

## R SHEET ON LOCAL FLAVOR BANS ARE A BAD IDEA

October 2020

### BACKGROUND

During the EVALI outbreak of 2019, nine states either banned or tried to ban sales of flavored e-cigarettes through executive action, with Massachusetts banning the sale of all vaping products. Proposed bans in New York and Montana were overturned in courts. EVALI, which stands for e-cigarette or vaping use-associated lung injury, was caused by the use of black market, mostly THC cartridges laced with Vitamin E acetate. The stated impetus for the bans was thus to protect public health from potentially deadly products, however, the bans applied to legal and regulated products which were not a factor in the outbreak.

Following the EVALI outbreak, several states formalized flavor bans through legislation. Massachusetts and California included menthol flavor in e-cigarettes, as well as menthol-combustible cigarettes. Similar effort in Chicago succeeded in banning all flavored vape products, but not menthol cigarettes. The central argument advanced by the proponents of these legislations is that banning e-cigarette and vape flavors would stymie the vaping epidemic among youth.

### CURRENT DEBATE

Even during the EVALI event, some tobacco control advocates emphasized youth initiation as the main rationale for banning flavored vaping products. For instance, [in a letter dated in November 2019 urging national ban on flavored e-cigarettes](#), AMA joined Campaign for Tobacco Free Kids, Truth Initiative and other organizations to argue specifically that flavored e-cigarettes are “placing another generation at risk of nicotine dependence.”

This argument for strict flavor bans makes the following points. First, there is high prevalence of e-cigarette use among teens. Second, most teen users of e-cigarettes prefer flavored products. Third, teens are not aware of the nicotine content of flavored vape products. Some tobacco

### SUMMARY

- Several states are implementing bans on flavor in e-cigarettes including menthol flavors that are more restrictive than current FDA policy to prevent youth vaping.
- These local legislative efforts to ban all flavored tobacco products, including menthol, essentially circumvents more thorough policy analyses conducted by the FDA and are likely to be ineffective and lead to unintended consequences while penalizing current adult cigarette smokers who would want to switch to less dangerous e-cigarettes.
- With the national policy that raised the minimum age to purchase all tobacco products to 21 already showing a positive effect on teen vaping, the best use of local resources is to strengthen compliance with new age restrictions, other teen vaping prevention programs and investment in cessation resources.

control advocates also insinuate that the vaping industry specifically targeted teens in their marketing. In their fact sheet “[Flavored Tobacco Products Attract Kids](#),” Campaign for Tobacco Free Kids conclude that “E-cigarette marketing employs many of the same strategies used for years by cigarette manufacturers that proved so effective in reaching kids, such as celebrity endorsements, slick TV and magazine advertisements, and sports and music sponsorships. Another strategy has been the widespread marketing of e-cigarettes and nicotine “e-juice” with a wild assortment of candy, fruit and other flavors.”

The opposition to flavor bans comes from the affected industries of retailers and manufacturers who stand to lose revenue. But there is also a public health argument. As noted in the editorial in [The Nation](#) and [The Atlantic](#), published at the time of the EVALI tragedy, flavor bans may have potential adverse public health consequences by preventing established adult cigarette smokers from

switching to [demonstrably safer](#) e-cigarettes. In considering the ban on [menthol flavor in tobacco products](#), as well as in its ultimate [decision to ban flavored nicotine cartridges but allowing flavors in other vaping products](#), the FDA considered the cost benefit analysis of the potential role of flavored vape products in helping adult smokers to switch to e-cigarettes versus the concerns about youth initiation. The result was the evidence-based policy decision that addressed both the potential for harm reduction among adult smokers while taking concrete steps to curb youth vaping.

## ACTION ITEMS

The impetus for these bans appears to be dissatisfaction with the slow regulatory process at the FDA by the tobacco control advocates. In referring to increases in youth vaping, Matthew Myers, the president of the Campaign for Tobacco Free Kids opined to [NBC News](#) that “I don’t think there is any question that the last six-plus years the FDA has failed to take actions necessary to prevent this from happening.”

And here lies the problem. The local legislative efforts to ban all flavored tobacco products, including menthol, essentially circumvents the more thorough policy analyses conducted by the FDA. Therefore, the local policies are less likely to be effective and lead to unintended consequences.

Foremost, these efforts create a patchwork of state and local regulations, where the effect of the policy partly depends on the geography, namely the proximity to neighboring jurisdiction with different regulations. But in the 21<sup>st</sup> century-internet-dominated commerce, geography may not even matter. Although legitimate online sellers will honor the local regulations, it is doubtful the compliance will be universal among all online outlets, especially among those selling bootleg or gray market products.

From the harm reduction perspective, the net effect on public health may also be detrimental. Although local bans may not stem the availability of flavored vapes, they do make obtaining them less convenient. Rudimentary consumer psychology tells us that an adult cigarette smoker considering switching to e-cigarettes may not feel it is worth the effort to do so if the vaping products they want are not readily available. In the end, cigarette smokers in the jurisdiction with flavor bans would be more likely to remain cigarette smokers. This is exactly why the FDA implemented only a partial ban.

In summary, total bans on flavor tobacco products dogmatically emphasize one solution to rather intricate public health problems of youth initiation, health disparities and the burden of tobacco use. Yet, the single most important driver for these policies, teen vaping rate is [going down](#). This is mainly because of the national policy of the higher purchasing age restriction, not because few states implemented restrictive bans on flavored tobacco. Local resources are best used in strengthening local compliance with new age restriction and other local teen prevention efforts as well as investment in cessation resources. Federal efforts can focus on compliance in the online marketplace. This regulatory strategy would not impede with access to vaping products among adult smokers who may not be considering complete abstinence from nicotine but are willing to switch to a less dangerous product.

## CONTACT US

For more information on this subject, contact the R Street Institute, 1212 New York Ave. NW, Washington, D.C. 20005, 202-525-5717.



Alec Ulasevich  
Senior Fellow, Harm Reduction  
[aulasevich@rstreet.org](mailto:aulasevich@rstreet.org)  
202-525-5717