



Tobacco Product Retail Non-Compliance Rate Report

STATE OF UTAH

Population Health

September 30, 2022

To: Social Services Appropriations Subcommittee
From: Braden Ainsworth, Tobacco Prevention and Control Program
Subject: Tobacco Product Retail Non-Compliance Rate Report

Purpose

The Legislature intends that the Department of Health and Human Services report by October 1, 2022 to the Social Services Appropriations Subcommittee on the impacts of Health's interventions to reduce the 7.8% non-compliance rate of retailers selling tobacco products to youth as well as what other state's with lower noncompliance rates are doing that Utah is not.

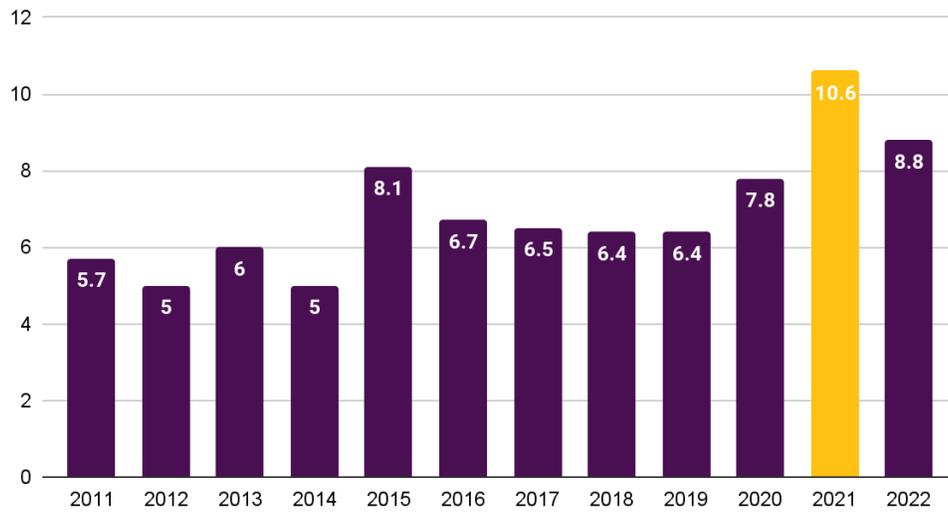
Executive Summary

The compliance check rate for FY22 decreased by 1.8% (8.8%) compared to FY21 (10.6%). However, this is still 2.4% higher than pre COVID-19 rates (7.8% in 2020). The Tobacco Prevention and Control Program (TCP) has implemented new approaches to reduce non-compliance rates, and plans to implement other approaches in the current fiscal year.

Reducing the Sale of Tobacco, Electronic Cigarette, and Other Nicotine Products to Minors

Local health departments (LHDs) enforce Utah's youth tobacco access laws through local retail tobacco permits, education, and underage compliance checks. In FY22, LHDs conducted approximately 2,861 retailer underage compliance checks to monitor the sales of tobacco, electronic cigarette, and nicotine products to individuals under the age of 21. During these checks 8.8% of tobacco retailers sold a tobacco, electronic cigarette, or a nicotine product to an underage buyer which is an improvement compared to 10.6% in FY21. Local health departments spend approximately \$287,473.50 annually on compliance check activities. Electronic cigarette tax funding may be used to supplement compliance check enforcement efforts if needed.

Utah Compliance Check Violation Rates (Percentage), FY11-22



Reasons for Non-compliance Rates

- Increase in ‘bad actors’ who attempt to sell regardless of the laws or penalties associated with illegal sales.
 - Retailers have told local health department staff that they are making more money selling products illegally (including to underage buyers) than they pay in penalties.
- In December 2019 federal law increased the minimum age of sale of tobacco products to 21 and in July 2020 Utah laws were updated to reflect the minimum age of sale of tobacco products, electronic cigarette products, and nicotine products to 21. Since then, LHDs and law enforcement have begun working with older underage buyers.
 - Before the increase in the minimum age of sale, LHDs were instructed to use buyers in the age range 15-17 and on rare occasions age 18.
 - According to FY22 data illegal sales rates by age of buyer were as follows:

Age of Underage Buyers	Illegal Sale Rates
15	0%
16	4.1%
17	6.4%
18	11.8%
19	8.5%
20	9%

- Impact of COVID-19 in 2020 and the lack of ability for the LHDs to conduct as many

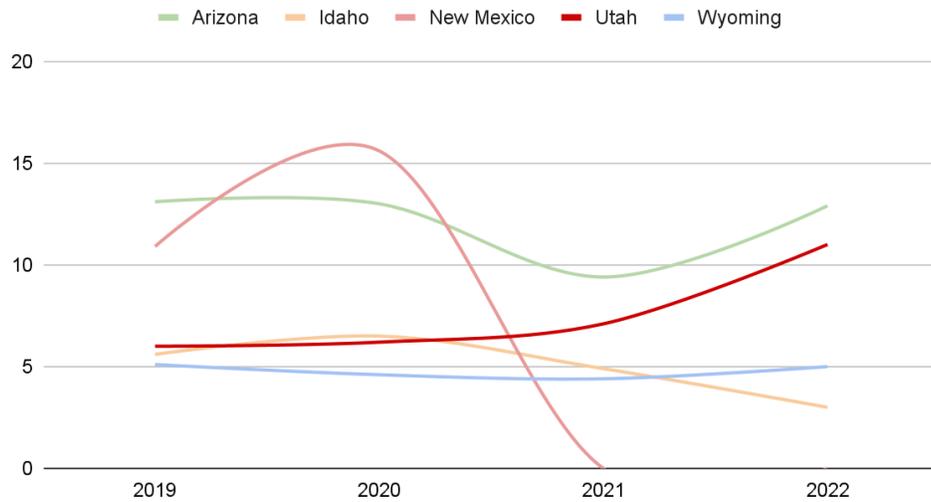
inspections as previously conducted may have contributed to a higher non-compliance rate of 10.6% in FY 2021.

- This was due to limited opportunities to conduct checks during COVID lockdowns and staff reassignments to COVID-related duties at the LHD level.
- During this time, retailers behaved differently as a result of inconsistent enforcement statewide.
- Increased turnover in retail staff especially among those retailers permitted as 'General Tobacco Retailers' has created challenges with ensuring that staff is adequately trained in tobacco retail compliance.
 - Increased turnover led to a lack of training by retailers to clerks about underage tobacco, electronic cigarette, and nicotine product sales, harms, and Utah laws and administrative rules.
- Increase in new and emerging products coming to the market including nicotine products.
 - In May 2021, nicotine products were included in the enforcement protocol for underage purchases. Previously, only cigarettes, cigars, smokeless tobacco, and electronic cigarette products were included.
- Electronic verification systems were not being updated with current tobacco 21 age laws. In addition, LHD staff reported cases where retail staff were purposefully overriding electronic verification systems.

Other State Compliance Rates

- Underage Sale rates that are available from other states are based on the Federal Synar Program results. The FDA conducts their own underage compliance check inspections in each state. The Synar rate takes into account both the state and FDA compliance rates. The latest data available from other states is from 2021.
- In 2021, Utah had an underage sales rate of 10.6% (state combined rate for state fiscal year SFY21) and 11.0% (Synar rate for the federal fiscal year FFY22). Nationally, states ranged from a high of 17.2% (Florida) to a low of 1.0 % (Montana) in 2021. Some of the western states had the following Synar non-compliance rates between 2019 and 2022:

Western States Synar Rates



- New Mexico shows a 0% violation rate for FFY21 and FFY22. This is due to their suspension of the Synar program in their state due to the COVID-19 pandemic and lack of staffing during this time.
- Idaho has a lower Synar rate than Utah. When asked what they are doing in their state to have low Synar violation rates their response was as follows:
 - Increased retailer education including a monthly tobacco retailer newsletter. They have also been distributing a new retailer education package that targets the business owners and point of sale for employees. They also indicated they are producing a new website for retailer education.
- Some states, including Colorado did not respond to our request for their non-compliance rates. Wyoming did not respond with possible reasons why their rates were lower than Utah's rates.

What the Tobacco Prevention and Control Program (TPCP) is Doing Differently

- Utah created a new position for a tobacco retail and compliance specialist. This specialist works with the local health departments to improve the compliance check process and reporting as well as providing technical assistance as needed including:
 - Utilized 'Did You Know', a monthly newsletter about Utah tobacco laws for retailers that the local health departments can use to educate retailers on a regular basis.
 - Created a training guide for underage buyers that local health departments can use for training.
 - Created a 5-step guide for local health departments to aid in compliance checks and reporting to the state.
- In conjunction with the LHDs, TPCP has utilized QuickBase, a database that has improved the compliance check process through better collaboration with our enforcement partners, consistent and electronic enforcement tools, and active tracking of violations. The cost to use this tool to the Department of Health and Human Services will continue to be minimal

and can be covered with existing funds.

- TPCP has developed an online enforcement protocol in conjunction with the Department of Public Safety and others, for online illegal sales by both individuals and Utah tobacco retailers.
 - A form has also been developed and made available to the public for the reporting of illegal sales of a tobacco product, an electronic cigarette product, or a nicotine product.
 - Implementation of online compliance checks will be covered with existing funds.

What TPCP Plans to do in the Future

- Work to make sure the LHDs are getting back on-track with enforcement plans which were affected by COVID-19 and build capacity to complete at least one check per year at each retail location.
 - This includes working to improve the number of LHDs that consistently conduct two inspections per retailer per year.
- Continue to update training resources for compliance check protocols and provide consistent training.
- Update the free 'Utah Tobacco Retail Education Guide' (developed by the State TPCP) for retailers with an emphasis on underage sales with increased promotion of the education and benefits it allows.
- Continue to communicate with other states that have lower non-compliance rates and what steps we can take here in Utah to improve our rates.
- Stores that were only checked once had a higher rate of non-compliance. Changes in code and additional funds provided by the recent tax on e-cigarettes and other nicotine products were aimed at giving LHDs the resources needed to perform additional checks each year. TPCP will plan to perform this analysis again after LHDs achieve an average of two checks per retailer per fiscal year.
- Work with the Utah State Tax Commission to investigate the possibility of penalizing manufacturers, importers and distributors who sell restricted products to Utah retailers for distribution within the state.
- TPCP plans to work with their independent external evaluator RTI International in FY23 to evaluate and investigate the impact of the following:
 - Utah's e-cigarette flavor restriction.
 - Association between tobacco retail density and health improvement index (HII) area.
 - Sales and trends for emerging nicotine products and the impact on combustible product use.

Potential Policy Considerations

- A higher concentration of tobacco retailers is correlated with increased exposure to tobacco product advertising, as well as higher tobacco use rates, relapse and reduced

success in quit attempts by current tobacco users.¹²³

- Enact state law or authorize local health departments the ability to enforce proximity laws and place a cap on the numbers of available tobacco retail permits to reduce the number of locations where tobacco and nicotine products are sold.
- Increase tobacco retail license and/or retail permit fee.
 - Amend law to increase the fee for the retail tobacco license (free) and/or local health department retail permit, which is \$30 for new permit, \$20 for permit renewal, and possible \$250 fee for retail tobacco specialty business. A general tobacco retailer permit is valid for two years, whereas a retail tobacco specialty business permit is valid for one year ([Utah Code 26-62-203](#), [Utah Admin. Rule R384-324](#))
 - Increased permit fees can lead to a reduction in overall retailers who sell tobacco and nicotine products as well as to an increase in cost for tobacco products which is passed along to consumers.⁴ This increased cost has been shown to lead to less product consumption.⁵
- Mandate a tobacco retail education program.
 - Video, interactive, and possibly combined with off-site alcohol training provided by the Utah Department of Health and Human Services. Charges for one tool that TPCP investigated would be approximately \$3.50, per user and \$3.50 for each name listed on an external database per person. Utah currently offers this voluntary [retailer education training](#).
 - Retailer training would address the harms of tobacco and nicotine product use, how to check identification, all Utah tobacco laws and administrative rules, and penalties associated with violating these laws and rules.

¹Nicotine & Tobacco Research. (2016). Tobacco Retail Outlet Density and Young Adult Tobacco Initiation. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4830222/pdf/ntv036.pdf>

²Reitzel, L. R., Cromley, E. K., Li, Y., Cao, Y., Dela Mater, R., Mazas, C. A., Cofta-Woerpel, L., Cinciripini, P. M., & Wetter, D. W. (2011). The effect of tobacco outlet density and proximity on smoking cessation. *American journal of public health*, 101(2), 315–320. <https://doi.org/10.2105/AJPH.2010.191676>.

³Ackerman, A., Etow, A., Bartel, S., & Ribisl, K. M. (2017). Reducing the Density and Number of Tobacco Retailers: Policy Solutions and Legal Issues. *Nicotine & tobacco research : official journal of the Society for Research on Nicotine and Tobacco*, 19(2), 133–140. <https://doi.org/10.1093/ntr/ntw124>

⁴Increasing Tobacco Prices Through Non-Tax Approaches. <https://countertobacco.org/policy/raising-tobacco-prices-through-non-tax-approaches/#licensingfees>

⁵Effects of Tobacco Taxation and Pricing on Smoking Behavior in High Risk Populations: A Knowledge Synthesis. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3228562/>