

Unpacking the Illicit E-Cigarette Crackdown by State AGs

WRITTEN BY

Christopher Carlson | Michael B. Jordan | Zie Alere

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In mid-January, a bipartisan coalition of nine state attorneys general, as well as the Washington, D.C., attorney general, announced a coordinated effort to curb illicit electronic cigarette sales. The attorneys general of California,[1] Connecticut,[2] Illinois,[3] Hawaii,[4] Minnesota,[5] New York,[6] New Jersey,[7] Vermont, Ohio and Washington, D.C., are coordinating enforcement activity targeting dealers of these products — issuing warning letters, serving civil investigative demands and filing complaints.

The crackdown illustrates the rising prominence of state attorneys general using consumer protection laws to address issues of national scope, especially when federal efforts prove ineffective. Regarding illicit e-cigarettes specifically, the [U.S. Food and Drug Administration](#) has struggled to curb the products' market dominance, leading state regulators to fill the void.

Defining Illicit E-Cigarettes

Here, “illicit” or “unauthorized” refer to e-cigarettes that lack FDA premarket authorization and cannot lawfully be marketed in the U.S. — not including products sold pursuant to the FDA’s enforcement discretion.

Under the Family Smoking Prevention and Tobacco Control Act,[8] all new tobacco products must receive premarket authorization from the FDA.[9] A “new tobacco product” includes “any tobacco product ... that was not commercially marketed in the United States as of February 15, 2007.”[10] Thus, e-cigarettes recently introduced into the market are new tobacco products that require FDA premarket authorization. New tobacco products that lack authorization are considered “adulterated” and cannot be introduced into interstate commerce.[11]

One exception is for certain products with timely submitted, pending premarket tobacco product applications. In 2020, the FDA indicated that a subset of new tobacco products on the market as of Aug. 8, 2016, can continue to be sold pursuant to FDA enforcement discretion if the products have premarket tobacco product applications that (1) were filed with the FDA by Sept. 9, 2020; and (2) are either under FDA review or the subject of negative FDA action — marketing denial order, refusal to accept or refusal to file — and have received a stay or rescission of this decision.[12]

Notably, the FDA did not issue a similar enforcement discretion policy for nontobacco nicotine products. After

Congress authorized the FDA to regulate nontobacco nicotine products,[13] the agency required premarket tobacco product applications to be submitted for such products by May 14, 2022, and authorized by July 13, 2022, without exception.[14]

Although the FDA has recently indicated that there is no such enforcement discretion policy in effect for any pending premarket tobacco product applications products,[15] the agency's messages on this point have been mixed at best, and we are unaware of any enforcement actions taken against companies with timely, submitted premarket tobacco product applications that are still undergoing FDA review.[16]

Thus, it appears that the FDA, in practice, continues to exercise enforcement discretion in accordance with its 2020 guidance.

FDA Enforcement Efforts

The FDA has described[17] enforcement against illicit e-cigarettes as “among [its] highest enforcement priorities,” but there is little evidence that the agency's enforcement efforts have meaningfully reduced the illicit products' market share. The FDA — in coordination with the [U.S. Department of Justice](#) and [U.S. Customs and Border Protection](#) — has a variety of tools at its disposal to target illicit e-cigarettes.

These include the following.

Civil Money Penalties

Up to \$15,000 per violation, or up to \$250,000 per violation made with the intent to mislead or defraud, for a maximum of \$1 million total civil penalties in a single proceeding.[18]

Injunctions

The DOJ, on the FDA's behalf, initiates injunctive proceedings to restrain violations.[19]

Import Alerts

Products are placed on an import alert list, detained without physical exam upon arrival in the U.S., and potentially refused entry by the CBP unless the importer demonstrates that the product does not have the violation noted on the import alert.[20]

Seizure and Destruction

The DOJ seeks to have the products condemned as “adulterated or misbranded” by the district court, seized, and/or destroyed.[21]

Criminal Charges

The DOJ brings criminal charges for manufacturing or introducing adulterated tobacco products into interstate

commerce. Conviction could result in up to one year of imprisonment, or up to three years for subsequent or intentional violations, as well as possible criminal fines.[22]

To its credit, the FDA has issued 87 civil money complaints[23] against illicit e-liquid manufacturers and at least 177 such complaints against retailers. Additionally, the DOJ has pursued eight injunction actions[24] against manufacturers regarding their alleged production of unauthorized e-cigarettes.

Through a multiagency task force,[25] the FDA has also made strides at ports of entry. In October 2024, the FDA and CBP announced[26] the seizure of approximately three million units of imported illicit e-cigarettes. The FDA also periodically publishes import alerts,[27] including a “Red List” of illicit e-cigarettes subject to detention by the CBP upon entry.

Nevertheless, most of the FDA’s domestic enforcement efforts consist of issuing warning letters.[28] The FDA’s compliance dashboard[29] indicates that, since fiscal year 2021, the FDA has issued more than 50,000 warning letters in the tobacco product category. However, the FDA is often slow to follow up — if it does at all.

Notwithstanding the FDA’s efforts, illicit e-cigarettes continue to dominate the U.S. market, and by some estimates, exceed 60% of e-cigarette sales.[30]

Multistate Attorney General Crackdown

The FDA’s failure to clear store shelves of illicit e-cigarettes has led state attorneys general to step forward, including the recent bipartisan coalition of nine state attorneys general and the Washington, D.C., attorney general. Usually, the attorneys general have used state consumer protection laws and other applicable state laws, such as restrictions on flavored tobacco products, to target illicit e-cigarettes.

Below, we discuss the recent actions taken by the multistate coalition.

Lawsuits

California

On Jan. 15, [California Attorney General Rob Bonta](#) filed a complaint[31] in the Los Angeles County Superior Court — *People of the State of California v. Flumgio Technology Inc.* — against a distributor alleging violations of the state’s False Advertising Law and Unfair Competition Law. Regarding the False Advertising Law, California argues that the distributor’s marketing of a “clear” e-cigarette insinuates that the product was unflavored when it is in fact mint flavored.

Regarding the Unfair Competition Law, California argues that the distributor failed to maintain required licenses, unfairly targeted underage consumers, introduced flavored products into the market that cannot be legally sold at retail under the state’s flavor ban, and encouraged retailers to sell such products.

Illinois

On Jan. 16, [Illinois Attorney General Kwame Raoul](#) filed a complaint^[32] in the [Cook County Circuit Court](#) — People of the State of Illinois v. Chicago Merchandise Co. — against distributors of e-cigarettes, alleging violations of the state’s Preventing Youth Vaping Act and Consumer Fraud and Deceptive Business Practices Act.

The complaint alleges that the distributors market and sell e-cigarette brands that are “adulterated” under state law, i.e., lacking required FDA premarket authorization and not subject to enforcement discretion. It also alleges that the distributors’ website and social media posts emphasize product characteristics that encourage persons under 21 to use e-cigarettes — namely flavor options, ease of use and high nicotine content.

Minnesota

On Jan. 15, [Minnesota Attorney General Keith Ellison](#) filed a complaint^[33] against a manufacturer of flavored e-cigarettes for violations of the state’s prohibition on marketing e-cigarettes that resemble non-e-cigarette products, requirements for e-cigarette delivery sales, and requirements under the Prevention of Consumer Fraud Act and Uniform Deceptive Trade Practices Act.

Specifically, in State of Minnesota v. Venture Concepts Group LLC, the complaint alleges that the manufacturer markets e-cigarettes that resemble highlighters, and accepts and ships orders of such products without conducting adequate age verification.

New York

On Jan. 16, [New York Attorney General Letitia James](#) filed a complaint^[34] in the Herkimer County Supreme Court against two companies that operate a retail store for allegedly selling flavored e-cigarettes in violation of the state’s flavor ban, failing to require purchasers to provide proof of age as required under state law, and selling e-cigarettes to persons under 21.

In People of the State of New York v. G-Smoke360 Corp., the complaint also alleges that the retailer failed to follow requirements related to the display and storage of e-cigarettes in the store, made unlawful multipackage discount offerings, and sold e-cigarettes without the required certificate of registration.

Ohio

Before the January coordinated enforcement activity, Ohio endeavored “to combat the influx of illegal vaping devices flooding Ohio communities.”^[35] This campaign resulted in lawsuits being filed in July 2024 against three retailers under the state’s consumer protection laws.

However, all three of these lawsuits have been dismissed by Ohio trial courts based on federal preemption — an issue discussed more fully below.^[36]

Civil Investigative Demands

Connecticut

On Jan. 16, [Connecticut Attorney General William Tong](#) announced^[37] that he served civil investigative demands on multiple retailers and wholesalers allegedly selling illicit e-cigarettes. Civil investigative demands are investigative subpoenas commonly issued by state attorneys general.

Connecticut's recent civil investigative demands seek comprehensive information regarding the sale of these products, and the wholesalers and distributors supplying them.

Warning Letters

New Jersey

[New Jersey Attorney General Matthew Platkin](#) announced^[38] on Jan. 16 the issuance of nearly 11,000 warning letters instructing businesses to cease and desist from selling flavored e-cigarettes in violation of the state flavor ban.

New Jersey's warning letters follow the office's August 2024 issuance^[39] of notices of violation to 19 retailers, which assessed civil monetary penalties for their alleged sale of flavored e-cigarettes.

Hawaii

Similarly, on Jan. 16, Hawaii Attorney General Anne Lopez announced^[40] the issuance of over 800 warning letters to retailers and distributors that her office believes may be dealing in illicit products. The letters^[41] warn businesses to "remove from your shelves any products not authorized for sale," and return such products to their manufacturer or distributor.

Enforcement Actions To Be Determined

Vermont and Washington, D.C.

The attorneys general of Vermont and Washington, D.C., have not announced specific actions taken as part of the coalition. The California attorney general's press release indicates, however, that these states will be "enforcing their respective tobacco and consumer protection laws to go after the companies responsible for importing, distributing, selling, and marketing flavored disposable e-cigarettes."

Preemption Concern for State Efforts

Although the Family Smoking Prevention and Tobacco Control Act's premarket authorization requirements are generally enforceable only by the FDA,^[42] the recent crackdown illustrates various avenues through which state attorneys general target many of the same unauthorized products. These efforts could still be barred by implied preemption, however, even when enforcement is based in state law.

Under the Federal Food, Drug and Cosmetic Act, as amended by the Family Smoking Prevention and Tobacco Control Act, enforcement actions generally must be "by and in the name of the United States."^[43] In other words, "only the FDA may enforce the [Food, Drug and Cosmetic Act],"^[44] including premarket authorization

requirements.

Importantly, even when a state bases an enforcement action in state law, the Food, Drug and Cosmetic Act may impliedly preempt the claim where the act is a critical element of the claim.[45]

As noted above, three recent Ohio court decisions found that preemption barred the Ohio attorney general from bringing lawsuits under the Ohio Consumer Sales Practices Act against sellers of unauthorized e-cigarettes. Although the claims were based in state law, the Ohio courts dismissed the cases in October 2024 and February 2025, finding that the attorney general's CSPA actions were impliedly preempted by the Food, Drug and Cosmetic Act.[46]

The crux of each decision was that the state law claims would not exist but for the underlying federal regulatory scheme. Appeals in two of the cases remain pending, and the Ohio attorney general could still appeal the other decision.

Nevertheless, consistent with the recent round of actions above, state attorneys general will likely continue to try to identify stand-alone, non-Food, Drug and Cosmetic Act bases for targeting illicit e-cigarettes.

The Takeaway: Gap-Filling by State Attorneys General

The coordinated enforcement by state attorneys general in the illicit e-cigarette space illustrates a major motivator for state regulators: ineffective federal enforcement.

Enforcing premarket authorization requirements — which sellers of illicit e-cigarettes openly flout — is traditionally the province of the FDA. Unless the FDA makes significant headway in clearing market shelves of illicit e-cigarettes, however, we anticipate that manufacturers, distributors and retailers will continue to see increased enforcement efforts from state attorneys general eager to fill the perceived regulatory void.

Multistate consumer protection efforts like this coordinated crackdown on illicit e-cigarettes are likely to become even more common as the Trump administration seeks to roll back federal regulatory efforts. Beyond the tobacco and nicotine context, industries ranging from consumer packaged goods to financial services should remain vigilant for an uptick in gap-filling by state attorneys general.[47]

[1] <https://oag.ca.gov/news/press-releases/attorney-general-bonta-vows-continue-cracking-down-illicit-flavored-disposable-e>.

[2] <https://portal.ct.gov/ag/press-releases/2025-press-releases/attorney-general-tong-announces-crackdown-on-bootleg-ecigarettes>.

[3] <https://illinoisattorneygeneral.gov/news/story/attorney-general-raoul-continues-crackdown-on-illicit-flavored->

disposable-e-cigarette-products-as-part-of-bipartisan-national-collaboration.

[4] <https://ag.hawaii.gov/wp-content/uploads/2025/01/News-Release-2025-03.pdf>.

[5] https://www.ag.state.mn.us/Office/Communications/2025/01/16_HighLightVapes.asp.

[6] https://www.health.ny.gov/press/releases/2025/2024-01-16_herkimer_county_vape_shop.htm.

[7] <https://www.njoag.gov/ag-platkin-division-of-consumer-affairs-issues-warning-letters-to-nearly-11000-nj-businesses-reminding-them-that-selling-flavored-vapor-products-is-unlawful/>.

[8] See <https://uscode.house.gov/statutes/pl/111/31.pdf>.

[9] 21 U.S.C. § 387j(a)(2).

[10] *Id.* § 387j(a)(1).

[11] *Id.* § 387b(6)(A).

[12] See <https://www.fda.gov/media/133880/download>; <https://www.fda.gov/tobacco-products/compliance-enforcement-training/advisory-and-enforcement-actions-against-industry-unauthorized-tobacco-products> (There are a few tobacco products that have received a marketing denial order (MDO) that are under further agency review and for which FDA has stated the Agency does not intend to pursue enforcement action during the pendency of the re-review. In addition, in a very limited number of instances, some courts have granted stays of MDOs pending judicial review in order to maintain the status quo, or FDA has administratively stayed MDOs. In those particular instances, FDA does not intend to take enforcement action.).

[13] See <https://www.congress.gov/117/plaws/publ103/PLAW-117publ103.pdf>.

[14] See <https://www.fda.gov/tobacco-products/ctp-newsroom/reminder-electronic-submission-premarket-applications-non-tobacco-nicotine-products-due-may-14> (Manufacturers of NTN products on the market as of April 14, 2022 that wish to continue to market their products are required to submit a PMTA by May 14, 2022. . . . Further, for products on the market April 14, 2022, a PMTA must be submitted by May 14, 2022, and the product must receive a marketing granted order from FDA by July 13, 2022, in order to remain on the market.).

[15] See, e.g., <https://www.fda.gov/tobacco-products/ctp-newsroom/working-states-fda-warns-more-100-retailers-illegal-sale-youth-appealing-e-cigarettes-including-geek> (To date, the FDA has authorized 34 e-cigarette products and devices. These are the only e-cigarette products that currently may be lawfully marketed and sold in the United States.).

[16] See <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/compliance-actions-and-activities/warning-letters> (listing warning letters to date); <https://www.fda.gov/tobacco-products/compliance-enforcement-training/advisory-and-enforcement-actions-against-industry-unauthorized-tobacco-products> (listing civil money penalty complaints and injunctions to date).

[17] <https://www.fda.gov/tobacco-products/compliance-enforcement-training/advisory-and-enforcement-actions-against-industry-unauthorized-tobacco-products>.

[18] See 21 U.S.C. § 333(f).

[19] See 21 U.S.C. § 332.

[20] See 21 U.S.C. § 381.

[21] See 21 U.S.C. § 334(a)(2), (b), (d)(1).

[22] See 21 U.S.C. § 333(a).

[23] <https://www.fda.gov/tobacco-products/compliance-enforcement-training/advisory-and-enforcement-actions-against-industry-unauthorized-tobacco-products#a> (Which Retailers Have Received CMP Complaints for Violations Related to Unauthorized Tobacco Products?).

[24] <https://www.fda.gov/tobacco-products/compliance-enforcement-training/advisory-and-enforcement-actions-against-industry-unauthorized-tobacco-products#7> (Which Manufacturers Have CTP Initiated Permanent Injunction Actions Against Relating to Their Continued Manufacture of Unauthorized Tobacco Products?).

[25] https://www.fda.gov/news-events/press-announcements/justice-department-and-fda-announce-federal-multi-agency-task-force-curb-distribution-and-sale?utm_campaign=ctp-enforcement&utm_content=pressrelease&utm_medium=email&utm_source=govdelivery&utm_term=stratcomms.

[26] <https://www.fda.gov/news-events/press-announcements/76-million-illegal-e-cigarettes-seized-joint-federal-operation>.

[27] https://www.accessdata.fda.gov/cms_ia/industry_98.html.

[28] <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/compliance-actions-and-activities/warning-letters>.

[29] <https://datadashboard.fda.gov/ora/cd/complianceactions.htm>.

[30] See <https://www.altria.com/-/media/Project/Altria/Altria/Investors/events-and-presentations/2025/2024-Q4/Press-Release.pdf> (We estimate that illicit products now represent more than 60% of the e-vapor category.).

[31] Complaint, California v. Flumgio Tech. Inc., No. 25PSCV00155 (Cal. Super. Ct.).

[32] Complaint, Illinois v. Chicago Merchandise Co., No. 2025CH00422 (Ill. Cir. Ct.).

[33] Complaint, Minnesota v. Venture Concepts Grp. LLC, No. 62-CV-25-382 (Minn. Dist. Ct.).

[34] Complaint, New York v. G-Smoke360 Corp., No. EF2025-112607 (N.Y. Sup. Ct.).

[35] <https://www.ohioattorneygeneral.gov/Media/News-Releases/July-2024/To-Protect-Ohio-Youth-AG-Yost-Targets-Sellers-of-I>.

[36] Ohio ex rel. Yost v. Central Tobacco & Stuff Inc., No. 24-CVH-070664 (Ohio Ct. C.P. Oct. 29, 2024), appeal docketed No. 24 CAE 110103 (Ohio Ct. C.P. Nov. 26, 2024); Ohio ex rel. Yost v. Orrville Tobacco & Vape Shop LLC, No. 2024-CVC-H-0327 (Ohio Ct. C.P. Feb. 5, 2025); Ohio v. Elevate Smoke LLC, No. A2403034 (Ohio Ct. C.P. Feb. 20, 2025).

[37] <https://portal.ct.gov/ag/press-releases/2025-press-releases/attorney-general-tong-announces-crackdown-on-bootleg-ecigarettes>.

[38] <https://www.njoag.gov/ag-platkin-division-of-consumer-affairs-issues-warning-letters-to-nearly-11000-nj-businesses-reminding-them-that-selling-flavored-vapor-products-is-unlawful/>.

[39] <https://www.njoag.gov/ag-platkin-division-of-consumer-affairs-issues-19-notices-of-violation-to-stores-after-investigation-into-illegal-sales-of-flavored-vapor-products-banned-in-new-jersey/>.

[40] <https://ag.hawaii.gov/wp-content/uploads/2025/01/News-Release-2025-03.pdf>.

[41] <https://ag.hawaii.gov/cjd/files/2025/01/Updated-AG-Letter-to-Licensees-2025-01-17.pdf>.

[42] See 21 U.S.C. § 337(a).

[43] See *id.*

[44] [Diccroce v. McNeil Nutritionals LLC](#) , 82 F.4th 35, 40 (1st Cir. 2023).

[45] See [Buckman Co. v. Plaintiffs' Legal Comm.](#) , 531 U.S. 341, 353 (2001).

[46] Ohio ex rel. Yost v. Central Tobacco & Stuff Inc., No. 24-CVH-070664 (Ohio Ct. C.P. Oct. 29, 2024); Ohio ex rel. Yost v. Orrville Tobacco & Vape Shop LLC, No. 2024-CVC-H-0327 (Ohio Ct. C.P. Feb. 5, 2025); Ohio v. Elevate Smoke LLC, No. A2403034 (Ohio Ct. C.P. Feb. 20, 2025).

[47] See <https://www.law360.com/articles/2284836/predicting-where-state-ag-s-will-direct-their-attention-in-2025>.

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