policy Coordinator, at (970) 224-5209, or e-mail at lward@healthdistrict.org.

³⁴ Friedman, A. (2015). How does electronic cigarette access affect adolescent smoking? *Journal of Health Economics*. Retrieved from <https://scholar.harvard.edu/afriedman/publications/how-do-electronic-cigarettes-affect-adolescent-smoking>