

JAN 25 2023

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**A BILL FOR AN ACT**

RELATING TO HEALTH.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. Tobacco use remains the leading cause of  
2 preventable disease and death in the United States and in  
3 Hawaii. Tobacco use is a serious public health problem in terms  
4 of the human suffering and loss of life it causes, as well as  
5 the financial burden it imposes on society and our healthcare  
6 system. According to the Centers for Disease Control and  
7 Prevention's 2014 "Best Practices for Comprehensive Tobacco  
8 Control Programs" guide, \$526,000,000 in health care costs are  
9 directly attributed to smoking in the State of Hawaii.

10           Furthermore, in a 2016 report titled "E-Cigarette Use Among  
11 Youth and Young Adults," the United States Surgeon General  
12 explained that ninety-five per cent of all smokers start smoking  
13 before the age of twenty-one. A 2017 study published in the  
14 American Journal of Preventive Medicine found that eighty-one  
15 per cent of youth who ever used a tobacco product report that  
16 the first product they used was flavored. Flavored tobacco  
17 products promote youth initiation to tobacco use and push young  
18 occasional smokers to become daily smokers by reducing or

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1 masking the natural harshness and taste of tobacco smoke,  
2 thereby increasing the appeal of tobacco products.

3       Menthol is used by the tobacco industry because it has a  
4 cooling and numbing effect and can reduce the throat irritation  
5 caused by smoking, thus making menthol cigarettes an appealing  
6 option for youth who are initiating tobacco use. Candy and  
7 fruit flavors improve the taste and reduce the harshness of  
8 tobacco products, making them more appealing and easier for  
9 beginners to try tobacco products and ultimately become  
10 addicted. The popularity of electronic cigarettes among youth  
11 is concerning. The combination of enticing flavors and nicotine  
12 salts allows higher levels of nicotine to be inhaled with less  
13 irritation. In the 2016 report titled "E-Cigarette Use Among  
14 Youth and Young Adults," the United States Surgeon General  
15 stated that, "Compared with older adults, the brain of the youth  
16 and young adults is more vulnerable to the negative consequences  
17 of nicotine exposure. The effects include addiction, priming  
18 for use of other addictive substances, reduced impulse control,  
19 deficits in attention and cognition, and mood disorders."

20       While there has been a significant decline in the use of  
21 combustible cigarettes over the last decade, there has been a  
22 dramatic increase in the use of electronic smoking devices by  
23 Hawaii's youth. Vaping in Hawaii is at an epidemic level.

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1 According to the 2011 and 2015 Hawaii Youth Tobacco Survey,  
2 during these four years, the proportion of youth experimenting  
3 with electronic smoking devices increased six-fold among middle  
4 school youth and four-fold among high school youth. According  
5 to the 2019 Hawaii Youth Risk Behavior Survey, thirty-one per  
6 cent of middle school and forty-eight per cent of public high  
7 school students had tried electronic smoking devices. The 2019  
8 Hawaii Youth Risk Behavior Survey also indicates that eighteen  
9 per cent of middle school and thirty-one per cent of high school  
10 students currently vape. The 2019 Hawaii Youth Risk Behavior  
11 Survey also shows the rates are higher in the neighbor island  
12 counties with high school vaping use rates exceeding thirty-five  
13 per cent for Hawaii, Maui, and Kauai. These rates rank among  
14 the highest in the country.

15 Furthermore, while the 2009 Family Smoking Prevention and  
16 Tobacco Control Act (Tobacco Control Act, P.L. 111-31),  
17 prohibited characterizing flavors, including fruit and candy  
18 flavorings, in cigarettes, it did not ban menthol in cigarettes  
19 or the use of characterizing flavors in other tobacco products.  
20 The Tobacco Control Act provided the United States Food and Drug  
21 Administration with the authority to regulate cigarettes, roll-  
22 your-own tobacco, and smokeless tobacco, but required the Food  
23 and Drug Administration to undertake an extensive rulemaking

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1 process to extend its regulatory authority to include e-  
2 cigarettes. Delays in the regulatory process allowed the  
3 tobacco industry and electronic smoking device industry to  
4 significantly increase the introduction of and extensively  
5 market flavored non-cigarette tobacco products, especially in  
6 electronic smoking devices. It is no coincidence that the  
7 number of electronic cigarette flavors have skyrocketed in  
8 recent years. In a 2018 study published in The Journal of  
9 Medical Internet Research, the count of flavor labels was  
10 reported to have more than doubled from 7,776 in 2013-2014 to  
11 15,586 in 2016-2017. Hawaii has experienced the heightened  
12 promotion of vape products that offer candy and local flavors  
13 designed to appeal to the State's youth, such as orange soda,  
14 apple mui, Kona coffee, Maui Mango, Shaka strawberry, lychee  
15 ice, and Molokai Hot Bread. Additionally, many of the packages  
16 are designed to look like candies popular with children, such as  
17 Jolly Ranchers and Sour Patch Kids.

18 Furthermore, young people are disproportionately using  
19 flavored tobacco products, including menthol. According to the  
20 2019 Hawaii Youth Risk Behavior Survey, an average of fifty-nine  
21 per cent of Hawaii's high school cigarette smokers and thirty-  
22 eight per cent of middle school cigarette smokers used menthol.

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1 Current surveillance data show that menthol cigarette  
2 smoking is high among the general population in Hawaii with  
3 further gender and racial disparities. According to the 2020  
4 Behavioral Risk Factor Surveillance System, sixty-three per cent  
5 of adult smokers in Hawaii usually smoke menthol cigarettes.  
6 The 2020 Behavioral Risk Factor Surveillance System also shows  
7 that prevalence is high among specific ethnic groups with  
8 seventy-nine per cent of Filipinos, seventy-eight per cent of  
9 Native Hawaiians, and sixty-nine per cent of Japanese usually  
10 smoking menthol cigarettes. Furthermore, the 2020 Behavioral  
11 Risk Factor Surveillance System shows that female smokers in  
12 Hawaii smoke menthol cigarettes at significantly higher rates  
13 than men - seventy-five per cent versus fifty-one per cent  
14 comparatively.

15 Given the significant threat to public health posed by  
16 flavored tobacco products, including those with menthol, five  
17 states, including Massachusetts, New Jersey, New York, and Rhode  
18 Island, and California and 350 localities have enacted laws  
19 prohibiting the sale of flavored tobacco products. These laws  
20 now protect over twenty-five per cent of the United States  
21 population. Hawaii should also take steps to regulate these  
22 products to reduce tobacco-related health disparities and  
23 address the youth vaping epidemic.

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1           Accordingly, the purpose of this Act is to prohibit the  
2 sale or distribution in Hawaii of all flavored tobacco products,  
3 including products with menthol, and prohibit the mislabeling of  
4 products as nicotine-free.

5           SECTION 2. Chapter 321, Hawaii Revised Statutes, is  
6 amended by adding a new part to be appropriately designated and  
7 to read as follows:

8                   "PART           .    **SALE OF FLAVORED TOBACCO PRODUCTS**

9           **§321-A Definitions.** As used in this part, unless the  
10 context otherwise requires:

11           "Cigarette" has the same meaning as in section 245-1.

12           "Constituent" means any ingredient, substance, chemical, or  
13 compound, other than tobacco, water, or reconstituted tobacco  
14 sheet, that is added by the manufacturer to a tobacco product  
15 during the processing, manufacture, or packing of the tobacco  
16 product.

17           "Department" means the department of health.

18           "Director" means the director of health.

19           "Distinguishable" means perceivable by either the sense of  
20 smell or taste.

21           "Electronic smoking device" means any device that may be  
22 used to deliver any aerosolized or vaporized substance to the  
23 person inhaling from the device, including, but not limited to,

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1 an electronic cigarette, electronic cigar, electronic pipe, vape  
2 pen, or electronic hookah. "Electronic smoking device" includes  
3 any component, part, or accessory of the device, and also  
4 includes any substance that may be aerosolized or vaporized by  
5 such device, whether or not the substance contains nicotine.  
6 "Electronic smoking device" does not include drugs, devices, or  
7 combination products authorized for sale by the United States  
8 Food and Drug Administration, as those terms are defined in the  
9 Federal Food, Drug, and Cosmetic Act.

10 "E-liquid" means any liquid or like substance, which may or  
11 may not contain nicotine, that is designed or intended to be  
12 used in an electronic smoking device, whether or not packaged in  
13 a cartridge or other container. "E-liquid" shall not include  
14 prescription drugs; cannabis for medical use pursuant to chapter  
15 329 or manufactured cannabis products pursuant to chapter 329D;  
16 or medical devices used to aerosolize, inhale, or ingest  
17 prescription drugs, including manufactured cannabis products  
18 manufactured or distributed in accordance with section 329D-  
19 10(a).

20 "Entity" has the same meaning as in section 245-1.

21 "Flavored tobacco product" means any tobacco product that  
22 contains a taste or smell, other than the taste or smell of  
23 tobacco, that is distinguishable by an ordinary consumer either

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1 prior to or during the consumption of a tobacco product,  
2 including, but not limited to, any taste or smell relating to  
3 fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla,  
4 honey, molasses, or any candy, dessert, alcoholic beverage,  
5 herb, or spice.

6 "Labeling" means written, printed, pictorial, or graphic  
7 matter upon a tobacco product or any of its packaging.

8 "Packaging" means a pack, box, carton, or container of any  
9 kind, or if no other container, any wrapping, including  
10 cellophane, in which a tobacco product is sold or offered for  
11 sale to a consumer.

12 "Retailer" means an entity who sells, offers for sale, or  
13 exchanges or offers to exchange tobacco products to consumers  
14 for any form of consideration. The term "retailer" includes an  
15 owner, agent, or employee of a tobacco retail location.

16 "Tobacco product" means:

17 (1) Any product containing, made of, or derived from  
18 tobacco or nicotine that is intended for human  
19 consumption or is likely to be consumed, whether  
20 inhaled, absorbed, or ingested by any other means,  
21 including but not limited to a cigarette, a cigar,  
22 pipe tobacco, chewing tobacco, snuff, or snus;

23 (2) Any electronic smoking device and any substances that



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1           may be aerosolized or vaporized by such device,  
2           whether or not the substance contains nicotine; or  
3       (3) Any component, part, or accessory of any item  
4           described in paragraph (1) or (2), whether or not any  
5           of these contains tobacco or nicotine, including but  
6           not limited to filters, rolling papers, blunt or hemp  
7           wraps, hookahs, mouthpieces, and pipes.

8       "Tobacco product" does not mean drugs, devices, or combination  
9       products authorized for sale by the United States Food and Drug  
10      Administration, as those terms are defined in the Federal Food,  
11      Drug, and Cosmetic Act.

12       "Tobacco retail location" means any premises where tobacco  
13      products are sold or distributed to a consumer, including but  
14      not limited to any store, bar, lounge, cafe, stand, outlet,  
15      vehicle, cart, location, vending machine, or structure."

16       **§321-B Sale of flavored tobacco products; mislabeling as**  
17      **nicotine-free.** (a) Beginning January 1, 2024, it shall be  
18      unlawful for any retailer to:

19       (1) Sell, offer for sale, or possess with the intent to  
20           sell, or offer for sale, a flavored tobacco product;  
21           or

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1           (2) Mislabeled as nicotine-free, or sell or market for sale  
2           as nicotine-free, any e-liquid product that contains  
3           nicotine.

4           (b) A statement or claim, including but not limited to  
5           text, color, or images on the tobacco product's labeling or  
6           packaging that is used to explicitly or implicitly communicate  
7           that the tobacco product has a flavor other than tobacco, made  
8           by a manufacturer or an agent or employee of the manufacturer,  
9           and directed to consumers or the public shall be prima facie  
10          evidence that the tobacco product is a flavored tobacco product.

11          (c) Any flavored tobacco product found in a retailer's  
12          possession that is in violation of this part may be considered  
13          contraband, may be seized by an inspector, or may be subject to  
14          immediate destruction or disposal by the retailer in accordance  
15          with the Hawaii Administrative Rules. The cost of proper  
16          disposal of electronic smoking devices and e-liquids as  
17          hazardous waste pursuant to the Hawaii Administrative Rules,  
18          shall be borne by the retailer.

19          (d) Any retailer who violates this part shall be subject  
20          to a fine not less than \$100 nor more than \$1,000 for each  
21          separate offense. Each day of each violation constitutes a  
22          separate offense. Any fines collected by the department shall  
23          be deposited to the credit of the general fund.

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1 (e) Notwithstanding any other law to the contrary, any  
2 county may adopt a rule or ordinance that places greater  
3 restrictions on the access to flavored tobacco products than  
4 provided in this part. In the case of a conflict between the  
5 restrictions in this part and any county rule or ordinance  
6 regarding access to flavored tobacco products, the more  
7 stringent restrictions shall prevail.

8 **§321-C Inspectors; authority and access to records.** (a)

9 The director may appoint, commission, or contract for services  
10 of a third party one or more inspectors as the exigencies of the  
11 enforcement of this part may require. Persons appointed,  
12 commissioned, or contracted for services under this part shall  
13 have and may exercise all the powers and authority outlined in  
14 the rules adopted pursuant to 321-D.

15 (b) Information necessary to investigate violations of  
16 this part shall be made available to the department and any  
17 appointed, commissioned, or contracted inspectors of the  
18 department.

19 **§321-D Administrative rules.** (a) The department may  
20 adopt rules pursuant to chapter 91 to effectuate the purposes of  
21 this part.

22 (b) No later than June 30, 2024, the department shall  
23 adopt interim rules, which shall be exempt from chapters 91 and

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1 201M, to effectuate the purposes of this part; provided that the  
2 interim rules shall remain in effect until January 1, 2030, or  
3 until rules are adopted pursuant to subsection (a), whichever  
4 occurs sooner.

5       **§321-E Contract for services.** Subject to section 26-36,  
6 the department may contract the services of a third party in  
7 accordance with chapter 103D for enforcement, inspections, or  
8 any other services needed to administer this part."

9       SECTION 3. Section 328J-11.5, Hawaii Revised Statutes, is  
10 repealed.

11       ~~["§328J-11.5] Statewide concern. (a) Sales of~~  
12 ~~cigarettes, tobacco products, and electronic smoking devices are~~  
13 ~~a statewide concern. It is the intent of the legislature to~~  
14 ~~regulate the sale of cigarettes, tobacco products, and~~  
15 ~~electronic smoking devices in a uniform and exclusive manner.~~

16       ~~(b) All local ordinances or regulations that regulate the~~  
17 ~~sale of cigarettes, tobacco products, and electronic smoking~~  
18 ~~devices are preempted, and existing local laws and regulations~~  
19 ~~conflicting with this chapter are null and void.~~

20       ~~(c) Nothing in this chapter shall be construed to limit a~~  
21 ~~county's authority under section 328J-15." ]~~

22       SECTION 4. There is appropriated out of the general  
23 revenues of the State of Hawaii the sum of \$1,000,000 or so much

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1 thereof as may be necessary for fiscal year 2023-2024 and the  
2 same sum or so much thereof as may be necessary for fiscal year  
3 2024-2025 to carry out the purposes of this Act, including the  
4 hiring of necessary staff.

5 The sums appropriated shall be expended by the department  
6 of health.

7 SECTION 5. The department of health shall establish two  
8 full-time equivalent (2.0 FTE) program specialist positions to  
9 review, process, and initiate inspections under the authority of  
10 the department of health and one full-time equivalent (1.0 FTE)  
11 hearings officer position to preside over administrative  
12 hearings and other related hearings duties.

13 SECTION 6. This Act does not affect rights and duties that  
14 matured, penalties that were incurred, and proceedings that were  
15 begun before its effective date.

16 SECTION 7. If any provision of this Act, or the  
17 application thereof to any person or circumstance, is held  
18 invalid, the invalidity does not affect other provisions or  
19 applications of the Act that can be given effect without the  
20 invalid provision or application, and to this end the provisions  
21 of this Act are severable.

22 SECTION 8. In codifying the new sections added by section  
23 2 of this Act, the revisor of statutes shall substitute

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1 appropriate section numbers for the letters used in designating  
2 the new sections in this Act.

3 SECTION 9. Statutory material to be repealed is bracketed  
4 and stricken.

5 SECTION 10. This Act, upon its approval, shall take effect  
6 on January 1, 2024.

7

8

INTRODUCED BY: 

9

BY REQUEST

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**Report Title:**

Flavored Tobacco Products; Sale; Ban; Appropriation

**Description:**

Bans the sale of flavored tobacco products and mislabeled e-liquid products. Appropriates funds. Repeals certain provisions of the Hawaii Revised Statutes relating to the sale of tobacco products. Effective January 1, 2024.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

## JUSTIFICATION SHEET

DEPARTMENT: Health

TITLE: A BILL FOR AN ACT RELATING TO HEALTH.

PURPOSE: To prohibit the sale, offering for sale, or possession with the intent to sell, or offer for sale, of any flavored tobacco products, including products derived from nicotine and menthol tobacco products, and the mislabeling as nicotine-free any e-liquid product containing nicotine within the State.

MEANS: Adds a new part to chapter 321, Hawaii Revised Statutes (HRS). Appropriates funds for fiscal years 2023-2024 and 2024-2025. Repeals section 328J-11.5, HRS.

JUSTIFICATION: This measure responds to the epidemic of youth vaping due to the appeal of electronic smoking devices (ESDs) that feature flavored tobacco products, including menthol, that are a gateway to cigarettes and other substances. Additionally, international studies have identified counterfeit electronic cigarette products with mislabeled nicotine concentrations, necessitating better control and monitoring of nicotine containing products and sales outlets.<sup>1</sup>

Impact on the public: This measure addresses the youth vaping epidemic by prohibiting the sales or distribution of all flavored tobacco products. The fiscal impact of a ban on flavored tobacco products in Hawaii would result in modest reductions in Hawaii's tax revenues while at the same time leading to reductions in chronic

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<sup>1</sup> Omaiye, E. E., Cordova, I., Davis, B., & Talbot, P. (2017). Counterfeit Electronic Cigarette Products with Mislabeled Nicotine Concentrations. *Tobacco Regulatory Science*, 3(3), 347-357. <https://doi.org/10.18001/TRS.3.3.10>



diseases and health care spending, including Medicaid spending in the State.<sup>2</sup>

Most ESDs contain nicotine, which is addictive, and youth who regularly use ESDs are more likely to use tetrahydrocannabinol (THC) and other substances. Youth ESD users are four times more likely to become regular cigarette users. Menthol and other flavors are popular with younger smokers. Flavorants are product tested for ingestion and not inhalation and long-term consequences of regular inhalation of oils like vegetable glycerin and propylene glycol (derived from petroleum) are being collected and evidence is increasing for risks for lung and cardiovascular damage from vaping. This measure will not prohibit smokers from legally obtaining non-flavored tobacco products.

Public Health Impact:<sup>3</sup>

- More than 3,000 smokers (5.6% of menthol smokers) would quit as a result.
- 700 premature smoking-caused deaths avoided.
- Fewer youth initiating smoking with menthol cigarettes.

Fiscal Impact:<sup>4</sup>

- At least \$48 million in long-term health care cost savings for the State.<sup>5</sup>
- \$11.5 million decline in cigarette tax revenue (13.1% decline).

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<sup>2</sup> Chaloupka, F.J. *Potential Effects of a Ban on the Sale of Flavored Tobacco Products in Hawaii*, University of Illinois at Chicago, 2021

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> The projected health care savings and public health benefits are conservative because they do not include the impact on youth who will not start to smoke as a result of this policy. Preventing kids in Hawaii from becoming addicted smokers would secure millions of dollars in future health care cost savings.

- \$1.3 million decline in other tobacco products tax revenue (14.9% decline).

Repeal of section 328J-11.5, HRS, is necessary to enable counties to set additional rules in response to higher rates of flavored tobacco product use among neighbor island youth and adults.

Impact on the department and other agencies:

This proposal creates parity between cigarettes and ESDs, because all flavored tobacco products would be restricted, not just flavored cigarettes. Mislabeled nicotine containing products can be monitored and controlled. Interim administrative rules will be developed to provide the Department of Health with expedited authority to enforce the law. The department will contract out retail store investigations. Three positions will be hired within the department, one hearings officer and two program specialists to provide retailer and public education, monitor contracts, and enforce administrative fines.

A reduction in tobacco use resulting from a comprehensive flavor ban would likely lead to significant reductions in health care spending.

GENERAL FUND: \$1,000,000.00 for fiscal years 2023-2024 and 2024-2025.

OTHER FUNDS: None.

PPBS PROGRAM DESIGNATION: HTH-590.

OTHER AFFECTED AGENCIES:

EFFECTIVE DATE: January 1, 2024.