

**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 the Notice of Modification to Text of Proposed Regulations
regarding the Unflavored Tobacco List
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Lauren Kass Lempert, JD, MPH; Pamela Ling, MD MPH; Stanton Glantz, PhD;
Dorie Apollonio, PhD MPP; Stella Aguinaga Bialous, DrPH, FAAN;
University of California San Francisco

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We applaud California Attorney General Rob Bonta’s establishment on December 31, 2025, and continued maintenance of the Unflavored Tobacco List (UTL) to protect the public health by removing flavored tobacco products from the market. AB 3218 and the 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. 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 contained cooling agents that imparted menthol-like cooling sensations and were marketed in packaging closely resembling menthol products.

As detailed below, we support the proposed modifications to the UTL regulations because they are reasonable and help to strengthen the UTL. In addition, we suggest 12 additional changes to make the requirements more specific to simplify and improve compliance and enforcement. In particular, we recommend that products should be prohibited from being included on the UTL if the FDA has already classified them as having a “characterizing flavor” or if they have added ingredients such as sweeteners and/or cooling agents.

Context

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 youthenticating candy, dessert, and other novelty flavors that lead to nicotine addiction among children who otherwise would not have initiated smoking.⁷ Data from the 2024 National Youth Tobacco Survey (NYTS) show that 87.6% of middle and high school students who use e-cigarettes use a flavored product.⁸ 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.^{9, 10}

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 Monitoring E-Cigarette Trends in the United States. Urgent Action Needed to Protect Kids from Flavored E-Cigarettes. CDC Foundation and Truth Initiative. November 21, 2024. <https://tobacomonitoring.org/reports/project-reports-and-data-briefs/>

⁸ 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: <http://dx.doi.org/10.15585/mmwr.mm7335a3>

⁹ Donaldson CD, Couch ET, Hoefl 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.

¹⁰ Bae D, Rahman T, Sanchez LMM, Miech R, Harlow AF, Han DH, Cho J, Sussman S, Dai HD, Meza LR, Mason T, Leventhal A. Trends in e-cigarette flavour use and demographic correlates among US youth from 2020 to 2023. *Tob Control*. 2025 Aug 12;tc-2024-059186. doi: 10.1136/tc-2024-059186. Epub ahead of print. PMID: 40803830; PMCID: PMC12503093.

California's statewide flavor law prohibiting flavored tobacco product sales resulted in declines in e-cigarette and cigarette sales in the state.¹¹ The new law and regulations 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 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.¹² Public health researchers have described these elements of California's law as "visionary" that should be a model for other states.¹³

Importantly, rigorous enforcement of the UTL can help stem the tide of flavored nicotine pouch use among youth and young adults. Because of the breadth of California's flavor law, the UTL will also apply to flavored nicotine pouches which have flooded the market since the law was adopted. More than a billion units of oral nicotine pouch products were sold per month in 2024,¹⁴ and that growth continues to explode. According to Nielsen sales data for the 52 weeks ending in August 2025, nicotine pouches increased in sales rapidly while the other major nicotine

¹¹ 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.

¹² Jordt, Sven-Eric, et al. "Synthetic cooling agents and nicotine analogs in new tobacco products: tobacco industry strategies to bypass regulation." (2024).

¹³ : 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.

¹⁴ He Y, Zhang Z, Keller-Hamilton B, et al. Trends of oral nicotine pouch prices and sales by product characteristics in the USA, 2021-2024. *Tob Control*. Jun 12 2025;doi:10.1136/tc-2024-059222

products declined, making them the fastest growing nicotine category in convenience stores,¹⁵ which are popular among young people.¹⁶

Of particular concern, increasing nicotine pouch prevalence is seen among adolescents and young adults in the US.¹⁷ Among high school adolescents in the US, oral nicotine pouch use more than doubled from 1.1% to 2.4% from 2021-2024,¹⁸ and all indications suggest that that use will continue to increase. For example, an analysis of a 2021 cohort of California high-school adolescents and 2024 NYTS data¹⁹ showed that oral nicotine products were the second most prevalent nicotine product, after e-cigarettes.²⁰ Oral nicotine product use among young adults aged 21-24 in the US have higher current use rates,^{17, 21, 22} and awareness and favorable perceptions of oral nicotine products are high among young adults.

We enthusiastically support the creation of the Unflavored Tobacco List

¹⁵ Nicotine pouches. Category champions 2025. Convenience Store News. https://csnews.com/category-champions-2025?section=nicotine&mkt_tok=ODI1LUxTUC01NDUAAAGeuOKZJ-ms8GZYrFdhXlaxurjGYpPe1UNWcPGE1s95Xy2pDHUbwSzCQcWjv4MnuS0WVX08oJm74mzWRE2FL74TGXUBFXUCB_Du97IYQtOfhZJR.

¹⁶ Russell, Z. Data: Younger Shoppers Gravitate Towards Convenience Stores. Store Brands. August 27, 2023. <https://storebrands.com/data-younger-shoppers-gravitate-towards-convenience-stores>

¹⁷ Patel M, Kierstead EC, Kreslake J, Schillo BA. Patterns of oral nicotine pouch use among U.S. adolescents and young adults. *Prev Med Rep.* Aug 2023;34:102239. doi:10.1016/j.pmedr.2023.102239

¹⁸ 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.* Sep 5 2024;73(35):774-778. doi:10.15585/mmwr.mm7335a3

¹⁹ Jamal A, Park-Lee E, Birdsey J, et al. Tobacco Product Use Among Middle and High School Students - National Youth Tobacco Survey, United States, 2024. *MMWR Morb Mortal Wkly Rep.* Oct 17 2024;73(41):917-924. doi:10.15585/mmwr.mm7341a2

²⁰ Harlow AF, Vogel EA, Tackett AP, et al. Adolescent Use of Flavored Non-Tobacco Oral Nicotine Products. *Pediatrics.* Sep 1 2022;150(3)doi:10.1542/peds.2022-056586

²¹ Couch ET, Halpern-Felsher B, Werts M, Chaffee BW. Use of Emerging and Conventional Oral Tobacco Among Adolescent and Young Adult E-Cigarette Users. *Subst Use Misuse.* 2023;58(2):283-288. doi:10.1080/10826084.2022.2161314

²² Travis N, Warner KE, Goniewicz ML, et al. The Potential Impact of Oral Nicotine Pouches on Public Health: A Scoping Review. *Nicotine Tob Res.* Mar 24 2025;27(4):598-610. doi:10.1093/ntr/ntae131

We enthusiastically support the creation of the UTL and generally support the proposed implementing regulations. The implementing regulations and proposed modifications 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.
- 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.

Suggestions to make the requirements more specific to simplify and improve compliance and enforcement.

1. Prohibit products that have been deemed by FDA to have a “characterizing flavor” from being included in the UTL.

For example, in its January 16, 2025, Decision Summary for its Marketing Granted Order for ZYN nicotine pouches,²³ the FDA stated that they deemed ZYN Smooth and Chill (renamed “Original”) as “characterizing flavors” along with Citrus, Cinnamon, Coffee, and Menthol ZYN flavored pouches.

The Attorney General should immediately remove all ZYN “Original” (aka “Chill”) and “Smooth” nicotine pouches from the UTL and in the future should prohibit any products deemed by FDA to have a “characterizing flavor.”

2. Prohibit products that have added ingredients such as sweeteners and/or cooling agents from being included in the UTL.

²³ FDA Technical Project Lead (TPL) Review of PMTAs for ZYN nicotine pouches, January 16, 2026, p. 5 fn 4. Available: https://www.accessdata.fda.gov/static/searchtobacco/2-6-25/PMTA_TPL_PM593-PM612_Zyn_01_13_2025_Redacted.pdf

In the same Decision Summary, FDA stated: “Due to added ingredients such as sweeteners and cooling agents, FDA has determined that all new products have a non-tobacco characterizing flavor for the purposes of this review.”²⁴

3. Modify the definition of “applicant” in §942(a) to explicitly include vape shops that make their own flavors, which means they essentially become “manufacturers.”
4. 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.²⁵
5. 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.”²⁶
6. 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),

²⁴ FDA Technical Project Lead (TPL) Review of PMTAs for ZYN nicotine pouches, January 16, 2026, p. 5 fn 4. Available: https://www.accessdata.fda.gov/static/searchtobacco/2-6-25/PMTA_TPL_PM593-PM612_Zyn_01_13_2025_Redacted.pdf

²⁵ 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.

²⁶ 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>

- rather than put the burden on the Attorney General (to prove that the product is flavored and therefore illegal to sell).
7. Following the example of San Francisco Health Code sections 19R²⁷ and 19S,²⁸ §948 should prohibit any product that has not obtained FDA marketing authorization from being listed on the UTL.
 8. Require all applicants to submit examples of packaging under §949(b) as a condition of placement on the UTL.
 9. To strengthen enforcement of the “tobacco product flavor enhancer” prohibition,^{29, 30,}
³¹ prohibit flavoring agents that can be added to packaging since these substances can diffuse into the tobacco product.³²
 10. 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.
 11. Make scientific information submitted by applicants under §953(7)(d) publicly available (may be redacted to protect confidential proprietary information) to ensure

²⁷ https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_health/0-0-0-3378

²⁸ https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_health/0-0-0-60597

²⁹ Ling PM, Kim M, Egbe CO, Patanavanich R, Pinho M, Hendlin Y. Moving targets: how the rapidly changing tobacco and nicotine landscape creates advertising and promotion policy challenges. *Tob Control*. 2022 Mar;31(2):222-228. doi: 10.1136/tobaccocontrol-2021-056552. PMID: 35241592; PMCID: PMC9233523.

³⁰ Cwalina SN, Leventhal AM, Barrington-Trimis JL. E-cigarette flavour enhancers: Flavoured pod attachments compatible with JUUL and other pod-based devices. *Tob Control*. 2020 Dec;29(e1):e127-e128. doi: 10.1136/tobaccocontrol-2020-055618. Epub 2020 Apr 9. PMID: 32273434; PMCID: PMC7544664.

³¹ <https://www.amazon.co.uk/stores/PrisTeam/page/B5528A8F-04DA-4C58-8E03-6BD0085510F2#:~:text=PrisTeam%20Menthol%20Balls%20For%20Cigarettes%20%2D%203%20Packs%20Of%20100%20Black,%20%20Easy%20To%20Use...&text=Premium%20Menthol%20Crush%20Balls%20for%20Cigarettes%20%2D%20Grape%20Ice%20Flavour%20Crushballs,%E2%80%93%20British%20Quality%20Crushballs>

³² 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.

transparency and the ability of scientists and researchers to confirm the unflavored determination.

12. Provide a starting point and/or range for determining the amount assessed for penalty citations and violations under §955(b).

Conclusion

California's Unflavored Tobacco List and its implementing regulations are substantiated by scientific evidence are already helping 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 modifications to the implementing regulations will strengthen the UTL and facilitate compliance and enforcement by state and local authorities.