Decriminalizing Commercial Tobacco

Addressing Systemic Racism in the Enforcement of Commercial Tobacco Control

This joint statement from a consortium of public health organizations sets forth aspirational principles to help local and state health departments, decisionmakers, advocates, and other stakeholders advance equitable enforcement[i] practices related to the purchase, possession, sale, and distribution of all tobacco products.[ii] These principles can also help address tobacco addiction and reduce tobacco-related harms while maintaining and improving the efficacy of enforcement of commercial tobacco laws and policies.

[i] This document adopts the definition of equitable enforcement set forth in the ChangeLab Solutions resource Equitable Enforcement to Achieve Health Equity: An Introductory Guide for Policymakers and Practitioners:

> *"Equitable enforcement is a process of ensuring compliance with law and policy that considers and minimizes harms to underserved communities. An equitable enforcement approach means considering equity – both at the level of the public entity's overall enforcement strategy and at the level of individual enforcement actions. It also means considering equity at all stages of enforcement, from determining when to undertake an enforcement action – and against whom – to deciding which enforcement tools to use."*

[ii] We recognize the important role of ceremonial and traditional tobacco for many indigenous communities. This document is intended to address commercial tobacco, not the provision, possession, or use of tobacco products as part of an indigenous practice or other recognized religious or spiritual ceremony or practice. All references to tobacco and tobacco products in this document refer to commercial tobacco, including e-cigarettes.

This statement is for informational purposes only and does not constitute legal advice. Readers should consult with an attorney licensed to practice in their state before adopting any recommendations in this statement.

BACKGROUND

Despite an overall decline in the prevalence of tobacco use, not all populations are equally protected by the laws, policies, and resources that are intended to reduce tobacco use and tobacco-related harm. Tobacco industry documents reveal how disparities in the burden of tobacco-related disease and death outcomes among certain communities are no coincidence. On the contrary, the tobacco industry strategically markets and perniciously targets its deadly products in underserved communities.[1,2] As a result, certain racial and ethnic communities, low-income communities, and LGBTQ+ communities, among others, are exposed to more point-of-sale advertising, live in places with a greater concentration of retailers that sell tobacco products, and have a higher prevalence of tobacco use.

Indeed, tobacco use, particularly menthol cigarettes and flavored little cigars, are a main vector of death and disease in economically disadvantaged Black and Brown communities. Mentholated tobacco products are not only linked to higher rates of tobacco initiation but are also more heavily marketed in areas with greater numbers of low-income and Black residents and cheaper in geographic areas with greater proportions of Black residents.[3,4,5,6,7] As disparities in tobacco advertising, access, and use persist, so do disparities in the enforcement of commercial tobacco control laws and policies.

The COVID-19 pandemic has exposed the underlying health inequities and systemic racism that have gripped Black and Brown communities for hundreds of years. Law enforcement should not approach, harass, or arrest structurally marginalized communities, especially children of color, because they have a tobacco product in their possession. In fact, it's the exact opposite of what is needed. To save lives, especially Black and Brown lives, local and state tobacco prevention and control partners must address where and how public health laws contribute to systemic racism and discrimination. This includes not only working to eliminate the sale of mentholated tobacco products but also addressing inequities in the enforcement of commercial tobacco control laws and policies.

The outlined values and recommendations are intended to address state and local enforcement practices related to the purchase, possession, sale, and distribution of commercial tobacco products. These values and recommendations may also apply to other tobacco control laws and policies (e.g. smoke-free and tobacco-free places) and public health efforts more broadly. Importantly, efforts to decriminalize the purchase, possession, sale, and distribution of commercial tobacco products and enact broader reforms to enforcement practices must be accompanied by free, accessible, confidential, and culturally appropriate cessation and counseling services.

VALUES AND RECOMMENDATIONS

VALUE 1: Commercial tobacco control laws and policies, including regulations on the sale and distribution of commercial tobacco products, are first and foremost public health measures.

I. Vest enforcement authority for commercial tobacco control laws in public health or other non-police officials (e.g. civil code enforcement officers).[iii]

- Ultimately, states and localities that currently rely on police or other traditional law enforcement entities to enforce commercial tobacco control laws should shift enforcement to public health or other non-police entities. Proactive efforts necessary to facilitate this shift may include amending state and local laws, building capacity, and developing guidance.
- States and localities should appropriate funding to build local government capacity to shift the enforcement of commercial tobacco control laws to entities other than local police officers.
- Stakeholders should develop guidance for local jurisdictions without a viable non-police entity presently able to enforce commercial tobacco control laws.

II. Ensure revenues from commercial tobacco control laws, including tobacco taxes, are used to support public health objectives and advance health equity.

- All funding should be directed to health entities to support:
  - The adoption, implementation, and non-police enforcement of commercial tobacco control laws.
  - Laws, policies, initiatives, and interventions designed to prevent and reduce commercial tobacco use, including those focused on the social and structural determinants of health.
  - Comprehensive tobacco control programs, including the provision of evidence-based counseling and cessation services.
- If legally feasible, states and localities should amend existing measures (e.g. tobacco taxes) to redirect funding to public health entities.

III. Conduct systematic, evidence-based research on the implementation and enforcement of commercial tobacco control laws with a particular focus on how implementation and enforcement practices affect underserved populations in urban, suburban, and rural communities such as youth, persons of color, persons with low-incomes, persons who identify as LGBTQ+, and persons with disabilities.

[iii] Large-scale tobacco trafficking or tax evasion may necessitate the continued involvement of traditional law enforcement entities such as the state's attorney general. However, states and localities should ensure that the involvement of such entities is limited to the most serious offenses, with public health and/or other non-police officials enforcing the overwhelming majority of commercial tobacco control laws.

VALUE 2: State and local governments should reform or eliminate laws, policies, and enforcement practices that target individuals, especially youth, rather than businesses and industry actors.

I. **Eliminate youth purchase, use, and possession penalties ("youth PUP laws").**

- States and localities should abolish laws, policies, and enforcement practices that target persons under twenty-one (21) years old, including laws that impose criminal, civil, administrative, or any other penalties on youth for the purchase, use, or possession of tobacco products.
- States and localities should repeal existing and resist efforts to enact new youth PUP laws.
- If a youth PUP law exists at the state level, localities within the state should:
  - Repeal any local youth PUP laws.
  - Advocate for the repeal of the state youth PUP law.
  - Prohibit local officials, including local law enforcement, from enforcing the state youth PUP law.

II. **Eliminate criminal penalties for individuals, including retail clerks, that unlawfully sell, give, barter, distribute, or otherwise exchange tobacco products.** State and local laws should focus on holding businesses and industry actors accountable for violations of tobacco control laws.

III. **Ensure laws and policies that prohibit students and/or staff from possessing or using commercial tobacco products in school address violations in a manner consistent with restorative justice principles.**

- Enforcement of tobacco-free school laws and policies should not involve law enforcement personnel, including school resource officers.
- Student violations should never result in suspension, expulsion, criminal referral, or any other punitive response.
- Students who possess or use commercial tobacco products in school should have the product confiscated and be referred to free, evidence-based education, counseling, and cessation support services. Students who do not engage with education, counseling, and cessation support services should not face additional penalties or disciplinary action.

VALUE 3: Enforcement practices and penalties for violations of commercial tobacco control laws should be proportional to the alleged violation and address health, equity, and social justice considerations.

I. **Eliminate the use of physical force against people suspected or guilty of violating commercial tobacco control laws.**

II. **Prohibit enforcement officials from initiating contact with an individual based on the individual's possession of a tobacco product.**

III. **Ensure that if commercial tobacco control laws are enforced against individuals, as opposed to businesses, they should not include punitive measures such as criminal penalties, fines, or mandatory community service.**

- If state or local law regulates the possession of tobacco products, violations should result in a referral for evidence-based counseling and cessation support. Individuals who do not engage with the counseling and cessation services should not be subject to any additional penalties.
- If state or local commercial tobacco control laws do impose punitive measures such as fines or mandatory community service for violations:
  - The amount of the fine should be based on an individual's ability to pay.
  - Individuals who do not pay the fines or complete community service should not be subject to any additional penalties.
  - Fines and mandatory community service should never be imposed on underage youth who violate commercial tobacco control laws.

VALUE 4: State and local governments should adopt legal and policy frameworks that facilitate the effective, equitable enforcement of commercial tobacco control laws by holding businesses and other industry actors accountable for violations.

I. **Ensure all retailers that sell commercial tobacco products, including e-cigarettes, are required to obtain and maintain a valid tobacco retailer license.**

- Tobacco retailer licensing is an effective, evidence-based approach to hold businesses accountable for violations of commercial tobacco control laws.
- Licensing can provide a dedicated funding stream to support the implementation and enforcement of commercial tobacco control laws by public health officials. States and localities should establish tobacco retailer licensing fees sufficient to cover the full cost of implementation and enforcement, including retailer education initiatives and regular compliance checks of all retailers that sell tobacco products.

II. Hold business owners accountable for violations committed by their employees.

- States and localities should hold business owners accountable by imposing penalties for violations of commercial tobacco control laws by the businesses' agents or employees.
- All penalties for violations of laws regulating the sale and distribution of commercial tobacco products should be imposed on business owners and other industry actors.
- If state or local law penalizes retail clerks for violations, business owners must also be penalized for the violation. The penalties applicable to business owners should be substantially greater than those applicable to retail clerks.

III. Establish tiered penalties for businesses that violate commercial tobacco control laws.

- States and localities should suspend or revoke the ability of a business to sell tobacco products if the business violates commercial tobacco control laws. The suspension and/or revocation period should increase based on the number of violations a business has committed within the previous five years.
- Civil and/or administrative fines should increase based on the number of violations a business has committed within the previous five years.
- Criminal penalties should be reserved only for businesses that repeatedly violate commercial tobacco control laws.

IV. Ensure that enforcement practices aimed at commercial tobacco retail sales establishments occur in a data-driven, evidence-based, and equitable manner.

- States and localities should conduct at least one unannounced compliance check annually of each business that sells or distributes commercial tobacco products. A business found in violation of commercial tobacco control laws should be subject to an additional compliance check within six months of the violation.
- Collect and evaluate data regarding compliance checks of and enforcement actions against tobacco retail sales establishments to ensure that enforcement practices do not unfairly target underserved communities. If businesses in certain communities have a greater number or rate of violations, public health officials should seek to identify compliance barriers and offer technical assistance to help businesses comply with applicable laws.
- Conduct empirical studies evaluating the adoption and implementation of these recommendations to ensure the recommendations accomplish their intended public health and equity goals. If research identifies any unintended consequences, states and localities should adjust commercial tobacco control laws and policies as necessary to ensure their efficacy and equitableness.

ENDORSING ORGANIZATIONS*

Action on Smoking & Health

African American Tobacco Control Leadership Council

American Cancer Society Cancer Action Network

American Heart Association

American Lung Association

American Public Health Association

Americans for Nonsmokers' Rights

Asian Pacific Islander Coalition Advocating Together for Health

Asian Pacific Partners for Empowerment, Advocacy and Leadership

Association of Schools and Programs of Public Health

Blue Cross and Blue Shield of Minnesota

Campaign for Tobacco Free Kids

The Center for Black Health & Equity

The Center for Tobacco Control Research and Education

ChangeLab Solutions

ClearWay Minnesota[SM]

Community Advocates

Counter Tools

Eta Sigma Gamma, Inc.

Hawai'i Public Health Association

Healthy King County Coalition (WA)

IFF Health

The Institute for Healing Justice & Equity

Jump at the Sun Consultants, LLC

Minnesota Public Health Association

Missouri Eliminate Tobacco Use Initiative

Missouri Foundation for Health

Missouri Public Health Association

National LGBT Cancer Network

National Network of Public Health Institutes

Neighborhood House

New Mexico Allied Council on Tobacco

New York State Public Health Association

Ohio Public Health Association

Partnership for a Tobacco Free Wisconsin

Pennsylvania Public Health Association

Preventing Tobacco Addiction Foundation

Public Health Law Center

SelfMade Health Network

Tobacco Control Network

Truth Initiative

Twin Cities Medical Society

Washington State Public Health Association

Wisconsin Public Health Association

Wisconsin Association of Local Health Departments and Boards

*** Organizational endorsements received by January 29, 2021.**

If your organization is interested in endorsing this joint statement, please contact LaTroya Hester, Director of Communications, The Center for Black Health & Equity, at lhester@centerforblackhealth.org.

REFERENCES

[1] Brown-Johnson, C. G., England, L. J., Glantz, S. A., & Ling, P. M. Tobacco industry marketing to low socioeconomic status women in the USA. Tobacco Control. 2014;23(E2):e139-46.

[2] U.S. Department of Health and Human Services. The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2014. Printed with corrections, 2014. Available at https://www.cdc.gov/tobacco/data_statistics/sgr/50th-anniversary/index.htm.

[3] Food and Drug Administration. Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol Versus Nonmenthol Cigarettes. 2013. Available at: http://www.fda.gov/downloads/ScienceResearch/SpecialTopics/PeerReviewofScientificInformationandAssessments/UCM361598.pdf.

[4] Nicole M Kuiper, MPH, Doris Gammon, MS, Brett Loomis, MS, Kyle Falvey, BS, Teresa W Wang, PhD, Brian A King, PhD, MPH, Todd Rogers, PhD. Trends in Sales of Flavored and Menthol Tobacco Products in the United States During 2011–2015. Nicotine & Tobacco Research. 2018;20(6):698–706.

[5] Joseph G. L. Lee, Lisa Henriksen, Shyanika W. Rose, Sarah Moreland-Russell, Kurt M. Ribisl. A Systematic Review of Neighborhood Disparities in Point-of-Sale Tobacco Marketing. American Journal of Public Health. 2015;105(9):e8-e18.

[6] Lisa Henriksen, Nina C. Schleicher, Dianne C. Barker, Yawen Liu, Frank J. Chaloupka. Prices for Tobacco and Nontobacco Products in Pharmacies Versus Other Stores: Results from Retail Marketing Surveillance in California and in the United States. American Journal of Public Health. 2016;106(10):1858-1864.

[7] Henriksen L, Schleicher NC, Dauphinee AL, Fortmann SP. Targeted advertising, promotion, and price for menthol cigarettes in California high school neighborhoods. Nicotine & Tobacco Research. 2012;14(1):116-121.

ACKNOWLEDGMENTS

A special thank you to the core team who facilitated the drafting of this document:

Sean J. Haley, PhD, MPH, CUNY Graduate School of Public Health and Health Policy

Derek Carr, JD, ChangeLab Solutions

Maria Julian, MPA, Counter Tools

Phillip Gardiner, DrPH, African American Tobacco Control Leadership Council

Josh Prasad, MPH, IIF Health

Ginny Chadwick, MPH, MA, University of Missouri - Columbia

SUGGESTED CITATION

Tobacco Control Enforcement for Racial Equity: Decriminalizing Commercial Tobacco Addressing Systemic Racism in the Enforcement of Commercial Tobacco Control. January 2021.