

ACCELERATING ENDGAME POLICIES

Debunking the Industry's Illicit Trade Arguments



As California communities work to end the commercial tobacco epidemic,¹ the Partnership supports accelerating “endgame” policies that completely prohibit or phase out the sale of cigarettes and other commercial tobacco products.²

Endgame policies are among the most effective tools for minimizing commercial tobacco-related death and disease. One of the principal critiques of endgame proposals, however, is that they will push the tobacco product market toward underground and illegal sales, often referred to as illicit trade. This resource considers these arguments, concluding that while illicit trade may result from endgame policies, the benefits of reducing commercial tobacco use and its related public health harms far outweigh any potential risk from illicit trade. Furthermore, based on real-world examples, the scope of illicit trade is likely to be much more limited than the tobacco industry would lead communities to believe.

Learning from Known Examples

Several large jurisdictions have adopted flavored tobacco sales prohibitions without the feared increase in illicit sales. When Congress prohibited the sale of flavored cigarettes in 2009, for example, the tobacco industry argued that the prohibition would create an illicit market for flavored cigarettes. Research since then has demonstrated that the federal prohibition has not resulted in significant increases in illegal flavored cigarette sales.³

Canadian provinces that prohibit the sale of menthol tobacco products provide another good example of how prohibiting the sale of commercial products does not necessarily create an illicit market. Nova Scotia instituted the first sales prohibition in Canada in 2015, and despite the tobacco industry's predictions, no large uptick in illicit sales occurred.⁴ Commentators have noted that it would be improbable that an illicit market could rival current consumption levels of menthol cigarettes.⁵ Menthol sales restrictions in Canada have also proven to be effective in promoting cessation rather than illicit demand, with Ontario's sales prohibition, for example, resulting in many quit attempts.⁶

In 2004, Bhutan became the first and only country to prohibit commercial tobacco sales. Although cigarette smuggling in Bhutan is reportedly significant, most of its illicit commercial tobacco trade can be attributed to tobacco industry behavior. Experts agree that more effective enforcement that would prevent the industry from flooding the market with illicit products would likely limit this problem.⁷ Though this ban was in place for years, the country lifted aspects of the ban during the pandemic out of concern that it was promoting cross-border smuggling and enabling transmission of COVID-19.

The most common examples of illicit trade come from tax arbitrage opportunities — buying from a low-tax jurisdiction and selling in a high-tax one. In Canada, for instance, which has high cigarette tax rates, contraband cigarette sales constitute between 20 to 30 percent of the market.⁸ Tax arbitrage tends to be most common where there is an opportunity for easy direct sales, given the barrier to entry and increased risk of enforcement from setting up a new retail distribution network.⁹ With tax arbitrage, supply is easy to come by because the cigarettes are bought legally in another jurisdiction. However, as endgame policies become more common and fewer legal products are available, tax arbitrage opportunities will also become more limited. As endgame policies spread, it will be difficult for the tobacco industry to sustain the tobacco epidemic through illicit avenues.¹⁰ For example, up to 80 percent of illicit street sales in some New York City neighborhoods are Newport menthol cigarettes; thus, a national ban on sales of menthol cigarettes could actually decrease illicit trade.¹¹ Also, surveys show that large percentages of menthol smokers would choose to quit smoking if menthol cigarettes were no longer available to purchase legally.¹²

Several large jurisdictions have adopted commercial tobacco sales prohibitions without the feared increase in illicit sales.



While illicit trade can result from sales prohibitions, the tobacco industry has a history of exaggerating the problem and presenting misleading claims. For instance, before the Family Smoking Prevention and Tobacco Control Act was enacted in 2009, the industry projected that further restrictions on flavored tobacco sales would benefit “criminal enterprises and terrorist organizations,”¹³ which has not come to pass.¹⁴ Additionally, evidence for the industry’s argument often relies on tobacco industry-funded data, which tend to lack transparency and external validation, and contain methodological flaws.¹⁵

The industry’s campaigns against illicit trade are often motivated by profits. Altria-owned NJOY, for example, recently filed a lawsuit against several manufacturers and distributors of disposable e-cigarettes like Elf Bar and Puff Bar.¹⁶ The company underscores that these products are being sold without FDA authorization and in violation of state laws like California’s SB-793, but such products also vie with NJOY for a share of the e-cigarette market. By using the law to try to shrink the illicit market, NJOY can grow its market share. The tobacco endgame similarly threatens the tobacco industry’s profits, so the industry can be expected to use litigation and other tactics to frustrate the efforts of communities that pursue endgame policies.¹⁷

South Africa Discussion

South Africa's five-month prohibition on tobacco sales during the pandemic, which was intended to prevent severe illness among smokers infected by COVID-19, led industry commentators to draw conclusions about the effect of endgame policies on the illicit market.¹⁸ Some tobacco researchers have pointed to South Africa's prohibition as counterproductive, arguing that it fueled the illicit market for cigarettes.¹⁹

These researchers have also cautioned, though, that South Africa's experience should not be used as a case study for endgame policy because the necessary preconditions for success were not in place.²⁰ In particular, South Africa's smoking rate is high (20 percent), its existing illicit sales levels were high (one-third of all sales), and the policy did not provide sufficient lead time before the ban went into effect nor did it offer cessation services.²¹ Others have echoed these conclusions, stating that the prohibition was ineffective because it was implemented suddenly and with no cessation support put in place.²²

Thus, South Africa's experience is not truly comparable to U.S. jurisdictions, which do not have similarly high levels of illicit sales and smoking rates. Also, the potential illicit sales impact from sales prohibitions can be mitigated by enacting policies that have sufficient lead time for implementation and that offer cessation support.

Endgame Policies Vary

In addition to the evidence described above for larger jurisdictions with no sales exemptions, some tobacco sales prohibitions will almost certainly not trigger illegal sales due to their scope or exemptions. If, for example, a jurisdiction is a small or mid-sized city, motivated commercial tobacco users may travel to a neighboring jurisdiction to purchase tobacco products. Such a situation would be unlikely to provide much incentive for illicit trade.

Exemptions for particular types of sales also matter for illicit trade. For instance, a combustible-only sales ban might be more likely to redirect sales to e-cigarettes rather than create an illicit market for combustible products. Also, allowing purchases at some stores (e.g., adult only) would be unlikely to generate significant incentives for illicit activity.

The Center does not recommend including exemptions in endgame policies, given the challenges exemptions create for enforcement and equity, and the reduced benefits for public health. It is worth pointing out, however, that if jurisdictions pursue more limited approaches, the argument that illicit trade will undermine such policies would be unlikely to carry weight.

Take Aways

Trade Offs

Although illicit sales are undesirable, advocates and policy makers should take care to weigh the tangible and wide-sweeping benefits of an endgame policy against the potential but likely negligible risks of illicit trade. It would be nearly impossible to replicate a large enough illicit sales network to mirror the visibility, scale, and convenience of legal sales.²³ Evidence from jurisdictions with strong sales prohibitions, even where significant illicit sales activity exists, strongly suggests that these policies reduce overall tobacco use and result in significant health benefits. For instance, Bhutan's sales restriction appears to have been highly effective, with tobacco use at a mere 2.8 percent.²⁴ Likewise, despite the implementation challenges of South Africa's sales prohibition, 16 percent of South Africa's smokers said the prohibition caused them to quit and they did not plan to start again.²⁵

War on Drugs and Prohibition

Often, concern around illicit sales comes from the U.S. experience with the war on drugs and the over-enforcement and racially inequitable implementation of drug policies. Commercial tobacco control proponents, though, have learned from these failed measures. Instead of penalizing individual users for possession, use, or purchase of tobacco ("PUP" laws), advocates understand this is counterproductive and have focused enforcement on tobacco industry behavior and sales. As a result, endgame policies that target the tobacco industry, including retailers, rather than people who smoke, cannot be appropriately compared to the experience with the war on drugs.

The tobacco use context is also distinct from alcohol use during the Prohibition era. Unlike alcohol prohibition, most tobacco users actively want to quit, and many say they likely would quit if they could no longer purchase cigarettes legally. Under Prohibition, on the other hand, most saw their own use of alcohol as unproblematic and the prevalence of alcohol use was high.²⁶

Policy Design

It is possible to reduce illicit sales with effective enforcement and good policy design. As noted, substantial tools already exist at the federal and state level to enforce against illicit sales. Individuals can report illicit products to the FDA, for example, which in turn can issue warning letters, assess civil monetary penalties, or seize products.²⁷ Also, if demand starts low or is reduced through multi-layered policies that include ample cessation support options like pharmaceutical nicotine, then illicit markets work poorly. Factors such as low smoking rates,



low levels of baseline illicit sales, and phasing in implementation with a robust educational campaign and accompanying cessation support can all help make a policy effective.²⁸ Taking illicit sales into account when shaping policy could limit the formation of an illegal market.

Conclusion

Illicit trade is often used as an argument against pursuing endgame policies in California. Those concerns, however, tend to be greatly exaggerated to industry's benefit. Several policy and implementation measures can be taken to prevent and reduce illicit trade. That being said, even communities that have experienced illicit trade in response to policy change continue to reap public health benefits from disruptive endgame policies.

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Endnotes

- 1 The Public Health Law Center recognizes that traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries. In comparison, commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information, visit <http://keepitsacred.itcml.org>. When the word “tobacco” is used throughout this digest, a commercial context is implied and intended.
- 2 Joelle Lester and Mark Meaney, *Not for Sale: State Authority to End Cigarette Sales*, 44 *Mitchell Hamline School of Law* 68-97 (2018), <https://www.publichealthlawcenter.org/resources/not-sale-state-authority-end-cigarette-sales-2018>.
- 3 Attorneys General of Connecticut, et al., *Comments on Tobacco Control Legal Consortium, et al., Citizen Petition to the Federal Food and Drug Administration Related to Prohibiting Menthol as a Characterizing Flavor in Cigarettes* (April 12, 2013) (Docket No. FDA-2013-P-0435) (2021) (hereinafter *AG Comments*).
- 4 Michal Stokolsa, *No Surge in Illicit Cigarettes After Implementation of Menthol Ban in Nova Scotia*, 28 *TOBACCO CONTROL* 702 (2019).
- 5 Kevin Schroth et al., *Why an FDA Ban on Menthol Is Likely to Survive a Tobacco Industry Lawsuit*, 134 *PUB. HEALTH REP.* 300 (2019).
- 6 Michael Chaiton et al., *Association of Ontario’s Ban on Menthol Cigarettes with Smoking Behavior 1 Month After Implementation*, 178 *JAMA INTERN MED.* 710 (2018), <https://doi.org/10.1001/jamainternmed.2017.8650>.
- 7 Patricia A. McDaniel et al., *The Tobacco Endgame: A Qualitative Review and Synthesis*, 25 *TOBACCO CONTROL* 594, 601 (2016).
- 8 Peter Reuter, *Can Tobacco Control Endgame Analysis Learn Anything from the US Experience with Illegal Drugs?*, 22 *TOBACCO CONTROL* i49 (2013).
- 9 See U.S. Food and Drug Admin., *Draft for Comment, Illicit Trade in Tobacco Products after Implementation of an FDA Product Standard* (2018).
- 10 Eric N. Lindblom, *Illicit Trade Poses No Threat to an FDA Rule to Minimize Nicotine in Smoked Tobacco Products*, 109 *AM. J. PUBLIC HEALTH* 960-61 (2019) (noting that an illicit market is “harder to establish or maintain than the existing illicit trade in tax-evading cigarettes, which smokers and smugglers can readily buy from legal sellers in low-tax jurisdictions”), <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2019.305138?journalCode=ajph>.
- 11 Schroth, *supra* note 5.
- 12 Christopher J. Cadham et al., *The Actual and Anticipated Effects of a Menthol Cigarette Ban: A Scoping Review*, 20 *BMC PUBLIC HEALTH* 1055 (2020).
- 13 Martin L. Orlowsky, Chairman, President and Chief Executive, Lorillard Tobacco Company, Letter to the Editor, *N.Y. TIMES* (Jun. 6, 2008).
- 14 Allen Gallagher et al., *Tobacco Industry Data on Illicit Tobacco Trade: A Systematic Review of Existing Assessments*, 28 *TOBACCO CONTROL* 334 (2019); Eric Crosbie et al., *To Minimize Illicit Tobacco Trade, FDA Should Reject Any Partnership with the Tobacco Industry, Reject Industry Estimates and Exaggeration of Illicit Trade, and Use the FTC Protocol on Illicit Trade as a Model to Counter the Supply Side of Illicit Trade*, Docket No. FDA-2018-N-0529 (May 30, 2018).
- 15 See Allen Gallagher et al., *supra* note 14.
- 16 *Altria’s NJOY Sues 34 E-Vapor Product Makers, Seeks Damages*, *REUTERS* (Oct. 19, 2023), <https://www.reuters.com/legal/altrias-njoy-sues-34-e-vapor-product-makers-seeks-damages-2023-10-19>.

- 17 *NJOY Brings Sweeping Litigation Against Illicit Disposable Vapor Manufacturers*, Altria (Oct. 19, 2023), <https://investor.altria.com/press-releases/news-details/2023/NJOY-Brings-Sweeping-Litigation-Against-Illicit-Disposable-Vapor-Manufacturers/default.aspx>.
- 18 See, e.g., Joseph Cotterill, *Illicit Trade Thrives as South Africa Bans Alcohol and Tobacco Sales*, FINANCIAL TIMES (Apr. 27, 2021).
- 19 Corné van Walbeek et al., *Lighting Up the Illicit Market: Smoker's Response to the Cigarette Sales Ban in South Africa*, University of Cape Town (2020), <http://www.reep.uct.ac.za/news/REEP2ndreport>.
- 20 Samantha Filby et al., *The Temporary Ban on Tobacco Sales in South Africa: Lessons for Endgame Strategies*, Tobacco Control online (Jan. 20, 2021), <https://tobaccocontrol.bmj.com/content/early/2021/01/20/tobaccocontrol-2020-056209>.
- 21 *Id.* at 5.
- 22 Chris Bostic, ASH Webinar, *Endgame for Tobacco: The World We Want, Action on Smoking and Health* (2020), <https://ash.org/bostic-endgame-for-tobacco>.
- 23 See Lindblom, *supra* note 10, at 960.
- 24 See McDaniel et al., *supra* note 7, at 601.
- 25 See Chris Bostic, *supra* note 22.
- 26 See Elizabeth Smith & Ruth E Malone, *An Argument for Phasing Out Sales of Cigarettes*, 29 TOBACCO CONTROL 6 (2020).
- 27 *Report Potential Tobacco Product Violation*, FDA, <https://www.fda.gov/tobacco-products/compliance-enforcement-training/report-potential-tobacco-product-violation>.
- 28 See Smith & Malone, *supra* note 26.