The Tobacco Industry is Not the Public Health Solution

Big tobacco has a history of prioritizing corporate profits over people and communities burdened by tobacco-related illness and death.[i] Tobacco industry marketing strategies have led to disparities in tobacco use, including higher use of tobacco products in limited-income communities, among people of color and individuals who identify as LGBTQ+.[ii] For example, tobacco industry memos revealed a 1990s R.J. Reynolds cigarette marketing plan, known as "Project Subculture Urban Marketing," that targeted marketing at gay men and individuals experiencing homelessness in San Francisco.[iii] For decades, the tobacco industry has lied to specific communities and the public at large saying their products are not addictive, harmful or deadly. Tobacco manufacturers continue to create and flood the market with newly designed products they market as being less harmful and alternatives to quitting – a tactic that is not new.

The Tobacco Industry's Long History of Deceit about the Harm Caused by Cigarettes

In the 1950s, scientific studies by the American Cancer Society and others established a definitive link between tobacco use and cancer. As health concerns about smoking started to emerge at this time and in the 1960s, cigarette manufacturers began to redesign their products to offer individuals who smoke, products they claimed to be "less harmful" or as an alternative to quitting. For instance, so-called "light" cigarettes were marketed as healthier with less tar and nicotine. Yet, due to the design of these cigarettes, people who smoked actually smoked longer, inhaling more deeply and more frequently to get their desired dose of nicotine. These design changes may have actually led to an increase in lung cancer cases. Cigarette manufacturers knew these products posed no less risk, yet fraudulently sold them to Americans as such.

One of the most stunning examples of industry tactics was revealed in the landmark case of *U.S. v Philip Morris*, the litigation brought by the U.S. government against the industry accusing it of violating the Racketeering Influenced and Corrupt Organizations (or RICO) Act. After six years of litigation, nine months of trial and hundreds of depositions, U.S. District Court Judge Gladys Kessler found the tobacco industry engaged in an illegal, decades-long campaign to deceive people who smoke about the health hazards of smoking in violation of RICO. Kessler held that the defendants "have **marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted**."[iv] The Court of Appeals for the DC Circuit upheld Kessler in numerous appeals, most recently in 2015, allowing a variety of remedies because defendants "**would likely commit similar violations in the future**."[v]

New Tobacco Products Marketed Using the Same Message

There is no safe form of tobacco despite the many different forms of tobacco on the market. Despite the fact that 68% of adults who smoke report that they want to quit,[vi] tobacco manufacturers continue to sell cigarettes and create new addictive tobacco products intended to attract new users and keep existing users. Contrary to claims from manufacturers that e-cigarettes transition people off cigarettes, 58.81% of young adults who currently used e-cigarettes in 2020 had never previously smoked cigarettes.[vii]

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No existing tobacco products have been FDA-approved to help individuals quit.

The tobacco industry is using the same marketing strategies as the "light" and "low" cigarettes campaigns from the past by using messages and imagery to promote and sell dangerous and highly addictive e-cigarettes, heated tobacco products, and nicotine pouches. One study showed how e-cigarette companies have used similar marketing themes historically used to sell cigarettes, including using cartoons to appeal to youth and using young models in in newspapers, magazines, TV ads as well as in, movies/streaming services geared towards young individuals. Similarly, a 2019 Stanford research report compared Juul's 2015-2018 marketing campaigns to specific cigarette ads, highlighting the similar use of playful tones and bright colors, the hiring of celebrities, and distribution of free samples at sponsored youth-oriented entertainment venues.[viii]

E-cigarette Avoidance of Federal & State Regulation

E-cigarettes started to become available on the U.S. marketplace in 2007. The FDA took action to deny importation of these products on the grounds they were approved cessation products. To escape FDA's authority, in 2009, two companies operating as NJOY sued the FDA for denying importation of its products. NJOY successfully argued their e-cigarettes are meant to deliver nicotine as a substitute for cigarettes and therefore are not therapeutic cessation devices.[xii] In 2009, Congress granted FDA the authority over all tobacco products, but it was not until 2016 that the FDA asserted its authority over e-cigarettes as tobacco products as part of the "Deeming Rule." Unsurprisingly, a number of tobacco industry lawsuits were filed against the FDA to invalidate the deeming rule, alleging the FDA did not have the ability to regulate e-cigarette and cigar products. ACS CAN along with other public health groups filed an amicus brief outlining the importance of the agency's role in regulating these products. Meanwhile, the eight years the FDA took to finalize the deeming rule and the time for the tobacco industry lawsuits to be resolved, the U.S. marketplace was flooded with e-cigarettes and other new tobacco products. The lack of FDA regulation allowed a new generation of youth to become addicted to tobacco products. E-cigarettes became the most commonly used tobacco product among U.S. youth in 2014.[xiii] By December 2018, the alarming and continued rate at which youth and young adults were using e-cigarettes lead to the U.S. Surgeon General declaring youth e-cigarette use to be an epidemic.[xiv] The tobacco industry's latest trick to sell their products without FDA oversight involved claiming certain products are made from synthetic nicotine and not tobacco. Notably some e-cigarettes that were denied marketing orders to sell their products, including Puffbar[xv] and Vapor Salon,[xvi] began to publicly announce their intentions to reintroduce their same e-cigarette products using synthetic nicotine – a loophole in the Tobacco Control Act – to circumvent FDA regulation. Fortunately, Congress closed this glaring loophole in 2022 by clarifying the definition of tobacco products to include any product that contains nicotine, regardless of the source of the nicotine.

To also avoid state regulations, the tobacco industry often requests specific tobacco product exemptions or loopholes to state and local policies. These laws can allow e-cigarettes, cigars, products with modified risk orders or products containing synthetic nicotine to be excluded from excise taxes or taxed at a significantly lower excise tax rate. Exemptions are never added to policies for public health reasons and can contribute to worsening health disparities. In addition, some state tobacco control funding has been redirected to fund the comparative risks of "alternative" products, instead of funding fact-based tobacco prevention and control programs.

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In September 2022, Altria, one of the RICO defendants and the maker of Marlboro cigarettes, and owner of the controlling share of Juul, agreed to pay $438.5 million dollars to 32 states and Puerto Rico to resolve claims of illegal conduct. According to Connecticut Attorney General William Tong, who led the bi-partisan investigation, Juul "relentlessly marketed vaping products to underage youth, manipulated their chemical composition to be palatable to inexperienced users, employed an inadequate age verification process, and misled consumers about the nicotine content and addictiveness of its products."[ix]

FDA Inadequately Enforcing Therapeutic Modified Risk Claims

Studies have shown how e-cigarette companies have marketed their products using a variety of cessation and unsubstantiated therapeutic claims both before[x] and after the FDA had authority over e-cigarettes as a tobacco product. E-cigarettes are often illegally promoted as healthier alternatives to cigarettes or as tools to help individuals quit smoking.[xi] Cessation claims, including that a product can help a person quit using tobacco, are claims that must be approved by the FDA as a medical drug or device. Tobacco manufacturers cannot make cessation claims unless they have been approved as such. Use of these illegal claims may misinform individuals to believe the tobacco products are safe, which isn't true.

Congress granted FDA the authority to regulate the tobacco industry's use of marketing claims because of the industry's long history of misleading the public on the harms of its products. To claim a tobacco product poses a "modified risk," a tobacco product manufacturer must apply and prove to the FDA the product *significantly* reduces harm and the risk of tobacco-related disease to the individuals using the product as well as non-users, while also proving how use of the modified risk claim will not result in increased initiation of the tobacco product by individuals who do not use it, particularly youth. Also, as part of this authority, tobacco manufacturers are both explicitly and implicitly prohibited from saying their product is "FDA approved." The FDA does not approve the sale of new tobacco products, as all tobacco products are harmful.

Unfortunately, the FDA has inadequately enforced the use of both therapeutic claims and modified risk claims used to sell tobacco products. ACS CAN, with its tobacco control partners, have opposed the tobacco industry's existing and proposed modified risk marketing orders, as their product applications to date have been insufficient in proving that the products as used by consumers would lead to reduced harm and risk. In addition, all the applications have lacked any information on the impact on youth – which is required under the law. ACS CAN has also sent letters to FDA urging the agency to investigate the illegal use of cessation claims by tobacco companies to market tobacco products.

ACS CAN's Position

Tobacco companies have violated civil racketeering laws and defrauded the American public by lying for decades about the health effects of smoking, manipulating their products to make them more addicting, marketing products directly to children, and more. Letting tobacco companies draft the solution to reduce tobacco product use is shortsighted. ACS CAN urges lawmakers to protect public health, not Big Tobacco's profits, by passing comprehensive tobacco control policies that apply to all tobacco products.

Ensuring tobacco control policies are comprehensive and evidenced based is the best way to overcome the tobacco industry's attempts to undermine existing laws and reduce tobacco use. The tobacco industry

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motives are very clear, they will aggressively market their products to underage individuals, people with limited-income, communities of color and LGBTQ+ individuals. All tobacco products should be treated equally in tobacco control laws because all tobacco products cause harm. The tobacco industry's constant request for exemptions to be added or requests to delay the implementation of strong tobacco control regulations only benefits Big Tobacco at the expense of everyone else's health.

Well established and effective multi-prong tobacco control policies that are comprehensive are necessary to eliminate tobacco-related disparities and health inequities. Specifically, ACS CAN advocates for evidence-based tobacco control policies at the federal, state and local levels, including:

- the FDA using its full authority to enforce premarket review of new tobacco products, restrict the marketing of these products to youth, and enforce the prohibition on unsubstantiated therapeutic claims;
- fully fund federal and state tobacco control programs to prevent initiation of tobacco products, monitor tobacco product use, identify tobacco related disparities, and promote effective strategies to help individuals who use tobacco products to successfully quit;
- enact comprehensive tobacco control policies with clear definitions that apply to all tobacco products, including e-cigarettes, hookah and other emerging tobacco products and do not exclude specific products from regulations or make location exemptions for the use of certain products;
- increase the tax on cigarettes by at least $1.00 per pack with a parallel tax on all other tobacco products, including e-cigarettes;
- end the sale of menthol cigarettes and all other flavored tobacco products;
- enact comprehensive smoke-free policies in all workplaces, including restaurants, bars and gaming facilities;
- provide access to comprehensive tobacco cessation services and effective FDA-approved cessation medications without barriers or cost-sharing to help people quit tobacco; and
- preserve the right of local governments to pass public health policies that are stronger than state and federal laws.

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