

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 3218 (Wood)
Version: June 27, 2024
Hearing Date: July 2, 2024
Fiscal: Yes
Urgency: No
AM

SUBJECT

Unflavored Tobacco List

DIGEST

This bill requires the Attorney General (AG) to establish and maintain on its website a list of tobacco product brand styles that lack a characterizing flavor, known as the “Unflavored Tobacco List” (UTL). The bill deems any brand style not on the UTL to be a flavored tobacco product, and therefore banned in this state. The bill authorizes the AG to deny inclusion of a tobacco product on the UTL, as provided.

EXECUTIVE SUMMARY

In 2020, SB 793 (Hill, Ch. 34; Stats. 2020) was enacted into law and prohibited a tobacco retailer, or any of its agents or employees, from selling, offering for sale, or possessing with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer, with certain exceptions. The statute did not become operative for over two years due to a referendum and subsequent litigation. This bill seeks to bolster SB 793 by requiring the AG to establish and maintain the UTL. The bill, among other things, authorizes the AG to seek injunctive relief and civil penalties against any manufacturer that certifies a brand lacks a characterizing flavor, but the AG determines otherwise. The bill is sponsored by Attorney General Rob Bonta and is supported by numerous public health organizations. The bill is opposed by the California Fuels and Convenience Alliance. The bill passed the Senate Health Committee on a vote of 9 to 1.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Pursuant to the Cigarette and Tobacco Products Licensing Act of 2003, requires the Board of Equalization (BOE) to license all entities engaged in the sale of cigarettes and tobacco products in California. (Bus. & Prof. Code § 22970 et seq.)

- 2) Requires the California Department of Health (CDPH) to establish and develop a program to reduce the availability of “tobacco products” to persons under 21 years of age through authorized enforcement activities pursuant to the Stop Tobacco Access to Kids Enforcement Act (STAKE Act). (Bus. & Prof. Code § 22952.)
- 3) Requires all persons engaging in the retail sale of tobacco products to check the identification of tobacco purchasers, to establish the age of the purchaser, if the purchaser reasonably appears to be under 21 years of age. (Bus. & Prof. Code § 22956.)
- 4) Authorizes an enforcing agency to assess civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes to another person who is under 21 years of age, except for military personnel 18 years of age or older, any tobacco product, instrument, or paraphernalia that is designed for the smoking or ingestion of tobacco products ranging from \$400 to \$6,000 for a first, second, third, fourth, or fifth violation within a five-year period. (Bus. & Prof. Code § 22958.)
- 5) Prohibits a tobacco retailer, or any of the tobacco retailer’s agents or employees, from selling, offering for sale, or possessing with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer. (Health & Saf. Code § 104559.5(b)(1).)
 - a) Provides that there is a rebuttable presumption that a tobacco product is a flavored tobacco product if a manufacturer or any of the manufacturer’s agents or employees, in the course of their agency or employment, has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor, including, but not limited to, text, color, images, or all, on the product’s labeling or packaging that are used to explicitly or implicitly communicate that the tobacco product has a characterizing flavor. (*Id.*, at (b)(2).)
 - b) Exempts these products from the prohibition in 4): premium cigars sold in cigar lounges where products are purchased and consumed only on the premises; and loose leaf tobacco or premium cigars. (*Id.* at (d) & (e).)
- 6) Defines “flavored tobacco product” as any tobacco product that contains a constituent that imparts a characterizing flavor. (*Id.* at (a)(6).)
- 7) Defines “characterizing flavor” to mean a distinguishable taste or aroma, or both, other than the taste or aroma of tobacco, imparted by a tobacco product or any byproduct produced by the tobacco product. Includes, but are not limited to, tastes or aromas relating to any fruit, vanilla, chocolate, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice. Prohibits a tobacco product from being determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information and instead, it is the presence of a distinguishable taste or aroma, or both, that constitutes a characterizing flavor. (*Id.* at (a)(1).)

- 8) Requires the AG to develop and publish on its website the California Tobacco Directory, which is required to list only the tobacco product manufacturers, brand families, and brand styles of cigarettes that are compliant with the law regarding the use of stamps and meter impressions and the Master Settlement Agreement (MSA) entered into by California and leading U.S. tobacco product manufacturers, as specified. (Rev. & Tax Code § 30165.1.)
- 9) Authorizes a California Department of Tax and Fee Assessment (CDTFA) employee, upon presentation of the appropriate identification and credentials, to enter into, and conduct an inspection of any building, facility, site, or place for which there is evidence of either the evasion of the taxes imposed, or the failure to comply with the requirements of the MSA. (Rev. & Tax Code § 30435.)
- 10) Provides that certain tobacco products, upon seizure by CDTFA, be forfeited to the state. Requires specified property forfeited to the state to be sold by CDTFA at public auction, except for cigarettes or tobacco products, which are required to be destroyed. (Rev. & Tax Code § 30436 & 30449.)
- 11) Provides, pursuant to the California Constitution, that the people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies are required to be open to public scrutiny. (Cal. const. art. I, § 3(b)(1).)
 - a) Requires a statute to be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. (Cal. const. art. I, § 3(b)(1).)
 - b) Requires a statute that limits the public's right of access to be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest. (Cal. const. art. I, § 3(b)(1).)
- 12) Governs the disclosure of information collected and maintained by public agencies pursuant to the California Public Records Act (CPRA). (Gov. Code § 7920.000 et seq.)
 - a) States that the Legislature, mindful of the individual right to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (§ 7921.000.)
 - b) Defines "public records" as any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. (Gov. Code § 7920.530.)
 - c) Provides that all public records are accessible to the public upon request, unless the record requested is exempt from public disclosure. (Gov. Code § 7922.530.)

This bill:

- 1) Requires the AG to establish and maintain on its website a list of tobacco product brand styles that lack a characterizing flavor, known as the “Unflavored Tobacco List” (UTL).
 - a) Requires the AG to publish the UTL by December 31, 2025. Requires any “brand style” not on the UTL to be deemed a flavored tobacco product. Defines “brand style” as a style of tobacco product within a brand that is differentiated from other styles of that brand by weight, volume, size, Universal Product Code, Stock Keeping Unit, nicotine content, characterizing flavor, logo, symbol, motto, labeling, marketing, materials, packaging, or other indicia of product identification.
- 2) Requires every manufacturer and every importer of tobacco products to submit to the AG a list of all brand styles of tobacco products they manufacture or import for sale or distribution in or into California that lack a “characterizing flavor.”
 - a) Expands the definition of “characterizing flavor” in existing law to also include, among the list of various flavors, a cooling sensation distinguishable by an ordinary consumer during the consumption of a tobacco product.
- 3) Authorizes the AG to deem each submission to be a request to have the brand style included on the UTL. Requires any submission to be accompanied by a certification from the manufacturer or importer, under penalty of perjury, that does all of the following:
 - a) describes each brand style, brand, and tobacco product category, including, but not be limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff, electronic cigarettes, electronic pipes, and electronic hookahs;
 - b) describes, for each brand style, whether a formal authorization, approval, or order from the U.S. Food and Drug Administration (FDA) has been sought and, if so, the status of the request; and
 - c) certifies that each brand style lacks a characterizing flavor.
- 4) Requires a manufacturer or importer, upon the request of the AG, to provide additional information and factual substantiation regarding a brand style’s lack of characterizing flavor, as well as additional information and documentation regarding packaging or marketing of a brand style.
 - a) Requires all this information to be considered confidential and corporate proprietary information. Prohibits this information from being subject to disclosure under the CPRA.
- 5) Requires the AG to consider, in determining whether or not a brand style has a characterizing flavor, among other factors, the information from the manufacturer or importer regarding the brand style. Requires the AG to presume a brand style to

have a characterizing flavor if the manufacturer or importer, or any employee or agent of the manufacturer or importer, has made a statement or claim directed to consumers or to the public that the tobacco product has or produces a characterizing flavor, including, but not limited to, any text, color, or images on the product's labeling or packaging, that explicitly or implicitly communicates that the tobacco product has a characterizing flavor. Permits this presumption to be rebutted by the manufacturer or importer.

- 6) Requires every manufacturer and every importer that has made a submission to provide updated information to the AG whenever it no longer manufactures or imports a brand style listed on the UTL, or when that brand style no longer lacks a characterizing flavor. Requires this updated information to be provided to the AG prior to or on the date upon which the manufacture or importation of the brand style ceases, or prior to or on the date upon which the brand style no longer lacks a characterizing flavor.
- 7) Requires every manufacturer or importer that submits a product to be included on the UTL to do all of the following:
 - a) consent to the jurisdiction of the California courts for the purpose of enforcement of the provisions in this bill and any promulgated regulations;
 - b) appoint a registered agent for service of process in this state;
 - c) identify the registered agent to the AG; and
 - d) waive any sovereign immunity defense that may apply in an action to enforce the provisions of this bill or regulations.
- 8) Authorizes the AG to require a manufacturer or importer of tobacco products that are sold or distributed in or into California, whether directly or indirectly through a distributor, wholesaler, or retailer, to submit a list of all brand styles that they manufacture or import into the state.
- 9) Requires every manufacturer and importer to submit an initial application fee, and for the AG to collect an annual renewal fee, of up to \$1,000 per brand style, not to exceed the reasonable costs of processing the submissions and operating the UTL, to offset the costs incurred by the AG for processing the submissions and operating the UTL. Requires the fees to be deposited into the California UTL Fund, which this bill creates, be continuously appropriated without regard to fiscal year to the AG.
- 10) Requires the AG to decline to include, and to remove, any brand style on the UTL that the AG reasonably determines has a characterizing flavor, or that is adulterated, misbranded, or otherwise required to obtain, but has not received, a formal authorization, approval, or order from the FDA. Makes removal of a brand style effective 30 days after the manufacturer or importer is given notice. Authorizes a manufacturer or importer to provide additional materials within 30 days of the notice of removal, which will also be deemed confidential.

- 11) Permits a manufacturer or importer that certified the brand style lacks a characterizing flavor, upon receiving notice from the AG that a brand style is either removed from the UTL or declined inclusion on the list, to challenge the AG's determination as erroneous, seek to rebut any presumption relied upon by the AG, and seek relief from the determination, by filing a writ of mandate in the Superior Court of the County of Sacramento, or as otherwise provided by law, and providing additional materials. Prohibits the filing of the petition from staying the AG's determination except upon a ruling of a court of competent jurisdiction.
- 12) Prohibits a person from affixing, or causing to be affixed, any tax stamp or meter impression to a package of cigarettes, or pay any tax levied on a tobacco product, unless the brand style of the cigarettes or tobacco products is included on the UTL.
- 13) Authorizes the AG to seek injunctive relief and a civil penalty not to exceed \$50,000 and recover reasonable attorney's fees, investigation costs, and expert fees against an entity or individual that certifies a brand style lacks a characterizing flavor when the certifying entity or individual had no reasonable basis to believe the certification was true.
- 14) Prohibits a distributor from selling any tobacco product not on the UTL or any tobacco product flavor enhancer to any retailer, wholesaler, or other person for sale in California. Permits the AG to assess civil penalties for each tobacco product or any tobacco product flavor enhancer sold in violation of this provision against the distributor as follows:
 - a) no more than \$2,000 for the first violation;
 - b) no more than \$3,500 for the second violation;
 - c) no more than \$5,000 for the third violation within a five-year period;
 - d) no more than \$6,500 for the fourth violation within a five-year period; and
 - e) no more than \$10,000 for a fifth or subsequent violation within a five-year period.
- 15) Requires the court, whenever the AG prevails in a civil action to enforce the provisions of this bill, to award to the AG all costs of investigating and prosecuting the action. Requires awards to be paid to the Public Rights Law Enforcement Special Fund.
- 16) Permits the AG to adopt rules and regulations deemed necessary to implement the provisions of this bill, including any further delineating tobacco product status and characterizing flavor determinations and adopting an administrative process for the imposition of civil penalties. Deems regulations as emergency regulations to be considered by the Office of Administrative Law as necessary for the immediate preservation of the public health, safety, and welfare.

- 17) Specifies that the provisions of this bill do not preempt or otherwise prohibit the adoption of a local ordinance that is more restrictive, that references or incorporates the UTL, or that imposes standards or definitions for a characterizing flavor that are more restrictive than those in this bill.
- 18) Prohibits the AG from including or retaining in the California Tobacco Directory any brand style that is not listed on the UTL.
- 19) Expands the authorization for CDTFA employees to conduct investigations, and inspections, to include any building, facility, site, or place where evidence of a violation of the prohibition to sell flavored tobacco products may be discovered.
- 20) Adds to the list of tobacco products deemed forfeited to the state upon seizure of cigarettes or tobacco products that have affixed a California cigarette tax stamps or meter impressions, or for which tax is paid, that are offered for sale, possessed, kept, stored, or owned by any person with the intent to sell the cigarettes or tobacco products in violation of the requirements to be listed on the UTL. Requires any cigarettes or tobacco products forfeited to the state in violation of the UTL to be destroyed.
- 21) Requires the person from whom property was seized to be liable for the cost of the destruction of property pursuant to this bill. Requires the proceeds of the sale of forfeited property and any money forfeited to the state to be deposited in the General Fund.

COMMENTS

1. Stated need for the bill

The author writes:

Despite the prohibition of flavored tobacco products in California, it remains readily available within our communities and on the shelves of too many retailers. The vast majority of children who use tobacco, use flavored tobacco products. Market ploys and products that facilitate addictive behavior and harm health, especially among youth, has no business in California and we must make implementation of these laws well defined and the enforcement sound. This bill will provide small scale retailers much needed clarity on which products are legal, enable the Attorney General to hold those enabling the wide scale distribution of illicit flavored tobacco products in California accountable, and empower law enforcement agencies to seize those illegal products.

Attorney General Rob Bonta, the sponsor of the bill, writes:

Under current law, the flavored tobacco ban prohibits the retail sale of flavored tobacco products. Despite the ban, these products are still being sold in California and are ending up in the hands of young people. Tobacco companies make and market flavored tobacco products, which come with high nicotine content in a myriad of kid-friendly flavors. Young people are predominately the consumers of these products, and the usage among youth has increased rapidly in recent years, specifically among middle school students. A 2023 study by the Centers for Disease Control and Prevention found that among middle school and high school students who currently use e-cigarettes, nearly 9 in 10 use flavored e-cigarettes.[...]

AB 3218 would provide the Attorney General's Office, as well as other state and local enforcers, with the tools and support needed to keep flavored tobacco products out of the hands of young people; helping prevent young people from entering a lifetime of addiction and harm.

2. Ban on flavored tobacco

In 2020, SB 793 (Hill, Ch. 34; Stats. 2020) was enacted into law and prohibited a tobacco retailer, or any of its agents or employees, from selling, offering for sale, or possessing with the intent to sell or offer for sale, a flavored tobacco product or a tobacco product flavor enhancer. This prohibition does not apply to the sale of Hookah water pipes and flavored shisha tobacco products, pipe tobacco, and premium cigars. SB 793 also included the menthol flavor under its ban.

The tobacco industry qualified a referendum for the November 8, 2022 ballot seeking to have voters decide whether SB 793 should take effect. Enforcement of the ban was halted pending the election. Ultimately, voters upheld SB 793 under the referendum. The following day, R.J. Reynolds, the manufacturer of Newport menthol cigarettes and top-selling vaping products, filed a federal lawsuit challenging the law. Both federal district and appellate courts upheld the law, and in December of 2022, the U.S. Supreme Court refused to hear the tobacco industry's appeal. Two years after the passage of SB 793, the ban finally became operative, and under current law, a tobacco retailer, or agent or employee of a tobacco retailer, in violation of the ban is guilty of an infraction and punishable by a fine of \$250 for each violation.

3. This bill seeks to bolster the provisions of SB 793

The AG notes that "without strict enforcement in this market, noncompliant sellers provide easy access to flavored tobacco products." To strengthen enforcement of the existing flavored tobacco product ban, AB 3218 holds noncompliant sellers accountable and reduces the availability of flavored tobacco products by, among other things:

- establishing a publicly available list of all tobacco products that are permissibly unflavored and allowed to be sold in California;
- deeming any product not on the list a flavor tobacco product prohibited to be sold in this state;
- authorizing the AG to seek civil penalties against distributors for selling products not appearing on the UTL in order to hold the distribution chain accountable at a higher level than the retail level;
- rendering products not appearing on the UTL ineligible for tax stamps so that such products will be contraband and subject to seizure;
- requiring the AG to not include on, or remove from, the UTL any brand style that the AG determines has a characterizing flavor;
- revising the definition of “characterizing flavor” to include products that impart cooling sensations distinguishable by an ordinary consumer during the consumption of a tobacco product;
- authorizing the AG to seek injunctive relief and civil penalties against any manufacturer that certifies a brand lacks a characterizing flavor, but the AG determines otherwise; and
- authorizing the AG to omit from the UTL any tobacco products lacking FDA authorization.

The Senate Health Committee analysis of this bill notes:

According to an October 2019 report from CDPH, “Challenges in Enforcing Local Flavored Tobacco Restrictions,” a non-flavored list, which includes all tobacco products that may be sold in a particular jurisdiction with a flavored tobacco ban, has several substantial benefits. First, developing, maintaining, and using a non-flavored list is significantly easier than a banned product list. Whereas a banned products list may contain thousands of products, a non-flavored list might only contain several hundred unflavored products. As a result, a non-flavored list will be easier to maintain and use for both enforcement officers and retailers looking to comply with flavored tobacco restrictions. Additionally, a non-flavored list will make enforcement easier; unflavored tobacco products are less likely to be regional in nature, as regional variations are found in flavors. CDPH further states that California’s non-flavored list could be incorporated by reference in other states reducing the duplicative work required in building regional lists. Given the relatively static roster of unflavored tobacco products, a non-flavored list will require less training for enforcement personnel and be less vulnerable to enforcement difficulties at the retail level. Experts also agree that developing a non-flavored list will be easier than developing a banned products list.¹

¹ Sen. Health Comm. analysis of AB 3218 (2023-24 reg. sess.) as amended May 16, 2024 at p. 6.

4. Limitation on the access to public records

Under the CPRA, public records are open to inspection by the public at all times during the office hours of the agency, unless exempted from disclosure. (Gov. Cod § 7922.252.) A public record is defined as any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any public agency regardless of physical form or characteristics. (Gov. Code § 7920.530.) There are several general categories of documents or information that are permissively exempt from disclosure under the CPRA essentially due to the character of the information. The exempt information can be withheld by the public agency with custody of the information, but it also may be disclosed if it is shown that the public's interest in disclosure outweighs the public's interest in non-disclosure of the information. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, at 652.). Additionally some records are prohibited from disclosure or are specifically stated to not be public records. (*see* Gov. Code § 7924.110(a).)

California generally recognizes that public access to information concerning the conduct of the people's business is a fundamental and necessary right.² At the same time, the state recognizes that this right must be balanced against the right to privacy.³ The general right of access to public records may, therefore, be limited when records include personal information. This bill specifies that any information a manufacturer or importer submits to the AG regarding its brand style and information regarding its characterizing flavor is confidential and proprietary and therefore not subject to disclosure under the CPRA. The bill states that this limitation on public records is necessary to facilitate manufacturer submissions of information related to brand styles of tobacco products for consideration by the AG.

5. Backlog of applications for FDA approval

The bill authorizes the AG to decline or remove a product that is "adulterated as defined in Section 387b of or misbranded as defined in Section 387c of the Federal Food, Drug, and Cosmetics Act (FFDCA) or that is otherwise required to obtain and has not received a formal authorization, approval, or order under 387e(j) or 387j of the FFDCA. Tobacco products that were commercially marketed in the U.S. after February 15, 2007 and on or before August 8, 2016, were required to apply for formal FDA approval by September 9, 2020. There is currently a backlog of about 1 million applications pending approval at the FDA from the original 27 million applications submitted.⁴ Some stakeholders contend that, according to the FDA, these products with pending applications are legal to sell, even though they are technically considered adulterated

² Cal. Const., art. I, § 3; Gov. Code, § 7921.000.

³ Cal. Const., art. I, § 1.

⁴ *FDA Authorizes Marketing of Four Menthol-Flavored E-Cigarette Products After Extensive Scientific Review*, FDA, (Jun. 21, 2024), available at <https://www.fda.gov/news-events/press-announcements/fda-authorizes-marketing-four-menthol-flavored-e-cigarette-products-after-extensive-scientific>.

under the FFDCA because they have not received approval from the FDA. The DOJ does not agree with this assertion and instead posits that the FDA, under its prosecutorial discretion, has chosen not to enforce the FFDCA to some of these products with pending applications, not that the FDA has said these products are legal to sell. As evidence for their interpretation, they point to a recent press release from the FDA that notes the FDA has authorized four menthol-flavored e-cigarette products and states that:

The agency maintains a printable one-page flyer of all authorized e-cigarette products; these are the only e-cigarette products that currently may be lawfully marketed and sold in the U.S. and those manufacturing, importing, selling, or distributing e-cigarettes without the required premarket authorization risk enforcement.⁵

Stakeholders contend that they are worried that the AG may use the discretion under the bill to remove or deny a product that has a pending application with the FDA from being on the UTL, even though the product does not meet the definition of flavored tobacco under the state statute. They note that this issue is compounded by the fact that enforcement under the bill provides for seizure and destruction of products upon removal from the directory. Stakeholders have offered amendments to address this concern but the author and sponsor have declined the amendments. The sponsor argues that it would be imprudent to enact a statutory limitation based on the FDA's enforcement priorities, as these priorities can change, and that by specifically stating these products can be sold in this state the bill may actually run afoul of federal preemption issues.

6. Statements in support

The California Children's Hospital Association writes in support, stating:

Tobacco companies have long pushed candy-flavored products into the youth market, quietly hooking kids into a dangerous addiction to nicotine. Smoking increases the risk for respiratory infections, weakens the immune system and is a major cause of several chronic health conditions, including chronic obstructive pulmonary disease, heart disease and diabetes. In addition, there is growing evidence that vaping can also harm lung health.

In November 2018, the U.S. Food and Drug Administration (FDA) and the U.S. Centers for Disease Control and Prevention (CDC) reported a dramatic increase in youth nicotine use, leading the Surgeon General and the FDA to declare youth e-cigarette use an epidemic in the United States. The disturbing rates of teen e-cigarette use continued to rise in 2019, with more than 1 in 4 high school students and more

⁵ *Ibid.*

than 1 in 10 middle school students using e-cigarettes. Altogether, more than 5.3 million youth were current e-cigarette users in 2019, with the overwhelming majority of youth citing use of popular fruit and menthol or mint flavors.

Eighty one percent of young people who have used tobacco started with a flavored product, and 9 in 10 middle school and high school users still report they use flavored ecigarettes. These products often mimic popular candies, drinks, or snacks in both packaging and flavor, making them particularly appealing to youth. A variety of flavored tobacco products like cotton candy, bubble gum, and mango are widely available on retail shelves. Seventy-two percent of youth tobacco users have used a flavored tobacco product in the past month and at least two-thirds of youth tobacco users report using tobacco products “because they come in flavors I like.”

By providing clarity about which tobacco products are, in fact, flavorless, and giving more tools to law enforcement, AB 3218 will further protect children and adolescents from the dangers of tobacco and nicotine addiction.

7. Statements in opposition

The California Fuels and Convenience Alliance writes in opposition, stating:

While we support the concept of a Tobacco Directory and clear guidance from the Attorney General (AG) on what tobacco products are allowed to be sold by retailers, we continue to be concerned with the broad discretion given to the AG to further prohibit legal products in the state based on a subjective determination of a “characterizing flavor”. [...]

By making more changes to the definition of “characterizing flavor”, AB 3218 would create further uncertainty as to which products are allowed to be sold. Specifically, the bill modifies the definition to capture products with a “cooling” or “numbing” sensation, which is legally vague, and subject to interpretation by current, and future, politically elected Attorneys General. All nicotine products contain a numbing element, and could also broadly feel like cooling, making it possible for an AG to theoretically ban every single nicotine product under the provisions of this bill. We recognize that the definition is based on an “ordinary consumer” standard and what a “typical, reasonable consumer would expect or perceive under normal conditions”. Unfortunately, we believe this is legally subjective and open to interpretation from the courts.

In order to maintain a level of legal consistency, CFCA urges that the bill be amended to remove “cooling” and “numbing” from the definition of “characterizing flavor”. When SB 793 was passed, the intent was to restrict the “growing market of flavored tobacco products...undermining progress in reducing youth tobacco use in California.” The current definition in AB 3218 would go far beyond this intent and

take more legal products off the shelf, bolstering the illicit market and reducing state revenues from our highly regulated stores.

SUPPORT

Attorney General Rob Bonta (sponsor)
California Children's Hospital Association
California Dental Association
California School Nurses Organization
CleanEarth4kids.org
County Health Executives Association of California
County of Santa Clara
Mendocino County Tobacco Prevention Coalition
San Francisco Marin Medical Society

OPPOSITION

California Fuels and Convenience Alliance

RELATED LEGISLATION

Pending Legislation: SB 1230 (Rubio, 2024) increases civil penalties for violations of the Stop Tobacco Access to Kids Enforcement Act to \$6,000 and \$20,000 for various violations, requires flavored tobacco products or tobacco product flavor enhancers to be seized, and adds those products to existing law regarding forfeited products to be destroyed. SB 1230 is pending in the Assembly Governmental Organization Committee.

Prior Legislation:

AB 935 (Connolly, Ch. 351, Stats. 2023) aligned violations of the prohibition on sales of flavored tobacco and civil penalties with penalties for the Stop Tobacco Access to Kids Enforcement Act.

AB 598 (Robert Rivas, 2021) was substantially similar to this bill. AB 598 was not heard in any Committee due to the COVID-19 pandemic.

SB 793 (Hill, Ch. 34, Stats. 2020) *see* Comment 2), above.

PRIOR VOTES

Senate Health Committee (Ayes 9, Noes 1)
Assembly Floor (Ayes 55, Noes 4)
Assembly Appropriations Committee (Ayes 11, Noes 1)
Assembly Judiciary Committee (Ayes 10, Noes 0)
Assembly Health Committee (Ayes 12, Noes 0)
