

TOBACCO HARM REDUCTION PRODUCTS SHOULD BE PROMOTED NOT PROHIBITED



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About CAGW

Citizens Against Government Waste (CAGW) is a private, nonprofit, nonpartisan organization dedicated to educating the American public about waste, mismanagement, and inefficiency in government.

CAGW was founded in 1984 by J. Peter Grace and nationally syndicated columnist Jack Anderson to build public support for implementation of the Grace Commission recommendations and other waste-cutting proposals. Since its inception, CAGW has been at the forefront of the fight for efficiency, economy, and accountability in government.

CAGW has more than 1 million members and supporters nationwide. Since 1984, CAGW and its members have helped save taxpayers more than \$2.4 trillion. CAGW publishes special reports, including the *Congressional Pig Book* and *Prime Cuts*, as well as its official newsletter *Government Waste Watch* and blog *The Waste Watcher*, to expose government waste and educate the American people on what they can do to stop the abuse of their hard-earned money. Internet, print, radio, and television news outlets regularly feature CAGW's publications and experts.

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Introduction

Tobacco harm reduction (THR) products have helped millions of tobacco users stop smoking, saving lives. But despite these benefits, concerns over youth tobacco use has led the federal government and state legislatures to restrict THR products.

This issue brief reviews the benefits of less dangerous THR products like smokeless tobacco products, e-cigarettes, and vaping when used as effective tools to help adult smokers quit traditional cigarettes. Governmental bodies have instituted regressive taxes, excessive regulations, and outright bans on THR products resulting in poorer health outcomes and encouraging more dangerous avenues for adult smokers. Instead, policymakers should acknowledge the benefits of THR products in mitigating future deaths from traditional cigarettes.

If public health is the key driver behind regulating tobacco and THR products, then THR products should be at the forefront of the discussion regarding adult smoking cessation.

THR Products Are a Less Dangerous Alternative to Smoking

Research has found that burning tobacco and the hazardous chemicals found in cigarettes are the leading cause of harm to public health, not nicotine. According to the American Lung Association, a conventional cigarette contains more than 6,000 ingredients and, when burned, releases more than 7,000 chemicals, including arsenic, formaldehyde, lead, and tar.¹ Traditional cigarette use is associated with cancer, heart disease, lung disease, diabetes, and other chronic illnesses.

According to the Centers for Disease Control and Prevention (CDC), cigarette smoking is responsible for more than 480,000 deaths annually in the United

States, including more than 41,000 deaths resulting from secondhand smoke exposure.² This is about one in five deaths annually, or 1,300 deaths every day.

These deaths are avoidable. THR products like e-cigarettes and vaping devices have proven to help adult smokers quit smoking traditional cigarettes. THR products marketed in the U.S. avoid the burning of tobacco, while offering the delivery of nicotine. THR products can save lives by transitioning smokers away from burn products and are a less dangerous alternative to traditional cigarettes. A re-examination of the impact of nicotine on “tobacco-related harms” found that “nicotine itself, while not completely benign, carries substantially lower risks than smoking.”³

Smoking is on the Decline in the U.S.

Between 2005 and 2021, traditional smoking dropped by 45 percent, from 20.9 percent (nearly 21 of every 100 adults) to 11.5 percent (nearly 12 of every 100 adults).⁴ From 2007 to 2015, more than three million U.S. adults used THR products to quit smoking cigarettes.⁵ A March 9, 2023 CDC report found that in 2021, among American adults currently using e-cigarettes, 40.3 percent had formerly smoked cigarettes.⁶ Yet THR products are heavily criticized even though they have proven to be helpful for adult smokers battling cigarette addiction.

Flavor Bans and Excise Taxes Do More Harm Than Good

Hysteria and fearmongering around the supposed increase of youth tobacco use have created the perfect storm for widespread government overreach and bans on THR products. The restrictions and prohibitions on THR products like e-cigarettes ignore the fact that they are less dangerous alternatives for adult smokers who want to quit smoking traditional cigarettes. According to a February 2023 Metrics & Insights tobacco harm reduction survey, 74 percent strongly or somewhat support the concept of tobacco harm reduction products and 66 percent think the Food and Drug Administration (FDA) should

1 American Lung Association, “Tobacco Facts,” <https://www.lung.org/quit-smoking/smoking-facts>.

2 Centers for Disease Control and Prevention (CDC), “Smoking & Tobacco Use, Fast Facts,” June 2, 2021, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm#beginning.

3 Raymond Niaura, PhD, “Re-thinking nicotine and its effects,” pp. 2, 7, Schroeder Institute for Tobacco Research and Policy Studies, Truth Initiative, https://truthinitiative.org/sites/default/files/media/files/2019/08/ReThinking-Nicotine_0.pdf.

4 CDC, “Smoking & Tobacco Use, Fast Facts,” June 2, 2021, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm#beginning.

5 Lindsey Stroud, “Tobacco Harm Reduction 101: A Guidebook For Policymakers,” The Heartland Institute, https://73012231-4f43-420e-bc46-fdf2eebd18cf.filesusr.com/ugd/ef1eaa_f5b8e4eafb414d0092190f33124994d4.pdf.

6 CDC, “QuickStats: Percentage Distribution of Cigarette Smoking Status among Current Adult e-Cigarette Users, by Age Group - National Health Interview Survey, United States, 2021,” March 9, 2023, <https://www.cdc.gov/mmwr/volumes/72/wr/mm7210a7.htm>.

focus on harm reduction instead of prohibition.⁷

Nonetheless, the FDA is currently considering two proposed rules, one of which would ban flavored cigars and the other of which would ban menthol cigarettes.⁸ A decision is expected to be made in the fall of 2023. On August 1, 2022, Citizens Against Government Waste (CAGW) submitted comments to the FDA in response to its Solicitation for Public Comments on the Tobacco Product Standard for Menthol in Cigarettes (FDA-2021-N-1349).⁹ CAGW argued that the proposed rule to ban menthol flavoring in cigarettes would negatively impact state and federal budgets that rely on tobacco tax revenues, hurt small business, fail to reduce youth cigarette use even though youth cigarette use is currently at historic lows, and create a black market of unregulated menthol cigarettes that will put consumer in danger.

Should the FDA implement a ban on menthol-flavored cigarettes, the largest beneficiary would likely be China, which is the world's largest supplier of illicit menthol-flavored cigarettes. According to Statista, in 2019, China produced 2.61 million metric tons of tobacco. Its closest competitors are India, which produced 804.4 thousand metric tons, Brazil with 769.8 thousand metric tons, Zimbabwe with 257.8 thousand metric tons, and the United States, with 212.3 thousand metric tons.¹⁰

In CAGW's 2014 book, *Intellectual Property: Making It Personal*, the organization raised the alarm about the potential importation of counterfeit products should further restrictions or bans be placed on various products, including tobacco, after Australia imposed a restrictive labeling law that enabled counterfeiters to easily produce packaging identical to the real product.¹¹ Unfortunately, the increased risk of counterfeit goods not only harmed the brands that were being illegally reproduced, but also significantly increased consumer harm. The authors noted

that, "bootlegged cigarettes can contain caustic or toxic chemicals, including high levels of arsenic, due to fewer controls over manufacturing."¹²

On May 12, 2023, the FDA issued marketing denial orders (MDO) to 10 companies which manufacture approximately 6,500 flavored e-cigarette products. Tobacco products covered under an MDO cannot be legally introduced into interstate commerce in the U.S. without risking FDA enforcement. In addition to ensuring that the manufacturer complies with the MDO, as with unauthorized products generally, the FDA intends to ensure compliance by distributors and retailers.¹³

Even with the FDA's crackdown on THR products, the number of unique e-cigarette devices sold in the U.S. has tripled to more than 9,000 since 2020. This increase is, unfortunately, driven mainly by unauthorized disposable vaping products from China.¹⁴ Concern with such products led the FDA to issue warning letters to 187 retailers across the country on June 22, 2023, for selling Elf Bar and Esco Bars products. These letters were preceded by May 25, 2023 warning letters to Shenzhen Innokin Technology Co. Ltd., the maker of Esco Bars, and Breeze Smoke, LLC, which imports and distributes Breeze products.¹⁵ According to the FDA, those firms have been manufacturing, distributing, and importing unauthorized tobacco products in the U.S.¹⁶

A February 7, 2020, CAGW blog post predicted China would be the largest driver of illegal vaping products now pouring into the U.S. marketplace. The blog post stated, "Tobacco is a legal product in the U.S., and even if Congress could ban it, there is little doubt that China, which grows the most globally, and other sources would immediately create a black market. The same result will occur if vaping flavors are banned. Current adult users, who also like sweet and fruity flavors, will either go back

7 Metric and Insights LLC, "A Nationwide Survey Among General Population Adults," February 2023, <https://www.altria.com/-/media/Project/Altria/Altria/harm-reduction/our-approach-to-harm-reduction/ALCS-THREngagementSurvey2022.pdf>.

8 Charlie Minato, "FDA Head Says Agency Plans to Announce Flavored Cigar, Menthol Cigarette Bans in Fall 2023," Halfwheel.com, March 1, 2023, <https://halfwheel.com/fda-head-says-flavored-cigar-menthol-cigarette-rules-targeted-for-fall-2023/420774/#:~:text=Flavored%20Tobacco%2C%20Regulations,-FDA%20Head%20Says%20Agency%20Plans%20to%20Announce%20Flavored%20Cigar,Cigarette%20Bans%20in%20Fall%202023>.

9 Eric Maus, "CAGW Submits Comments to FDA Opposing Menthol Flavor Ban," Citizens Against Government Waste, August 1, 2022, <https://www.cagw.org/legislative-affairs/fda-comments/cagw-submits-comments-fda-opposing-menthol-flavor-ban>.

10 M. Shahbandleh, "World Tobacco Production by Country 2021," Statista, January 5, 2023, <https://www.statista.com/statistics/261173/leading-countries-in-tobacco-production/>.

11 Thomas A. Schatz and Deborah Collier, *Intellectual Property: Making It Personal*, p. 29, Citizens Against Government Waste, 2014, https://www.cagw.org/Intellectual_Property.

12 Ibid.

13 Food and Drug Administration (FDA), "Tobacco Products Marketing Orders," July 10, 2023, <https://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/tobacco-products-marketing-orders#Marketing%20Denial>.

14 Matthew Perrone, "Thousands of Unauthorized Vapes Are Pouring into the US Despite the FDA Crackdown on Fruity Flavors," AP News, June 28, 2023, <https://apnews.com/article/fda-vapes-vaping-elf-bar-juul-80b2680a874d89b8d651c5e909e39e8f>.

15 FDA, "FDA Inspection Blitz Leads to More Than 180 Warning Letters to Retailers for the Illegal Sale of Youth-Appealing Elf Bar and Esco Bars E-Cigarettes," June 22, 2023, <https://www.fda.gov/news-events/press-announcements/fda-inspection-blitz-leads-more-180-warning-letters-retailers-illegal-sale-youth-appealing-elf-bar>.

16 FDA, "FDA Puts Firms Responsible for Esco Bars and Breeze - Two Popular Disposable E-Cigarette Brands - on Notice," Accessed July 19, 2023, <https://www.fda.gov/tobacco-products/ctp-newsroom/fda-puts-firms-responsible-esco-bars-and-breeze-two-popular-disposable-e-cigarette-brands-notice>.

to combustible cigarettes or take the chance and purchase products illegally, which will create a real crisis and endanger the health of millions of Americans.”¹⁷

The demand for vaping products is undeniable despite a federal crackdown. E-cigarette unit sales rose nearly 47 percent between January 2020 and December 2022.¹⁸

The FDA should approach the issue of THR products with evidence-based data and logical reasoning, which is, unfortunately, often lacking in Washington, D.C. CAGW’s November 2021 issue brief, “Tobacco Harm Reduction Products Should Be Widely Adopted,” examined the impact of vaping products worldwide. The report noted that Sweden has smoking rates of 5 percent compared to France at 33 percent, with Britain and Denmark at 16 percent.¹⁹ This low rate can be attributed in large part to strong tobacco harm reduction policies.

Japan has also embraced vaping products over traditional cigarettes, leading to significant declines in smoking. In 2016, Japan had 43.6 billion sticks in domestic cigarette sales, which dropped by 43 percent to 25 billion sticks by 2021. The widespread use in Japan of heated tobacco products and heated sticks to produce vapor, not smoke, increased over those five years. Tobacco harm reduction is more widely adopted internationally, while the U.S. continues to enact more restrictions.²⁰

State Action on THR

Unfortunately, a handful of states have also enacted restrictions on THR products through bans and excise taxes. These include New York, the poster child for a state taking the wrong approach by instituting heavy-handed government laws and regulations. Governor Kathy Hochul (D) supported S4007 and A3007, and would end the sale of menthol cigarettes, flavored cigars, flavored cigarillos, and smokeless tobacco. S2425 and A86 would increase taxes on certain tobacco products from 75 percent to 129 percent and increase the tax imposed on the retail sale of vapor products from 20 percent to 45 percent.

The tobacco tax increase passed but the flavor ban failed. New York already has the highest tobacco taxes in the

nation. Effective September 1, 2023, the New York State excise tax on cigarettes will increase by \$1.00 per pack of 20. Also, effective September 1, 2023, the New York State excise tax on little cigars will increase by \$1.00 per pack of 20.

The New York Association of Convenience Stores commented on the tax increase bills by stating, “Prohibition will have no impact on smoking rates but will instead hurt small retailers and drive consumers to nearby states, Native Reservations, and the thriving underground market ... It is additionally disingenuous for the state to propose banning flavored tobacco while publicly touting the sale of grapefruit, pineapple, and tropical cannabis vaping products.”²¹ The group also says the banning of these products would affect job growth. International Brotherhood of Teamsters Local 810 President Mike Smith said that the ban will cause a loss of nearly 500 jobs out of 4,000 drivers, warehouse workers and salespeople represented by his union.²²

Other states that acted on THR issues include Nebraska. LB727 passed and was signed into law on June 6, 2023. It will impose a 10 percent retail tax on electronic nicotine delivery systems containing more than three milliliters. Instead of reducing youth vaping this bill will encourage purchases in neighboring states like Iowa, similar to the outcome in other states like New York that raised taxes. The new taxes will also move consumers to the black market and thus reduce state revenues, while increasing health risks.

SF 2123, which did not pass in the Minnesota legislature in 2023, would have limited options for adults by imposing a flavor ban on the sale of all nicotine and tobacco products, regardless of FDA authorization. This type of legislation is typical of many states that seek to change behavior with draconian laws and fail to acknowledge the benefits of THR. It is likely this same bill will come up in future legislative sessions.

Cigarette taxes have often resulted in less revenue than originally projected. The funds raised through tobacco taxes are also frequently diverted for unrelated purposes. Additionally, excise taxes are regressive and

17 Elizabeth Wright, “Moonshine Vaping Coming to Your Neighborhood,” Citizens Against Government Waste, February 7, 2020, <https://www.cagw.org/thewastewatcher/moonshine-vaping-coming-soon-your-neighborhood>.

18 Stefan Skyes, “Flavored E-Cigarette Sales Are Booming Despite Federal Crackdown,” CNBC, June 22, 2023, <https://www.cnbc.com/2023/06/22/flavored-e-cigarette-sales-usage-up-among-youths.html>.

19 Joe Nocera, “Sweden figured out how to stop people from smoking,” *Chicago Tribune*, June 12, 2017, <http://www.chicagotribune.com/opinion/commentary/ct-perspec-smoking-0616-md-20170612-story.html>.

20 Alex Norcia, “Why Japan’s Huge Drop in Smoking is a Story Prohibitionists Ignore,” *Filter*, May 13, 2021, <http://filtermag.org/why-japans-huge-drop-in-smoking-is-a-story-prohibitionists-ignore>.

21 Hannah Buehler, “Governor Looks to Ban Flavored Tobacco Products in NYS,” WKBW 7 News Buffalo, February 10, 2023, <https://www.wkbw.com/news/local-news/governor-looks-to-ban-flavored-tobacco-products-in-nys>.

22 Zach Williams, “Labor Warns of Lost Jobs,” *New York Post*, March 1, 2023, https://nypost.com/2023/03/01/organized-labor-warns-of-lost-jobs-if-flavored-tobacco-ban-gets-approved-in-nys-budget/?utm_campaign=iphone_nyp&utm_source=mail_app.

disproportionately harm lower-income earners. When taxes are significantly raised on consumers, they seek tobacco products from bordering states or illicit markets resulting in budget shortfalls. Programs that were meant to be funded through the excise tax end up requiring other revenue sources that fall on taxpayers.

California, which relies on tobacco tax dollars to fund early childhood services, projected a shortfall of 30 percent in tobacco tax revenue from fiscal year (FY) 2021 to FY 2026. For FY 2023, California projected it would receive approximately \$348 million from cigarette taxes to fund First 5, the state's early childhood programs, but updated estimates now show a shortfall of \$38 million less than originally projected.²³ The state must make up the shortfall from other streams of revenue, cut funding for the program, or cut another program to fund early childhood.

The impact of high excise taxes can be seen in the Tax Foundation's December 2022 Cigarette Taxes and Cigarette Smuggling by State report. The group found that, "New York has the highest inbound smuggling activity, with an estimated 53.5 percent of cigarettes consumed in the state deriving from smuggled sources in 2020. New York is followed by New Mexico (45.5 percent), California (44.8 percent), Washington (41.5 percent), and Minnesota (34.8 percent). New Hampshire has the highest level of net outbound smuggling at 52.4 percent of consumption, likely due to its relatively low tax rates and proximity to high-tax states in the northeastern United States. Following New Hampshire is Indiana (35.6 percent), Virginia (27.6 percent), Idaho (25.8 percent), Wyoming (24.4 percent), and North Dakota (18.6 percent)."²⁴

Examples of cigarette smuggling include three men who were arrested in Texas for transporting internationally produced illicit cigarettes. They admitted they intended to smuggle more than 400 million cigarettes.²⁵

Youth Smoking is Steadily Declining

The phrase "Youth Vaping Epidemic" gets headlines, but it is not an accurate assessment of the state of youth smoking. The CDC reported a 28 percent reduction, or 1.73 million, in the number of young smokers, from 6.2 million in 2019 to 4.47 million in 2020. Teen use of electronic cigarettes declined for a second consecutive year in 2021, according to the government's annual National Youth Tobacco Survey. In 2021, 11.3 percent of high school students reported that they currently vape, down by 42 percent from 19.6 percent in 2020, compared to the 27.5 percent decline between 2019 and 2020, according to a CDC report of the survey.²⁶

Yet, states are still attempting to limit access to THR products for adults who are trying to quit. In the name of curbing youth vaping, state legislatures have wrongfully instituted flavor bans and taxes instead of enforcing restrictions on selling THR products by holding retailers accountable for selling to underage consumers.

Conclusion

Tobacco harm reduction is a public health strategy the U.S. must adopt to move forward in lowering the health risks associated with cigarette use and addiction. Similar to seatbelts, airbags, and helmets, which are all examples of policy harm reduction, vaping and e-cigarettes do not eliminate all risk, but are a less dangerous option than traditional cigarettes.²⁷ The U.S. has been on the wrong side of the tobacco harm reduction debate for far too long and has let fear control a narrative which consequently has resulted in millions of lives lost.²⁸

The imposition of bans and heavy-handed government regulations not only fail to decrease market demand, but also open consumers to the dangers of an unregulated illicit black market. Instead of legislating morality, it would in the best interests of consumers and taxpayers and provide the best outcome for public health for the U.S. to adopt policies to combat tobacco addiction with widespread approval and availability of tobacco harm reduction products.

23 Ana B. Ibarra, "Californians Are Smoking Less: Why That's a Problem for These Early Childhood Services," CalMatters, July 18 2023, <http://calmatters.org/health/2023/07/first-5-california-tobacco-tax-cuts/>.

24 Adam Hoffer, "Cigarette Taxes and Cigarette Smuggling by State, 2020 – Tax Foundation," Tax Foundation, June 12, 2023, https://files.taxfoundation.org/20221207131911/Cigarette-Taxes-and-Cigarette-Smuggling-by-State.pdf?_gl=1*ac1xm8*_ga*MTc5NjAxNzMSlE2ODYxNTIzMjU.*_ga_FP7KWDV08V*M-TY4NjE1MjMyNC4xLjAuMTY4NjE1MjMyNC42MC4wLjA.

25 St. John Barned-Smith and Gabrielle Banks, "Inside the lucrative smuggling operation that sees millions of Chinese cigarettes pass through Texas," *Houston Chronicle*, July 1, 2021, <https://www.houstonchronicle.com/news/houston-texas/crime/article/china-cigarettes-tobacco-trafficking-tx-16281704.php>.

26 CDC, "Smoking & Tobacco Use, Youth and Tobacco Use," [https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm#:~:text=These%20declines%20resulted%20in%20an,to%202019%20\(6.20%20million\)](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm#:~:text=These%20declines%20resulted%20in%20an,to%202019%20(6.20%20million).).

27 CASAA, "Tobacco Harm Reduction Education & Information," March 11, 2022, <https://casaa.org/education/>.

28 Ibid., CDC, "Smoking and Tobacco Use, Fast Facts."