



The Nose Knows

GUIDELINES FOR USING THE SNIFF TEST FOR
FLAVOR ENFORCEMENT

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Overview

When to do a sniff test?

Why do a sniff test?

How to do a sniff test?

An Act Modernizing Tobacco Control

Relevant laws and regulations:

- ▶ An Act Modernizing Tobacco Control, MGL Ch 270 §6
- ▶ Minimum Standards for Retail Sale of Tobacco and Electronic Nicotine Delivery Systems, 105 CMR 665.000
- ▶ Local Board of Health Tobacco Sales Regulations

An Act Modernizing Tobacco Control

Changes Regarding Flavor Laws:

- Bans the sale of ALL flavored products, including e-cigarettes, menthol cigarettes and chewing tobacco.*
- Determining factor: “Characterizing Flavor other than tobacco.” MGL Ch270 §28; 105 CMR 665.005
- Manufacturer Letters are required for Nicotine Content (e-cigarettes) and Non-Flavored Products.

An Act Modernizing Tobacco Control

Other Relevant Changes:

- Increased Fines for State Law Violations:
 - First Violation: \$1000
 - Second Violation: \$2000
 - Third Violation: \$5000
- The law and regulation do not pre-empt cities and towns from strengthening any policy therein.

“Characterizing Flavor”

A distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted or detectable before or during consumption of a tobacco product including but not limited to, a taste or aroma relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the provision of ingredient information or the use of additives or flavorings that do not contribute to the distinguishing taste or aroma of the product.

(105 CMR 665.005)

“Characterizing Flavor”

MARKETING INNOVATIONS, INC.
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CONFIDENTIAL
PURSUANT TO COURT ORDER

BROWN & WILLIAMS TOBACCO CORPORATION

PROJECT BEHAVIOR

September, 1972

PRODUCT: Youth Cigarette - New concepts

MARKETING INNOVATIONS' SUGGESTIONS:

MI suggests new ideas for the breath-freshener field...

COCA-FLAVOR While the government would not permit us to add caffeine to a cigarette, it may be possible to use artificial ingredients to obtain a coca taste and aroma. Suitable names might be: COCA-COLA, COCA-COZZIER.

APPLE FLAVOR Apples connote goodness and freshness and we see many possibilities for our youth-oriented cigarette with this flavor. Apple cider is also a possibility.

SMOOTH FLAVOR CIGARETTE We believe that there are pipe tobaccos that have a sweet aromatic taste. It's a well known fact that teenagers like sweet products. Honey might be considered.

If any of the above ideas have interest, MI, will prepare concept ads.

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Source: <http://industrydocuments.library.usf.edu/tobacco/docs/42b0037>



The Concept Flavor





You do not need a PhD in Chemistry or a Magic Nose

- ▶ “The Regulation does not state or intimate anywhere that any specialized criteria or standard must be used to determine whether a particular tobacco product in a ‘unflavored product’ ... or that any particular training or expertise is required to make that determination.” (Cumberland Farms v. Board of Health of Yarmouth, 97 Mass. App. Ct. 1111, 1123 (Mass. App. Ct. 2020).



First...

- ▶ Does it have a flavor or possible concept flavor stated on the packaging?
- ▶ Has your board already given out a fine for this product;
- ▶ If you have a tobacco control person, what are their thoughts?
 - ▶ What have their colleagues found?
- ▶ Does the manufacturer letter state that it is unflavored or is it silent on this product?
 - ▶ If silent, then the product can be considered flavored (CITATION).

If Yes, Then...

- ▶ Is your board meeting in person?
- ▶ Product samples: Two needed
 - ▶ Original Product
 - ▶ NOTE: Retain original product in case of a court challenge.
 - ▶ Test Sample
- ▶ Board of Health:
 - ▶ Determination: Smell
 - ▶ Vote to up-hold or dismiss



Other Notes...

Manufacturers Letters

“Documentation from the product’s manufacturer or the manufacturer’s agent in a form and manner specified by the Department, certifying such tobacco product does not meet the definition of a flavored product or tobacco product flavor enhancer, and that the product lacks any characterizing flavor.”

(105 CMR 665.010 (E))

Non-nicotine products: What is covered?

- ▶ CONVENTIONAL PRODUCTS

- ▶ Examples: cigarettes, cigars, chew, spit, pipe, hookah or loose tobacco
- ▶ These products must contain either tobacco or nicotine.

- ▶ VAPE PRODUCTS

- ▶ Examples: e-cigarettes, “Electronic Nicotine Delivery Systems”
- ▶ All products that “rely on vaporization or aerosolization” are covered regardless if they contain tobacco or nicotine. This includes vapes that deliver CBD, Delta-8, Vitamin B12 or just a flavored solution.

Questions?

Contact Information

Statewide Technical Assistance Providers

- ▶ Lisa Stevens-Goodnight, Director of Tobacco Control, Massachusetts Municipal Association, lstevensgoodnight@mma.org
- ▶ Cheryl Sbarra, *Executive Director and Senior Staff Attorney*, Massachusetts Association of Health Boards, sbarra@mahb.org
- ▶ Sarah McColgan, Tobacco Control Program Director, Mass. Health Officers Association, smccolgan@mhoa.com