

18-05

STATEMENT OF POLICY

Tobacco Prevention

Policy

The National Association of County and City Health Officials (NACCHO) urges the Food and Drug Administration (FDA) to enact more stringent regulations related to the manufacturing, distribution, advertising, and marketing of tobacco products, including smokeless, nicotine delivery, and emerging tobacco products. NACCHO also urges the FDA to conduct research on the health impact of smokeless and emerging tobacco products, menthol products, and disparities in tobacco advertising, marketing, and use. Until further research and regulations are in place, NACCHO encourages local health departments to support legislation and policy efforts that do the following:

Regulation of New Products

- Require the FDA to provide full disclosure of all chemicals included in new tobacco products.
- Ban the distribution of free samples of emerging tobacco products and new nicotine delivery devices.
- Support the prohibition of dissolvable tobacco products not currently regulated by the FDA.
- Continue to use broad defining language to include cigarettes, nicotine delivery products, tobacco products, smokeless tobacco, and e-cigarettes in all new smoke-free legislation for indoor and outdoor environments.

Marketing/ Sale Regulations

- Introduce and enact bans on targeted marketing to racial and ethnic minorities, LGBTQ+ population, and children, and regulating advertisement placement and point-of-sale marketing among local tobacco retailers.
- Support additional licensure requirements for local tobacco and emerging tobacco product retailers.
- Strengthen and enforce proper age restriction signage and health warnings among local tobacco retailers.
- Partner with local and state economic development centers to assist small tobacco retailers impacted by the enactment of tobacco control legislation.
- Support national chain retailers' voluntary prohibition of tobacco sales.
- Advocate for city/state/federal prohibition of sales of nicotine delivery and tobacco products via mail-order or internet sales.
- Support local enforcement of the prohibition of "loose" cigarette sales among tobacco retailers.
- Support prohibitions on roll-your-own tobacco paper.



- Prohibit self-service access to non-cigarette tobacco products.
- Prohibit the sale of flavored non-cigarette tobacco products.
- Support policies that minimize use of hookahs.

Taxation

- Introduce, enforce, and expand excise tax on all nicotine and nicotine delivery products.
- Introduce, enforce, and expand new excise tax on all emerging nicotine products and all new nicotine delivery devices at or beyond current level equivalent to cigarettes and other tobacco products.
- Introduce, enforce, and expand new excise tax on existing tobacco products.

Smoke-Free Laws and Policy

- Advocate for and expand local smoke-free workplace and smoke-free public place policies.
- Advocate for and support smoke-free housing policies, especially in multi-unit family and publicly subsidized housing.
- Support smoke free policies in child care and child foster care settings.
- Advocate for and support including the banning of smoking in cars where children are present in smoke-free indoor air policies.
- Oppose legislation exempting smokeless tobacco products and nicotine delivery devices from regulation.
- Work with states on eliminating preemption laws that may prohibit local tobacco control policy efforts.

Cessation and Prevention

- Include work with law enforcement to enforce/report violations among retailers.
- Ensure the existence of and expand access to affordable and available local tobacco cessation services.
- Advocate for and expand policies that support local school tobacco prevention efforts.
- Support healthcare providers tobacco cessation efforts by educating and training them on the Ask, Advise, and Refer method.
- Support research on messaging and implementing effective strategies that support cessation.
- Work with state and local tobacco control coalitions to educate the public on the negative health consequences of all tobacco products.

Health Impacts Research

- Advocate and support the requirement of the FDA to conduct continuous long-term research on the health impact of tobacco use.
- Encourage local Community Participatory Research on the health impacts of secondhand smoke exposure and the impact of disparities in ill-health across racial/ethnic group.
- Advocate for additional research into the health impacts of prolonged menthol use on the circulatory, dental, and respiratory systems.
- Advocate for research on the impact of tobacco use on behavioral health patients, and educate behavioral health providers on the impacts of tobacco use on their patients.

Funding

- Advocate for increased public funding for local public health tobacco prevention and control efforts.

Justification

For the purpose of this policy, “tobacco products” include any product that contains tobacco, is derived from tobacco, or contains nicotine, which is intended for human consumption, or is likely to be consumed, whether smoked, heated, vaporized, chewed, absorbed, dissolved, or ingested by any other means. The term “tobacco products” includes e-cigarettes, other electronic smoking devices, and any other future products that are deemed tobacco products, but does not include any cessation product approved by the United States Food and Drug Administration for use as a medical treatment to reduce and eliminate nicotine or tobacco dependence.

Tobacco use continues to be a leading cause of preventable disease, disability, and death in the United States. Since the original Surgeon General’s report on tobacco in 1964 more than 20 million Americans have died from smoking.¹ As of 2019, approximately 34.1 million U.S. adults still smoke cigarettes, and as of 2020 about 4.47 million middle and high school students use at least one tobacco product, including e-cigarettes.^{2,3} Emerging tobacco products and nicotine delivery devices such as juul and e-cigarettes have become especially popular with young people under the age of 17. Little is known about the health effects of the products and perceptions of the potential risks and benefits vary widely among the public, users of the products, health care providers, and the public health community.⁴

On June 22, 2009, President Obama signed into law the Family Smoking Prevention and Tobacco Control Act (TCA), giving the FDA authority to regulate the manufacturing, distribution, sale, advertising, and marketing of tobacco products. It also preserves state and local governmental authority to regulate tobacco sales and distribution in their jurisdictions.⁵ Under TCA, the tobacco industry is required to disclose information on ingredients and constituents in smokeless tobacco products, and gain FDA approval for any changes to products.⁵ The FDA also has the authority to conduct pre-market reviews of all new tobacco products.⁵ The law contains strict provisions regarding the manufacture, sale, distribution, advertising, and marketing of smokeless tobacco products that aim to reduce access to these products by youth. For example, the law prohibits smokeless tobacco products from being sold by impersonal modes of sale, such as in vending machines or self-service display; limits most free distribution of smokeless tobacco products; prohibits tobacco brand name sponsorship of any athletic, musical, or other social or cultural event; and prohibits the sale of clothing and other items with smokeless tobacco brands or logos.⁶ Even though these new restrictions are essential to reducing the prevalence of smokeless tobacco use, many of the provisions contain exemptions that severely limit their effectiveness.⁷ For example, free distribution of smokeless tobacco products is allowed through mail-order and in adult-only facilities, such as bars or adult-only areas at public venues, festivals, or events.⁸ Additionally, many state and local tobacco control laws fail to include smokeless tobacco products, allowing these products to be marketed and distributed with minimal regulation.⁹

Strengthening state and local policies will help to better regulate emerging tobacco products and nicotine delivery devices by filling in the gaps in existing tobacco control legislation, particularly in the following areas:

Taxation: Many state laws either only list specific tobacco products or define tobacco products as “those that can be smoked or chewed.” This exclusion of other tobacco and nicotine delivery products may allow these products to be sold to minors or to be taxed at a much lower rate than cigarettes.¹⁰ Current data shows that state tax rates of smokeless tobacco products are substantially lower than that of cigarettes. For example, in Indiana, a package of 15 Camel Orbs, a type of dissolvable pellets, sold for less than three dollars, which included a 24% excise tax. A pack of premium brand cigarettes were taxed at \$0.995 per pack and sold for five dollars.¹¹ Many states have also adopted a weight-based tax rate policy, causing low-weight products such as smokeless tobacco products to be severely under-taxed.¹² Several states have taken steps to ensure the inclusion of smokeless tobacco products in state tobacco control laws. The State of Minnesota passed the Tobacco Modernization and Compliance Act of 2010, which changed the definition of “tobacco products” in its tax code to include any tobacco product that is “intended for human consumption, whether chewed, smoked, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means.”¹²

Flavoring: The Tobacco Control Act prohibited the use of characterizing flavors in cigarettes, with the exception of tobacco and menthol.¹⁰ The law also did not prohibit characterizing flavors in smokeless tobacco products and cigars, allowing these products to be sold in a wide variety of flavors that attract both adults and adolescents, such as mint, fruit, candy, and alcohol flavors.¹³ Both New York City and Providence, RI have successfully regulated the sale of flavored smokeless tobacco products. New York City enacted a law which prohibits the sale of tobacco products with a characterizing flavor other than menthol, mint, or wintergreen, except in certain “tobacco bars.”¹⁴ As of June 2022, over three hundred cities and counties have enacted restrictions on the sale of flavored tobacco products, and at least 150 of those restrict the sale of menthol cigarettes including highly populated areas like Los Angeles and San Francisco.²² The FDA recently proposed two new tobacco product standards to prohibit menthol as a characterizing flavor in cigarettes²³ and to prohibit characterizing flavors in all cigars.²⁴ In proposing the new standards, FDA states that prohibiting those products will reduce tobacco-related disease and death and reduce tobacco-related health disparities.

Marketing/Distribution: The Tobacco Control Act prohibits free sample of smokeless tobacco except in “qualified adult-only facilities,” which are commonly tents or booths set up at public gatherings such as sporting events or rodeos.¹² Although minors are prohibited from entering the tents, this provision is usually not strongly enforced, thereby giving minors free access to smokeless tobacco products.¹² About 20 states have already taken some initiative to prohibit the distribution of free tobacco samples; however, many of these laws exclude smokeless tobacco products or contain exemptions that limit their effectiveness.⁹

New and emerging tobacco products are constantly being developed and promoted by the tobacco industry. Without adequate regulation and further research into their health effects, these products will continue to pose a great threat to public health.

The FDA ruling of Aug. 8, 2016, regulates all tobacco products, including e-cigarettes, hookah tobacco, and cigars.¹⁵ This law applies to retailers selling tobacco products and is intended to make regulated tobacco products less accessible and attractive to youth. Across the country, there was growing interest in another program, Tobacco 21, intended to increase the legal age to purchasing tobacco products, including e-cigarettes. In December 2019, Congress passed, and President Trump signed, legislation that immediately raised the federal legal age of purchasing tobacco products from 18 to 21.¹⁶

NACCHO recognizes the importance of finding additional tools and policies to help smokers, including supporting cessation programs and services such as quitlines. Currently, little scientific evidence exists to show that e-cigarettes and other nicotine delivery devices are effective cessation devices. Until further research shows that they are safe and effective as a cessation product, NACCHO suggests that e-cigarettes along with other emerging tobacco products are regulated to the extent that the law allows for tobacco products.

Preemption: Local governments must be permitted to institute ordinances to include all tobacco products in clean indoor air laws and regulate sales of tobacco products and their accessories. Preemptive legislation at the state level prohibits localities from enacting laws that vary from or are more stringent than state law. In the case of tobacco/vaping legislation, state preemption language prevents local governments from passing stronger, more comprehensive regulations regarding smoke or vape-free indoor air, increasing tobacco product taxes, regulating the sales and retail environments to reduce use of tobacco and vaping products, and increasing the minimum age for sale.

The tobacco industry has historically supported preemptive state laws as a way to reverse existing local tobacco control ordinances and prevent future enactment of such ordinances.¹⁷ In fact, the tobacco industry's leading legislative strategy against local tobacco control laws has been preemptive state laws.¹⁸

For many years, the Federal Cigarette Labeling and Advertising Act (FCLAA) preempted states from taking any action for health purposes to restrict cigarette advertising or promotion. However, the Family Smoking Prevention and Tobacco Control Act, signed into law June 22, 2009, changes this by allowing states or local communities to restrict or regulate the time, place, and manner (but not the content) of any cigarette advertising or promotions.¹⁹ Given that federal law can no longer preempt state law, state laws should not preempt local laws.

The U.S. Department of Health and Human Services made the elimination of preemption in tobacco control a national goal in Healthy People 2020, with the following objective: Eliminate State laws that preempt stronger local tobacco control laws. This includes preemption on smoke-free indoor air, preemption on advertising, and preemption on youth access.²⁰

Between 2004 and 2019, seven states repealed provisions that preempt local tobacco control law. As of December 31, 2021, 24 states have laws preempting local ordinances related to youth access to tobacco; 23 states preempt local restrictions on selling tobacco products to young people, and 20 states preempt local restriction on distributing tobacco products to youth.

Seven states preempt all types of local tobacco advertising restrictions, and 16 states have laws preempting localities from passing ordinances related to licensure of tobacco products.²¹

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Record of Action

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