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Critical Legal Issues: WORKING PAPER SERIES

IMPLEMENTING THE CONTINUUM OF RISK: MODIFIED RISK TOBACCO PRODUCTS

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IMPLEMENTING THE CONTINUUM OF RISK: MODIFIED RISK TOBACCO PRODUCTS

INTRODUCTION

Years ago, beginning in the 1950s and 1960s, as the health consequences of cigarette smoking became more widely known, tobacco companies marketed "light," "low-tar," and "mild" cigarettes as safer than regular cigarettes.[1] However, while these marketing claims led consumers to believe that these cigarettes caused fewer health problems than regular, full-flavored cigarettes, in reality they proved to be just as hazardous because of the way smokers changed their smoking behavior (*e.g.*, blocking vent holes, deeper inhalation, etc.).[2] As a result, "light," "low-tar," and "mild" cigarettes were proven to have a more detrimental effect on public health than

[1] *See e.g.*, National Cancer Institute, *Smoking and Tobacco Control Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* (2001), https://cancercontrol.cancer.gov/brp/TCRB/monographs/13/m13_complete.pdf (hereinafter, "NCI Monograph 13"); *see also* Lynn T. Kozlowski and Janine L. Pillitteri, *Beliefs about 'Light' and 'Ultra Light' Cigarettes and Efforts to Change Those Beliefs: an Overview of Early Efforts and Published Research*, 10 TOBACCO CONTROL i12-i16 (2001) (detailing introduction of 'Light' and 'Ultra Light' cigarettes in the 1950s and 1960s as a response to a growing public awareness of the health risks of smoking.).

[2] *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat 1842-49 (2009), at § 2(38) (congressional findings stating, "As the National Cancer Institute has found, many smokers mistakenly believe that 'low tar' and 'light' cigarettes cause fewer health problems than other cigarettes. As the National Cancer Institute has also found, mistaken beliefs about the health consequences of smoking 'low tar' and 'light' cigarettes can reduce the motivation to quit smoking entirely and thereby lead to disease and death."); *see also id.* at § 2(39) (finding "recent studies have demonstrated that there has been no reduction in risk on a population-wide basis from 'low tar' and 'light' cigarettes, and such products may actually increase the risk of tobacco use.").

traditional combustible cigarettes.[3]

Decades later, when Congress passed the Family Smoking Prevention and Tobacco Control Act of 2009[4] ("Tobacco Control Act" or "TCA"), it amended the Federal Food, Drug, and Cosmetic Act ("FDCA") to provide the U.S. Food and Drug Administration ("FDA") with regulatory authority over the manufacture, marketing, labeling, and distribution of tobacco products. In so doing, Congress enacted a carefully calibrated regulatory scheme that provided FDA with "new and flexible enforcement authority to ensure that there is effective oversight of the tobacco industry's efforts to develop, introduce, and promote less harmful tobacco products."[5]

Importantly, the TCA did not allow FDA to ban traditional tobacco products or nicotine, or freeze the industry's ability to develop new products.[6] Further, among the purposes of the Tobacco Control Act, Congress specified that it was enacted, in part, to allow adult access to innovative, less harmful products. But, at the same, because of the history associated with light, low-tar, and mild cigarettes, Congress

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[3] *See U.S. v. Philip Morris USA, Inc. et al.*, 449 F. Supp. 2d 1 (D.D.C. 2006) (Kessler, J.), *aff'd in part and vacated in part, U.S. v. Philip Morris USA, Inc.*, 566 F.3d 1095 (May 22, 2009). The full 1,682 page opinion is available at http://www.publichealthlawcenter.org/sites/default/files/resources/doj-final-opinion.pdf; *see also* NCI Monograph 13, *supra* n. 1.

[4] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat 1842-49 (2009).

[5] *Id.* at § 3(4).

[6] *See e.g.*, President Barack Obama, Remarks by the President at the signing of the Family Smoking Prevention and Tobacco Control Act (June 22, 2009), transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-the-signing-of-the-family-smoking-prevention-and-tobacco-control-act (stating, "This legislation will not ban all tobacco products, and it will allow adults to make their own choices").

sought to prevent the use of unauthorized claims of "modified risk", *i.e.*, claims that a particular tobacco product might be safer or less harmful, or contain fewer harmful substances, compared to another tobacco product.

By way of background, while the Tobacco Control Act initially applied only to cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco, § 901(b) of the FDCA provides FDA with authority to "deem" other types of tobacco products to be subject to FDA's tobacco product authorities.[7] Notably, the TCA's enactment coincided with the introduction of novel, reduced-harm tobacco products, namely electronic nicotine delivery systems ("ENDS" or "vapor" products), and heat-not-burn tobacco products. ENDS products have an electric heating element (an atomizer or cartomizer) to vaporize a liquid solution. Solutions (also called e-liquid) usually contain a mixture of propylene glycol and vegetable glycerin (which act as solvents and increase the flavor and vapor), nicotine, and flavorings.

On August 8, 2016, FDA exercised its authority by finalizing the "Deeming Rule," [8] which extended the agency's regulatory authority to all products (including ENDS/vapor products) meeting the FDCA's definition of "tobacco product" under

[7]21 U.S.C. § 387a(b).

[8]Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Regulations on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, 81 Fed. Reg. 28974 (May 10, 2016) (hereinafter, "Deeming Rule").

FDCA § 201(rr).[9] Now, deemed tobacco products, which include ENDS, heat-not-burn and other reduced-harm products, as well as cigars, pipe tobacco, and hookah, are subject to the Tobacco Control Act.

Importantly, "[i]n contrast to combustible tobacco cigarettes, ENDS products do not 'burn,' and do not contain most of the estimated 7,000 chemical constituents present in tobacco smoke."[10] Thus, as explained by the National Academies of Science, Engineering and Medicine's Committee on the Review of the Health Effects of Electronic Nicotine Delivery Systems, "it is generally believed that [ENDS/vapor products] are 'safer' than combustible tobacco cigarettes," although "exposures to nicotine and a variety of potentially harmful constituents do occur."[11]

Despite the growing scientific consensus that ENDS/vapor products are relatively less harmful than traditional combustible tobacco products, manufacturers and industry face skeptical regulators and stakeholders. Unfortunately, and likely because of past experiences with "safer" cigarette claims, FDA has implemented both the TCA's premarket review and modified risk provisions in such a way as to prevent

[9] The term "tobacco product" means any product made or derived from tobacco that is intended for human consumption, including any component, part, or accessory of a tobacco product (except for raw materials other than tobacco used in manufacturing a component, part, or accessory of a tobacco product), and does not mean an article that is a drug, device or combination product, as defined in the FDCA. 21 U.S.C. § 321(rr)(1).

[10] *See* National Academies of Science, Engineering and Medicine: Committee on the Review of the Health Effects of Electronic Nicotine Delivery Systems, THE PUBLIC HEALTH CONSEQUENCES OF E-CIGARETTES (eds. Kathleen Stratton *et al.*, 2018), Preface, at ix, *available at* https://www.nap.edu/catalog/24952/public-health-consequences-of-e-cigarettes.

[11] *Id.*

both the introduction of new tobacco products, even those on the lower end of the "continuum of risk," as well as truthful claims about those products, by effectively requiring those products be zero-risk. This development poses broad public health concerns that could jeopardize the goals of the existing regulatory framework.

I. FDA ANNOUNCES NEW REGULATORY APPROACH EMBRACING THE CONTINUUM OF RISK

On July 28, 2017, FDA Commissioner Scott Gottlieb, M.D., announced FDA's "Comprehensive Plan for Tobacco and Nicotine Regulation,"[12] which embraced the continuum of risk and provided "a framework for regulating nicotine and tobacco."[13] But no discussion concerning this innovative regulatory approach and the health effects of new, less-risky tobacco products is complete without acknowledging the devastating reality affecting current smokers. Indeed, in the United States alone, the annual burden of smoking-attributable mortality is estimated to be approximately 480,000.[14] That is why FDA and its leadership have repeatedly endorsed the

[12]U.S. Food & Drug Admin., FDA News Release, *FDA Announces Comprehensive Regulatory Plan to Shift Trajectory of Tobacco-Related Disease and Death* (July 28, 2017), https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm568923.htm.

[13]U.S. Food & Drug Admin., FDA Voice Blog, *Advancing Tobacco Regulation to Protect Children and Families: Updates and New Initiatives from the FDA on the Anniversary of the Tobacco Control Act and FDA's Comprehensive Plan for Nicotine* (Aug. 2, 2018), https://blogs.fda.gov/fdavoice/index.php/2018/08/advancing-tobacco-regulation-to-protect-children-and-families-updates-and-new-initiatives-from-the-fda-on-the-anniversary-of-the-tobacco-control-act-and-fdas-comprehensive-plan-for-nicotine/.

[14]U.S. Dep't of Health and Human Servs., Ctr. for Disease Control and Prevention, *The Health Consequences of Smoking—50 Years of Progress. A Report of the Surgeon General* (2014), at 11, available at https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf; U.S. Food & Drug Admin., FDA Website, Health Information,

continuum of risk.[15]

What is more, this sentiment is consistent with FDA Commissioner Gottlieb's recent remarks, which indicate that FDA believes "in the concept of a continuum of risk related to tobacco products" and that "there is a role for modified risk products."[16] Further, Dr. Gottlieb stated that FDA believes "fully transitioning smokers to [electronic nicotine delivery systems] can reduce the morbidity and mortality associated with tobacco use."[17]

Indeed, even in the midst of a press release discussing FDA's enforcement blitz targeting youth use of certain cartridge-based e-cigarette products, which represent only a portion of the U.S. vapor products market, Dr. Gottlieb reiterated that FDA is

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https://www.fda.gov/tobaccoproducts/publichealtheducation/healthinformation/default.htm#reference.

[15]*See*, *e.g.,* Deeming Rule, 81 Fed. Reg. 28974, 29027 (May 10, 2016) ("FDA agrees that a continuum of nicotine-delivering products does exist as demonstrated by the lower levels of toxicants in ENDS in comparison to cigarettes and may warrant different requirements for products at different ends of this continuum."); Deeming Tobacco Products to be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Regulations on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, Proposed Rule, 79 Fed. Reg. 23142, 23147 (Apr. 25, 2014) (FDA stating that "there are distinctions in the hazards presented by various nicotine-delivering products"); *id.* at 23152 ("FDA realizes that while all tobacco products are potentially harmful and potentially addictive, different categories of tobacco products have the potential for varying effects on public health."); M. Zeller, *Reflections on the 'Endgame' for Tobacco Control*, TOBACCO CONTROL 22:i40-41, at i40 (2013) ("[a]nyone who would ponder the endgame must acknowledge that the continuum of risk exists and pursue strategies that are designed to drive consumers from the most deadly and dangerous to the least harmful forms of nicotine delivery.").

[16]FDA Commissioner Scott Gottlieb, M.D., *FDA's Nicotine and Tobacco Regulation and the Key Role of Regulatory Science* (June 18, 2018)*, s*peech presented at Tobacco Regulatory Science Program Meeting, White Oak, MD, https://www.fda.gov/NewsEvents/Speeches/ucm611033.htm.

[17]*Id.*

> fully committed to the concept that products that deliver nicotine exist on a continuum of risk, with combustible products representing the highest risk, and electronic nicotine delivery systems perhaps presenting an alternative for adult smokers who still seek access to satisfying levels of nicotine, but without all of the harmful effects that come from combustion.[18]

II. STATUTORY BACKGROUND

Pursuant to Section 911 of the TCA, a tobacco product seeking to make modified risk claims can only be introduced or delivered for introduction into interstate commerce after FDA specifically authorizes the claims through the modified risk tobacco product ("MRTP") application process, and issues either a "risk modification" or "exposure modification" marketing order to the applicant.[19] More specifically, Section 911(g)(1) authorizes FDA to issue a *risk* modification order for claims of reduced risk if the applicant can show that the product—as actually used by consumers—will (i) "significantly reduce harm and the risk of tobacco-related disease to individual tobacco users" and (ii) "benefit the health of the population as a whole while taking into account both users of tobacco products and persons who do not currently use tobacco products."[20] Section 911(g)(2) authorizes FDA to issue an *exposure* modification order for claims that a product contains reduced levels of

[18] *See* U.S. Food & Drug Admin., FDA News Release, *FDA Takes New Steps to Address Epidemic of Youth E-Cigarette Use, Including a Historic Action Against More Than 1,300 Retailers and 5 Major Manufacturers for Their Roles Perpetuating Youth Access* (Sept. 12, 2018), https://bit.ly/2O3olH5.

[19] 21 U.S.C. § 387k(g)(1)-(2).

[20] 21 U.S.C. § 387k(g)(1) (emphasis added).

substances (this includes "free of" claims such as "no tar," "no smoke," etc.). The requirements to obtain an exposure modification order includes, among other things:

i. An FDA finding that the order would be appropriate to promote the public health;

ii. any label, labeling, and advertising for such product that would cause it to be an MRTP is limited to an explicit or implicit representation that such tobacco product or its smoke does not contain or is free of a substance or contains a reduced level of a substance, or presents a reduced exposure to a substance;

iii. scientific evidence is not available and, using the best available scientific methods, cannot be made available without conducting long-term epidemiological studies for an application to meet the standards set forth in § 911(g)(1); and

iv. the scientific evidence that is available without conducting long-term epidemiological studies demonstrates that a measurable and substantial reduction in morbidity or mortality among individual tobacco users is reasonably likely in subsequent studies.[21]

In a March 2012 draft guidance document (hereinafter, the "*MRTPA Draft Guidance"*), FDA outlined additional criteria that an applicant must demonstrate to obtain an exposure modification order. [22]

To determine the benefit to the health of individuals and the population as a whole under FDCA § 911(g)(1) and 911(g)(2), FDA must take into account the following:

[21] 21 U.S.C. § 387k(g)(2)(i)-(iv).

[22] 21 U.S.C. § 387k(g)(2)(B); *see also*, U.S. Food & Drug Admin., Draft Guidance for Industry: *Modified Risk Tobacco Product Applications* (Mar. 2012), https://www.fda.gov/downloads/TobaccoProducts/Labeling/RulesRegulationsGuidance/UCM297751.pdf, at 4 (hereinafter, "*MRTPA Draft Guidance"*).

i. The relative health risks to individuals of the subject tobacco product;

ii. the likelihood that those who do not use tobacco products will start using the subject product (*i.e.*, initiation); and

iii. the likelihood that users who would otherwise stop using tobacco products will start using the subject product (*i.e.*, cessation).[23]

These requirements establish a burden of proof so high that FDA has not approved a single MRTP claim to date and it is questionable whether the agency ever will.

III. FDCA § 911 SUFFERS FROM FIRST AMENDMENT INFIRMITIES

Some have argued that application of the FDCA § 911 requirements to some tobacco products—specifically certain ENDS/vapor products —may be unconstitutional. Indeed, as of this writing, a vapor product manufacturer, Nicopure Labs, LLC, and a nonprofit trade association, the Right to Be Smoke Free Coalition, have filed a First Amendment challenge against FDA's implementation of the MRTP provision.[24] [25] Among other things, the lawsuit alleges that the MRTP provision prohibits the dissemination of truthful, non-misleading claims about vapor products.

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[23]21 U.S.C. § 387k(g)(4).

[24]*See* Opening Brief of Appellants Nicopure Labs, LLC and Right to Be Smoke-Free Coalition, *Nicopure Labs, LLC and Right To be Smoke-Free Coalition v. Food and Drug Admin., et al*., Case No. 17-5196 (D.C. Cir. Feb. 12, 2018). Disclosure: Eric P. Gotting and Azim Chowdhury, of Keller and Heckman LLP, serve as Counsel for the Appellants, Nicopure Labs, LLC, and Right to Be Smoke-Free Coalition, in this case. Washington Legal Foundation filed an *amicus* brief supporting the Appellants' First Amendment arguments. *See* Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Plaintiffs-Appellants, Urging Reversal, *Nicopure Labs, LLC and Right To be Smoke-Free Coalition v. Food and Drug Admin., et al*., Case No. 17-5196 (D.C. Cir. Feb. 12, 2018), https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/litigation/briefs/WLFBriefNicopure.pdf.

[25]The lawsuit also challenges the pre-market approval provisions of the TCA—and FDA's concomitant failure to tailor stringent pre-market approval provisions for cigarettes to less risky vapor products—as well as FDA's ban on free samples of vapor products (including sampling of variously flavored e-liquids by adults at vape shops).

Simply put, vapor companies wish to communicate to adult consumers, for example, that their products do not contain certain substances (*e.g.,* "no diacetyl" or "no allergens"), that they are unlike more dangerous cigarettes because they have "no tar" or produce "no combusted smoke," and they pose less risk than cigarettes (as FDA and its leadership have repeatedly acknowledged[26]). However, vapor companies cannot make these claims, even if entirely truthful, without prior FDA authorization, which increasingly seems unlikely, as the agency has never authorized such a claim under the stringent and cost-prohibitive MRTP standard.

Indeed, FDA's standard for issuing an exposure-modification order under FDCA § 911(g)(2) is effectively insurmountable, as it requires demonstrating through actual consumer-perception studies that the reduced exposure claims will not mislead consumers into believing the product (1) is or has been demonstrated to be less harmful or (2) presents, or has been demonstrated to present, less of a risk of disease than other commercially marketed tobacco products. In other words, an applicant must prove that its reduced exposure claims will not cause consumers to believe that the product is, in fact, less harmful than other tobacco products—which, some argue, defeats the purpose of making the claim.

IV. REQUIRED SHOWINGS AND SCIENTIFIC STUDIES UNDER FDCA § 911

In the *MRTPA Draft Guidance*, FDA outlined the quantum and quality of

[26] *See supra*, n. 15.

scientific data the agency expects will accompany an MRTPA. Among other things, FDA stated that an applicant's MRTPA should address the following key areas of investigation:

i. Health risks of the tobacco product;

ii. the effect the tobacco product and its marketing may have on tobacco-use behavior among current tobacco users;

iii. the effect the tobacco product and its marketing may have on tobacco-use initiation among non-users (both never users and former users);

iv. the effect of the tobacco product's marketing on consumer understanding and perceptions; and

v. the effect the tobacco product and its marketing may have on the population as a whole.[27]

In turn, FDA's *MRTPA Draft Guidance* elucidates additional considerations for each of these required showings.

For demonstrating the tobacco product's health risk, FDA recommends, among other things, that applicants seeking a risk modification or exposure modification order include "[h]uman studies regarding actual use of the product to determine if users are likely to use the product in a manner that reduces their individual health risks or exposures as compared to other commercially marketed tobacco products."[28] For applicants seeking only a risk modification order, FDA recommends that applications include human studies showing the product's use will result in significant reduction in harm and the risk of tobacco-related disease to individual tobacco

[27] *See MRTPA Draft Guidance*, at 16-17.

[28] *Id.* at 18.

users.[29]

To address the effect on behavior among current tobacco users, FDA recommends that applicants submit (i) nonclinical and/or human studies to assess the abuse liability (*i.e.*, the likelihood that individuals will develop physical and/or psychological dependence on the tobacco product) and the potential for misuse of the product as compared to other tobacco products on the market, and (ii) human studies regarding actual use of the product and consumer perception of the product, including its labeling, marketing, and advertising.[30] Similarly, to address the effect of the MRTP on tobacco-use initiation, FDA recommends applicants submit human studies that evaluate consumer perception of the product, including its labeling, marketing, and advertising.[31]

With respect to the effect of marketing on consumer understanding and perception, FDA recommends that applicants submit "[h]uman studies regarding consumer understanding of the product, including its labeling, marketing, and advertising."[32] Finally, to address the effect of an MRTP on the population as a whole, FDA recommends that applicants submit quantitative estimates of the effect the marketing of the product, as proposed, may have on the health of the population as a

[29] *Id.*

[30] *Id.* at 19.

[31] *Id.* at 20.

[32] *Id.* at 21.

whole.[33] While a full summary of the contents of FDA's *MRTPA Draft Guidance* is beyond the scope of this WORKING PAPER, it is notable that the document includes specific guidance regarding the design and aims of each of the studies solicited by the agency to make the showings outlined in the *MRTPA Draft Guidance*.

V. FDA & TPSAC REVIEW OF PENDING MODIFIED RISK TOBACCO PRODUCT APPLICATIONS

On January 24-25, 2018, the Tobacco Products Scientific Advisory Committee ("TPSAC") convened to consider MRTPAs submitted by Philip Morris Products S.A. ("PM") for its tobacco heating system known as iQOS and the Marlboro-branded "HeatSticks" used with the iQOS device.[34] PM devoted significant time and resources to developing these applications, submitting over two million pages of data and conducting seventeen non-clinical studies and eight clinical studies.[35] Despite the wealth of scientific evidence supporting the application, certain commenters have demanded that PM meet criteria that go well beyond what FDA requires under FDCA § 911(g)(1).[36]

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[33] *Id.*

[34] *See* Tobacco Products Scientific Advisory Committee (TPSAC) final meeting agenda (Jan. 24-25, 2018), https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM593110.pdf.

[35] *See* Philip Morris International Presentation (Jan. 24, 2018), at 12, https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM594323.pdf.

[36] 21 U.S.C. § 387k(g)(1).

Although FDA's review is ongoing, TPSAC voted 8-0, with one abstention, that PM had not conclusively demonstrated that iQOS reduces the risk of disease and voted 5-4 to reject claims that iQOS presents less risk of harm than continuing to smoke cigarettes.[37] TPSAC voted against approval, despite significant reductions in harmful constituents compared to cigarettes, because the studies conducted purportedly failed to show that such reductions are likely to translate into measurable population-level reductions in morbidity or mortality. FDA and TPSAC's review of the iQOS application, as well as FDA's application of the Tobacco Control Act to e-cigarette and vapor products, raise broad public policy concerns that threaten to undermine the underlying purposes of the TCA, as well as the agency's purported strategy to address tobacco-related disease and death.

In addition, as this WORKING PAPER went to press, TPSAC has convened to evaluate R.J. Reynolds Tobacco Company's ("RJR") Camel Snus smokeless tobacco products.[38] During its two-day meeting on September 13-14, 2018, TPSAC reviewed RJR's MRTPAs for six styles of Camel Snus that were submitted in March 2017 and

[37] *See* U.S. Food & Drug Admin., Tobacco Products Scientific Advisory (TPSAC), Summary Minutes of the Jan. 24-25, 2018 TPSAC Meeting (approved Feb. 26, 2018), https://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM599236.pdf.

[38] *See* U.S. Food & Drug Admin., Sept. 13-14, 2018: Tobacco Products Scientific Advisory Committee Meeting Announcement, https://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/ucm611251.htm (regarding RJR's Camel Snus products). Additional materials from the Sept. 13-14, 2018 TPSAC meeting are available at https://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/ucm583080.htm.

filed for scientific review in December 2017.[39] The Committee acknowledged that "switching completely" from cigarettes to Camel Snus could significantly reduce the risk of lung cancer and respiratory disease among smokers, although TPSAC members were evenly divided, with two members abstaining, on claims regarding oral cancer and heart disease.[40]

TPSAC's embrace of RJR's "switching completely" claim for its Camel Snus products demonstrates that certain stakeholders have been at least partially successful in framing the terms of the public health debate at TPSAC. Further, at the Camel Snus TPSAC meeting, the Committee "recognized that switching to snus means less risk for smokers of cigarettes and that no smoke equals less risk."[41] However, a vote on "using snus instead of cigarettes reduces risk" provoked much debate, and was voted 1-5 against, with two abstentions, based on the omission of "switching completely" language as a result of FDA's request, although both TPSAC and RJR

[39] *See* Modified Risk Tobacco Product Applications: Applications for Six Camel Snus Smokeless Tobacco Products Submitted by R.J. Reynolds Tobacco Company; Availability, 82 Fed. Reg. 60206 (Dec. 19, 2017).

[40] *See* R.J. Reynolds Tobacco Company, *R.J. Reynolds Tobacco Makes Significant Step on Tobacco Harm Reduction: FDA To Continue its Evaluation on Modified-Risk Claims for Camel Snus* (Sept. 14, 2018), http://s2.q4cdn.com/129460998/files/doc_news/2018/2018-01-RJRT-Release-.1344.pdf; *See also FDA's Scientific Advisory Committee Advanced Modified Risk Classification for Camel Snus*, CONVENIENCE STORE NEWS (Sept. 17, 2018), https://csnews.com/fdas-scientific-advisory-committee-advances-modified-risk-classification-camel-snus.

[41] *Id.*

argued for inclusion of the phrase.[42] While the TPSAC meeting for RJR's Camel Snus was a step in the right direction because at least certain MRTP claims were endorsed, it remains to be seen whether FDA will heed TPSAC's advice and issue an MRTP order, approving modified risk claims associated with the Camel Snus products.[43]

VI. CERTAIN STAKEHOLDERS' IMPROPER ATTEMPT TO EXPAND FDCA § 911(g)(1)

Despite the Tobacco Control Act's ample guidance concerning the data that FDA may consider when evaluating MRTPAs, certain stakeholders have urged the agency to read additional requirements into the MRTPA standard in FDCA § 911(g)(1).[44] These stakeholders have submitted comments arguing, among other things, that: (i) in considering MRTPAs, "a flavor should only be allowed if the

[42]A webcast recording of the September 13-14, 2018 TPSAC hearing is available on the FDA website. U.S. Food & Drug Admin., *September 13-14, 2018: Tobacco Products Scientific Advisory Committee Meeting Announcement*, https://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/ucm611251.htm.

[43]FDA and TPSAC's approach to MRTP claims will be tested again next year, as it was recently announced, on September 14, 2018, that FDA filed for scientific review U.S. Smokeless Tobacco Company's (USSTC's) MRTPAs for its Copenhagen® Snuff Fine Cut, a moist snuff smokeless tobacco product. *See* U.S. Food & Drug Admin., U.S. Smokeless Tobacco Company Modified Risk Tobacco Product Application, https://bit.ly/2y8G2dy; *see also* Modified Risk Tobacco Product Application: Application for Copenhagen® Snuff Fine Cut, a Loose Moist Snuff Tobacco Product Submitted by U.S. Smokeless Tobacco Company LLC, 83 Fed. Reg. 47925 (Sept. 21, 2018). Importantly, USSTC's Copenhagen® Snuff Fine Cut is a grandfathered product, commercially marketed as of February 15, 2007, meaning that it does not require premarket review to be marketed (without MRTP claims). *See* Executive Summary, Modified Risk Tobacco Product Application: Application for Copenhagen® Snuff Fine Cut submitted by U.S. Smokeless Tobacco Company, redacted version available at https://digitalmedia.hhs.gov/tobacco/static/mrtpa/Copenhagen/2.3-executive%20summary%20_Redacted.pdf.

[44]21 U.S.C. § 387k(g)(1).

applicant shows that the flavored product helps smokers completely switch from combustible tobacco to the harm-minimized product AND that it does not appeal or attract youth (verified with careful post-market surveillance of actual use patterns)";[45] (ii) applicants must demonstrate exclusive use, or the absence of "dual use";[46] and (iii) applicants show that the new product is less harmful than other smoking cessation products.

Moreover, with respect to PM's iQOS MRTPAs, certain stakeholders have requested additional data, beyond the over two-million pages of data initially submitted. Among other types of data, these stakeholders have requested: PM's media plans; any data PM has on iQOS use demographics in the markets where it is currently sold; and any data on consumer reaction to advertising mockups, such as a study of the appeal of Menthol Heat Sticks.[47] Indeed, one commenter advocated that "before either pending [PM] application can be granted, FDA must thoroughly investigate [PM's] world-wide marketing of iQOS to determine if the marketing that is actually occurring is consistent with the representations these companies have made

[45]Comment of Truth Initiative (Jan. 4, 2018), FDA Docket No. FDA-2017-D-3001, at 9, https://www.regulations.gov/document?D=FDA-2017-D-3001-0174; *see also* Comment from Campaign for Tobacco-Free Kids, FDA Docket No. FDA-2017-D-3001, https://www.regulations.gov/document?D=FDA-2017-D-3001-0194.

[46]Comment of Truth Initiative (Jan. 4, 2018), FDA Docket No. FDA-2017-D-3001, at 2-3,11, https://www.regulations.gov/document?D=FDA-2017-D-3001-0174.

[47]Comment from Campaign for Tobacco-Free Kids, FDA Docket No. FDA-2017-D-3001 https://www.regulations.gov/document?D=FDA-2017-D-3001-0194.

to FDA and TPSAC concerning the domestic marketing plans."[48] In effect, the comment requests that PM market its product uniformly across the world, regardless of cross-border legal and regulatory distinctions. This ignores the reality, however, that other countries may take different approaches to reduced-risk claims concerning various tobacco products. [49]

VII. TEXTUAL AND POLICY CONSIDERATIONS FOR INTERPRETING FDCA § 911(g)(1)

Notwithstanding the arguments advanced by certain stakeholders, the text of the FDCA does not support the assertion that MRTPAs must demonstrate that a new product is less harmful than smoking cessation products, or even the absence of dual use. Instead, the statutory standard requires that applicants show the new product is expected to "benefit the health of the population as a whole," nothing more. While FDA is required to consider "the risks and benefits to persons from the use of the proposed MRTP as compared to the use of smoking cessation products approved to treat nicotine dependence," an MRTP is not required to be less harmful than smoking

[48] *Id.* at 2.

[49] *See*, *e.g.*, Canada's Tobacco and Vaping Products Act (S.C. 1997, c.13) (Sept. 16, 2018) (hereinafter, the "TPVA"), *available at* http://laws-lois.justice.gc.ca/eng/acts/T-11.5/page-1.html. Although TPVA Section 30.43 prohibits the use of comparative promotional statements—specifically, statements that could lead a consumer to believe that certain health benefits will result from vaping through a comparison of vaping products to tobacco products—on September 4, 2018, Health Canada distributed a draft list of relative risk statements about vaping products (*i.e.*, the "List of Statements for Use In the Promotion of Vaping Products") that would be permitted under the TVPA. Health Canada accepted comments on this list until September 17, 2018. The list is now under review with the Scientific Advisory Board on Vaping Products (SAB).

cessation products.[50]

Moreover, these concerns are contrary to the rationale for establishing MRTPs. Congress recognized that existing smoking cessation products were ineffective and established a framework to allow new, and less harmful, tobacco products to come to market. This reflects a key insight: it is not that MRTPs are completely safe, or even the safest nicotine-containing product available, but that they are much safer than smoking.[51]

In addition, from a policy standpoint, these comments are overly simplistic. For example, commenters have suggested that to provide a public health benefit, an MRTPA must be "designed and marketed to encourage adult smokers who cannot or will not quit using nicotine to *transition completely* to the product."[52] This premise is flawed because it assumes that dual use always, unequivocally, has a negative effect on public health. However, the latest research suggests that adult smokers may go through six or more attempts to successfully quit combustible cigarettes.[53] Accordingly, smokers are likely to go through a period of dual use as they transition

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[50]21 U.S.C. § 387k(g)(4).

[51]*C.f.* David B. Abrams *et al*., *Harm Minimization and Tobacco Control: Reframing Societal Views of Nicotine Use to Rapidly Save Lives*, 39 ANN. REV. OF PUB. HEALTH 193, 197 (2018).

[52]Comment of Truth Initiative (Jan. 4, 2018), FDA Docket No. FDA-2017-D-3001, at 2, https://www.regulations.gov/document?D=FDA-2017-D-3001-0174.

[53]Henry Saffer, Daniel Dench, *et al*., *E-Cigarettes and Adult Smoking*, National Bureau of Economic Research Working Paper Series, Working Paper 24212 (2018), at 19, http://www.nber.org/papers/w24212.pdf.

away from combustible cigarettes. If that is the case, dual use can be thought of as a necessary step on the path to ultimate cessation. Indeed, in 2013, FDA recognized this possibility when it updated nicotine replacement therapy ("NRT") labeling "to permit NRT use while smoking (also known as dual use) as part of the journey to cessation and permits sustained use for relapse prevention for a lifetime if need be."[54]

In any event, dual use is only a negative if it results in more smoking than occurred previously (*i.e.*, if a smoker replaces one of five cigarettes smoked daily with a vapor product, then it is not obvious that this outcome is worse from a public health perspective). Indeed, Public Health England reports that a recent comparison between dual users of ENDS and traditional smokers concluded that "dual use is not associated with an increase in harm."[55] Further, after "[a]djusting for socio-demographics and dependence, current dual users [are] significantly more likely to be motivated to stop smoking in the next three months," which suggests that "dual use may be a transient phase of heighted motivation to stop smoking."[56]

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[54]David B. Abrams *et al*., *Harm Minimization and Tobacco Control: Reframing Societal views of Nicotine Use to Rapidly Save Lives*, 39 ANN. REV. OF PUB. HEALTH 193, 197 (2018), https://www.annualreviews.org/doi/pdf/10.1146/annurev-publhealth-040617-013849; Modifications to Labeling of Nicotine Replacement Therapy Products for Over-the-Counter Human Use, 78 Fed. Reg. 19718, 19719 (Apr. 2, 2013) (". . . we have determined that the concomitant use of OTC NRT products with cigarettes or with other nicotine-containing products does not raise significant safety concerns").

[55]Public Health England, *Evidence Review of E-Cigarettes and Heated Tobacco Products 2018*, Figure 11, at 84 (Feb. 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684963/Evidence_review_of_e-cigarettes_and_heated_tobacco_products_2018.pdf.

[56]*Id.* at 97.

Lastly, certain commenters misunderstand the scope of FDA's mandate under FDCA § 911(g)(1). Specifically, FDA lacks statutory authority to examine an applicant's marketing of an MRTPA abroad. Indeed, concerns regarding an applicant's marketing of an MRTPA abroad are examples of certain stakeholders' desire to push FDA's authority extra-territorially, beyond the statutory limits imposed by the MRTP provision of the TCA. In any event, the TCA provides that all MRTP marketing orders are time-limited[57] and require post-marketing surveillance and studies.[58] Thus, to the extent that FDA is concerned about the sincerity of an applicant's marketing commitments, the agency has ample statutory authority to rigorously examine the applicant's annual post-market surveillance reports after issuing an order under FDCA § 911(g)(1).[59]

CONCLUSION

FDA Commissioner Gottlieb has stated that the agency believes in the continuum of risk. However, to date, a disconnect exists between the agency's rhetoric and actions because FDA has failed to issue a single MRTP order in the over

[57] *See* 21 U.S.C. § 387k(h)(4) ("an order issued under subsection (g)(1) shall be effective for a specified period of time.").

[58] *See* 21 U.S.C. § 387k(i)(1) ("The Secretary shall require, with respect to a product for which an applicant obtained an order under subsection (g)(1), that the applicant conduct post-market surveillance and studies for such a tobacco product to determine the impact of the order issuance on consumer perception, behavior, and health, to enable the Secretary to review the accuracy of the determinations upon which the order was based, and to provide information that the Secretary determines is otherwise necessary regarding the use or health risks involving the tobacco product.").

[59] *Id.*

nine years since passage of the Tobacco Control Act. When Congress enacted the law, it implicitly acknowledged that existing nicotine replacement therapy products were insufficient to adequately prevent tobacco-related disease. And, as recently as September 2018, the FDA Commissioner confirmed that the agency believes in a role for modified risk tobacco products and the continuum of risk. If that is the case, it is time for FDA to reflect that belief in its approach to evaluating MRTP applications.

