

E-CIGARETTE POLICY OPTIONS FOR STATES

In response to recent data indicating a substantial increase in e-cigarette use among teenagers, and the onset of vaping related pulmonary injuries, state health departments are taking more aggressive policy interventions to reduce e-cigarette use by youth. To support more comprehensive and coordinated actions the state health officials in Regions 1 and 2 requested that ASTHO provide a list of evidence-based and informed policy options. Below is a repository of policies and recommendations for all state health officials. It is based on a collection of best practices, federal recommendations, and consultation with experts, advocates, and other stakeholders. We hope it is useful to support the efforts of state health departments across the nation as they confront the issue of youth e-cigarette use.

Background

E-cigarette use among [youth](#) is [epidemic](#). From 2011 to 2015, youth e-cigarette use [climbed dramatically](#) before dropping off significantly in 2016 and 2017. Then, youth use [dramatically increased](#) again in 2018, with 20.8 percent of high school students reporting e-cigarette use in the last 30 days. Results from the 2019 National Youth Tobacco Survey indicate that the prevalence of e-cigarette use among [high schoolers](#) in 2019 is now 27.5 percent.

E-cigarette use is [unsafe](#) for kids, teens, and young adults with the nicotine in e-cigarettes highly addictive able to harm brain development, which continues until an individual's early- or mid-20s. Along with nicotine, e-cigarette aerosol that users breathe and exhale can contain ultrafine particles, flavorings such as diacetyl that have been linked to serious lung disease, volatile organic compounds, cancer-causing chemicals, and heavy metals. E-cigarette aerosol can therefore be harmful to both the users and the bystanders exposed to secondhand aerosol.

FDA has [regulatory authority](#) over e-cigarettes, and on Sept. 11, 2019 [HHS indicated](#) that federal guidance on flavored e-cigarette products were forthcoming, which would clear the market of unauthorized flavored e-cigarette products until further FDA action. On Jan. 2, FDA announced an [enforcement guidance](#) outlining that most flavors of cartridge-based e-cigarette products (e.g., JUUL) would no longer be allowed on the market, with tobacco and menthol flavors exempted. All other e-cigarette products, including e-liquids and disposable e-cigarettes, can remain on the market with any flavoring. The Trump administration also signed legislation [implementing Tobacco 21 nationwide](#), inclusive of all tobacco products and without a military exemption or other exemptions. While federal regulations continue to change, states have opportunities to pass their own policies that make e-cigarettes less available and appealing to young people.

Below is a review of policy interventions to address e-cigarette use. The review includes an overview and summation of the evidence base for the policy, key considerations and components for the policy, industry-supported counterarguments that might be seen when passing a policy, and additional resources, when available. Journal studies and public health partner recommendations are cited whenever possible.

The policy interventions include:

- **Flavor restrictions, including mint and menthol**
- **Restricting the sale of products above a set nicotine concentration level**
- **Prohibiting bulk purchasing of e-cigarette products**
- **E-cigarette product price increases**
- **Comprehensive clean indoor air acts inclusive of e-cigarettes**
- **Advertising and point of sale restrictions**
- **Internet sales restrictions**
- **Enforcement considerations**

Flavor Restrictions, Including Mint and Menthol

<p>Overview and evidence base</p>	<ul style="list-style-type: none"> Youth prefer flavored e-cigarette products and those who vape flavored e-cigarettes are more likely to continue vaping and vape more. According to FDA, 96.1 percent of youth who initiated e-cigarette use between 2016 and 2017 did so with a flavored e-cigarette product. The 2019 National Youth Tobacco Survey found that 72.2 percent of current high school e-cigarette users reported using a flavored e-cigarette product in the last 30 days, up from 67.8 percent in 2017. Flavored e-cigarettes, with fruit, menthol or mint, and candy, desserts, or other sweets being the most commonly reported flavors. Young smokers are more likely to use menthol flavored cigarettes, and close to half of high school aged youth choose mint e-cigarettes. Studies show that a flavored tobacco sales restriction can markedly decrease the availability and sales of specified flavored tobacco products in a community, which is associated with a lower likelihood of ever using a tobacco product among teens. In 2019, bills were introduced in several states this past legislative session to prohibit or limit the sale of flavored tobacco and/or e-cigarette products, including in California (AB 739 and HB 38), the District of Columbia (B23-0453), Florida (HB 151), Illinois (HB3883 and HB3387), Massachusetts (H 1902, S 1279, H 4089, S 2357, and H 3778), New Jersey (A 5134), Ohio (HB 346), and Washington state (HB 1932). Several local jurisdictions have prohibited or limited the sale of flavored tobacco products, including e-cigarettes.
<p>Key considerations and components</p>	<ul style="list-style-type: none"> In Feb. 2020, FDA will remove all flavored e-cigarette cartridge products (e.g., JUUL) except for tobacco and menthol flavors. States can go beyond federal regulation by passing policy that addresses menthol cartridge products, all flavored e-liquids and disposable products, and flavored combustible products (e.g., menthol cigarettes and flavored cigars). How are e-cigarettes defined by state law? Are they included in a definition of “tobacco products”? Apply restrictions to e-cigarettes and all tobacco products. Prohibit mint and menthol along with other flavors since flavor restrictions that have not been comprehensive likely have reduced the policies’ efficacy.
<p>Industry supported claims</p>	<ul style="list-style-type: none"> Flavored products are needed to help adults with their cessation of combustible tobacco products. Adults and youth who prefer and use flavored e-cigarettes will return to or begin to use combustible tobacco products, which are more harmful than e-cigarettes. Small businesses will close, and people will lose their jobs. States can better enforce their laws prohibiting the sale of e-cigarettes to youth.
<p>Additional resources</p>	<ul style="list-style-type: none"> U.S. Sales Restrictions on Flavored Tobacco Products Regulating Flavored Tobacco Products Regulating Menthol Tobacco Products

Restricting the Sale of Products Above a Set Nicotine Concentration Level

<p>Overview and evidence base</p>	<ul style="list-style-type: none"> • Youth and young adult users are especially impacted by nicotine addiction. • There's concern that JUUL and other products based on nicotine salts are formulated in a way that allow nicotine-containing aerosol to be inhaled more easily and with less irritation than other e-liquids traditionally formulated with free-base nicotine. • This is not a policy area with examples in state and local law, but states should be able to pass their own policies in this area. • Evidence about e-cigarettes' potential in helping adult smokers quit is limited. • No e-cigarette has been approved by FDA for cessation purposes. At this time, there is insufficient evidence to recommend specific cessation treatments for youth addicted to nicotine.
<p>Key considerations and components</p>	<ul style="list-style-type: none"> • The policy approach should be a sales restriction (e.g., products with a nicotine concentration above X milligrams per milliliter cannot be sold) instead of a tobacco product standard (e.g., products manufactured and consumed cannot be above X milligrams per milliliter). • A product standards approach could raise preemption concerns stemming from the 2009 Family Smoking Prevention and Tobacco Control Act. • The proposed federal END ENDS Act would cap nicotine concentration in e-liquids to 20 milligrams per milliliter, a figure that's one-third the nicotine concentration of JUUL pods and other e-cigarette products. This is identical to the maximum nicotine concentration permitted in the UK. • May also consider requiring disclosure of nicotine level to allow consumers to be better informed of product contents. • May also consider restricting the sale of nicotine products with higher levels to specialty stores or locations.
<p>Industry supported claims</p>	<ul style="list-style-type: none"> • Restricting nicotine concentration would reduce adult choice and make e-cigarettes less appealing to adults addicted to combustible products who want to quit or transition.

Prohibiting Bulk Purchasing of E-cigarette Products

Overview and evidence base	<ul style="list-style-type: none">• Prohibiting the bulk sale of e-cigarette products would help prevent the resale of e-cigarette products to those under the legal purchase age.• JUUL Labs limits individual purchases to one JUUL vaporizer and four nicotine pods, and is supportive of bulk purchasing restrictions.
Key considerations and components	<ul style="list-style-type: none">• Apply these policies to sales by both retailers and wholesalers.• While there are no examples in state or local law, many states address the resale issue by prohibiting the informal sale or furnishing of any tobacco product to consumers not of the legal purchase age. For example, a recent Maine law (LD 1190) established criminal penalties for furnishing or allowing consumption of tobacco products by minors.• Bulk purchasing restrictions are analogous to federal minimum pack size requirements and local pack size requirements for cigars.
Industry supported claims	<ul style="list-style-type: none">• This is a strong policy on its own and does not need to be part of a comprehensive policy to address youth product use, such as flavored tobacco product restrictions.

E-cigarette Product Price Increases

<p>Overview and evidence base</p>	<ul style="list-style-type: none"> • A 10 percent increase in price reduces sales of disposable e-cigarettes by approximately 12 percent (and by about 19% for reusable e-cigarettes), suggesting that policies altering e-cigarette retail prices—such as limiting rebates, discounts and coupons and imposing a tax—could potentially lead to significant reductions in e-cigarette use. • Higher tobacco prices may encourage cessation among existing tobacco users, prevent initiation among potential users, and reduce the quantity of tobacco consumed among continuing users, particularly among vulnerable populations such as youth and low-income smokers who are more sensitive to costs and pricing. • Price increases may help offset expenses and costs related to tobacco control programs or enforcement and build revenue for the state.
<p>Key considerations and components</p>	<ul style="list-style-type: none"> • Pricing for e-cigarettes fall into a few categories: <ol style="list-style-type: none"> 1. Increases based on the current sales price, or <i>ad valorem</i> (preferred policy). 2. Pricing e-cigarettes and vapor products at the same rates as regular cigarettes. 3. Imposing a per milliliter price increase on liquid nicotine or consumable material (least impactful). 4. Setting a minimum price. 5. Including a litter mitigation fee in the pricing. • Consider the pricing of all e-liquids and components of e-cigarette devices necessary for their operation. • Consider implementing the price increase at either the wholesale or retail stage of sale (whichever is most convenient based on the licensing and enforcement structure of the jurisdiction). • Ad valorem policies based on the cost of the product at retail or wholesale is preferred because it is simple to implement and it automatically adjusts with inflation. • States should prohibit the distribution and sampling of e-cigarettes and related products for free or at a nominal cost. • Per millimeter pricing may be difficult to enforce and is often a policy option preferred by the industry. • States should prohibit the use of coupons, rebates, and other discounting practices in e-cigarette product sales. • The definition of e-cigarette should exempt any nicotine-containing product that is FDA-approved as a smoking cessation device so that market pricing encourages tobacco users to quit.
<p>Industry supported claims</p>	<ul style="list-style-type: none"> • E-cigarettes do not contain tobacco leaf and should not be subjected to the same level of taxation as cigarettes, cigars, or smokeless tobacco. However, many e-cigarettes contain nicotine, which is derived from tobacco products, and taxing e-cigarettes would maintain an equitable tax burden. • Taxes are often used to deter use of harmful products, but e-cigarettes are cessation and harm reduction products (assisting adults who want to quit smoking), and therefore should not be taxed.

	<ul style="list-style-type: none"> • There will be a negative impact on retailers and will ultimately result in loss of jobs.
Additional resources	<ul style="list-style-type: none"> • Policy Considerations for E-Cigarette Taxation • Policy Scan of States with Laws Taxing E-cigarettes

Comprehensive Clean Indoor Air Acts Inclusive of E-cigarettes

Overview and evidence base	<ul style="list-style-type: none"> • States can expect similar impacts from a comprehensive clean indoor air policy that includes e-cigarette products. • Nineteen states, two territories, and several hundred localities currently prohibit e-cigarette use from some workplaces. Some states prohibit their use in numerous other settings, such as prisons, train stations, and fairgrounds. • Comprehensive smoke-free indoor air laws (e.g., those inclusive of all indoor workplaces such as bars, restaurants, and casinos) encourage smoking cessation and deter youth initiation of combustible tobacco while protecting employees and patrons from secondhand smoke exposure. • These laws, covering nearly two-thirds of all Americans, do not harm the business of bars and restaurants.
Key considerations and components	<ul style="list-style-type: none"> • If a state has a clean indoor air law only for combustible tobacco products, it should amend the existing policy to include e-cigarettes. • Smoking should be prohibited within 25 feet of all doorways to a place of employment. • Awareness and enforcement of clean indoor air laws are important for the policy to be effective. Before the policy goes into effect, the health agency should reach out to businesses to make them aware of new laws and provide smoke-free signage to display.
Industry supported claims	<ul style="list-style-type: none"> • Business will be adversely impacted. • Adult-only establishments should give patrons the freedom to choose whether or not to smoke. • Modern ventilation systems can make indoor areas safe and comfortable for nonsmokers while still permitting tobacco product use. • The industry may also work to insert preemption language into a comprehensive clean indoor air bill to weaken tobacco control protections at the local level.

Advertising and Point of Sale Restrictions

<p>Overview and evidence base</p>	<ul style="list-style-type: none"> • In 2017, the tobacco industry spent over \$7.3 billion on advertising and promotional expenditures. • Tobacco industry marketing, advertising and promotions encourage youth smoking uptake; increase total cigarette sales; distort youth perceptions about the availability, use, and popularity of cigarettes; foster positive brand imagery; cue cravings and undermine quit attempts; and fuel tobacco-related disparities. • Tobacco product advertising appears in most convenience stores, entices kids to use tobacco products, and is sometimes placed less than three feet from the ground or next to candy. • The 2009 Tobacco Control Act and FDA’s publication of its Deeming Rule have instituted a patchwork of federal point of sale protections that vary by tobacco product. • According to CDC, approximately 70 percent of youth are exposed to e-cigarette advertisements at the point of sale. • Exposure to e-cigarette marketing is predictive of subsequent e-cigarette experimentation among youth and young adult “never” tobacco users. • CDC recognizes that youth-appealing e-cigarette advertising exposure is associated with increased risk of e-cigarette use in young people, and recommends that states and communities limit where and how tobacco products are sold and advertised. • Point of sale environments around schools may contribute to e-cigarette use among youth. • Recall of e-cigarette point of sale and online advertisements is significantly associated with youth e-cigarette susceptibility and use. • Comprehensive restrictions on tobacco advertising, promotion, and sponsorship are effective at reducing tobacco use, especially among young people
<p>Key considerations and components</p>	<ul style="list-style-type: none"> • Regarding laws on any tobacco product packaging, consult with a legal expert on what states are permitted to regulate and what is federally preempted. • States can require that retailers (1) display point of sale health warnings that communicate the health risks of e-cigarettes and other tobacco products and (2) offer resources on tobacco cessation. • States can restrict all in-store advertising without regard to content (i.e., “content neutral” advertising restrictions). • Time advertising restrictions (e.g., point of sale advertisements that must be removed or covered up during after-school hours), place-based advertising restrictions (e.g., “no retailers within X feet of schools can advertise tobacco products,” or “tobacco products cannot be advertised within X feet of candy or cash registers”), and manner advertising restrictions (e.g., “no outdoor signage or sandwich board advertisements can be displayed”) can all be considered. • These laws can be implemented through statute, ordinance, within tobacco licensing laws, or through tobacco zoning laws.

Industry supported claims	<ul style="list-style-type: none"> • Opponents may argue that they have the Constitutional right to communicate with adult consumers through advertising, citing the First Amendment or the Commerce Clause. Consulting with legal experts is highly recommended.
Additional resources	<ul style="list-style-type: none"> • Public Health Law Center’s Restricting Tobacco Advertising • Counter Tobacco’s Restricting Tobacco Advertising

Internet Sales Restrictions

Overview and evidence base	<ul style="list-style-type: none"> • Youth are easily able to purchase e-cigarettes online because of an absence of age-verification measures used by internet e-cigarette vendors. • The federal Preventing Online Sales of E-Cigarettes to Children Act, recently passed by the House and now in the Senate, would add e-cigarettes to the Prevent all Cigarette Trafficking (PACT) Act of 2009, an existing law that prohibits online underage sales of cigarettes and smokeless tobacco and imposes requirements on internet retailers (e.g., to collect state taxes, verify age at time of purchase, use a delivery method that checks ID, and obtains a signature at delivery). • The PACT Act preserves state authority to prohibit the shipment of tobacco to individual customers and personal residences within the state. Several states, including Connecticut, New York, and Vermont, currently prohibit shipment. • Vermont recently added e-cigarettes to its restrictions on internet sales. • The PACT Act preempts state, local, and tribal governments from enacting laws to require “common carriers” (i.e., businesses that transport merchandise) to check IDs or obtain signatures upon delivery. • Regulating internet sales of e-cigarettes to ensure they are delivered only to consumers of a legal purchase age would help keep e-cigarettes away from young people.
Key considerations and components	<ul style="list-style-type: none"> • Enforcement of internet sales may be challenging depending on where enforcement action takes place (i.e., at the point of purchase or upon delivery). • While the proposed changes to the PACT Act would add e-cigarettes to the underage sales prohibition and other requirements, it would also preempt the states from regulating common carriers, which could complicate enforcement efforts.
Industry supported claims	<ul style="list-style-type: none"> • This policy makes it harder for some adults to purchase nicotine products that are less harmful than cigarettes and other combustible tobacco.
Additional resources	<ul style="list-style-type: none"> • E-Cigarettes and Other Tobacco Products Online: Preventing Sales to Kids • Online Sales of E-Cigarettes & Other Tobacco Products • Online E-Cigarette Sales & Shipments to Consumers: State Laws Prohibiting Them

Enforcement Considerations

<p>Key considerations and components</p>	<ul style="list-style-type: none"> ● Consider the range of products intended to be regulated. Exempting products in certain situations (e.g., from a clean indoor air law), could create confusion and lead to enforcement difficulties. <ul style="list-style-type: none"> ○ Maintaining a list of all regulated products for each policy option can help. For example, California requires manufacturers to register each of their non-flavored tobacco products with the Office of the State Attorney General. Thus, any product not on the list would be considered flavored under any applicable laws. ● Establish clear procedures for monitoring compliance and assessing reasonable penalties or fines for first and subsequent violations. <ul style="list-style-type: none"> ○ Include license suspension and revocation for subsequent violations and consider the assessment of re-inspection fees for repeat violators. ○ Ensure penalties are appropriate and legal within the jurisdiction and that they are enough to cover all administrative expenses. ○ Include reasonable appeal processes. ○ Make sure procedures are consistent throughout the jurisdiction. ● Clearly define restrictions and specify prohibited behaviors or when a person can be found in violation of the policy. ● Clearly identify to whom the policy applies. ● Before policies go into effect, educate the community and businesses about the requirements and penalties. ● Clearly identify who or what department is responsible for enforcing the policy. For example, enforcement of internet sale restrictions may be within the authority of the state attorney general’s office rather than the department of health. ● Effective enforcement requires coordination among different enforcement agencies (e.g., law enforcement and administrative agencies). ● Consider including synthetic nicotine in any relevant definitional terms.
<p>Additional resources</p>	<ul style="list-style-type: none"> ● Regulating Flavored Tobacco Products ● Location, Location, Location: Tobacco & E-Cig Point of Sale ● Regulating Electronic Cigarettes & Similar Devices