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Law and Policy Partnership to End the Commercial Tobacco Epidemic

ENDGAME POLICY PLATFORM – VERSION 1

LAW AND POLICY PARTNERSHIP TO END THE COMMERCIAL TOBACCO EPIDEMIC

Purpose and Vision

The purpose of the endgame policy initiative is to eradicate the tobacco industry's influence and harm in California by building a statewide movement that prepares and transitions communities, especially those consisting of priority populations that have historically been targeted by the tobacco industry, to end the commercial[1] tobacco epidemic, to protect public health, and to eliminate tobacco-related health disparities for all Californians by 2035. This Endgame Policy Platform was developed by the California Commercial Tobacco Endgame Advisory Council, which is comprised of leaders from priority populations, researchers, public health officials, and legal experts, who have worked individually and collectively to identify and develop a comprehensive strategy to eliminate the structural, political, and social dynamics that sustain the commercial tobacco epidemic.

Background

The U.S. Centers for Disease Control and Prevention reports that approximately 480,000 people die in the United States from smoking-related diseases and exposure to secondhand smoke every year, making tobacco use the nation's leading cause of preventable death.[2] Commercial tobacco use is the number one cause of preventable death in California and continues to be an urgent public health issue, as evidenced by the following:[3]

- Cigarettes, the single deadliest consumer product in history, remain widely sold and readily available. In addition, numerous other tobacco and nicotine products whose health risks are unknown, including those clearly targeted at youth, are proliferating in the market;

- The tobacco industry continues to intentionally and directly market its products to the most vulnerable and disenfranchised members of our society, including racial and ethnic minorities, the LGBTQ+ community, and youth, thus exacerbating health inequities;
- The tobacco industry spends an estimated $496 million annually to market tobacco products to California residents;[4]
- The tobacco industry has been adjudicated as racketeers in federal court as a result of its collective and coordinated denial, deceit, and targeting of deadly, addictive products to structurally marginalized communities;
- 40,000 California adults are killed by use of combustible tobacco products annually[5] and 4,200 Californians die from exposure to secondhand smoke annually;[6]
- While combustible cigarette use among youth has decreased, between 2014 and 2018, electronic smoking device use among California youth increased from 14.1% to 46.2%;[7]
- Youth who use electronic smoking devices are more likely to use other tobacco products, including combustible cigarettes.[8]
- More than 25% of all adult cancer deaths in California are attributable to smoking;[9]
- Each year, smoking costs California $13.29 billion in health care expenses, $3.58 billion in Medicaid costs, and $10.35 billion in productivity losses;[10]
- Tobacco products can cause disease in nearly every organ in the body and are responsible for 87% of lung cancer deaths, 32% of coronary heart disease deaths, and 79% of all cases of chronic obstructive pulmonary disease in the United States;[11]

In addition, as a result of the tobacco industry's concerted efforts to target vulnerable populations, including communities of color, commercial tobacco product use among priority populations in California contributes to health disparities, creates significant barriers to health equity, and perpetuates structural racism, as evidenced by the following:

- American Indians (19.1%), African Americans (17%), and gender and sexually diverse/ LGBTQ+ groups (17.4%) report higher rates of smoking than the state as a whole (11%);[12]
- The American Indian population in California reports the highest cigarette smoking rate among adults and American Indian youth report the highest rate of smoking among high school students;[13]

- The cigarette smoking rate among California Latinos is 10.2%, or 1.1 million smokers, making it the second largest demographic group of adult smokers;[14]
- Menthol cigarettes disproportionately impact the health of African Americans, gender and sexually diverse/LGBTQ+ groups, and youth;[15] and
- Californians with the lowest levels of educational attainment and annual household income have the highest smoking prevalence.[16]

What is Endgame?

Endgame definition:

> *Initiatives designed to permanently change the structural, political, and social dynamics that sustain the commercial tobacco epidemic in order to end it by 2035.*

--Adapted from: Malone, R. E., McDaniel, P. A., Smith, E. A. (2014). Tobacco Control Endgames: Global Initiatives and Implications for the UK. *Cancer Research UK*

Endgame Policy Platform

This Endgame Policy Platform identifies those policy and systems changes that the Endgame Advisory Council believes are critical to achieve the ultimate goal of the endgame policy initiative: ending the commercial tobacco epidemic throughout the state of California by 2035. The policy platform is intended to serve as a guide to assist California communities that are ready to move forward to accomplish this ambitious, necessary, and long-overdue goal.

Endgame Policy Rationale

There is no acceptable level of commercial tobacco-caused morbidity and mortality. While we have made significant progress in reducing the disease and death toll from commercial tobacco products, tobacco remains the leading cause of preventable disease, disability, and death. As a result, it is essential that we accelerate efforts to end the tobacco epidemic's toll in California.

Commercial tobacco use and addiction was created, and is sustained, by the tobacco industry's aggressive, predatory practices, that include designing, manufacturing and selling an exquisitely addictive, deadly product through marketing efforts that target and addict young people and other vulnerable, disadvantaged communities. Thus, ending the tobacco epidemic requires an unwavering focus on the source of this epidemic —the tobacco industry—by designing and implementing evidence-based and equity-focused endgame policies. Although important, it is not enough to focus our attention on educating youth on the dangers of tobacco products, or to provide support for those the tobacco industry has addicted. It is not even enough to attempt to regulate or influence the individual behavior of addicted tobacco users, such as through clean air ordinances or increased taxation. As the National Academy of Medicine has stated, "it does seem clear that a visible effort to enforce supply-side access restrictions is warranted" in order to end the tobacco epidemic.

Federal, state, local, and Tribal governments have more than a mere right to prohibit tobacco sales. An obligation also exists, deriving from global human rights norms. Under the United Nations Guiding Principles on Business and Human Rights (UNGP, often referred to as the Ruggie Principles) "Protect, Respect and Remedy" framework[17], governments have an obligation to step in when a third party, such as a corporation, violates recognized human rights. As the Danish Institute for Human Rights concluded in its assessment of Philip Morris International under the UNGP, the tobacco industry violates human rights every day: "Tobacco is deeply harmful to human health, and there can be no doubt that the production and marketing of tobacco is irreconcilable with the human right to health. For the tobacco industry, the UNGPs therefore require the cessation of the production and marketing of tobacco."[18] While this policy platform does not directly address production, it seems likely that minimizing the market for commercial tobacco products will have an upstream effect on production. As it is clear that the tobacco industry has no intention of voluntarily shutting down, it is the duty of governments to step in to protect the public.

We have made remarkable progress over the past decade. The current tobacco regulatory landscape includes policies that were once thought inconceivable.[19] Many communities are now protected from tobacco health harms by a wide range of policies, including comprehensive smoke-free policies, flavored tobacco sales restrictions that include menthol, coupon redemption restrictions, minimum prices, tobacco retailer location and density restrictions, and restrictions on the sale of tobacco sales in pharmacies, to name just a few. In addition, state and local activity led to the adoption of a federal minimum legal sales age of 21. Still, more work remains to be done to fully protect communities from the preventable death and disease that is caused by tobacco products. Ending the tobacco epidemic will require reorientation of the tobacco control strategic environment towards bold restrictions of tobacco

sales, including the total elimination of the sale of all commercial tobacco products.[20] While there has been an increase in litigation, courts have consistently held that sales restrictions are not preempted by federal law. In California, there is no legal impediment to adopting endgame policies at the local level.[21]

Within this policy platform, terms such as "community" and "priority population" are used to ensure that we are focused on those populations that have been most directly targeted by the tobacco industry. However, it is also important to keep in mind that social, health, economic, environmental, and educational inequities occur in different ways within population subgroups which create unique challenges based on such geographic communities. For example, African Americans living in a rural community may face different or even additional challenges than those living in an urban environment. Likewise, African Americans living in a rural community may face similar challenges as another disadvantaged group living in the same community than they do with other African Americans living in another geographic location. It is essential that we develop policies that reach all of these groups in our efforts to eliminate the harms caused by the tobacco industry on all Californians.

Racism is a Structural Barrier

Commercial tobacco use is a fundamental health equity and social justice issue. Structural racism within the United States has resulted in the systemic oppression of communities of color which has led to poorer outcomes in all facets of life, including population health indicators. Structural racisms is underwritten by our laws, practices, systems, and cultural and societal norms,[22] and private actors have exploited these structural barriers for their own financial gain. Tobacco use is a perfect illustration of the complicated structural elements that have directly led to such disparate health outcomes. The commercial tobacco industry has predatorily targeted communities of color through a variety of mechanisms, including pervasive and culturally appropriative advertising, cheap products, supportive public policies, and high retailer density, and by intentionally pushing certain products, like menthol cigarettes, that are easier to initiate and more difficult to quit. As long as money can be made from addicting the most disadvantaged communities, the industry will continue to develop new products to accomplish its goals with no account for the devastating magnitude of lives lost. Endgame policies are one necessary step to reduce some of these health disparities by eliminating the sale of a product that causes such a disproportionate level of death and disability for historically disadvantaged communities.

Health Equity

To achieve health for all, policy development must encompass principles of health equity with a focus on reducing health disparities.

- Working toward health equity will require that all commercial tobacco control policies are developed and implemented in partnership with the communities most affected by the commercial tobacco epidemic. This includes working directly with all of the statewide priority population coordinating centers with special emphasis on:
    - Developing partnerships with Tribal governments to support their efforts to decrease commercial tobacco use.
    - Understanding the unique role that the tobacco industry has played in exacerbating health disparities, especially through targeted marketing of menthol cigarettes to the African American and LGBTQ+ communities and its culturally appropriative use of Native American symbols to advertise tobacco products.
- Engaging thoughtfully with all stakeholders, including working with nontraditional partners working outside of commercial tobacco control, including human rights organizations, Black, Indigenous, and people of color (BIPOC) led organizations, advocates to end homelessness, and environmental protection and social justice organizations.
- Focusing enforcement efforts on the tobacco industry and retailers rather than the targeted, addicted consumers. This requires the elimination of penalties for the purchase, use, or possession of tobacco products. Consideration must be given to areas such as school settings where appropriate measures will have to be adopted to address the use and possession of tobacco products.
- Prioritizing endgame efforts on environments through which priority populations are disproportionately exposed to or harmed by tobacco products, such as housing and workplaces, and as a result of retailer location and density.
- Minimizing or eliminating the use of the traditional criminal justice apparatus and prioritizing other forms of more equitable enforcement methods to implement and enforce tobacco endgame policies and public health measures in general.
- Emphasizing that tobacco users, especially addicted tobacco users, suffer from a series of health inequities compared to non-tobacco users. These include disparities in access to healthcare for their condition (tobacco dependence) compared to other conditions; lack of access to affordable healthcare in general due to policies allowing insurers to charge

higher premiums; and lack of appropriate regulation, allowing the tobacco industry to reap profits from continued sale of a deadly, addictive, defective product in a manner that is not tolerated for any other consumer product. The final result is that people who smoke cigarettes on average suffer a loss of over ten years of life expectancy compared to people who do not smoke cigarettes.

Endgame policy

1. End the sale of all commercial tobacco products.

Middlegame policies

1. Direct sales restrictions.

    (a) End the sale of all combustible commercial tobacco products.

    (b) End the sale of all flavored commercial tobacco products.

    (c) End the sale of commercial tobacco products that produce environmental waste.

    (d) Prohibit internet sales of all commercial tobacco products.

2. Retailer-focused location and density policies intended to dramatically reduce the widespread retail sale of commercial tobacco and its disproportionate concentration in economically disadvantaged neighborhoods. Strategies are to restrict retailer:

    (a) Type (e.g., not in pharmacies, not in liquor stores, not in only adult-only tobacco retailers).

    (b) Location (e.g., not near schools and kid-friendly spaces; not in smoke-free facilities, and no internet sales).

    (c) Density (not within 1000 feet of another tobacco retailer).

    (d) Volume (e.g., cap and winnow until there is parity across neighborhoods defined by income/race (or, ideally, by all categories identified in outcomes measure section).

3. Smoke-free and tobacco-free policies.

    (a) Enact comprehensive smoke-free/tobacco-free indoor and outdoor policies, including smoke-free housing policies. As the U.S. Surgeon General's Report

concluded, "[s]moke-free policies reduce smoking prevalence, reduce cigarette consumption, and increase smoking cessation."[23] Comprehensive smoke-free policies not only minimize exposure to secondhand and thirdhand smoke, they also lead to smoking cessation.

(b) This requires further exploration of the common threats between commercial tobacco and cannabis use and constant evaluation of the rapid evolution of products to ensure that they are captured by existing policy definitions.

4. Pricing policies.

(a) Raise prices for all commercial tobacco products.[24] The U.S. Surgeon General has concluded that "increasing the price of cigarettes reduces smoking prevalence, reduces cigarette consumption, and increases, smoking cessation."[25] Raising prices on all commercial tobacco products will lead to a reduction in tobacco use, especially among priority populations like youth and people with lower incomes.[26] While California localities are preempted from imposing taxes on tobacco products, they can still adopt measures to minimize the availability of cheap commercial tobacco products. Raising the prices of all commercial tobacco products will only be effective if such policies are combined with other strategies, such as setting minimum pack sizes and restricting coupon redemption, discounts, and retail value-added promotions. Measures that result in increased revenue to government, such as taxation and licensing fees, must include dedication of a substantial portion of revenues to activities aimed at decreasing the harms caused by tobacco use, such as supporting community tobacco control activities, media, and cessation support. Revenues that accrue to government from the sale of tobacco must not become an excuse to not institute aggressive measures to lower sales. It is also essential to address the practical effects of pricing strategies on lower income communities, e.g., integrating meaningful and culturally appropriate cessation policies. In addition to raising commercial tobacco prices, Tribal communities can adopt tax increases to achieve this same goal.

5. Cessation support.

(a) Provide population-wide comprehensive, barrier-free, and widely promoted cessation support to facilitate the achievement of above population-level endgame strategies. This includes evidence-based, culturally appropriate, free, accessible, and tailored cessation support as a requirement of all policies.

6. Equity-focused policies.

    (a) Monitor potential unintended consequences from endgame policies and take action to counter such consequences including, but not limited to: increased cannabis use; increased sales of products (e.g. cannabis, alcohol) that raise separate public health concerns. inequitable application, implementation, and enforcement of policies; increased profiling or targeting of communities who are commonly targeted by the tobacco industry and law enforcement; and illicit sales and purchase activity in the wake of commercial tobacco sales elimination. This includes:

    (b) Enact proactive antiracist policies.

    (c) Eliminate all purchase, use, and possession penalties.

7. Industry-focused policies.

    (a) Counter pro-tobacco influences, including political campaign contributions, legislative interference, and lawsuits, through strategies aimed at better understanding of the sources and effects as well as better communication of such influences to the general public.

Outcome measures

Long-term endgame outcome goal. To provide all Californians with a fair and just opportunity for health and well-being, which can be measured by:

1. Prevalence for all commercial tobacco product use at or below 1.9% by 2035 for all communities (assuming that methods can be developed to accurately measure prevalence rates for each priority population), including:

- All age groups;
- All racial and ethnic groups;
- All income groups, especially those with a low socioeconomic status;
- Tribal communities;
- LGBTQ+ groups;
- People with mental health or behavioral health conditions; and

- Rural and urban communities.

2. Reduction in smoking-related illness and disease, including lung cancer, heart disease, hypertension, chronic obstructive pulmonary disease (COPD), and diabetes incidence in California.

Short- and medium-term outcome measures. Similar to overall goal, these will be disaggregated by priority population, whenever possible:

1. Policy adoption and implementation

- Increase in the number and type of comprehensive policies (all products, no retailer exemptions, smoke-free multi-unit housing, smoke-free/tobacco-free outdoor areas) passed by certain dates. The identification of key dates can be tied to the CTCP calendar for LLA reporting.
- Increase in policies that raise the price of all commercial tobacco products and reduce the availability of tobacco product coupons and other discounts.
- Increase in compliance rates of endgame policies.

2. Policy effects

- Reduction in exposure to secondhand smoke and increase in percentage of population covered by policies intended to reduce exposure to thirdhand smoke. This includes an increase in the percent of the population covered by comprehensive smoke-free and tobacco-free policies, including outdoor areas and in multi-unit housing.
- Decrease in availability and use of flavored tobacco products and all commercial tobacco products.
- Reduction in the number of tobacco retailers either as a specific policy initiative or through attrition and ensuring that the remaining tobacco retailers are not concentrated in industry-targeted areas.
- Reduction in tobacco product waste including, specifically, discarded cigarette filters and e-cigarette products.
- Increase in the percentage of the state's population, and each priority population, covered by each policy.

- Ensuring that there is not an increase in unintended, but potentially foreseeable, consequences, such as criminalization of communities affected by endgame policies or substitution of smoked cannabis for smoked tobacco.

3. **Cessation outcomes**
   - Development and implementation of culturally-targeted tailoring of evidence-based strategies supporting cessation (i.e. counseling + NRT).
   - Removal of all access barriers to evidence-based strategies for supporting quitting smoking, and sufficient marketing of services to ensure 90% of population is aware of their availability and how to access them.
   - Development and implementation of culturally-sensitive strategies that reduce tobacco use and increase cessation in populations historically targeted by the tobacco industry. This includes development of targeted multilingual ads and promotions.
   - Increase in quit attempts and calls to Quitlines.
4. **Equity-focused outcomes**
   - Development of a system that uses more holistic measures versus purely economic outcomes. Models such as the Social Progress Index can be a guide, but will need to be tailored to each community's needs.
   - Assessment of unintended consequences: economic impact analysis and number/rate of arrests related to endgame policies.
   - Reduction in health disparities caused by commercial tobacco use.
5. **Industry-influence**
   - Development and implementation of policies prohibiting cultural, research, and educational organizations from accepting any funds from tobacco industry or tobacco-industry front groups.

Cannabis

- The connection between the tobacco industry and the cannabis industry,[27] and the development of co-use products, is rapidly expanding.[28] This is especially problematic among youth users. Many tobacco and cannabis heated products and vaporizers resemble

each other, and crossover products, such as pods containing THC for use in a JUUL device also facilitate co-use. In addition, there are newer methods of co-consumption (e.g. "moking", smoking a mixture of cannabis and tobacco in a bong or waterpipe, or the "silicon valley spliff," simultaneously using a JUUL and a cannabis vape pen). In 2016, 8.9% of all US students and 30.6% of e-cigarette users reported using cannabis in an e-cigarette device.[29] It seems increasingly likely that, as the tobacco industry continues to invest in the cannabis industry, there will be additional efforts to perpetuate the tobacco epidemic.

- Efforts have been made to exempt cannabis from smoke-free laws in spite of language indicating that such exemptions are not allowed under California law.[30] For example, the cities of San Francisco and West Hollywood recently considered a smoke-free multi-use housing ordinance that exempted cannabis.
- It is essential to consider the analogous regulatory structure for cannabis when developing commercial tobacco control policies to ensure that gaps do not exist between the two and to identify public health intersections, including both potential concerns and opportunities.
- Ensure that policies do not allow for the combination of cannabis and commercial tobacco retail stores as the tobacco industry becomes more heavily invested in cannabis.
- Monitor jurisdictions that prohibit the retail sale of cannabis as a possible companion to commercial tobacco endgame policies.
- Continue to consider whether the decriminalization of cannabis, especially the legalization and development of production, sales, and marketing infrastructures, may present both opportunities and hazards for winning over policymakers and the public to the rationale for tightening policies related to the sale of commercial tobacco products.

Policy Development and Support

- Align the CTCP-funded endgame projects toward common goals and identify effective strategies to scale up for more widespread adoption and implementation.
- Synthesize the evidence base and continually identify research needs.
- Develop model language for all policies that can be adapted to meet each community's unique needs to accomplish the goal of eliminating of the sale of all commercial tobacco products.

- Develop effective training opportunities, education, and a media campaign to assist communities in moving toward the endgame.
- Identify feasibility considerations and create self-assessment resources.
- Ensure community stakeholder involvement at all stages of policymaking process.

Community Engagement/Essential Partners

- Prioritize health equity and social justice best practices in communities through partnerships with traditional and non-traditional stakeholders that support campaign goals and can best inform and lead on adoption, implementation, and enforcement practices by bringing diverse perspectives to the campaign. This will be assessed by policy area and by priority population. While there is likely to be substantial overlap in essential partners needed, certain policies will require input from non-traditional partners to ensure that our policies prioritize health equity and social justice needs in every community. The overall goal is to include traditional partners within the tobacco control community and nontraditional partners outside of commercial tobacco control who work with affected populations.
- Develop opportunities for engagement which includes community education, awareness, and assessment of readiness for policy change.
- Address the intersection between commercial tobacco-related death and disease with other public health and social justice issues.

Implementation

- Develop model of best practices for implementation which includes:
  - Building a timeline from adoption to enforcement, with input and buy-in from community partners and the agency selected to enforce the policy;
  - Providing education for the entire community. Education should be tailored for different constituencies, and distributed via multiple platforms and media, with a plan for the agency selected to enforce the policy to sustain long-term education;
  - Developing programs to assist retailers to shift their business focus. Potential to connect with Article 17 of the Framework Convention on Tobacco Control related to the provision of support for viable alternative business opportunities;

- Developing resources to support cessation promotion to populations affected;
- Evaluating the impact of policy implementation and enforcement on tobacco use and exposure; and
- Ensuring that enforcement prioritizes health equity and social justice.

- Monitor the impact of policies to ensure equitable reach across California's demographically and geographically diverse communities and evaluate policy adoption for unintended consequences that contribute to harassment, racism, or stigmatization towards people who use tobacco products.

Preparation for legal challenges

The recent proliferation of litigation related to flavored tobacco policies indicates the strong likelihood that endgame policies will also face legal challenges. To mitigate the stress and uncertainty for local jurisdictions, legal technical assistance is available to help prepare for any type of legal challenge. This includes:

- Maintaining and updating legal analysis on the authority for each policy.
- Tracking and analyzing the implications of all related litigation.
- Coordinating litigation support for municipalities defending endgame policies against tobacco industry litigation.

Endnotes

1 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. Comparatively, commercial tobacco is manufactured for recreational use and profit, resulting in disease and death. For more information, visit the National Native Network website: http://www.keepitsacred.itcmi.org. When the word "tobacco" is used throughout this document, a commercial context is implied and intended.

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