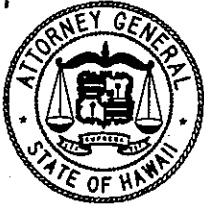


SB 2105



**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008**

ON THE FOLLOWING MEASURE:

S.B. NO. 2105 RELATING TO TOBACCO

BEFORE THE:

SENATE COMMITTEE ON HEALTH

DATE: Monday, February 4, 2008 **TIME:** 1:15 PM

LOCATION: State Capitol, Room
Deliver to: Committee Clerk, Room 215, 1 copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Earl R. Hoke, Jr., Deputy Attorney General

Chair Ige and Members of the Committee:

The Attorney General provides the following recommendations and comments concerning this measure.

We are aware of only one other state that has a prohibition on flavored cigarette sales. The State of Maine's legislation was adopted effective September 30, 2007. The prohibition on the sale or distribution of flavored cigarettes or flavored cigars begins July 1, 2009. We are unsure if there will be constitutional challenges to the Maine statute on the basis of a violation of the Commerce Clause, which regulates interstate commerce. Other potential constitutional challenges to the Maine statute include an alleged violation of the Supremacy Clause of the Constitution because the state regulation is preempted by the federal Cigarette Labeling and Advertising Statutes, 15 U.S.C. § 1331, et seq. The Cigarette Labeling and Advertising Statutes state in relevant part, "No requirement or prohibition based on smoking and health shall be imposed under state law with respect to advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). Other potential constitutional issues revolve around challenges based upon the Equal Protection Clause, on the basis that the statute arbitrarily distinguishes

between flavored cigarettes and other cigarettes produced on the domestic market for no legitimate governmental reason. A further challenge may present itself in an alleged violation of the Contracts Clause, on the basis that the Maine statute forces distributors of flavored cigarettes to undo settled contracts with retail outlets. Should there be challenges to the Maine statute on these or other grounds, the result may implicate any statute passed in this jurisdiction. We note that section 709-908, Hawaii Revised Statutes, prohibits the sale of tobacco in any form, including chewing tobacco and snuff to a minor.

On October 11, 2006, it was announced that R.J. Reynolds Tobacco Company and the Attorneys General of 38 states, including Hawaii, entered into a settlement that ends the sale of candy, fruit, and alcohol flavored cigarettes manufactured and sold by the company. Under the settlement, Reynolds agreed to a ban in the United States of its Camel, Kool, and Salem flavored cigarettes. The agreement also imposes significant marketing restrictions to prevent Reynolds from marketing a flavored cigarette to youth in the future. The following restrictions apply to any cigarettes manufactured by Reynolds in the future that have a characterizing flavor other than tobacco or menthol.

The name of the cigarette may not be that of a candy, a fruit, or an alcoholic beverage and may not include any of a number of specified terms that evoke imagery of candy, fruit, or alcoholic beverages. Reynolds may not use print advertising, point of sale materials, exterior packaging, or non-age verified direct mail or internet advertising that contain (i) names of a candy, a fruit, or an alcoholic beverage, (ii) any of a number of specified terms that evoke imagery of candy, fruit, or alcoholic beverages, or (iii) imagery of candy, fruit, sweet desserts, or alcoholic beverages; and Reynolds may not distribute scented promotional materials, such as "Lift and Sniffs" or "Scratch and Sniffs."

The states had asserted that Reynolds was violating the 1998 tobacco Master Settlement Agreement's prohibition on youth targeting through its advertising, marketing, and promotion of its flavored cigarettes.

The evidence that led the states to conclude that Reynolds was targeting youth included: use of candy, fruit, and alcohol flavors with high youth appeal; use of advertising and packaging with graphics, typography, colors, styles, and themes that were enticing to youth; and use of "Scratch and Sniff" and "Lift and Sniff" promotional cards scented with sweet, candy aromas, but with none of the scent of tobacco.

The brand styles of flavored cigarettes sold by Reynolds that are banned by the Agreement are: Camel Exotic Blends: Mandarin Mint, Dark Mint, Crema, Izmir Stinger, Twist, Cinnzabar, Mandalay Lime, Aegean Spice, Bayou Blast, Beach Breezer, Margarita Mixer, Midnight Madness, Back Alley Blend, Kauai Kolada, Twista Lime, Winter MochaMint, Warm Winter Toffee, Blackjack Gin, Screwdriver Slots, and SnakeEyes Scotch; Salem Silver: Dark Currents, Fire & Ice, Deep Freeze, and Cool Myst; and Kool Smooth Fusions: Mintrigue, Mocha Taboo, Midnight Berry, and Caribbean Chill.

Flavored cigarettes and smokeless tobacco products are sold in the State of Hawaii. Cigarettes containing menthol have been a long-standing preference among Hawaii smokers. According to the Department of Health, bidi cigarettes were banned in the City and County of Honolulu primarily because they contained candy like flavors and were marketed in order to be attractive to minors. While there is no specific Hawaii data on the appeal of flavored cigarettes to youth, products that are candy or fruit flavored such as drinks, candies, and other products have been shown to have a greater appeal to youth, on the national level. The use of fruit and candy flavor names entices children to try cigarettes and smokeless tobacco products that have flavors with

which they are familiar. Flavored cigarettes and smokeless tobacco products thus encourage children to begin using tobacco products.

This bill would ban the sale, offering for sale, and distribution of flavored cigarettes and smokeless tobacco products that impart a characterizing flavor, other than tobacco, menthol, or clove, prior to or during consumption. Because the bill allows for "menthol" as an acceptable flavor, issues may arise as to whether flavoring such as peppermint, spearmint, wintergreen, and other mint-like flavors would be acceptable, since menthol is an organic compound made synthetically or obtained from peppermint or other mint oils. The bill provides that the Attorney General may enforce the ban by seeking a civil injunction, a \$5,000 civil penalty, and costs including attorneys' fees.

Should this measure move forward, we respectfully offer the following change to the definition of "characterizing flavor" and "component parts" in order to better address the issue of natural or artificial flavoring devices, methodology, or technology utilized by the industry in flavoring cigarettes.

"Characterizing flavor" means any distinguishable or distinctive natural or artificial taste, flavor, smell, or aroma, other than tobacco, menthol, or clove, which emanates from or is imparted by the smokeless tobacco product, cigarette, the cigarette's smoke, or any of the cigarette's component parts at any time prior to or during consumption.

"Component parts" includes but is not limited to the tobacco, filter, paper, or natural or artificial flavoring device or substance in a cigarette.

We understand that cigarette flavoring technology includes the use of pellets that are imbedded in the cigarettes themselves that impart the flavoring to the cigarette. With this technology there may not be a specific smell or flavor that would be readily detected without actually lighting the cigarette itself. Absent disclosure of the technology and laboratory tests to determine if the cigarette imparts a flavor, taste, or smell other than those allowed by this bill, the industry or manufacturers could easily get around the law. To strengthen enforcement of the bill, we recommend that a section be added that would authorize the Department of Health to have access to information from cigarette and smokeless tobacco product manufacturers that discloses the characterizing flavor, flavoring device, or technology being used to produce the characterizing flavor in the cigarettes or smokeless tobacco product that would make them "flavored" under the bill. This information should be defined as proprietary and subject to protective orders. The records should be exempted from disclosure under chapter 92F, Hawaii Revised Statutes. The Department of Health should be provided with the laboratory resources and funding to conduct such testing.

In addition, we recommend that a new section -4, titled "Presumption," be added to the bill that would read as follows:

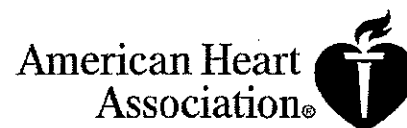
"§ -4 **Presumption.** The fact that the cigarette, component part of a cigarette, or smokeless tobacco product is labeled, advertised, promoted, or marketed as having or producing any natural or artificial flavor, taste, or aroma other than tobacco, menthol, or clove shall be prima facie evidence that the entity engaged in the conduct with knowledge of the flavored character and nature of the cigarettes or smokeless tobacco products that are being sold, offered for sale, or distributed."

This provision would allow enforcement of the ban on sale, offering for sale, or distribution of flavored cigarettes or

smokeless tobacco products without having to prove that an actual ingredient imparts a characterizing flavor. These proposed amendments will clarify potential ambiguities and aid in enforcement of the bill.

The Attorney General supports the intent of reducing the use of all tobacco products by the children of this State.

The American Heart Association mission is: To reduce disability and death from cardiovascular diseases and stroke.



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Testimony in SUPPORT of SB 2105, "Relating to Tobacco"

The 1998 legal settlement between the states and the tobacco companies prohibited the tobacco companies from taking "any action, directly or indirectly, to target youth... in the advertising, promotion or marketing of tobacco products." However, since the settlement, the tobacco companies have increased their cigarette marketing expenditures by over 94 percent to \$13.36 billion a year, or \$36.6 million a day, according to the Federal Trade Commission. Tobacco industry marketing expenditures in Hawaii in 2005 were \$42.2 million. Much of this marketing is still targeted at kids.

One of the tobacco industry's most outrageous tactics since the state settlement is the use of candy-flavored cigarettes and smokeless tobacco.

- Since the MSA, the tobacco companies have regularly introduced new candy and fruit-flavored tobacco products that clearly are intended as starter products for new tobacco users, most of whom are children. The R.J. Reynolds company, for example, introduced new flavored Camel cigarettes with names like Kauai Kolada, Twista Lime, Warm Winter Toffee and Mocha Mint. A 2005 Harvard School of Public Health study concluded, "Flavored cigarettes can promote youth initiation and help young occasional smokers to become daily smokers by masking the natural harshness and taste of tobacco smoke and increasing the acceptability of a toxic product." A national survey released in 2005 by the Roswell Park Cancer Institute found that 20 percent of smokers aged 17 to 19 said they had used flavored cigarettes in the past 30 days, while just six percent of smokers over the age of 25 did.
- The U.S. Smokeless Tobacco Company marketed spit tobacco with flavors including berry blend, mint, wintergreen, apple blend, vanilla and cherry.
- Cigar smoking can be deadly and addictive and, just like cigarette smoking, produces toxic secondhand smoke. Youth cigar smoking, like youth cigarette smoking, is also a serious problem, with increasing numbers of kids smoking sweet, candy-flavored cigars that look and feel like cigarettes. Yet the federal and state tax rates on cigars are still far below the current small federal and state tax on cigarettes. Nationally, an estimated 2.2 percent of adults smoke cigars and 14 percent of high school students are current cigar smokers (19.2 percent of males, 8.7 percent of females) – higher than high school students who use smokeless tobacco (8.0 percent). Among the most popular and fastest growing cigar products are small, cigarette-like cigars with kid-friendly flavors, and other flavored cigars. For instance, Altadis recently introduced a "super sweet" Sugarillos line for its Phillies brand and Swisher added a grape-flavored cigarillo to its Swisher Sweet flavors, such as strawberry and chocolate.

There are several ongoing efforts to stop the tobacco companies from continuing to target our children. Several state attorneys general, including Hawaii's, sued tobacco companies for violating the state settlement's prohibition on targeting kids. That resulted in a settlement with RJR Tobacco Company, but that agreement contains loopholes that will still allow the company to market flavored tobacco products in certain locations. In fact, barely seven months after settling its law suit with the state attorneys general, RJR was again trying to circumvent the settlement by

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introducing new flavored cigarettes in yet another marketing scheme that was likely to appeal to children. RJR took out a lavish ad in *Cosmopolitan*, a magazine with a high youth readership, to introduce its Camel Signature Blends cigarettes that come in Robust, Mellow, Frost and Infused flavors. RJR's web site describes Robust as "similar to notes found on cocoa and espresso"; Mellow as "accented with toasted honey"; Frost as "Fine Asian Mint... while the creamy finish delivers a smooth, buttery aftertaste"; and Infused as offering "notes of Citrus" and "a sweet apple-like flavor." These products are also being advertised and sold in stores. While RJR claims its web site is age-restricted, kids will be fully exposed to the magazine and store ads that highlight the tempting new cigarette names and claims of "distinctive flavor." RJR's continued marketing of flavored cigarettes is further evidence that the tobacco companies have not changed and will not change until forced to do so.

The other companies have yet to address the issue of flavored tobacco sales.

Tobacco use is the leading preventable cause of death in the United States. It kills more than 400,000 Americans and costs the nation more than \$96 billion in health care bills every year. Every day, another 1,200 Americans die from tobacco use and more than 1,000 kids become regular smokers. This deadly toll will continue to mount so long as tobacco companies like R.J. Reynolds remain unregulated and free to engage in marketing that appeals to kids. Cigarettes are flavored to hide the bitter taste of death and addiction that might turn away potential new addicts from becoming the next generation of the tobacco industry's victims. The Hawaii State Legislature should end the targeting of Hawaii's keiki by these merchants of death by passing SB 2105 and banning flavored tobacco products.

Respectfully submitted,

Donald B. Weisman
Hawaii Communications and Marketing/Government Affairs Director
American Heart Association