

WHERE THERE IS SMOKE, THERE IS HYSTERIA: CAN THE BACKLASH AGAINST TRADITIONAL TOBACCO PREDICT FUTURE REGULATIONS ON E-CIGARETTES?

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I. INTRODUCTION

Few parents would want to ask the following to their children: Are you smoking cigarettes? Since the 1960s, public perception of traditional tobacco products like cigarettes, pipes, and cigars has declined as information on the health risks associated with smoking became more prevalent. This coincided with increased regulations on the advertisement and sale of nicotine products.¹ However, in the 21st century, a new form of nicotine consumption has taken the market by storm in the form of “vaping.”² By using aerosol to deliver nicotine orally through electronic cigarettes (or known simply as “e-cigarettes”) as opposed to the traditional use of combustion for older forms of tobacco products, vaping is touted as having substantially reduced the health risks of tobacco consumption.³ The combination of smart advertising and a plethora of creative flavorings has made vaping particularly popular among young adults.⁴

In September of 2019, however, the Center for Disease Control (CDC) reported a spike in lung-related injuries stemming from the use of e-cigarettes, spurring discussions as to whether vaping should be more regulated.⁵ This Note will discuss the current state of medical research regarding the health effects of e-cigarettes, taking into account the recent information regarding respiratory injuries.⁶ The Note will then compare and contrast the state of research on e-cigarettes with that of traditional tobacco products from the 1960s onwards. The specific policy changes being compared and contrasted between the two include regulations on advertising, age restrictions, artificial flavorings, and other substantive matters. After considering both the change in public perception and regulations passed against traditional tobacco products, this Note predicts that e-cigarettes will follow a similar trajectory as traditional tobacco products with respect to advertising. However, e-cigarettes will not follow the same regulatory path as traditional tobacco products regarding outright public condemnation and disincentives, due to their public health advantages over tobacco smoking.

II. BACKGROUND

Prior to the mid-20th century, tobacco products were not seen as harmful from a medical perspective, and were used for recreational purposes.⁷ Although some segments of society, such as advocates of the temperance movement, sought to prohibit the use or sale of tobacco alongside alcohol, attempts to ban

1. See K. Michael Cummings & Robert N. Proctor, *The Changing Public Image of Smoking in the United States: 1964–2014*, 23 *CANCER EPIDEMIOLOGY, BIOMARKERS & PREVENTION* 32, 33–34 (2014) (discussing the changing public perception of smoking from 1964 onwards).

2. Yvette Brazier, *Are E-Cigarettes a Safe Alternative to Smoking?*, *MED. NEWS TODAY*, <https://www.medicalnewstoday.com/articles/216550> (last updated May 18, 2018).

3. *Id.*

4. Jidong Huang et al., *Vaping versus JUULing: How the Extraordinary Growth and Marketing of JUUL Transformed the US Retail E-Cigarette Market*, 28 *TOBACCO CONTROL* 146, 147 (2019).

5. *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, *CTR. FOR DISEASE CONTROL & PREVENTION*, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html (last updated Feb. 25, 2020) [hereinafter *E-Cigarette Lung Injury*].

6. *Id.*

7. Cummings & Proctor, *supra* note 1, at 32.

tobacco were never widespread.⁸ After the disappearance of the temperance movement, moves to regulate or prohibit tobacco became non-existent in the United States.⁹ Beginning in the 1930s, when lung cancer rates were climbing despite being an extremely rare form of cancer, medical professionals began noticing a link between smoking and lung cancer.¹⁰

In the 1950s, the effects of tobacco on health fell under greater scrutiny by medical professionals, with tobacco companies responding by increasing advertising and the release of “filtered” cigarettes that would ostensibly reduce the risks.¹¹ Two landmark reports published by the Royal Academy of Physicians in the United Kingdom and the United States Department of Health in 1962 and 1964, respectively, resulted in demands for increased regulation of tobacco products.¹² These damning reports described the numerous health risks associated with smoking that were previously unknown to the general public, such as the correlation between smoking and lung cancer.¹³ Tobacco companies were further hit with litigation concerning the advertising and health effects of tobacco products.¹⁴ This resulted in restrictions on the sale of these products as well as tobacco companies being more forthright about the negative health effects of tobacco, including but not limited to lung cancer, emphysema, etc.¹⁵

For the remainder of the 20th century, as smoking was increasingly portrayed in a negative light, the use of tobacco products began to steadily decline.¹⁶ Whereas smokers comprised 42% of the U.S. adult population in 1965, by 2011 it declined to less than 20% of the adult population.¹⁷ Public awareness of the health risks associated with smoking has also contributed to the decline of public acceptance of the practice, with 71% of Americans naming smoking as a major cause of cancer in 2001, and 59% supporting smoking bans in public places by 2011.¹⁸

In 2003, the first modern e-cigarette was designed and manufactured by Chinese pharmacist Hon Lik.¹⁹ Efforts to create electronic cigarettes go as far back as 1963, but serious efforts to create a commercially viable electronic cigarette can be seen as late as the 1990s, with major tobacco companies like RJ

8. *Id.*

9. *Id.*

10. *Id.*

11. *See id.* (discussing the use of filtered cigarettes in advertising and their prominence in tobacco sales in the 1950s and 1960s).

12. *See generally* SMOKING AND HEALTH 43 (ROYAL C. OF PHYSICIANS 1962)(reprt. 2015) (concluding that smoking is the leading cause in the rise of lung cancer deaths and increases the risk of other diseases such as coronary heart disease) [hereinafter SMOKING AND HEALTH]; DR. LUTHER L. TERRY, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE UNITED STATES 33 (U.S. DEP’T OF HEALTH 1964) (mirroring the conclusions of the Smoking and Health report published by the Royal College of Physicians regarding the link between smoking and health).

13. SMOKING AND HEALTH, *supra* note 12; TERRY, *supra* note 12.

14. *See* Cummings & Proctor, *supra* note 1, at 34 (discussing the litigation between tobacco companies and state attorneys general).

15. *Id.*

16. *Id.* at 33.

17. *Id.*

18. *Id.*

19. *The Story of the E-Cigarette*, FONTEM VENTURES (Jan. 29, 2015), <http://www.fontemventures.com/news/story-e-cigarette>.

Reynolds and Phillip Morris creating numerous designs attempting to deliver nicotine in a less harmful manner.²⁰ The e-cigarette designs pioneered by Hon are battery-powered products that typically deliver nicotine in the form of an aerosol.²¹ The aerosol, which is not created by combustion and contains no tar, circumvents many of the health risks of traditional tobacco products because the nicotine is isolated from the tobacco.²²

Originally bulky and unattractive from an aesthetic standpoint, the development of smaller and sleeker versions, like the JUUL, contributed to the popularity of e-cigarettes among young adults.²³ The newer aesthetic made it fashionable while their smaller sizes meant that they could be easily hidden, which was useful for younger users to evade detection by authority figures.²⁴ Within a decade of its invention, e-cigarettes became extremely popular due to the reduced health risks that were touted by their purveyors.²⁵ Additionally, e-cigarette pods came in a multitude of flavors that were more appealing to younger audiences, including fruity flavors like mango or even sweets like cotton candy.²⁶

Beginning in September of 2019, reports began to surface of lung-related injuries that were tied to the use of e-cigarettes.²⁷ Initially, the CDC could not pinpoint what the exact cause of the injuries was, but it confirmed that they were tied to e-cigarette use.²⁸ This led to public outcry throughout the country, with some municipalities and state governments even considering new regulations regarding the sale of e-cigarettes.²⁹ The CDC eventually confirmed that the cause was likely from black market pods containing tetrahydrocannabinol (THC) and not from any issues stemming from the e-cigarettes being used as intended.³⁰

Despite these findings, pressure from the public and state governments has continued to mount against e-cigarette manufacturers, with some even deciding to withhold the sale of flavored pods for the time being.³¹ This culminated in

20. See Lauren M. Dutra et al., *Philip Morris Research on Precursors to the Modern E-Cigarette Since 1990*, 26 *TOBACCO CONTROL* 97, 97–99 (2017) (discussing and analyzing the various e-cigarette designs contemplated by Phillip Morris, prefiguring the development of the modern e-cigarette in 2003 by Hon Lik).

21. *The Story of the E-Cigarette*, *supra* note 19.

22. See JOHN BRITTON & ILZE BOGDANOVICA, *ELECTRONIC CIGARETTES: A REPORT COMMISSIONED BY PUBLIC HEALTH ENGLAND 6–7* (PUB. HEALTH ENG. 2014) (“[E]lectronic cigarettes do not burn tobacco, so any toxins in vapour arise either from constituents and contaminants of the nicotine solution, and products of heating to generate vapour.”).

23. *Id.* at 8.

24. Huang et al., *supra* note 4, at 146.

25. *Id.*

26. See *id.* at 149 (discussing the prominence of flavorings in the marketing for JUUL).

27. *E-Cigarette Lung Injury*, *supra* note 5.

28. Jacob Sullum, *Black Market Pot—Not Vaping—Most to Blame for Lung Disease*, CHI. SUN-TIMES (Oct. 8, 2019), <https://chicago.suntimes.com/columnists/2019/10/8/20905306/vaping-lung-disease-juul-njoy-jacob-sullum>.

29. Kristen Jordan Shamus et al., *Michigan’s Flavored Vape Ban Stops Sales This Week. Here’s What You Need to Know*, DETROIT FREE PRESS (Sept. 30, 2019), <https://www.freep.com/story/news/local/michigan/2019/09/30/michigan-flavored-vape-ban-vaping-ecigarette-vapes/2424516001>.

30. Sullum, *supra* note 28.

31. Sheila Kaplan, *Juul Ends E-Cigarette Sales of Mint-Flavored Pods*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/health/vaping-juul-mint-flavors.html>.

the U.S. Food and Drug Administration (FDA) announcing a ban on flavorings for e-cigarettes, though it includes exemptions for menthol and tobacco flavorings in order to “strike the right public health balance” by targeting products widely used by children while allowing vaping as a “potential off-ramp” for adults who want to quit smoking.”³²

III. ANALYSIS

In attempting to craft a prediction on what path future regulations of e-cigarettes will follow, the Note will compare the current state of e-cigarettes with that of traditional tobacco products when regulations against tobacco use began in earnest in the 1960s. The Note will first examine the current state of research regarding the possible health effects of e-cigarettes, and the industry’s practice on its sale and advertisement of the product. The Note will then provide an examination of the medical research into and changing public perception of cigarettes and other traditional tobacco products during the mid-20th century. Finally, the Note will compare the two products and will predict, based on the medical research regarding e-cigarettes and the nature of policies taken by government entities, that e-cigarettes will likely experience similar restrictions as tobacco with respects to advertising but not with respect to policies that overtly discourage their use on account of their potential public health benefits.

A. *The Current State of Medical Research Regarding the Safety of E-cigarettes and Prevailing Industry Practices*

It is no surprise that, given the research on the negative health effects of tobacco products and the advertising of e-cigarettes as a safer alternative to smoking, medical professionals would collect data and observe the possible health effects of vaping.³³ Furthermore, given the advertising done by tobacco companies in the past (which will be further explored in the succeeding section), it is natural for the medical and scientific community to express initial skepticism regarding the safety of these products.³⁴ As a result of these concerns, the body of research on e-cigarettes is impressive, with several noticeable trends. One of the most important trends is that e-cigarettes are generally healthier than traditional tobacco products.³⁵

32. Ken Alltucker, *FDA Bans Mint- and Fruit-flavored Vaping Products but Exempts Menthol and Tobacco*, USA TODAY (Jan. 2, 2020), <https://www.usatoday.com/story/news/health/2020/01/02/vaping-ban-fda-strikes-mint-and-fruit-flavored-products/2796299001>.

33. See Caroline Franck et al., *Ethical Considerations of E-cigarette Use for Tobacco Harm Reduction*, 17 RESPIRATORY RSCH. 1, 1 (2016) (concerning the use of e-cigarettes as smoking cessation devices); Huang et al., *supra* note 4, at 147 (discussing marketing tactics utilized by JUUL); Igor Bursztyn, *Peering Through the Mist: Systematic Review of What the Chemistry of Contaminants in Electronic Cigarettes Tells Us About Health Risks*, 14 BMC PUB. HEALTH 1, 1 (2014) (analyzing the quantities of potential contaminants in e-cigarette vapors and whether they pose a sufficient risk to human health).

34. Cummings & Proctor, *supra* note 1, at 32.

35. Franck et al., *supra* note 33, at 7; Bursztyn, *supra* note 33, at 12.

Tobacco smoking comes with myriad health risks stemming from the combustion of nicotine products and the preparation of ingredients.³⁶ Cigarettes, which are one of the most popular methods of smoking, contain over 7,000 harmful chemicals, including carcinogens like formaldehyde, arsenic, butane, and many others.³⁷ As a result, constant smoking results not only in long-term inflammation and damage to tissue, but also leads to increased risk of lung cancer, emphysema, and other respiratory ailments.³⁸ The damage is not only confined to the respiratory system, but also to the cardiovascular system by promoting plaque buildup, resulting in an elevated risk for cardiac arrest and stroke.³⁹

It is within this context that e-cigarettes have received so much attention from the medical community. Although e-cigarettes are not entirely safe and come with their own problems (depending on the nicotine solution⁴⁰), e-cigarettes are shown to be significantly safer for consumers than cigarettes.⁴¹ Owing to the fact that the method of delivery is by aerosol rather than combustion, the vast majority of deadly chemicals usually present in tobacco smoke are either not present or “fall well below the threshold for concern for compounds with known toxicity.”⁴² Users of e-cigarettes also reported “less dyspnea on exertion [...], less cough, less expectoration and less sore throat” compared to traditional smoking.⁴³ Although research suggests that e-cigarettes are safer, researchers and medical professionals caution that the research is still ongoing, and skepticism within the medical community continues regarding the e-cigarette’s use as a smoking cessation method.⁴⁴

While many of the dangerous chemicals found in tobacco are not found in e-cigarettes, both contain nicotine, which is the primary addictive agent in tobacco.⁴⁵ Although not harmful on its own, it is still a habit-forming compound that may pose risks to younger users.⁴⁶ In this respect, e-cigarettes not only contain comparable levels of nicotine, but some solutions contained as much as 5% nicotine, which is higher than the nicotine found in cigarettes.⁴⁷ However, owing to public backlash and pressure from the FDA, the largest e-cigarette

36. U.S. DEP’T OF HEALTH, A REPORT OF THE SURGEON GENERAL: HOW TOBACCO SMOKE CAUSES DISEASE 2–3 (2010) [hereinafter HOW TOBACCO SMOKE CAUSES DISEASE].

37. *Id.*

38. *Id.*

39. *Id.* at 8–9.

40. Zachary Cahn & Michael Siegel, *Electronic Cigarettes as a Harm Reduction Strategy or Tobacco Control: A Step Forward or a Repeat of Past Mistakes?*, 32 J. OF PUBLIC HEALTH POL’Y 16, 18–23 (2011).

41. *Id.* at 27–29.

42. Burszty, *supra* note 33, at 12.

43. Rucha S. Dagaonkar & Zarir F. Udawadia, *Water Pipes and E-cigarettes: New Faces of an Ancient Enemy*, 62 J. OF THE ASS’N OF PHYSICIANS OF INDIA 324, 326 (2014).

44. *See id.* at 327 (discussing the need to weigh the health effects of e-cigarettes with the dangers of nicotine addiction in the context of Indian society).

45. *See* HOW TOBACCO SMOKE CAUSES DISEASE, *supra* note 36, at 4–5 (discussing the effects of nicotine on juvenile development and its addictive properties).

46. *Id.*

47. Sheila Kaplan, *Juul’s New Product: Less Nicotine, More Intense Vapor*, N.Y. TIMES (Nov. 27, 2018), <https://www.nytimes.com/2018/11/27/health/juul-ecigarettes-nicotine.html> (discussing the plans by JUUL to reduce nicotine levels in pods but also to increase the volume of the aerosol, which has led “[s]ome experts [to say] the higher vapor could potentially make the pods even more addictive.”).

producer, JUUL, has begun to scale back its nicotine solutions to more acceptable levels of nicotine.⁴⁸

The advertisement of e-cigarettes, specifically the flavors offered, is another consideration in determining the need for regulation.⁴⁹ Compared to traditional tobacco products, the solutions used in e-cigarettes can be synthetically manipulated to have a far broader range of flavors.⁵⁰ Such flavors can include fruit-based ones like mango, as well as cream, bubblegum, and many more.⁵¹ The combination of flavors that appeal to younger consumers and the addictive nature of nicotine raises concerns of exploitation by the e-cigarette companies.⁵²

One factor unique to JUUL, the largest e-cigarette company globally in terms of market share, is the heavy use of social media for advertising.⁵³ While other e-cigarette companies relied on traditional methods of advertising, JUUL focused heavily on cultivating a social media presence.⁵⁴ With advertising focused on the sleek appearance of the apparatus and the plethora of flavors, JUUL grew immensely, with sales increasing by 700% in 2016 alone.⁵⁵ With this type of rapid growth coupled with the marketing practices of the vaping industry, it is only a matter of time before e-cigarettes become targets for more regulation. This is becoming a reality as regulations are now being implemented at the state and federal level, bringing with it comparisons to what occurred to the tobacco industry in the mid-20th century, which will be explored later in this Note.

As a result of its sleek advertising campaign and wide variety of flavorings, JUUL has become quite popular among young adults.⁵⁶ The combination of flavors, innovative use of social media, and selective use of medical data touting the relative safety of e-cigarette have contributed to JUUL's overwhelming market share, with younger users being integral to its success.⁵⁷ Unsurprisingly, this has led to backlash from anti-tobacco groups who argue that e-cigarettes are leading to increased rates of nicotine addiction among young adults.⁵⁸ Although e-cigarettes in general can lead to nicotine addiction, JUUL's prominence in the market has made it a particularly attractive target for criticism regarding its advertising and business practices.⁵⁹

48. *Id.*

49. Huang et al., *supra* note 4, at 150.

50. *Id.*

51. *Id.*

52. Protection of Youth from Nicotine Product Addiction, Mich. Admin. Code R 325E-1.2019 (2019).

53. Huang et al., *supra* note 4, at 147.

54. *Id.*

55. Kimberly Suiters, *Are Your Kids JUULing at School? 7 On Your Side Investigates*, ABC7 WJLA (Jan. 31, 2018), <https://wjla.com/features/7-on-your-side/are-your-kids-juuling-at-school-7-on-your-side-investigates>.

56. Huang et al., *supra* note 4, at 146.

57. *Id.*

58. Laura Cassels, *Critics Say Trump's Partial Ban on Vape Flavors Fails to Protect Kids*, FLA. PHOENIX (Jan. 3, 2020), <https://www.floridaphoenix.com/blog/critics-say-trumps-partial-ban-on-vape-flavors-fails-to-protect-kids>.

59. Suiters, *supra* note 55.

Although the research on e-cigarettes seems to indicate that it is safer than traditional tobacco products, beginning in September 2019, the CDC began reporting a number of patients being admitted to hospitals for lung related illnesses, with 47 deaths confirmed as of November 20, 2019.⁶⁰ It was eventually revealed that the likely reason for the spike in patients admitted for vaping-related lung injuries (totaling 2,290 as of November 20, 2019)⁶¹ was vitamin E acetate, and was found in black market pods that contained THC, the primary psychoactive found in cannabis.⁶² In spite of the culprit being black market pods, the publicity surrounding the injuries has led some states like Michigan to implement additional regulations for e-cigarettes.⁶³

After much bad publicity surrounding the outbreak, the FDA announced its own plans to address the issue.⁶⁴ Although no formal policies have been put in place, the FDA has released a Guideline on Industry with regards to e-cigarettes, outlining the thoughts and likely future plans of the agency in response to the outbreak and long-standing concerns about the use of e-cigarettes among young adults.⁶⁵ With actors at both the state and federal levels signaling to the general public that action will be taken and likely have long-lasting effects, the vaping industry has begun to scale back certain industry practices, such as discontinuing sweet flavorings, in the hopes of ameliorating the situation.⁶⁶

There is no denying the massive presence of e-cigarettes, like JUUL, among such a crucial demographic and the potential to reduce deaths from smoking is not to be discounted.⁶⁷ However, the negative publicity resulting from the aforementioned crisis means that despite these positives, e-cigarettes will now be under greater scrutiny, not just from the public but also regulatory agencies.⁶⁸ But what will this new level of scrutiny look like in the near future? Will this new scrutiny mirror what occurred to tobacco during the 1960s, or will this portend an entirely new regulatory scheme? To understand this, it is important to discuss the state of tobacco during and immediately prior to the new regulations it became subject to in the 1960s.

B. The State of Medical Research, Industry Practice, and Public Perception of Tobacco post-World War II Onwards

Although research on tobacco had been conducted prior to World War II, it was not until after the war that medical research on the subject became both

60. *E-Cigarette Lung Injury*, *supra* note 5.

61. *Id.*

62. *Id.*

63. Mich. Admin. Code R 325E-1.2019.

64. U.S. Food & Drug Admin., *FDA Finalizes Enforcement Policy on Unauthorized Flavored Cartridge-Based E-Cigarettes that Appeal to Children, Including Fruit and Mint*, U.S. FOOD & DRUG ADMIN. (Jan. 2, 2020), <https://www.fda.gov/news-events/press-announcements/fda-finalizes-enforcement-policy-unauthorized-flavored-cartridge-based-e-cigarettes-appeal-children> [hereinafter *FDA Enforcement Policy*].

65. U.S. FOOD & DRUG ADMIN., ENFORCEMENT PRIORITIES FOR ELECTRONIC NICOTINE DELIVERY SYSTEMS (ENDS) AND OTHER DEEMED PRODUCTS ON THE MARKET WITHOUT PREMARKET AUTHORIZATION (REVISED) 1–2 (2020) [hereinafter *FDA GUIDANCE FOR INDUSTRY*].

66. Mich. Admin. Code R 325E-1.2019; *FDA Enforcement Policy*, *supra* note 64.

67. *FDA GUIDANCE FOR INDUSTRY*, *supra* note 65, at 7.

68. *Id.* at 7–9.

plentiful and negative.⁶⁹ Prior to 1953, cigarette use grew steadily for almost the entire first half of the 20th century, with 47% of American adults smoking cigarettes beginning in 1953.⁷⁰ Attempts to spread information on the negative health effects on tobacco during the 1950s were stymied, however, by a concerted effort on the part of tobacco companies to both minimize the impact of the research and assuage their customers through advertising.⁷¹

Most notable of these advertisements was the “filtered” cigarette, which was purported to solve the concerns of medical professionals by “filtering” the carcinogenic and other unhealthy elements of tobacco found during combustion and thus protecting the smoker from harm.⁷² The strategy worked: In 1952, filtered cigarettes accounted for less than 2% of cigarette sales, but by 1957 they accounted for 40% of cigarette sales, and by 1966 they accounted for 60% of sales.⁷³ In terms of total sales, after a brief dip in 1953 to 1954, cigarette use continued to grow.⁷⁴ This demonstrates a crucial element to the success of both cigarettes during this period of time and e-cigarettes in the future: the power of marketing and branding in selling these products.

Public perception of cigarette use, however, changed drastically after the release of two seminal reports: the 1962 *Smoking and Health* report by the Royal College of Physicians in the United Kingdom,⁷⁵ and the 1964 *Smoking and Health* report by the Office of the Surgeon General in the United States.⁷⁶ Both were damning in regards to the health effects of smoking, with the former report going so far as to state that “the benefits of smoking are almost entirely psychological and social”⁷⁷ and the latter report bluntly stating “the greater number of cigarettes smoked daily, the higher the death rate.”⁷⁸ Both reports made clear the correlation between smoking and a variety of diseases, including lung cancer, chronic bronchitis, emphysema, lip cancer, arteriosclerosis, and a host of other respiratory, neurological, gastrointestinal, and cardiovascular diseases.⁷⁹ With regards to lung cancer specifically, the Surgeon General’s report indicated a 9-to-10 fold increased risk of developing lung cancer, with heavy smokers having a 20 fold increase,⁸⁰ which is particularly jarring because prior to the 20th century lung cancer was an incredibly rare form of cancer.⁸¹

With the release of these reports, legislation was passed in the years after to deal with the sale and advertising of tobacco products with the most significant of these measures being the Federal Cigarette Labeling and

69. Cummings & Proctor, *supra* note 1, at 32.

70. *Id.* at 33.

71. *Id.*

72. *Id.* at 32.

73. *Id.*

74. *Id.* at 32–33.

75. SMOKING AND HEALTH, *supra* note 12.

76. TERRY, *supra* note 12.

77. SMOKING AND HEALTH, *supra* note 12, at 7.

78. TERRY, *supra* note 12, at 29.

79. SMOKING AND HEALTH, *supra* note 12, at 27–32; TERRY, *supra* note 12, at 31, 37–38.

80. TERRY, *supra* note 12, at 31.

81. *Id.* at 29.

Advertising Act of 1965 (hereinafter “the Act”).⁸² The Act mandated that, in an effort to protect the health of consumers, cigarette companies prominently display some form of statement on their packaging warning the potential buyer of the health risks associated with smoking.⁸³ Subsequent legislation built on those initial mandates, slowly restricting tobacco companies’ ability to advertise on television and radio, prohibiting smoking in certain areas, and requiring more specific warning labels on cigarette packaging.⁸⁴

Although the methods may not be similar, the antecedents for the marketing used by the vaping industry were present in the tobacco industry.⁸⁵ The tobacco industry during the 1950s relied on slick but misleading marketing for filtered cigarettes, making use of television and radio advertisements to deflect attention away from the increasingly negative research on tobacco.⁸⁶ Although the vaping industry may not be using the same mechanisms for advertising and the research actually supports the reduced risks of vaping relative to smoking, the vaping industry’s use of social media as a means of highly effective and low cost advertising is a point of kinship between the two industries.

C. Comparison and Preliminary Prediction on Whether or Not E-cigarettes Will Follow a Similar Policy Trajectory as Traditional Tobacco Products

In determining whether regulations on e-cigarettes will follow the same policy trajectory as traditional tobacco products, it is critical to compare the current status of e-cigarettes with the status of tobacco from the 1960s onwards, when governments began promulgating regulations against traditional tobacco products. If the status of e-cigarettes is similar to that of tobacco from the 1960s onwards, then it is possible that e-cigarettes will experience an onslaught of regulations on its sale and advertising, much like tobacco. Regulating e-cigarettes also comes with its own unique set of challenges, such as weighing the interests of current smokers who may benefit from transitioning to e-cigarettes versus the concerns of anti-tobacco groups regarding nicotine addiction among young adults, for example.

1. Similarities Between the Backlash Against E-Cigarettes and the Backlash Against Traditional Tobacco

One area of similarity between the two phenomena is that prior to public backlash, both products were experiencing a period of strong growth in sales.⁸⁷ With regards to cigarettes, the growth remained consistent for much of the first-half of the 20th century, with only slight declines during the Great Depression

82. Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§ 1331–1341 (1965).

83. *Id.*

84. *See e.g.*, Public Health Cigarette Smoking Act of 1970, Pub. L. No. 91-222 84 Stat. 87 (1970) (amending 15 U.S.C. §§ 1331-1338 to incorporate more stringent language on cigarette label warnings).

85. Cummings & Proctor, *supra* note 1, at 32.

86. *Id.*

87. *Id.*; Huang et al., *supra* note 4, at 146.

and from 1953 to 1954.⁸⁸ It was only after the release of the Surgeon General's report that public backlash led to a decline in sales.⁸⁹ Similarly, e-cigarettes have become immensely popular, with the sales of JUUL, the largest e-cigarette company, increasing by 700% in 2016.⁹⁰

Another point of similarity between the two is the importance of advertising in sustaining the growth of the product in the market, although there is a notable difference in the method. For cigarettes, advertising in the 1950s would be characterized as traditional by modern standards, with a focus on televised ads.⁹¹ The subject of these ads were often on filtered cigarettes, which were meant to mitigate concerns about the potential adverse effects of smoking.⁹² In contrast, e-cigarette advertising has now become focused on social media, with JUUL being a pioneer in this regard.⁹³ Social media advertising carries a distinct advantage over traditional advertising because it is substantially cheaper than other forms of advertising.⁹⁴ Additionally, the prevalence of social media among young adults makes it a natural place for merchants to advertise.⁹⁵ However, both served their purpose well in that tobacco and e-cigarette companies were able to use advertising to sustain their growth while allaying possible health concerns.⁹⁶

2. *Differences Between the Backlash Against E-Cigarettes and the Backlash Against Traditional Tobacco*

One of the most glaring differences regarding the two products, however, is that the research on their health effects at similar points in time were quite different.⁹⁷ Research into smoking from the 1950s onwards showed an unmistakable trend regarding the connection between smoking and disease.⁹⁸ Most notable was the connection between smoking and lung cancer, which was extremely rare prior to the 20th century.⁹⁹ In contrast, the trend in the research regarding e-cigarettes suggests they are healthier compared to traditional tobacco products.¹⁰⁰ Although research is still ongoing regarding possible health effects, e-cigarettes do not pose the same adverse health effects, with only the recent spate of lung injuries in September of 2019 suggesting a potentially fatal

88. Cummings & Proctor, *supra* note 1, at 32–33.

89. *See id.* at 33 (discussing the evolution regarding the social acceptability of smoking in many areas as their health risks became widely known and the attendant decline of smoking rates).

90. Suiters, *supra* note 55.

91. Cummings & Proctor, *supra* note 1, at 32–3.

92. *Id.*

93. Huang et al., *supra* note 4, at 150.

94. *Id.* at 148.

95. *Id.*

96. Cummings & Proctor, *supra* note 1, at 32; Huang et al., *supra* note 4, at 148.

97. *See generally* Cahn & Siegel, *supra* note 40, at 19 (providing information on the potential health benefits of e-cigarettes relative to tobacco); Cummings & Proctor, *supra* note 1, at 33 (describing the mounting evidence against the use of tobacco).

98. *See* Cummings & Proctor, *supra* note 1, at 32–33 (discussing the slow trend during the 20th century of research linking cigarettes to various diseases).

99. SMOKING AND HEALTH, *supra* note 12, at 27–28.

100. Cahn & Siegel, *supra* note 40, at 27–28 (criticizing the decisions of various health organizations to condemn the use of e-cigarettes).

use of e-cigarettes.¹⁰¹ The CDC has, however, made known that the injuries were not related to the e-cigarettes themselves.¹⁰²

Another difference can be discerned between the catalysts that spurred new regulatory and legislative action on both products. The 1964 Surgeon General's report was the culmination of years of consistent research done by the medical profession, although the impact of prior research was obscured due to advertising done by tobacco companies.¹⁰³ The U.S. Public Health Service had even published a warning concerning cigarette use in 1957, indicating awareness of the then-existing research.¹⁰⁴ The CDC reports, by contrast, were reactionary and meant to address an immediate concern, which was the spike in patients suffering from e-cigarette related lung injuries.¹⁰⁵ Due to the short timeframe, the CDC warnings only addressed the crisis at hand, with little information regarding scientific literature.¹⁰⁶ Although the CDC attempted to use measured language in describing the issue, the CDC made blanket statements regarding the use of e-cigarettes for preventative purposes, stating "irrespective of the ongoing investigation [...] Adults who do not currently use tobacco products should not start using e-cigarette, or vaping, products. There is no safe tobacco product."¹⁰⁷

The pace of regulatory efforts is an additional point of divergence between the two products. Prior to the 1960s, despite warnings from the Surgeon General and other agencies, responses to cigarettes were tepid at both the federal and state level.¹⁰⁸ This lack of action is made all the more glaring due to the rapidly growing body of research demonstrating the harms of tobacco.¹⁰⁹ By contrast, movement on regulating e-cigarettes has been swift, with a bevy of new regulations that are in the process of being implemented mere months after the CDC reported the outbreak of vape-related lung injuries.¹¹⁰ At the state level, Michigan has implemented emergency regulations that are meant to create a stopgap with regards to the availability of e-cigarettes to younger audiences within weeks of the CDC's initial reports.¹¹¹ The FDA also promulgated its own new guidelines and regulations in January of 2020, just months after the initial CDC report, despite a steep, noticeable downward trend in reported cases after initial peak in September of 2019.¹¹²

101. *E-Cigarette Lung Injury*, *supra* note 5.

102. *Id.*

103. TERRY, *supra* note 12, at 29; Cummings & Proctor, *supra* note 1, at 32–33.

104. Cummings & Proctor, *supra* note 1, at 33.

105. *E-Cigarette Lung Injury*, *supra* note 5.

106. *Id.*

107. *See id.* ("All tobacco products, including e-cigarettes, carry a risk.").

108. Cummings & Proctor, *supra* note 1, at 33.

109. *See generally* SMOKING AND HEALTH, *supra* note 12 (providing conclusions on the health effects of tobacco); TERRY, *supra* note 12 (providing similar conclusions on the health effects of tobacco).

110. Mich. Admin. Code R 325E-1.2019.

111. *Id.*

112. *FDA Enforcement Policy*, *supra* note 64.

3. *Challenges and Considerations in Determining Regulations on E-Cigarettes*

If e-cigarettes are apparently safer than cigarettes or other tobacco products, then why is there such a strong backlash against them, despite the lack of a body of research and damning reports like what occurred with cigarettes? A possible explanation could be concerns about the combination of sleek advertising to young and impressionable audiences, and the addictive nature of tobacco.¹¹³ This concern is warranted, given that the proliferation of e-cigarettes in the market has been spurred on by a younger audience, many of whom are introduced to nicotine through e-cigarettes.¹¹⁴ As an addictive substance there are concerns that e-cigarettes can serve as a gateway to cigarettes and tobacco products, although recent studies have shown that is not necessarily the case.¹¹⁵ As mentioned previously, however, nicotine can still be harmful on its own with regards to juvenile health, particularly neurological development.¹¹⁶

With that said, it is also known that many former smokers have used e-cigarettes as smoking cessation devices.¹¹⁷ Some medical professionals have suggested that they can be used for such a purpose, though the medical community as a whole is hesitant to include e-cigarettes as a smoking cessation device.¹¹⁸ This is further reinforced by comments made by e-cigarette manufacturers like JUUL, who explicitly state that they did not create their products with the intent of being used for smoking cessation.¹¹⁹ The higher levels of nicotine initially found in JUUL products also lends credence to the hesitancy of the medical profession to endorse e-cigarettes.¹²⁰ Despite this, the potential use of e-cigarettes for this purpose should not be discounted, as having smokers transition from traditional tobacco products to e-cigarettes can help reduce the health risks faced by smokers.¹²¹

It is also worth noting that e-cigarettes come with a problem not experienced in the sale of tobacco, which is the black market's role in facilitating the recent vape crisis.¹²² With the normalization of both e-cigarette and

113. Mich. Admin. Code R 325E-1.2019; HOW TOBACCO SMOKE CAUSES DISEASE, *supra* note 36, at 4–5; Huang et al., *supra* note 4, at 146–47.

114. Huang et al., *supra* note 4, at 146.

115. See Arman Azad, *E-cigarettes Aren't a "Gateway" to Teen Smoking, Study Says*, CNN (Nov. 4, 2019), <https://www.cnn.com/2019/11/04/health/vaping-smoking-gateway-study/index.html> (discussing how the new study has caused conflicting opinions on its importance, with some dismissing it as only an outlier and maintaining that earlier research still indicates a link between e-cigarettes and tobacco, while others are supporting the findings due to its new methodological approach).

116. HOW TOBACCO SMOKE CAUSES DISEASE, *supra* note 36, at 4–5.

117. Cahn & Siegel, *supra* note 40, at 24.

118. *Id.*

119. Nitasha Tiku, *Startup Behind the Lambo of Vaporizers Just Launched an Intelligent E-cigarette*, VERGE (Apr. 21, 2015), <https://www.theverge.com/2015/4/21/8458629/pax-labs-e-cigarette-juul> (discussing with R&D engineer Atkins on Juul as a smoking cessation device: “We don’t think a lot about addiction here because we’re not trying to design a cessation product at all . . . anything about health is not on our mind” (internal quotation marks omitted)).

120. Kaplan, *supra* note 31.

121. Franck et al., *supra* note 33, at 7 (arguing that while caution is warranted regarding the use of e-cigarettes, it should not serve to impede future research into its potential uses as a smoking cessation device).

122. *FDA Enforcement Policy*, *supra* note 64.

marijuana usage, the formation of a black market for e-cigarette pods containing THC, the principal psychoactive in marijuana plants, has dealt a serious blow to the perception that e-cigarettes have benefits for public health.¹²³ Considering the verifiable benefits vaping has over smoking, it is imperative that a solution to the current crisis must deal with this black market.¹²⁴ Allowing this market to exist will needlessly jeopardize the health of e-cigarette users and hamper attempts to curb smoking.¹²⁵

Efforts to combat this black market, however, will be difficult as regulations will likely clamp down on the sale of certain flavorings.¹²⁶ With the popularity of e-cigarettes among young adults being at least partially attributable to the wide variety of sweet flavorings available, it is possible that younger e-cigarette users may resort to the black market to acquire flavorings as well THC-laced solutions.¹²⁷ Regardless of the actions taken to reduce the use of e-cigarettes among young adults, government regulators will have to confront the e-cigarette black market.

A difficult aspect in deciding how these policies will be formulated moving forward is achieving a balance between protecting young adults from nicotine addiction and the legitimate goal of promoting harm reduction among smokers.¹²⁸ The benefits of e-cigarette use to current smokers can be a useful aid in reducing lung cancer and other diseases associated with smoking, which is a laudable goal considering the costs associated with such diseases.¹²⁹ At the same time, e-cigarette companies have created a formidable marketing campaign that has led to a large surge in young adults and teenagers using their products.¹³⁰ In deciding how to proceed, it is crucial to understanding why the e-cigarette marketing campaigns have been so successful.¹³¹

This success can be attributed to the innovative use of social media and the large number of flavorings available for e-cigarettes.¹³² If government regulators wish to reduce the number of young adults using e-cigarettes, then a possible avenue for doing so would be to restrict the types of flavorings available for e-cigarettes.¹³³ The FDA has recognized that this one of the main appeals of the e-cigarette to young adults, and research on the matters suggests that the

123. See *E-Cigarette Lung Injury*, *supra* note 5 (“National and state data from patient reports and product sample testing show tetrahydrocannabinol (THC)-containing e-cigarette, or vaping, products, particularly from informal sources like friends, family, or in-person or online dealers, are linked to most EVALI cases and play a major role in the outbreak.”).

124. Franck et al., *supra* note 33, at 7 (discussing the potential uses of e-cigarette in smoking cessation).

125. See *E-Cigarette Lung Injury*, *supra* note 5 (stating that black market vaping solutions were the cause in the rise of vape related lung injuries).

126. *FDA Enforcement Policy*, *supra* note 64.

127. See Huang et al., *supra* note 4, at 148 (demonstrating the role of sweet flavorings in enticing younger audiences to purchase e-cigarettes through social media advertising).

128. See *FDA Enforcement Policy*, *supra* note 64 (discussing the need to balance public health concerns with harm reduction).

129. See Franck, *supra* note 33, at 7 (discussing the potential uses of e-cigarette in smoking cessation).

130. Huang, *supra* note 4, at 149.

131. *Id.*

132. *Id.* at 148.

133. See *FDA Enforcement Policy*, *supra* note 64 (demonstrating that regulations are moving in this particular direction).

flavorings form an integral part of its advertisements.¹³⁴ If action is taken to curb e-cigarette use, it is likely that flavorings will be an attractive target for regulators in formulating policy on how to reduce e-cigarette usage.¹³⁵

However, it is possible that exemptions for certain types of flavorings will also be implemented.¹³⁶ The FDA has already indicated that tobacco and menthol flavorings will be exempted from its new regulations, with the stated goal of continuing to provide new avenues for smokers towards harm reduction.¹³⁷ Such an approach will likely not compromise the previous goal of reducing e-cigarette usage among young adults.¹³⁸ Young adults largely prefer fruit-based and mint flavors for e-cigarettes, which are not exempted from the new regulations being contemplated.¹³⁹ In restricting flavorings to only those preferred by current smokers, flavoring bans will help facilitate the use of e-cigarettes as a harm reduction tool.¹⁴⁰

Such a ban could impact the types of advertisements e-cigarettes are likely to use.¹⁴¹ Due to the centrality of flavorings in their social media advertisements, the inability to advertise e-cigarettes on that basis could lead to a further reduction of sales to young adults, as traditional tobacco flavorings are not as popular as sweeter alternatives.¹⁴² Although restrictions on e-cigarette advertising should not be ruled out, particularly social media advertisements, targeting flavorings may be an effective means of curbing the popularity of e-cigarettes among young adults.¹⁴³

A potential complication to the implementation of such a regulatory scheme is the role of the anti-tobacco lobby.¹⁴⁴ Anti-tobacco groups have taken a largely negative view of e-cigarettes due to concerns that e-cigarettes are aggressively marketed toward younger audiences as well as general concerns over nicotine addiction.¹⁴⁵ While the concern is certainly warranted, these groups may push for more aggressive regulations that are more likely to close off avenues for harm reduction rather than help smokers.¹⁴⁶ As such, it is crucial

134. *Id.*

135. *Id.*

136. FDA GUIDANCE FOR INDUSTRY, *supra* note 65, at 21.

137. *Id.*

138. *See id.* at 20 (mentioning that flavor is a key driver in young adult e-cigarette usage and the flavors exempted are not as popular).

139. *See id.* at 15 (describing statistics on the types of flavorings favored by younger users, with nearly 80 percent favoring mint, mango, or fruit flavorings, compared to nearly 6 percent of users favoring menthol).

140. *FDA Enforcement Policy*, *supra* note 64.

141. FDA GUIDANCE FOR INDUSTRY, *supra* note 65, at 25.

142. *Id.* at 15.

143. *See* Huang et al., *supra* note 4, at 150 (describing the role of flavorings in social media advertising for e-cigarettes).

144. *What We Do: E-Cigarettes & the Fight Against Tobacco*, ACTION ON SMOKING AND HEALTH, <https://ash.org/programs/e-cigarettes-the-fight-against-tobacco/> (last visited Apr. 26, 2021) [hereinafter *Fight Against Tobacco*].

145. *See id.* (describing the rationales behind the concern for e-cigarettes and frustrations over a lack of oversight and regulation).

146. *See generally* Franck et al., *supra* note 33, at 7 (discussing the promising use of e-cigarettes in harm reduction). *But see* Cassels, *supra* note 58 (describing the negative response from an anti-tobacco group concerning the proposed FDA regulations on e-cigarettes, arguing that the exemptions for menthol flavorings make the regulations insufficient for dealing with rampant e-cigarette use among young adults).

not to let prior concerns about the real harms associated with tobacco cloud future policies on how to address e-cigarette use among young adults.¹⁴⁷

Based on the pervasiveness of social media advertising by e-cigarette manufacturers as well as the possible public health benefits of replacing traditional tobacco with e-cigarettes, it is likely that e-cigarettes will face a similar policy trajectory in regards to advertising and sale, but will likely not track cigarettes in regards to a concerted effort from governments to explicitly entice consumers away from e-cigarettes.¹⁴⁸ There are valid concerns over how e-cigarettes are marketed and sold, particularly in regards to young adults, who may not be aware of the addictive nature of nicotine, and the potential effects of nicotine on juvenile development.¹⁴⁹ However, the consistency in regards to the research on the health effects of e-cigarettes suggests that governments have a legitimate public health interest in facilitating the move by smokers to use e-cigarettes to protect their health.¹⁵⁰ At least for the near future, governments are not likely to restrict the sale of e-cigarettes to such a level that they cannot be advertised like cigarettes, but it is likely that their sale will become more age-restricted, with harsher penalties for violators, as well as restrictions on the flavorings used in nicotine solutions.¹⁵¹

IV. RECOMMENDATION

In crafting a recommendation on how best to address e-cigarettes, it must address the troubling issue of how its marketed to young adults while respecting its potential benefits to public health, particularly towards current smokers. The emergency regulation promulgated in Michigan and the FDA's Guidance of Industry provide possible roadmaps to how future regulations on e-cigarettes may look, though the former is subject to a preliminary injunction that has been upheld by the Court of Appeals of Michigan.¹⁵² These examples also provide insight into how to handle different aspects of the issue, such as advertising in physical locations and the prevention of a black market forming in the wake of new regulations.¹⁵³

147. *Fight Against Tobacco*, *supra* note 144.

148. *See Cummings & Proctor*, *supra* note 1, at 33 (discussing the various federal efforts to limit the tobacco industry's ability to advertise and mislead consumers).

149. *HOW TOBACCO SMOKE CAUSES DISEASE*, *supra* note 36, at 4–5; Dagaonkar & Udawadia, *supra* note 43, at 327; Shamus et al., *supra* note 29.

150. *See Cahn & Siegel*, *supra* note 40, at 29 (discussing the misunderstanding about the functions of e-cigarettes in the broader debate on tobacco reduction); Franck et al., *supra* note 33, at 7 (discussing the health effects of e-cigarettes relative to tobacco and determining that the former is safer).

151. *FDA GUIDANCE FOR INDUSTRY*, *supra* note 65, at 19.

152. *Slis v. State*, No. 351211, 2020 WL 2601577, at *23 (Mich. Ct. App. May 21, 2020), appeal denied, 948 N.W.2d 82 (Mich. 2020); *FDA GUIDANCE FOR INDUSTRY*, *supra* note 65; Mich. Admin. Code R 325E-1.2019.

153. *FDA GUIDANCE FOR INDUSTRY*, *supra* note 65, at 28; Mich. Admin. Code R 325E-1.2019.

A. Michigan's Emergency Regulation

A major point of concern regarding e-cigarettes is how they are marketed and their popularity among young adults.¹⁵⁴ As mentioned previously, advertising was also a major concern regarding cigarettes, particularly when such advertising was used to deflect from findings on the health risks of cigarettes.¹⁵⁵ With the recent spike in lung injuries, Michigan put out emergency regulations addressing the sale of flavored nicotine solutions.¹⁵⁶ Although only a short-term solution to an immediate problem that is now not in force, the temporary restrictions on flavorings could actually be effective in curbing the use of e-cigarettes among young adults and would be preferable to an outright ban or restrictions on e-cigarettes themselves.¹⁵⁷

Michigan's emergency regulations essentially bar the sale or advertising by retailers of e-cigarettes on the basis of flavorings or claims of safety and health, as well as advertising near the point of sale or near candy and other sweet foodstuff.¹⁵⁸ This type of regulation has the advantage of targeting one of the strongest appeals of e-cigarettes among young adults, which is their variety of flavorings.¹⁵⁹ It features prominently in advertising for the products, and targeting such practices could go a long way to limit the growth of young adult e-cigarette usage.¹⁶⁰ However, the regulations on advertising seem to suggest physical advertisements.¹⁶¹ This is problematic because the biggest vehicle for advertising, as JUUL demonstrated, is through social media, which is widely used by young adults. Without addressing this aspect of advertising, the goal of these regulations could be blunted.¹⁶²

Unlike with traditional tobacco, however, e-cigarettes should not be completely barred from advertising on certain forms of media. While they still pose some risks and utilize nicotine, e-cigarettes are a safer form of nicotine consumption, and their possible public health benefits should not be discounted.¹⁶³ The Michigan regulations provide a good prototype by specifically restricting the type of advertisements most likely to target younger audiences, so restrictions on advertisements based on flavorings could be a

154. See Huang et al., *supra* note 4, at 148 (discussing the marketing strategy of JUUL to younger audiences through social media, and its prominent use of sweet flavorings and sex appeal in its social media advertising).

155. Cummings & Proctor, *supra* note 1, at 33.

156. Mich. Admin. Code R 325E-1.2019.

157. *Slis*, 2020 WL 2601577, at *23; Mich. Admin. Code R 325E-1.2019.

158. Mich. Admin. Code R 325E-1.2019 ("Beginning 14 days after these rules are filed with the secretary of state, a retailer or reseller shall not use . . . fraudulent or misleading terms or statements to sell . . . vapor products Fraudulent or misleading terms include "clean;" "safe;" "harmless;" or "healthy." Beginning 14 days after these rules are filed with the secretary of state, advertisements for vapor products shall not be placed within 25 feet of candy, foodstuffs, or soft drinks.").

159. See *id.* (stating in the Emergency Findings that one of biggest appeals of e-cigarettes was their flavorings and that it was the primary motivator for implementing this ban in the context of vape-related lung injuries).

160. Huang et al., *supra* note 4, at 150.

161. Mich. Admin. Code R 325E-1.2019.

162. Huang et al., *supra* note 4, at 150.

163. Cahn & Siegel, *supra* note 40, at 29.

possible route in the future.¹⁶⁴ However, they leave much to be desired, such as no mention of social media advertising or the nascent black market surrounding e-cigarettes that precipitated the crisis.¹⁶⁵

A further complication to using the Michigan emergency regulation is that there is a preliminary injunction issued against the regulation that has been upheld by the Court of Appeals of Michigan.¹⁶⁶ According to the Court, while the Michigan Department of Health and Human Services (DHHS) presented evidence of harm caused by the sale of flavored e-cigarettes, the regulation was ultimately procedurally invalid.¹⁶⁷ This was in large part due to the fact that the DHHS failed to comply with the administrative procedures in the Administrative Procedures Act of 1969 for notice and comment.¹⁶⁸ While the Court recognized that these requirements may be dispensed with “[i]f an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures,”¹⁶⁹ the Court concluded that the DHHS failed to “produce evidence that an emergency situation existed *such that a period of delay* would make any relevant difference in preserving the public’s health, welfare, or safety.”¹⁷⁰ This should not, however, detract from the regulation’s usefulness in demonstrating a possible path toward sensible regulations on e-cigarettes, as the Court acknowledged that “the public-interest factor favored neither plaintiffs nor defendants, finding compelling public interests on both sides of the issue.”¹⁷¹

B. *The Food and Drug Administration’s Response*

In addition to actions taken by states, the federal government has also initiated the process of regulating e-cigarettes through the Food and Drug Administration (FDA).¹⁷² The FDA, through a Guidance for Industry, announced a host of new restrictions on e-cigarettes meant to target the use of flavorings.¹⁷³ Although exemptions exist for tobacco and menthol flavorings,

164. Mich. Admin. Code R 325E-1.2019 (detailing the specifics of the ban on flavored nicotine coupled with bans on advertisements relying on flavor as a selling point).

165. *See id.* (showing that the rules make no mention of a black market or social media advertising).

166. *Slis*, 2020 WL 2601577, at *23.

167. *Id.* at *18 (“We hold that even giving due deference to the DHHS and the Governor, we cannot conclude that the Court of Claims erred by finding that plaintiffs had demonstrated a likelihood of success on the merits at this stage of the proceedings with respect to their claim that the emergency rules were procedurally invalid.”).

168. *Id.*; Mich. Comp. Laws § 24.248 (“If an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by sections 41 and 42 and states in the rule the agency’s reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by section 46 endorsed as an emergency rule, to 3 of which copies must be attached the certificates prescribed by section 45 and the governor’s certificate concurring in the finding of emergency. The emergency rule is effective on filing and remains in effect until a date fixed in the rule or 6 months after the date of its filing, whichever is earlier.”).

169. Mich. Comp. Laws Ann. § 24.248.

170. *Slis*, 2020 WL 2601577, at *18.

171. *Id.* at *22.

172. *FDA Enforcement Policy*, *supra* note 64; *FDA GUIDANCE FOR INDUSTRY*, *supra* note 65, at 18.

173. *FDA GUIDANCE FOR INDUSTRY*, *supra* note 65, at 18 (“Specifically, FDA intends to prioritize enforcement regarding the lack of marketing authorization against: [Any flavored, cartridge-based ENDS

there is now an unmistakable trend towards restricting the vaping industry's use of flavorings as a selling point for their products.¹⁷⁴ Like Michigan, the FDA is specifically targeting flavorings and e-cigarette advertisement in order to deter their use among minors and young adults.¹⁷⁵ These new regulations, however, are not meant to attack e-cigarettes directly, with the FDA being emphatic about the potential benefits of smokers transitioning to e-cigarettes.¹⁷⁶ The FDA regulations also go beyond what is currently occurring in Michigan because they correctly identify the sheer importance of social media marketing to the vaping industry.¹⁷⁷ This indicates that, in the future, the federal government will begin taking action to limit the social media presence of e-cigarette companies.¹⁷⁸

The proposed FDA policies also address the concerns of a black market for e-cigarette flavorings.¹⁷⁹ As mentioned previously, it was the use of black market pods and mixtures that led to the spike in injuries related to e-cigarette use in the latter half of 2019.¹⁸⁰ The FDA specifically states that it is in a position to do so by “(1) issuing a Warning Letter; (2) issuing an import alert and refusing admission of tobacco products imported or offered for import into the United States; and (3) initiating seizure or injunction court actions” against companies suspected of proffering illicit e-cigarette products.¹⁸¹ With these powers at their disposal, the FDA could help combat the use of dangerous off-brand e-cigarette products and further aid in making e-cigarettes a legitimate tool for harm reduction as they relate to tobacco.¹⁸²

With the points addressed in the FDA Guidance for Industry release, it would appear that the FDA acknowledges the benefits of e-cigarette use in combating tobacco usage while also seeking to address the dangers of their use by young adults, with the new regulations on marketing and sales tracking those of tobacco in the 1960s.¹⁸³ This is good from a public health standpoint because it indicates that the federal government is attempting to concretely address the worst abuses of the vaping industry while working to utilize e-cigarettes as a method of reducing smoking rates.

Despite the need to address the marketing of e-cigarettes and their use among young adults, it is vital that current tobacco regulations should not be

product (other than a tobacco- or menthol-flavored ENDS product); [a]ll other ENDS products for which the manufacturer has failed to take (or is failing to take) adequate measures to prevent minors' access; and [a]ny ENDS product that is targeted to minors or whose marketing is likely to promote use of ENDS by minors.”)

174. *See id.* (demonstrating that, even with the exceptions offered by the FDA, regulatory agencies are now focused on flavorings as an important factor in sales to young adults).

175. *Id.*

176. *Id.*

177. *See id.* (“Coupled with the recently signed legislation increasing the minimum age of sale of tobacco to 21, we believe this policy balances the urgency with which we must address the public health threat of youth use of e-cigarette products with the potential role that e-cigarettes may play in helping adult smokers transition completely away from combustible tobacco to a potentially less risky form of nicotine delivery.”).

178. *Id.*

179. *See* FDA GUIDANCE FOR INDUSTRY, *supra* note 65, at 28 (describing the problem of e-cigarette copy products and foreign unauthorized products causing confusion among consumers).

180. *E-Cigarette Lung Injury*, *supra* note 5.

181. FDA GUIDANCE FOR INDUSTRY, *supra* note 65, at 29.

182. *Id.*

183. Franck et al., *supra* note 33, at 7; *FDA Enforcement Policy*, *supra* note 64.

identical to or dictate future policies on e-cigarette regulation. They are not identical products and come with their own risks and uses, so to treat them the same would not be optimal.¹⁸⁴ Tobacco regulations arose within the context of the mounting evidence of great medical harm stemming from their use.¹⁸⁵ Federal legislation on the marketing of tobacco is decades old and does not factor new advances in technology and communication.¹⁸⁶

Besides the fact that e-cigarette companies are overly reliant on social media to advertise their products, e-cigarettes have demonstrable advantages in terms of health over traditional tobacco products. The FDA was emphatic in acknowledging this.¹⁸⁷ As tobacco legislation is oriented towards reducing use of the product itself on account of its drawbacks, simply lumping the two together would create unnecessary obstacles for current smokers to transition to vaping.¹⁸⁸ In order for the federal government to pass legislation to concretely address the issue of e-cigarette use among young adults, Congress would need to pass separate legislation placing e-cigarettes in a different category than tobacco.

That does not mean that tobacco legislation cannot inform or guide future e-cigarette regulations and legislation. The tobacco laws passed by Congress correctly identified that advertising was crucial to the success of cigarettes in the market, and that having restrictions on how tobacco companies can market their products provides a good starting point for contemplating new regulations.¹⁸⁹ Labeling requirements may also be useful at providing greater clarity to consumers about the use and purpose of e-cigarettes, similar to how labeling was used to warn smokers about the health risks of tobacco.¹⁹⁰ As mentioned previously, however, for future regulations to succeed they need to treat e-cigarettes as their own product, distinct from tobacco.

Another crucial element that is central to promoting public health with relation to e-cigarettes addressed in the new FDA guidelines but not in Michigan's emergency rules is the role of the black market in creating the crisis in the first place.¹⁹¹ While efforts to rein in manipulative advertising practices is commendable, efforts to clamp down on defective products and illicit goods are the only way to ensure that a health crisis of this nature does not arise again.¹⁹² By improving and adapting enforcement mechanism to prevent this, the FDA regulations represent a good first step, though they will need to be more

184. See, e.g., Bursztyn, *supra* note 33, at 12; Franck et al., *supra* note 33, at 7 (discussing the health benefits of e-cigarettes relative to tobacco and the potential for harm reduction but warning that the data is still incomplete and should be treated with caution).

185. *Id.*

186. See 15 U.S.C. §§ 1331–334 (showing that the law in question refers explicitly to cigarettes, suggesting that only traditional tobacco products were contemplated at the time the law was passed).

187. *FDA Enforcement Policy*, *supra* note 64.

188. See FDA GUIDANCE FOR INDUSTRY, *supra* note 65, at 3–4 (discussing how the FDA interpreted the Tobacco Control Act with regards to electronic cigarettes).

189. See 15 U.S.C. §§ 1331, 1335 (demonstrating the goal of federal legislation with regards to curbing tobacco usage, including limiting advertising for these products).

190. 15 U.S.C. § 1335.

191. *E-Cigarette Lung Injury*, *supra* note 5; FDA GUIDANCE FOR INDUSTRY, *supra* note 65, at 28.

192. See *E-Cigarette Lung Injury*, *supra* note 5 (describing the critical role black market products and solutions played in the recent e-cigarette health crisis).

comprehensive in the future.¹⁹³ The guidelines currently being contemplated only touch on the black market briefly, and the sanctions mentioned contemplate the malefactors as if they are commercial entities.¹⁹⁴ This suggests that the guidelines are meant to target suppliers, but it is the distributors who directly sell to potential customers.¹⁹⁵ Future regulations need to target both in order to reduce the presence of black-market e-cigarette products, as distributors will find other suppliers, potentially foreign ones, in order to meet demand.¹⁹⁶

C. Possible Future Approaches Derived from Existing Regulations

Taken as a whole and based on the trends presented, future regulations will likely consist of three prongs. The first is a restriction on the advertising of e-cigarettes on social media and other electronic means, as that is the vaping industry's primary target for advertising.¹⁹⁷ The second is a restriction on flavorings, which is meant to reduce its appeal to younger audiences and conversely promote flavorings that are familiar to current smokers so as to facilitate greater usage among current smokers.¹⁹⁸ The final prong is to directly target the e-cigarette black market in order to prevent the sale of black market pods containing THC or any kind of toxic chemicals that may create another health panic like the one that occurred in September 2019.¹⁹⁹ This configuration of goals suggests the purpose of these regulations is to facilitate a reduction in tobacco usage while preventing the use of faulty products, as well as addressing concerns from the general public about the use of e-cigarettes among teenagers and young adults.

This configuration of policies, aimed at limiting e-cigarette usage among young adult, is sensible to the extent that it recognizes the potential for e-cigarettes as a useful method of harm reduction.²⁰⁰ The specific exceptions to tobacco and menthol flavored e-cigarettes make it clear that the government recognizes the possibility of harm reduction through e-cigarettes.²⁰¹ Menthol and tobacco flavorings are directly aimed at current smokers as they are the most common flavors available for cigarettes.²⁰² This is in sharp contrast to sweet and fruit flavorings, which are predominately used by younger users and are a large part of their appeal among young adults.²⁰³ Although it has been argued that banning the flavorings will only lead to younger users migrating to the more

193. FDA GUIDANCE FOR INDUSTRY, *supra* note 65, at 28.

194. *Id.*

195. *Id.*

196. *See id.* (discussing the FDA's response to the black market by targeting non-compliant manufacturers and suppliers).

197. *See* Huang et al., *supra* note 4, at 150 (showcasing the importance of marketing with regards to e-cigarettes).

198. *FDA Enforcement Policy*, *supra* note 64.

199. *E-Cigarette Lung Injury*, *supra* note 5; FDA GUIDANCE FOR INDUSTRY, *supra* note 65, at 28.

200. *FDA Enforcement Policy*, *supra* note 64. *See* Cahn & Siegel, *supra* note 40, at 23 (indicating that current research suggests that at the very least e-cigarettes reduce the urge to smoke); Franck et al., *supra* note 33, at 7 (reinforcing that e-cigarettes can be an effective means of harm reduction).

201. FDA GUIDANCE FOR INDUSTRY, *supra* note 65, at 20.

202. *Id.*

203. *Id.*

traditional flavoring, data suggests that this may not be likely as a large part of the advertising for e-cigarettes focused on their selection of sweet flavors.²⁰⁴ While e-cigarette manufacturers still have other avenues for advertising, this restriction will aid in reducing the appeal of e-cigarettes to younger audiences by restricting flavorings to more traditional flavors associated with tobacco.²⁰⁵

Despite this, the flavoring ban concept has been criticized for not adequately protecting young adults by carving out exceptions to the ban.²⁰⁶ In particular, the exception to menthol flavorings has been criticized due to its popularity among young users alongside sweet flavoring, thus arguably undermining the ban's intended purpose.²⁰⁷ According to the National Youth Tobacco Survey, as many as 64 percent of young e-cigarette users make use of menthol or mint flavors.²⁰⁸ As a consequence of this, critics like the Campaign for Tobacco-Free Kids argue that the ban will ultimately be meaningless as JUUL and other e-cigarette manufacturers and retailers will simply advertise those flavors instead.²⁰⁹

Critics of these exceptions, however, fail to consider why these exceptions to the flavoring ban are in place. The FDA has been emphatic in recognizing that while use of e-cigarettes by young adults poses a serious problem that needs to be addressed, it must balance that with promoting harm reduction among current smokers.²¹⁰ Menthol is a common flavoring in traditional tobacco products and its inclusion in the exemption is meant to promote the use of e-cigarettes among smokers to reduce many of the illnesses associated with traditional tobacco usage.²¹¹ Although menthol is a popular flavor for e-cigarettes as well, the overall goal of promoting public health is served by not impeding access to these flavoring, and the medical research supports the contention that e-cigarettes are a healthier alternative to tobacco.²¹²

Furthermore, to suggest that exempting menthol from the flavor ban will have no effect on reducing young adult usage of e-cigarettes is without merit.²¹³ According to data gathered and cited by the FDA in their Guidance for Industry,

204. *See id.* (discussing the comments about the nature of these bans and countering that flavor is a strong factor for youth usage); Huang et al., *supra* note 4, at 149 (demonstrating the prevalence of flavor imagery in JUUL's Instagram marketing campaigns and its relation to other aspects of JUUL's advertisements such as sex appeal).

205. FDA GUIDANCE FOR INDUSTRY, *supra* note 65, at 20.

206. *See* Cassels, *supra* note 58 (reporting on the negative response to the proposed FDA regulations on e-cigarettes from an anti-tobacco group, citing the exemptions for menthol as being inadequate to stemming e-cigarette usage among young adults).

207. *Id.*

208. *See id.* (showing statistics from the National Youth Tobacco Survey regarding the types of flavors popular among young e-cigarette users that serve as the basis for Campaign for Tobacco-Free Kids disappointment over the proposed FDA regulations).

209. *Id.*

210. FDA Enforcement Policy, *supra* note 64.

211. *Id.*

212. *See* FDA GUIDANCE FOR INDUSTRY, *supra* note 65, at 19 ("The intent was, to the extent possible consistent with protecting population health, to avoid foreclosing one potential means by which some adult smokers might seek to transition completely away from combusted tobacco products to potentially less harmful tobacco products.").

213. *See id.* at 21 (explaining why the flavor exemptions are in place and why the FDA believes these exemptions will not seriously impact efforts to reduce the use of e-cigarettes among young adults).

a majority of users surveyed said that they used e-cigarettes because it had flavors that they liked, with mint and fruit based flavors being more popular than menthol or tobacco flavors.²¹⁴ Instituting bans on the most popular flavors will not only limit how e-cigarettes can be advertised, but younger users will likely drift away from the product as their primary reason for using it will no longer be available due to a ban on legitimate sellers and a clamp down on the black market.²¹⁵ As a result, these types of bans are not only likely to have an effect on the use of e-cigarettes by younger audiences, but will help maintain access to these products by current smokers in order to facilitate their use in harm reduction.

V. CONCLUSION

It is likely that future regulations on e-cigarettes will track those of traditional tobacco products, particularly with regards to advertising and sale to younger audiences. However, the legitimate uses of e-cigarettes in helping current smokers compared to traditional tobacco products suggest that e-cigarettes will not be subject to the same health regulations, with a greater focus on consumer safety and manufacturing.²¹⁶ The ideal approach would be to limit the advertising practices of e-cigarettes on social media and limit the flavorings used by e-cigarettes to those that are favored by current smokers such as menthol and tobacco flavors while restricting sweeter fruit-based flavors that are more popular among young adults. Such an approach will help facilitate harm reduction among current smokers while restrictions on advertisements and flavors will address concerns over the use of e-cigarettes among young adults.

214. *See id.* at 19 (“Data from the 2019 MTF survey indicate that youth use of mint- and fruit-flavored JUUL products is higher than that of menthol- and tobacco-flavored JUUL products.”).

215. *Id.*

216. *See* 15 U.S.C. §§ 133, 134 (2018) (outlining the ways in which the sale and advertising of cigarettes is limited); Mich. Admin. Code R 325E-1.2019 (outlining the ways in which the advertising and sale of e-cigarette will be limited for a period of six months); Cahn & Siegel, *supra* note 40, at 29 (“With entrenched skepticism toward harm reduction now manifested as deep cynicism about electronic cigarettes . . . the tobacco industry is ironically benefiting from its own past duplicity.”); *see also* Huang et al., *supra* note 4, at 150 (discussing the impact of social media advertising on the extraordinary growth of JUUL).