Reconsidering the Legality of Cigarette Smoking Advertisements on Television

Public Health and the Law

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Introduction
Amid the action of the 2013 Super Bowl aired the usual array of high-priced advertisements. Most ads were original. Some were unusual. One regional ad, however, seemed distantly familiar. The 30-second commercial promoted the NJOY King electronic (or e-) cigarette to at least 10 million viewers in several major markets. It featured an attractive male model taking a drag from what looks like (and NJOY calls) a cigarette. He then slowly blows smoke to the tune of Foreigner's "Feels Like the First Time." Of course, the "smoke" does not come from burning tobacco. Rather, it is the water vapor produced by an e-cigarette as part of its nicotine delivery process. This, however, was not evident from the imagery. For those watching the broadcast, including thousands of minors, NJOY's advertisement depicted what tobacco companies have not portrayed on television for decades: a person engaged in smoking behavior.

Following a series of legal maneuvers spearheaded by the federal government or agreed to by tobacco companies, television advertising of tobacco products has been prohibited since 1971. This is due, in part, to an unsurprising finding that the depiction of such products significantly influences people, especially children, to use them. The reappearance of "smoking" ads on television may technically meet legal muster given that the product is not a tobacco cigarette. Yet NJOY's ads were negatively received by many public health advocates in part because of the ads' potential to encourage unlawful tobacco use among minors. As discussed below, there are multiple legal paths to consider to preclude the depiction of smoking or related behaviors on television and other media without prohibiting the sale or promotion of e-cigarettes, or unconstitutionally infringing manufacturers' commercial speech interests.

The Rise of E-Cigarettes and Related Advertising
While NJOY's Super Bowl commercial reached perhaps the largest single audience to date, this ad and others began airing on television and other media in late 2012. For example, actor Steven Dorff introduced blu eCigs, owned by tobacco giant Lorillard, to American television audiences in October of last year.

About This Column
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Though the ads are recent, the products have existed for nearly half a century. Herbert Gilbert patented the first smokeless, non-tobacco cigarette in 1965. The modern prototype for the “electronic nicotine delivery system” (ENDS) was created in the early 2000s in China, which exported many of these products for sale in the United States.

A typical ENDS kit contains a battery and charging mechanism, a cartridge containing “smoke juice” (a combination of water, nicotine, and flavorings), and an atomizer to heat the cartridge contents into a vapor. Product costs vary from about $22 — $90 depending on the amount of equipment and cartridges purchased in a single package. Though considerably more expensive than a traditional pack of tobacco cigarettes, e-cigarette sales are booming. Sottera, Inc., makers of the leading brand, NJOY, sells its products in over 30,000 retail locations across all states. Collectively, ENDS companies reported profits of over $300 million in 2012. Profits may exceed $1 billion by 2016. The long-term objective, noted Sottera CEO Craig Weiss recently, “is to make (tobacco) cigarettes obsolete.”

In promoting their products, many ENDS companies mimic prior tobacco industry marketing strategies. The recent ad for the NJOY King is illustrative. Cue the classic rock music. Focus on the product: tan “filter;” classic cigarette construction with a “real paper feel;” and simulated burning tip. Pan to a young, attractive man as he takes a slow drag. “You know what the most amazing thing about this cigarette is?” the narrator asks. “It isn’t one.” By its design and function, however, it is hard to tell it is not a tobacco cigarette. Even its package resembles the classic styling and colors of Marlboro cigarettes.

As the number of ENDS products and related advertising expand, public health practitioners are divided. Some see ENDS as a viable option for smoking cessation (even though NJOY® and other companies do not imply any health benefits underlying their products’ use). Other public health officials are concerned about the lack of available information regarding long term effects, as well as the potential for some consumers to develop strong nicotine addictions. Determining whether e-cigarettes are in fact a healthier alternative to tobacco — or a new addictive risk — requires substantial further research. For now, the immediate concern is the extent to which on-air advertisements depicting smoking of a product designed to resemble tobacco cigarettes may encourage minors to smoke electronic or tobacco cigarettes.

Existing Legal and Policy Approaches to Curb Tobacco Advertisements

Not long ago, cigarette advertisements dominated television and radio airwaves. In the 1950s and 1960s they comprised more than 10% of network television advertising revenue. Tobacco companies frequently sponsored prime time shows like NBC’s Camel News Caravan. Smoking was also featured in popular shows such as The Flintstones and I Love Lucy. Well-known entertainers like Johnny Carson and John Wayne endorsed cigarette brands.

Ads depicted smokers as carefree, independent, and rebellious. Exhustive television and radio advertising helped boost cigarette sales by 17% between 1950 and 1960.

Public acceptance of pervasive tobacco advertising began to change following the U.S. Surgeon General’s Smoking and Health Report in 1964, the first study to link serious health consequences with smoking. It specifically identified children as susceptible to a lifelong addiction to smoking because they associate it with adulthood and view it as a status symbol for peer acceptance. Modern research confirms that children who see smoking behaviors in movies and on television are more likely to perceive smoking as acceptable and eventually try it. They are also at greater risk of becoming long-term smokers.

In response to the Surgeon General’s report, tobacco companies promised initially to self-regulate their marketing strategies, but still advertised on prime time television and sometimes disseminated inaccurate claims about the health benefits of smoking. In 1969, Congress enacted the Public Health Cigarette Smoking Act to prohibit all television and radio advertisements of cigarettes beginning January 2, 1971. The restriction was challenged legally on free speech and due process grounds, but was held to be constitutionally valid under standards at that time. Later, the Comprehensive Smokeless Tobacco Health Education Act of 1986 similarly banned smokeless tobacco advertisements from radio and television airwaves.

In 1998, the Master Settlement Agreement (MSA) between tobacco companies, 46 states, and the District of Columbia (1) restricted tobacco print advertising directly or indirectly targeting youth, (2) banned billboard cigarette advertisements, (3) disbanded the industry-funded Tobacco Institute, and (4) prohibited use of cartoon characters (such as Joe Camel) in cigarette advertisements. Subsequent litigation over MSA violations forced tobacco companies to refrain from advertising in certain magazines as well. Big tobacco companies, including Phillip Morris and Brown & Williamson, agreed not to advertise inside magazines with a 15% youth audience or on the back cover of any magazine. Lorillard agreed to not advertise in magazines with an 18% youth readership.

Acknowledging that tobacco advertisements contribute significantly to underage smoking, the federal Tobacco Control Act of 2009 further...
restricted tobacco marketing targeting children. It expanded the authority of the Food and Drug Administration (FDA) under the Food, Drug, and Cosmetic Act (FDCA) to regulate any product made or derived from tobacco and intended for human consumption. It also banned cigarette brand endorsements of sports and entertainment events. Additional efforts to limit tobacco advertisements are under consideration.

**Crafting a Ban on Displays of Cigarette Smoking Behaviors on Television**

Since existing tobacco advertising restrictions do not target smoking behaviors, NJOY can lawfully televise its ads. As a result, children, who are highly susceptible to advertising and unlikely to distinguish between ENDS and tobacco cigarettes, are once again exposed to broadcast images of smoking. The primary public health risk is not just that minors will try e-cigarettes, but that they will be influenced to smoke tobacco cigarettes — precisely the harm underlying support for existing tobacco advertising restrictions.

If most television, radio, and print advertising of cigarettes (and other tobacco products) is unlawful, how can NJOY lawfully depict cigarette smoking on its commercials? This ability is due in part to limitations in the scope of tobacco advertising restrictions. Though extensive, only the commercial promotion of tobacco products is explicitly banned; smoking behaviors (e.g., puffing on a cigarette, blowing smoke from one’s mouth) are not similarly precluded. Contrast this approach with voluntary limits on product use advertising agreed to by the alcohol industry and overseen by the Federal Trade Commission. For years, the alcohol industry has self-regulated marketing practices to limit advertising that shows excessive drinking or driving while intoxicated. While these sorts of behavioral images related to alcohol consumption in advertising are taboo, the tobacco industry has not agreed to similar limits.

If ENDS manufacturers do not voluntarily refrain from portraying dangerous behaviors in their advertisements (as alcohol companies have done), there are multiple legal paths to consider to restrict displays of smoking behaviors in ENDS advertising. For example, FDA has sought to regulate ENDS as “drugs” or “devices” via the FDCA, which would allow it to ban such products outright, absent considerable additional procedures to approve them for consumer use. However, in 2010 the D.C. Circuit Court of Appeals in *Soterra, Inc. v. FDA* accepted the industry argument that ENDS are neither drugs nor devices because they are not marketed as intended for a therapeutic purpose. Following *Soterra*, FDA is considering new guidance or regulation to more broadly define what it means to market a product “for therapeutic purposes.” Recent studies suggesting that many users view ENDS as smoking cessation aids may buttress future regulation of these products as drugs or devices, which would allow additional restrictions on advertising practices.

FDA is also considering regulating ENDS pursuant to the Tobacco Control Act, which currently covers cigarettes, cigarette tobacco, roll-
to protect impressionable minors from smoking-related ads, but lacks express legislative or regulatory support.

A more favorable approach is to legislatively expand existing prohibitions to ban advertising that depicts smoking behaviors using products that resemble cigarettes. “Smoking behaviors” may be defined minimally to include activities clearly associated with smoking tobacco cigarettes, such as placing a like product in the mouth or emitting what appears to be smoke. To the extent portraying these behaviors with tobacco products is currently unlawful, there is little justification (other than commercial interests) for allowing their display with a tobacco cigarette substitute.

**Conclusion**

Limiting the commercial portrayal of smoking behaviors on broadcast media which children are likely to view may advance the public’s health, be politically popular, and affirm cultural and social norms; but it also implicates industry legal interests. ENDS manufacturers may raise First Amendment commercial speech arguments as well as existing findings that their products are neither drugs nor delivery devices subject to more stringent marketing restrictions. Our legislative proposals would negate the latter argument. As to the former, commercial speech protections are strong, but so too are the public health, political, and social bases for advertising restrictions of smoking behaviors. To the extent that our proposed restriction does not prohibit ENDS advertising (unless it depicts smoking behaviors), the marketing and sale of these products may continue. Ultimately, adult consumers’ use of ENDS may prove significantly less harmful than tobacco cigarettes and help curb significant tobacco-related morbidity and mortality rates. However, the commercial success of ENDS cannot result in the undoing of decades of progress in de-normalizing smoking and tobacco use for the protection of minors by limiting their exposure to targeted cigarette advertising.

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3. See NJOY, supra note 1.
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9. Id.
17. See Alltucker, supra note 2.
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19. See NJOY, supra note 1.
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25. See Adkison et al., supra note 23.
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33. See Pollay, supra note 27, at 130.


35. Id., at 371-372.


38. See Pollay, supra note 27, at 130.


48. See Federal Trade Commission, supra note 47; Beer Institute, supra note 47.


52. Sottera, 627 F. 3d at 895.

53. Id.


56. See FDA, supra note 54.


58. Id.

59. See FDA, supra note 57.

