

## GUIDE FOR PUBLIC COMMENT ON FTC'S PROPOSED STUDY OF E-CIGARETTE SALES AND MARKETING ACTIVITIES

The Federal Trade Commission (FTC) is seeking public comment on a proposal to request marketing and sales information from marketers of electronic cigarettes (referred to as Electronic Nicotine Delivery Systems or "ENDS" by the Food and Drug Administration and herein). Comments are due on or before December 28, 2015 (FTC File No. P144504)

### Overview

The FTC currently collects marketing information from the major cigarette and smokeless tobacco manufacturers. [The Public Health and Tobacco Policy Center summarizes these annual reports in a fact sheet](#), which we understand serves as a valuable resource for New York contractors. The FTC is proposing to similarly conduct a three-year study of marketing and sales of ENDS in the U.S. through issuing annual information requests to five large and ten small major marketers of e-cigarettes. The agency seeks comments on the proposal, including whether and how to collect, analyze and report ENDS marketing and sales information.

This is an opportunity to share with the FTC how you feature tobacco product marketing data in your community education around tobacco use and how and why you would likewise value marketing and sales data pertaining to ENDS. It is important for the FTC to hear from state and local public health educators and policy makers about what type of information, and in what format, would be most useful for assessing the impact of and strategies around ENDS marketing which in turn inform evidence-based policies to address issues of concern.

To facilitate your participation, we have identified issues and drafted responses you may consider when submitting your personalized comments. Bear in mind the most effective comments will include compelling local data, observation and experience showing the relevance the ENDS marketing and sales data will have to your work. Narratives illustrating how you have used similar FTC-generated information can be especially helpful.

### How to Use this Guide

The FTC has posed specific questions with its proposal. We have prepared a summary response (Section I) which you may tailor and submit directly into the FTC's online submission form. We have also prepared a longer draft (Section II) in which the talking points are aligned with the FTC-numerated questions. We have prioritized answering the FTC-posed questions most relevant to New York contractors' work.

Contractor submissions should inform the FTC what information will be particularly helpful for you to conduct your work. Accordingly, your submission may expand upon or stray from the Center's draft guidance

Comments limited to 4000 characters may be submitted directly into an online form located at <https://ftcpublic.commentworks.com/ftc/electroniccigarettespra>. Lengthier comments may be submitted via attachment through the same webpage or via post sent to the FTC. Attachments and hard copies should reference “Electronic Cigarettes Paperwork Comment, FTC File NO. P144504.” Hard copies should be addressed to FTC, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC-5610 (Annex J), Washington, DC 20580. All comments should be submitted by December 28, 2015.

I. Guidance for comments submitted into online form (within 4000 character limit):

The FTC’s proposed study of electronic cigarettes marketing and sales is necessary and the information gathered will be practically useful. I work to educate communities about the problem of tobacco use, including how the industry drives that use. In my community education activities, I use the information Federal Trade Commission (FTC) currently collects and shares about tobacco industry marketing. I have found that this data is an effective resource to inform policymakers and support the development of evidence-based policies to counter industry activities and improve public health.

Specifically, information about e-cigarettes (which should include all electronic nicotine delivery systems (ENDS) and not simply the devices that look like traditional cigarettes) marketing expenditures, and various media used by product marketers is important to public health initiatives designed to counter industry activities that increase the use of addictive products detrimental to health. My work centers on the effect of point of sale marketing on tobacco use. Tobacco point of sale marketing has been an effective industry tactic to recruit new “replacement” smokers<sup>1</sup>—primarily youth—and to maintain use by existing customers. Retail tobacco marketing increases the likelihood that adolescents will initiate tobacco use and thwarts cessation attempts by current users.<sup>2</sup>

Current ENDS marketing mimics traditional cigarette marketing of the past<sup>3</sup> and may have similar effects on initiation of youth ENDS use.<sup>4</sup> Expenditures on ENDS promotion has sharply increased in recent years, particularly through media no longer available to traditional tobacco products (like television)<sup>5</sup> and primarily by the brands owned by large traditional tobacco companies.<sup>6</sup> This advertising is effectively reaching youth<sup>7</sup>--there is high awareness of ENDS advertising among youth and young adults, particularly at the point of sale.<sup>8</sup> This trend is disturbing given the rising popularity of ENDS among youth.<sup>9</sup>

While ENDS are relatively new to the market, they are a toxic, addictive product and are yet another form of tobacco.<sup>10</sup> Moreover, ENDS use is associated with increased likelihood of youth use of traditional combustible tobacco products.<sup>11</sup> Thus, it is vital for residents, public health professionals and policymakers to know how marketing and sales affect the community, particularly as it pertains to rising youth use of ENDS.<sup>12</sup>

*[Include information showing how you have used tobacco company marketing information to earn a response focused on POS and price discounts, particularly with decisionmakers. Include details (location, time period) and whether it led to policy proposal. E.g.,*

- FTC-gathered marketing data has been useful in my work. For example, I have used recent FTC reports showing a sharp increase in industry expenditures on cigarette price discounting<sup>13</sup> in combination with studies showing that cigarette prices are strongly correlated with cigarette use to drive local interest in countering price reductions. (For example, studies showing cigarette consumption decreases in response to price increases,<sup>14</sup> and lower prices attract new users and often prevent existing users from cutting down or quitting.<sup>15</sup>) Armed with the FTC report indicating cigarette price discounting accounts for 85% of all cigarette marketing expenditures,<sup>16</sup> I was able to impress upon my community leaders the significance of product price, which led to the Village of X entertaining an ordinance prohibiting the redemption of tobacco coupons last April.*
- I shared with my local board of health the FTC-reported expenditures the tobacco industry spent on point of sale pricing initiatives, emphasizing the increase in this subcategory over time. This information finally drove home for the board the importance the tobacco industry placed on keeping tobacco product prices low and triggered a discussion, still ongoing, about what our community could do counter industry behavior and keep prices higher and out of more people's hands*
- When the mayor of my village learned how much money the tobacco industry spent on marketing tobacco products at the point of sale, nationally and by extrapolation in our state and village, she had new appreciation for the influence this marketing must have. Empowered by the industry expenditures information collected by the FTC, the village began a closer examination of what is happening at the point of sale in our village and the legal ways we may reduce the marketing or temper its effectiveness in our community.]*

It will be helpful to my work for the FTC to differentiate by manufacturer type (*i.e.* exclusively ENDS manufacturers vs. manufacturers of ENDS and other tobacco products) marketing expenditures, and product sales and give-aways. It is critical for the FTC to collect and report comprehensive marketing expenditures by category and seek expertise in annually identifying these marketing categories. Similarly, differentiating between product type (*e.g.*, disposable vs. refillable; proprietary vs. multi-substance use; flavored products vs. unflavored; high, medium, and low (as determined by experts) nicotine concentrations); and methods of sale (brick and mortar stores vs. internet), is critical to understanding industry strategy and the resulting marketplace.

A high level of detail more accurately informs the circumstances in my community and assists in the development of appropriate and effective policies to protect public health.

II. Guidance for comments more extensively addressing FTC's specific inquiries. The FTC notice first invites comments on the proposed study's utility and methodology (which we have labeled as Section A). The notice subsequently identified six categories of anticipated information requests for comment (labeled as Section B). Finally, the notice invites comments on the specificity of data collection and reporting (labeled as Section C).

A. The FTC invites comments on: (1) Whether participation in the study is necessary, including whether the information will be practically useful; (2) the accuracy of our burden estimates, including whether the methodology and assumptions used are valid; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information.

*(A.1) The Federal Trade Commission's (FTC) proposed study of electronic cigarettes (or electronic nicotine delivery systems or ENDS) is necessary and the information gathered will be practically useful.*

- I work to educate communities about the problem of tobacco use, including how the industry drives that use. In my community education activities, as more fully described below, I use the information FTC collects and shares about tobacco industry marketing. This data is an effective resource for community education and supports the development of evidence-based policies to counter industry activities and improve public health.

*(A.3) The utility and clarity of the information the FTC proposes to collect can be enhanced in several ways.*

- Collect and report information on the universe of electronic nicotine delivery devices (ENDS), whether marketed as e-cigarettes, vape pens, e-hookah or any other name.
- Collect and report the ENDS marketing data in a manner that allows for straightforward, meaningful comparison data the FTC collects on cigarettes and smokeless tobacco products.
- In reporting the data, differentiate marketing practices and product sales by manufacturer type. Specifically, distinguish between manufacturers exclusively in the business of ENDS versus manufacturers of ENDS as well as other (traditional) tobacco products. This reporting will better inform public health professionals on how these products are marketed and sold (*e.g.*, companies marketing both ENDS and cigarettes may market ENDS to drive cigarette sales, while companies marketing ENDS to the exclusion of other products may differently promote their product).
- The term "give-away" should be clearly defined. Public health professionals will benefit from knowing whether FTC data captures, for example, free product given away on its own; products sold for negligible payment; products provided in exchange for the purchase of another product or service; products included with a subscription or membership fee; or items included in gift bags (*e.g.*, at celebrity

events). Additionally, the context for the give-aways should be included (*e.g.*, products given away at private events, public venues or at the point of sale).

B. The Commission anticipates that its requests will seek the following categories of information: (1) Sales and give-aways of e-cigarettes and related products (*e.g.*, refill cartridges and e- liquids); (2) marketing expenditures, including the amounts being spent on various media; (3) product placements in television programming, motion pictures, magazines, and other publications; (4) efforts such as age- screening mechanisms to prevent youth from being exposed to advertising and promotion for e-cigarettes or from obtaining free product samples; (5) expenditures on advertising to deter youth under the age of 18 from purchasing or using e-cigarettes; and (6) data collection activities, including data collection in connection with digital and social media marketing, and efforts to avoid collection of data from those under age 18.

The Commission requests comments on its intention to seek the above-listed categories of information.

*(B.1) The collection of information concerning sales and give-aways of e-cigarettes (or ENDS) and related products is vital for public health professionals and policymakers to address detrimental effects of ENDS use in their communities.*

- State and local tobacco control programs have been essential in reducing tobacco use across the country.<sup>17</sup> While ENDS are relatively new to the market, they are a toxic, addictive product and are yet another form of tobacco.<sup>18</sup>
- ENDS use is associated with increased likelihood of youth use of traditional combustible tobacco products.<sup>19</sup>
- Information about cigarette and other tobacco product sales and give-aways have supported evidence-based policies to reduce their use.

*(B.2) Information about ENDS marketing expenditures, including the amounts being spent on various media, is important to public health initiatives designed to counter industry activities that increase the use of addictive products detrimental to health.*

- Tobacco point of sale marketing has been an effective tactic to recruit new “replacement” smokers<sup>20</sup>—primarily youth—and to maintain use by existing customers. Retail tobacco marketing increases the likelihood that adolescents will initiate tobacco use and thwarts cessation attempts by current users.<sup>21</sup>
- ENDS marketing of today mimics traditional cigarette marketing of the past<sup>22</sup> and may have similar effects on initiation of ENDS use by youth.<sup>23</sup> Additionally, given the entry of major tobacco companies into the ENDS market, the industry is likely to continue to use the same marketing techniques for ENDS that were successful in increasing sales of cigarettes and other tobacco products. In fact, expenditures on ENDS promotion has increased sharply in recent years, particularly through media no longer available to traditional tobacco products (like television)<sup>24</sup> and primarily by the brands owned by large traditional tobacco companies (Altria’s MarkTen, R.J. Reynolds

Tobacco Company's Vuse, and Imperial Tobacco's blu).<sup>25</sup> This advertising is effectively reaching youth;<sup>26</sup> there is high awareness of ENDS advertising among youth and young adults, particularly at the point of sale.<sup>27</sup> This trend is disturbing given the rising popularity of ENDS among youth.<sup>28</sup>

- It is vital for residents, public health professionals and policymakers to know how marketing and sales affect the community, particularly as it pertains to rising youth use of ENDS. Information about cigarette and smokeless tobacco marketing has been an important tool for the development of evidence-based public health policies.

*[Include information about how you have used marketing information from tobacco companies to demonstrate focus on POS and price discounts, particularly with decisionmakers; include details if led to policy proposal. E.g.,*

- *I shared with my local board of health the FTC-reported expenditures the tobacco industry spent on point of sale pricing initiatives, emphasizing the increase in this subcategory increased over time. This information finally drove home for the board the importance the tobacco industry placed on keeping tobacco product prices low and triggered a discussion, still on going, about what our community could do counter industry behavior and keep prices higher- and out of more people's hands.*
- *When the mayor of my village learned how much money the tobacco industry spent on marketing tobacco products at the point of sale, nationally and by extrapolation in our state and village, she had new appreciation for the influence this marketing must have. Empowered by the industry expenditures information collected by the FTC, the village began a closer examination of what is happening at the point of sale in our village and legal way we may reduce the marketing or temper its effectiveness in our community.*
- *Recent FTC reports on cigarette marketing expenditures show a sharp increase in point of sale marketing since 1998.<sup>29</sup> The Surgeon General has identified cigarette marketing, particularly at the point of sale, causes tobacco use, including youth smoking initiation.<sup>30</sup> Additionally, point of sale marketing has been shown to undermine cessation attempts.<sup>31</sup> In response, federal, state and local policymakers have developed and implemented policies to reduce the impact of tobacco point of sale marketing (e.g., counter-marketing, warning labels, and sales restrictions).<sup>32</sup>*
- *Recent FTC reports identify a sharp increase in expenditures on price discounting for cigarettes, accounting for 85% of all cigarette marketing expenditures.<sup>33</sup> Cigarette prices are strongly correlated with cigarette use. Cigarette consumption decreases in response to price increases.<sup>34</sup> In particular, the most price-sensitive populations are often those most detrimentally affected by cigarette use.<sup>35</sup> Lower prices attract new users and often prevent existing users from cutting down or quitting.<sup>36</sup> In response, policymakers and tobacco control programs have been able to use this information to develop policies to thwart industry attempts to make products available at cheap prices to keep these disparately impacted populations smoking.<sup>37</sup>]*

*(B.3) The FTC should gather information about efforts to place products in television programs, movies, magazines and other publications.*

- The U.S. Surgeon General has concluded that tobacco marketing causes tobacco use.<sup>38</sup> Additionally, youth who are exposed to images of smoking in movies are more likely to smoke.<sup>39</sup> Given the relationship between ENDS use and future cigarette use by youth,<sup>40</sup> it is reasonable to expect ENDS print marketing and images of ENDS use in TV and movies will similarly affect youth ENDS and cigarette use. Thus, information about industry product placement and advertising activities will inform policy development to counter these tactics.

*(B.5) It will be useful for the FTC to additionally collect information on ENDS manufacturer expenditures on advertising purported to deter youth from purchasing or using ENDS products.*

- Similar efforts by cigarette and other tobacco companies have been shown to be wholly ineffective in deterring youth use of tobacco products and generally serve an ulterior motive—reducing support for policy interventions to reduce tobacco use.<sup>41</sup> Knowing how much effort ENDS marketers are expending in similar campaigns can assist in the development of public health policies to combat this subtle public relations campaign.

*(B.6) To increase our understanding of the ENDS industry, the FTC should collect information about ENDS social media marketing, including industry data collection activities and efforts to avoid collection of data from those under age 18.*

- 95% of teenagers ages 12-17 use the internet, and 81% of them use social media (and 71% use multiple platforms).<sup>42</sup> By comparison, 74% of adults who use the internet use social media,<sup>43</sup> but only 52% of those use multiple platforms.<sup>44</sup> Social media marketing may therefore reach more youth than adults, and information about industry use of social media will be important as new regulations on product use are adopted (*e.g.*, minimum age restrictions) and will inform the development of new policies to ensure that industry is not targeting youth.

C. The Commission also invites comments on the following issues:

*(C.1) Information collected by the FTC should be differentiated in order to more accurately inform the public and public health professionals about industry activities, including differentiation by:*

*(C.1(a)) Types of products (e.g., disposable devices vs. refillable devices and refill supplies).* Different products are differently priced, and price is important to consumer behavior.<sup>45</sup> Moreover, different products appeal to different consumers and understanding which

products are the focus of industry marketing will help identify the industry's target market. This information will be combined with use trend information to educate communities about industry activities.

(C.1(b) & C.7) Product flavors and nicotine strengths. Information about flavored product sales and give-aways will increase our understanding of target consumers and allow us to compare industry statements about those targets. We know that flavored tobacco products appeal to youth;<sup>46</sup> in fact, youth are far more likely to use flavored tobacco products than adults.<sup>47</sup> While ENDS are a new tobacco product, their use is associated with increased likelihood of youth use of traditional combustible tobacco products.<sup>48</sup> Information about sales and give-aways, in addition to marketing expenditures directed at promoting flavored products, will allow public health officials and policymakers to, for example, examine whether there is any inconsistency between directed industry resources and the identity of consumers using flavored products (*e.g.*, proportion of consumers, demographics of consumers).

Information about sales and give-aways by product nicotine strength is also useful. We know that traditional tobacco manufacturers develop “starter” products for new users—often with lower nicotine levels and characterizing flavors.<sup>49</sup> Further, marketing and sales information about these products may shed light on whether the product is being marketed or used as a cessation device and/or whether there is in fact a market for range of products with varied nicotine levels—including nicotine-free products. This information, used within the context of location of sales, existing state and local policies, etc. helps communities understand industry strategies and informs development of policies to counter them.

(C.1(c)) Sizes and liquid capacities of disposable e-cigarettes, cartridges and e-liquids sold and given away. Combined with information about sales price, this information will inform communities about the effective price for e-cigarettes and liquid nicotine. We know that higher tobacco prices reduce consumption;<sup>50</sup> and tobacco companies often try to thwart higher prices through price promotions, including bundling products to provide the consumer “more for less.”<sup>51</sup> Thus, information concerning various sizes of products marketed and sold will inform policy development. This information may additionally inform use trends when combined with other available data.

(C.1(d)) Whether the company sells directly to consumers (*e.g.*, over the Internet) or to wholesalers and distributors for subsequent sale to consumers (*e.g.*, at convenience stores). The method of sale is of particular importance to understanding what is happening at the point of sale, and, therefore, within our communities. As described above, point of sale marketing, which accompanies product sales, is particularly influential in driving tobacco use.<sup>52</sup> Information about where products are sold, and trends in those sales is important for policy development. For example, an important consideration would be knowing whether customers are leaving brick and mortar retail

environment in favor of internet purchases – that is, how much may restrictive policies help or hurt the economy of our local stores.

*Less detailed information would be of less value and utility for my work.* ENDS products and marketers vary greatly and are in the midst of rapid evolution as technology advances, the products become more familiar to consumers, companies grow (or independent companies emerge), and regulatory policies are implemented. Detailed information is necessary to evaluate trends and develop responsive policies.

*(C.2) The commission should collect data on product sales separately from data on product give-aways.* Sales data is important to track use trends. Give-away data is important to track trends in promotional strategies, which drive use. Making free product available effectively reduces the price to zero (or at least negligible, depending on the commission’s definition of “give-away”). With tobacco products, higher prices reduce consumption,<sup>53</sup> and tobacco companies often try to thwart higher prices through price promotions, including sampling.<sup>54</sup>

*(C.4) The commission should collect state-specific data about sales of e-cigarettes and related products.* State and local tobacco control programs have been essential in reducing tobacco use across the country.<sup>55</sup> While ENDS are relatively new to the market, they are a toxic, addictive product and are yet another form of tobacco.<sup>56</sup> As such, state and local governments have begun to regulate ENDS sales and use; these regulations understandably vary from state to state. Information about marketing, sales and give-aways of ENDS in the context of particular state regulations inform public health officials about policy effectiveness and industry strategy shifts in response to certain policies. Moreover, information about state variations in industry marketing expenditures will clarify target markets and can be compared with usage rates. (For example, industry marketing expenditures increased more than 400% in the New York market between 2011-2012, while a 2014 survey revealed an alarming rate of youth ENDS use.)

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<sup>1</sup> DIANE S. BURROWS, R. J. REYNOLDS TOBACCO COMPANY, YOUNG ADULT SMOKERS: STRATEGIES AND OPPORTUNITIES 2 (1984), available at <http://tobaccodocuments.org/rjr/508783540-3629.html> (discussing youth smoking, acknowledging that at the time only 31% of smokers begin after the age of 18, and concluding, therefore, that “younger adults are the only source of replacement smokers...If younger adults turn away from smoking, the Industry must decline, just as a population which does not give birth will eventually dwindle.”).

<sup>2</sup> U.S. DEP’T. OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS, A REPORT OF THE SURGEON GENERAL 8,487, 508 (2012); OBJ Carter et al., *The Effect of Retail Cigarette Pack Displays on Unplanned Purchases: Results from Immediate Postpurchase Interviews*, 18 TOBACCO CONTROL 218, 220 (2008) (finding point of sale tobacco marketing played a significant role in increasing unplanned...purchases of cigarettes” and many smokers thought the removal of displays would make it easier for them to quit); Ellen C. Feighery et al., *Cigarette Advertising and Promotional Strategies in Retail Outlets: Results of a Statewide Survey in California*, 10 TOBACCO CONTROL 184, 184-188 (2001); Melanie Wakefield et al., *The Effect of Retail Cigarette Pack Displays on Impulse Purchase*, 103 ADDICTION 322, 325 (2008).

<sup>3</sup> See Stuart Elliott, *E-Cigarette Makers’ Ads Echo Tobacco’s Heyday*, The New York Times (August 29, 2013), available at [http://www.nytimes.com/2013/08/30/business/media/e-cigarette-makers-ads-echo-tobaccos-heyday.html?\\_r=0](http://www.nytimes.com/2013/08/30/business/media/e-cigarette-makers-ads-echo-tobaccos-heyday.html?_r=0); see also CAMPAIGN FOR TOBACCO FREE KIDS, 7 WAYS E-CIGARETTE COMPANIES ARE COPYING BIG TOBACCO’S PLAYBOOK (OR 7 REASONS FDA SHOULD QUICKLY REGULATE E-CIGARETTES) (October 2, 2013), available at [http://www.tobaccofreekids.org/tobacco\\_unfiltered/post/2013\\_10\\_02\\_ecigarettes](http://www.tobaccofreekids.org/tobacco_unfiltered/post/2013_10_02_ecigarettes). This is not surprising given the entry of Big Tobacco into the e-cigarette market in 2012 with Lorillard Tobacco’s purchase of Blu, followed by R.J.

Reynolds and Altria's development of their own ENDS products. Mike Esterl, Got a Light-er Charger? Big Tobacco's Latest Buzz, *The Wall Street Journal* (April 25, 2013); see Gregory Conley, Big Tobacco's War on Vaping, *National Review* (January 16, 2015).

<sup>4</sup> See Ollie Ganz et al., *Electronic cigarette advertising at the point-of-sale: a gap in tobacco control research*, *TC ONLINE FIRST* (March 11, 2014), 2, 10.1136/tobaccocontrol-2013-051337; see also Kimberly Leonard, E-Cigarette Use Triples Among Teens, *USA Today* (April 16, 2015) (quoting CDC Director Tom Frieden discussing the alarming spike in youth e-cigarette use and the impact of heavy marketing by manufacturers); see also Jessica K Pepper et al., Effects of advertisements on smokers' interest in trying e-cigarettes: the roles of product comparison and visual cues, *23 Tobacco Control* iii31, iii31 (2014) (smokers appear to positively respond to ENDS advertisements).

<sup>5</sup> Rachel Kornfield et al., *Rapidly Increasing Promotional Expenditures for E-Cigarettes*, *TC ONLINE FIRST*, 1 (April 30, 2014),

<sup>6</sup> TRUTH INITIATIVE, VAPORIZED: YOUTH AND YOUNG ADULT EXPOSURE TO E-CIGARETTE MARKETING, 2, 21-22 (November 2015).

<sup>7</sup> TRUTH INITIATIVE, VAPORIZED: YOUTH AND YOUNG ADULT EXPOSURE TO E-CIGARETTE MARKETING, 22 (November 2015)

<sup>8</sup> TRUTH INITIATIVE, VAPORIZED: YOUTH AND YOUNG ADULT EXPOSURE TO E-CIGARETTE MARKETING, 6-8 (November 2015).

<sup>9</sup> Rene Arrazola, *Tobacco Use Among Middle and High School Students—United States, 2011-2014*, 64 *MORBIDITY AND MORTALITY WEEKLY* 381, 383 (April 17, 2015).

<sup>10</sup> ENDS have been recognized as tobacco products for regulatory purposes. *Sottera, Inc. v. Food and Drug Admin.*, 627 F.3d 891, 898-899 (2010).

<sup>11</sup> Dutra and Glantz, *E-Cigarettes and conventional cigarette use among US adolescents: A cross-sectional study*, 7 *JAMA PEDIATRICS* 610, 610 (July 2014); Adam M. Leventhal et al., *Association of Electronic Cigarette Use with Initiation of Combustible Tobacco Product Smoking in Early Adolescence*, 314 *JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION* 700, 706 (2015); Thomas A Wills et al., *E-cigarette use and willingness to smoke: a sample of adolescent non-smokers*, *TC ONLINE FIRST*, doi:10.1136/tobaccocontrol-2015-052349 (August 2015); Brian A. Primack, et al., *Progression to Traditional Cigarette Smoking after Electronic Cigarette use among US Adolescents and Young Adults*, *JAMA PEDIATRICS ONLINE FIRST*, E4-E5 (September 8, 2015); see Graham F. Moore et al., *E-cigarette use and intentions to smoke among 10-11-year-old never-smokers in Wales*, *TC ONLINE FIRST*, 10.1136/tobaccocontrol-2014-052011 (December 22, 2014) (finding e-cigarette use associated with weaker antismoking intentions); see also Andrea C. King et al., *Passive exposure to electronic cigarette (e-cigarette) use increases desire for combustible and e-cigarettes in young adult smokers*; see also Rebecca E. Bunnell, *Intentions to Smoke Cigarettes among Never-Smoking U.S. Middle and High School Electronic Cigarette Users, National Youth Tobacco Survey, 2011-2013, Nicotine & Tobacco Research*, 6 (2014) doi:10.1093/ntr/ntu166 (finding e-cigarette use among never-smokers associated with intentions to smoke); c.f. Abigail S. Friedman, *How Do Electronic Cigarettes Affect Adolescent Smoking?*, Harvard white paper April 22, 2015 (finding youth smoking decreases with access to e-cigarettes);

<sup>12</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, OFFICE OF SMOKING AND HEALTH, *ELECTRONIC NICOTINE DELIVERY SYSTEMS: KEY FACTS*, 1 (July 2015); see also CENTERS FOR DISEASE CONTROL AND PREVENTION, *E-cigarette use triples among middle and high school students in just one year*, Press Release <http://www.cdc.gov/media/releases/2015/p0416-e-cigarette-use.html> (April 16, 2015); see also Rene A. Arrazola, *Tobacco Use Among Middle and High School Students—United States, 2011-2014*, *MORBIDITY AND 64 MORTALITY WEEKLY REPORT* 381, (April 17, 2015).

<sup>13</sup> FED. TRADE COMM'N, *CIGARETTE REPORT FOR 2012*, Table 2E (2015); PUBLIC HEALTH & TOBACCO POLICY CENTER, *TOBACCO COMPANIES SPEND BILLIONS MARKETING THEIR PRODUCTS* (2015).

<sup>14</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., *SURGEON GENERAL'S REPORT: REDUCING TOBACCO USE*, 322-37 (2000) [hereinafter 2000 SURGEON GENERAL'S REPORT]; see also Frank J. Chaloupka et al. *Tax, Price and Cigarette Smoking: Evidence from the Tobacco Documents and Implications for Tobacco Company Marketing Strategies*, 11 *TOBACCO CONTROL* i62, i63-i64 (2002)[hereinafter Chaloupka, *Tax, Price and Smoking*]; Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, 20 *TOBACCO CONTROL* 235, 235-36 tbl. 1 (2010). For more information about the relationship between price and tobacco consumption, see PUBLIC HEALTH & TOBACCO POLICY CENTER, *TOBACCO PRICE PROMOTION: POLICY RESPONSES TO INDUSTRY PRICE MANIPULATION 2-7*, available at <http://www.tobaccopolicycenter.org/documents/Tobacco%20Price%20Promotion%20Complete%20Report.pdf>.

<sup>15</sup> See *id.* at 1 (higher prices reduce smoking initiation, cigarette consumption and increase successful cessation); see also PUBLIC HEALTH & TOBACCO POLICY CENTER, *TOBACCO PRICE PROMOTION: LOCAL REGULATION OF DISCOUNT COUPONS AND CERTAIN VALUE-ADDED SALES*, 2 (2013) (“Increasing the price of cigarettes prevents young people from initiating smoking and, despite the addictiveness of nicotine, reduces the number of cigarettes consumed by people who smoke, and increases cessation.”).

<sup>16</sup> FED. TRADE COMM'N, *CIGARETTE REPORT FOR 2012*, Table 2E (2015); PUBLIC HEALTH & TOBACCO POLICY CENTER, *TOBACCO COMPANIES SPEND BILLIONS MARKETING THEIR PRODUCTS* (2015).

<sup>17</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS*, 856-857 (2014); see also *id.* at 31, 792, 805, 811; U.S. DEP'T. OF HEALTH & HUMAN SERVS., *PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS, A REPORT OF THE SURGEON GENERAL*, 696, 811 (2012).

<sup>18</sup> ENDS have been recognized as tobacco products for regulatory purposes. *Sottera, Inc. v. Food and Drug Admin.*, 627 F.3d 891, 898-899 (2010).

- <sup>19</sup> Dutra and Glantz, *E-Cigarettes and conventional cigarette use among US adolescents: A cross-sectional study*, 7 JAMA PEDIATRICS 610, 610 (July 2014); Adam M. Leventhal et al., *Association of Electronic Cigarette Use with Initiation of Combustible Tobacco Product Smoking in Early Adolescence*, 314 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 700, 706 (2015); Thomas A Wills et al., *E-cigarette use and willingness to smoke: a sample of adolescent non-smokers*, TC ONLINE FIRST, doi:10.1136/tobaccocontrol-2015-052349 (August 2015); Brian A. Primack, et al., *Progression to Traditional Cigarette Smoking after Electronic Cigarette use among US Adolescents and Young Adults*, JAMA PEDIATRICS ONLINE FIRST, E4-E5 (September 8, 2015); see Graham F. Moore et al., *E-cigarette use and intentions to smoke among 10-11-year-old never-smokers in Wales*, TC ONLINE FIRST, 10.1136/tobaccocontrol-2014-052011 (December 22, 2014) (finding e-cigarette use associated with weaker antismoking intentions); see also Andrea C. King et al., *Passive exposure to electronic cigarette (e-cigarette) use increases desire for combustible and e-cigarettes in young adult smokers*; see also Rebecca E. Bunnell, *Intentions to Smoke Cigarettes among Never-Smoking U.S. Middle and High School Electronic Cigarette Users, National Youth Tobacco Survey, 2011-2013, Nicotine & Tobacco Research*, 6 (2014) doi:10.1093/ntr/ntu166 (finding e-cigarette use among never-smokers associated with intentions to smoke); c.f. ABIGAIL S. FRIEDMAN, HOW DO ELECTRONIC CIGARETTES AFFECT ADOLESCENT SMOKING?, HARVARD WHITE PAPER April 22, 2015 (finding youth smoking decreases with access to e-cigarettes);
- <sup>20</sup> DIANE S. BURROWS, R. J. REYNOLDS TOBACCO COMPANY, YOUNG ADULT SMOKERS: STRATEGIES AND OPPORTUNITIES 2 (1984), available at <http://tobaccodocuments.org/rjr/508783540-3629.html> (discussing youth smoking, acknowledging that at the time only 31% of smokers begin after the age of 18, and concluding, therefore, that “younger adults are the only source of replacement smokers...If younger adults turn away from smoking, the Industry must decline, just as a population which does not give birth will eventually dwindle.”).
- <sup>21</sup> U.S. DEP’T. OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS, A REPORT OF THE SURGEON GENERAL 8,487, 508 (2012); OBJ Carter et al., *The Effect of Retail Cigarette Pack Displays on Unplanned Purchases: Results from Immediate Postpurchase Interviews*, 18 TOBACCO CONTROL 218, 220 (2008) (finding point of sale tobacco marketing played a significant role in increasing unplanned...purchases of cigarettes” and many smokers thought the removal of displays would make it easier for them to quit); Ellen C. Feighery et al., *Cigarette Advertising and Promotional Strategies in Retail Outlets: Results of a Statewide Survey in California*, 10 TOBACCO CONTROL 184, 184-188 (2001); Melanie Wakefield et al., *The Effect of Retail Cigarette Pack Displays on Impulse Purchase*, 103 ADDICTION 322, 325 (2008).
- <sup>22</sup> See Stuart Elliott, *E-Cigarette Makers’ Ads Echo Tobacco’s Heyday*, The New York Times (August 29, 2013), available at [http://www.nytimes.com/2013/08/30/business/media/e-cigarette-makers-ads-echo-tobaccos-heyday.html?\\_r=0](http://www.nytimes.com/2013/08/30/business/media/e-cigarette-makers-ads-echo-tobaccos-heyday.html?_r=0); see also CAMPAIGN FOR TOBACCO FREE KIDS, 7 WAYS E-CIGARETTE COMPANIES ARE COPYING BIG TOBACCO’S PLAYBOOK (OR 7 REASONS FDA SHOULD QUICKLY REGULATE E-CIGARETTES) (October 2, 2013), available at [http://www.tobaccofreekids.org/tobacco\\_unfiltered/post/2013\\_10\\_02\\_ecigarettes](http://www.tobaccofreekids.org/tobacco_unfiltered/post/2013_10_02_ecigarettes). This is not surprising given the entry of Big Tobacco into the e-cigarette market in 2012 with Lorillard Tobacco’s purchase of Blu, followed by R.J. Reynolds and Altria’s development of their own ENDS products. Mike Esterl, *Got a Light-er Charger? Big Tobacco’s Latest Buzz*, The Wall Street Journal (April 25, 2013); see Gregory Conley, *Big Tobacco’s War on Vaping*, National Review (January 16, 2015).
- <sup>23</sup> See Ollie Ganz et al., *Electronic cigarette advertising at the point-of-sale: a gap in tobacco control research*, TC ONLINE FIRST (March 11, 2014), 2, 10.1136/tobaccocontrol-2013-051337; see also Kimberly Leonard, *E-Cigarette Use Triples Among Teens*, USA Today (April 16, 2015) (quoting CDC Director Tom Frieden discussing the alarming spike in youth e-cigarette use and the impact of heavy marketing by manufacturers); see also Jessica K Pepper et al., *Effects of advertisements on smokers’ interest in trying e-cigarettes: the roles of product comparison and visual cues*, 23 TOBACCO CONTROL iii31, iii31 (2014) (smokers appear to positively respond to ENDS advertisements).
- <sup>24</sup> Rachel Kornfield et al., *Rapidly Increasing Promotional Expenditures for E-Cigarettes*, TC ONLINE FIRST, 1 (April 30, 2014); Annice E. Kim, et al., *E-Cigarette Advertising Expenditures in the U.S., 2011-2012*, 46 Am. J. Prev. Med. 409, 410 (2014).
- <sup>25</sup> TRUTH INITIATIVE, VAPORIZED: YOUTH AND YOUNG ADULT EXPOSURE TO E-CIGARETTE MARKETING, 2, 21-22 (November 2015).
- <sup>26</sup> TRUTH INITIATIVE, VAPORIZED: YOUTH AND YOUNG ADULT EXPOSURE TO E-CIGARETTE MARKETING, 22 (November 2015)
- <sup>27</sup> TRUTH INITIATIVE, VAPORIZED: YOUTH AND YOUNG ADULT EXPOSURE TO E-CIGARETTE MARKETING, 6-8 (November 2015).
- <sup>28</sup> Rene Arrazola, *Tobacco Use Among Middle and High School Students—United States, 2011-2014*, 64 MORBIDITY AND MORTALITY WEEKLY 381, 383 (April 17, 2015).
- <sup>29</sup> FED. TRADE COMM’N, CIGARETTE REPORT FOR 2012, Table 2B-Table 2E (2015). Cigarette manufacturers’ “Point of Sale” expenditures currently comprise expenditures on “Coupons,” “Point of Sale,” “Price Discounts,” “Promotional Allowances – Retailers,” “Promotional Allowances – Wholesalers,” “Retail Value Added – Bonus Cigarettes” and “Retail Value Added – Non-Cigarette Bonus” as defined in the report (approximately \$9.18 billion). In 1998, those expenditures comprised the categories “Point-of-Sale,” “Promotional Allowances,” “Coupons,” and “Retail-Value-Added” as defined in the report (approximately \$1.56 billion).
- <sup>30</sup> DEP’T. OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL, 8, 508 (2012)

<sup>31</sup> OBJ Carter et al., *The Effect of Retail Cigarette Pack Displays on Unplanned Purchases: Results from Immediate Postpurchase Interviews*, 18 TOBACCO CONTROL 218, 220 (2008) (finding point of sale tobacco marketing played a significant role in increasing unplanned...purchases of cigarettes" and many smokers thought the removal of displays would make it easier for them to quit); Ellen C. Feighery et al., *Cigarette Advertising and Promotional Strategies in Retail Outlets: Results of a Statewide Survey in California*, 10 TOBACCO CONTROL 184, 184-188 (2001); Melanie Wakefield et al., *The Effect of Retail Cigarette Pack Displays on Impulse Purchase*, 103 ADDICTION 322, 325 (2008).

<sup>32</sup> E.g., Family Smoking Prevention and Tobacco Control Act; N.Y. DEPT. OF PUBLIC HEALTH, *This is Tobacco Marketing. Our Kids Have Seen Enough* campaign, available at <http://www.tobaccofreekids.org/our-kids-have-seen-enough-campaign/>; NEWBURGH, NY CODE §276-2.

<sup>33</sup> FED. TRADE COMM'N, CIGARETTE REPORT FOR 2012, Table 2E (2015); PUBLIC HEALTH & TOBACCO POLICY CENTER, TOBACCO COMPANIES SPEND BILLIONS MARKETING THEIR PRODUCTS (2015).

<sup>34</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., SURGEON GENERAL'S REPORT: REDUCING TOBACCO USE, 322-37 (2000) [hereinafter 2000 SURGEON GENERAL'S REPORT]; see also, Frank J. Chaloupka et al. *Tax, Price and Cigarette Smoking: Evidence from the Tobacco Documents and Implications for Tobacco Company Marketing Strategies*, 11 TOBACCO CONTROL i62, i63-i64 (2002); Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, 20 TOBACCO CONTROL 235, 235-36 tbl. 1 (2010). For more information about the relationship between price and tobacco consumption, see PUBLIC HEALTH & TOBACCO POLICY CENTER, TOBACCO PRICE PROMOTION: POLICY RESPONSES TO INDUSTRY PRICE MANIPULATION 2-7, available at <http://www.tobaccopolicycenter.org/documents/Tobacco%20Price%20Promotion%20Complete%20Report.pdf>.

<sup>35</sup> PUBLIC HEALTH & TOBACCO POLICY CENTER, TOBACCO PRODUCT PRICING POLICY IN VERMONT, 13-14 (2014).

<sup>36</sup> See *id.* at 1 (higher prices reduce smoking initiation, cigarette consumption and increase successful cessation); see also PUBLIC HEALTH & TOBACCO POLICY CENTER, TOBACCO PRICE PROMOTION: LOCAL REGULATION OF DISCOUNT COUPONS AND CERTAIN VALUE-ADDED SALES, 2 (2013) ("Increasing the price of cigarettes prevents young people from initiating smoking and, despite the addictiveness of nicotine, reduces the number of cigarettes consumed by people who smoke, and increases cessation.").

<sup>37</sup> See, e.g., NEW YORK, N.Y. ADMIN. CODE §17-176.1.

<sup>38</sup> U.S. DEPT. OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL, 508 (2012)

<sup>39</sup> U.S. DEPT. OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING-50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL, 15, 797-798 (2014).

<sup>40</sup> Dutra and Glantz, *E-Cigarettes and conventional cigarette use among US adolescents: A cross-sectional study*, 7 JAMA PEDIATRICS 610, 610 (July 2014); Adam M. Leventhal et al., *Association of Electronic Cigarette Use with Initiation of Combustible Tobacco Product Smoking in Early Adolescence*, 314 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 700, 706 (2015); Thomas A Wills et al., *E-cigarette use and willingness to smoke: a sample of adolescent non-smokers*, TC ONLINE FIRST, doi:10.1136/tobaccocontrol-2015-052349 (August 2015); Brian A. Primack, et al., *Progression to Traditional Cigarette Smoking after Electronic Cigarette use among US Adolescents and Young Adults*, JAMA PEDIATRICS ONLINE FIRST, E4-E5 (September 8, 2015); see Graham F. Moore et al., *E-cigarette use and intentions to smoke among 10-11-year-old never-smokers in Wales*, TC ONLINE FIRST, 10.1136/tobaccocontrol-2014-052011 (December 22, 2014) (finding e-cigarette use associated with weaker antismoking intentions); see also Andrea C. King et al., *Passive exposure to electronic cigarette (e-cigarette) use increases desire for combustible and e-cigarettes in young adult smokers; see also* Rebecca E. Bunnell, *Intentions to Smoke Cigarettes among Never-Smoking U.S. Middle and High School Electronic Cigarette Users, National Youth Tobacco Survey, 2011-2013, Nicotine & Tobacco Research*, 6 (2014) doi:10.1093/ntr/ntu166 (finding e-cigarette use among never-smokers associated with intentions to smoke); c.f. Abigail S. Friedman, *How Do Electronic Cigarettes Affect Adolescent Smoking?*, Harvard white paper April 22, 2015 (finding youth smoking decreases with access to e-cigarettes);

<sup>41</sup> CAMPAIGN FOR TOBACCO FREE KIDS, BIG SURPRISE: TOBACCO COMPANY PREVENTION CAMPAIGNS DON'T WORK; MAYBE IT'S BECAUSE THEY'RE NOT SUPPOSED TO (2015), available at <https://www.tobaccofreekids.org/research/factsheets/pdf/0302.pdf>.

<sup>42</sup> AMANDA LENHART, PEW RESEARCH CENTER, TEENS, SOCIAL MEDIA & TECHNOLOGY OVERVIEW 2015, (April 2015).

<sup>43</sup> PEW RESEARCH CENTER, SOCIAL NETWORKING FACT SHEET (January 2014), available at <http://www.pewinternet.org/factsheets/social-networking-fact-sheet/>.

<sup>44</sup> MAEVE DUGGAN, ET AL., PEW RESEARCH CENTER, SOCIAL MEDIA UPDATE 2014 (September 2014), available at <http://www.pewinternet.org/2015/01/09/social-media-update-2014/>.

<sup>45</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., SURGEON GENERAL'S REPORT: REDUCING TOBACCO USE, 322-37 (2000); see also, Frank J. Chaloupka et al. *Tax, Price and Cigarette Smoking: Evidence from the Tobacco Documents and Implications for Tobacco Company Marketing Strategies*, 11 TOBACCO CONTROL i62, i63-i64 (2002)[hereinafter Chaloupka, *Tax, Price and Smoking*]; Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, 20 TOBACCO CONTROL 235, 235-36 tbl. 1 (2010)[hereinafter Chaloupka, *Effectiveness of Tax and Price Policies*]. For more information about the relationship between price and tobacco consumption, see PUBLIC

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<sup>46</sup> See

<http://www.fda.gov/downloads/TobaccoProducts/Labeling/ProductsIngredientsComponents/FlavoredTobacco/UCM183214.pdf>; see also

<http://www.fda.gov/downloads/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/UCM183262.pdf>

<sup>47</sup> See

<http://www.fda.gov/downloads/TobaccoProducts/Labeling/ProductsIngredientsComponents/FlavoredTobacco/UCM183214.pdf>; see also

<http://www.fda.gov/downloads/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/UCM183262.pdf>

<sup>48</sup> Dutra and Glantz, *E-Cigarettes and conventional cigarette use among US adolescents: A cross-sectional study*, 7 JAMA PEDIATRICS 610, 610 (July 2014); Adam M. Leventhal et al., *Association of Electronic Cigarette Use with Initiation of Combustible Tobacco Product Smoking in Early Adolescence*, 314 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 700, 706 (2015); Thomas A Wills et al., *E-cigarette use and willingness to smoke: a sample of adolescent non-smokers*, TC ONLINE FIRST, doi:10.1136/tobaccocontrol-2015-052349 (August 2015); Brian A. Primack, et al., *Progression to Traditional Cigarette Smoking after Electronic Cigarette use among US Adolescents and Young Adults*, JAMA PEDIATRICS ONLINE FIRST, E4-E5 (September 8, 2015); see Graham F. Moore et al., *E-cigarette use and intentions to smoke among 10-11-year-old never-smokers in Wales*, TC ONLINE FIRST, 10.1136/tobaccocontrol-2014-052011 (December 22, 2014) (finding e-cigarette use associated with weaker antismoking intentions); see also Andrea C. King et al., *Passive exposure to electronic cigarette (e-cigarette) use increases desire for combustible and e-cigarettes in young adult smokers*; see also Rebecca E. Bunnell, *Intentions to Smoke Cigarettes among Never-Smoking U.S. Middle and High School Electronic Cigarette Users, National Youth Tobacco Survey, 2011-2013, Nicotine & Tobacco Research*, 6 (2014) doi:10.1093/ntr/ntu166 (finding e-cigarette use among never-smokers associated with intentions to smoke); c.f. Abigail S. Friedman, *How Do Electronic Cigarettes Affect Adolescent Smoking?*, Harvard white paper April 22, 2015 (finding youth smoking decreases with access to e-cigarettes);

<sup>49</sup> PUBLIC HEALTH & TOBACCO POLICY CENTER, ADVANCING TOBACCO CONTROL: THE KNOWN, THE NEW AND THE NEXT, 26 (2014).

<sup>50</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., SURGEON GENERAL'S REPORT: REDUCING TOBACCO USE, 322-37 (2000); see also,

Frank J. Chaloupka et al. *Tax, Price and Cigarette Smoking: Evidence from the Tobacco Documents and Implications for Tobacco Company Marketing Strategies*, 11 TOBACCO CONTROL i62, i63-i64 (2002); Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, 20 TOBACCO CONTROL 235, 235-36 tbl. 1 (2010). For more information about the relationship between price and tobacco consumption, see PUBLIC HEALTH & TOBACCO POLICY CENTER, TOBACCO PRICE PROMOTION: POLICY RESPONSES TO INDUSTRY PRICE MANIPULATION 2-7, available at <http://www.tobaccopolicycenter.org/documents/Tobacco%20Price%20Promotion%20Complete%20Report.pdf>.

<sup>51</sup> PUBLIC HEALTH & TOBACCO POLICY CENTER, TOBACCO PRICE PROMOTION: LOCAL REGULATION OF DISCOUNT COUPONS AND CERTAIN VALUE-ADDED SALES, 2 (2013).

<sup>52</sup> DIANE S. BURROWS, R. J. REYNOLDS TOBACCO COMPANY, YOUNG ADULT SMOKERS: STRATEGIES AND OPPORTUNITIES 2 (1984), available at <http://tobaccodocuments.org/rjr/508783540-3629.html> (discussing youth smoking, acknowledging that at the time only 31% of smokers begin after the age of 18, and concluding, therefore, that “younger adults are the only source of replacement smokers...If younger adults turn away from smoking, the industry must decline, just as a population which does not give birth will eventually dwindle.”); U.S. DEP'T. OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS, A REPORT OF THE SURGEON GENERAL 8,487, 508 (2012); OBJ Carter et al., *The Effect of Retail Cigarette Pack Displays on Unplanned Purchases: Results from Immediate Postpurchase Interviews*, 18 TOBACCO CONTROL 218, 220 (2008) (finding point of sale tobacco marketing played a significant role in increasing unplanned...purchases of cigarettes” and many smokers thought the removal of displays would make it easier for them to quit); Ellen C. Feighery et al., *Cigarette Advertising and Promotional Strategies in Retail Outlets: Results of a Statewide Survey in California*, 10 TOBACCO CONTROL 184, 184-188 (2001); Melanie Wakefield et al., *The Effect of Retail Cigarette Pack Displays on Impulse Purchase*, 103 ADDICTION 322, 325 (2008).

<sup>53</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., SURGEON GENERAL'S REPORT: REDUCING TOBACCO USE, 322-37 (2000) [hereinafter 2000 SURGEON GENERAL'S REPORT]; see also, Frank J. Chaloupka et al. *Tax, Price and Cigarette Smoking: Evidence from the Tobacco Documents and Implications for Tobacco Company Marketing Strategies*, 11 TOBACCO CONTROL i62, i63-i64 (2002); Frank J. Chaloupka et al., *Effectiveness of Tax and Price Policies in Tobacco Control*, 20 TOBACCO CONTROL 235, 235-36 tbl. 1 (2010). For more information about the relationship between price and tobacco consumption, see PUBLIC HEALTH & TOBACCO POLICY CENTER, TOBACCO PRICE PROMOTION: POLICY RESPONSES TO INDUSTRY

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<sup>54</sup> PUBLIC HEALTH & TOBACCO POLICY CENTER, TOBACCO PRICE PROMOTION: LOCAL REGULATION OF DISCOUNT COUPONS AND CERTAIN VALUE-ADDED SALES, 2 (2013).

<sup>55</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS, 856-857 (2014); *see also id.* at 31, 792, 805, 811; U.S. DEP'T. OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUTH AND YOUNG ADULTS, A REPORT OF THE SURGEON GENERAL, 696, 811 (2012).

<sup>56</sup> ENDS have been recognized as tobacco products for regulatory purposes. *Sottera, Inc. v. Food and Drug Admin.*, 627 F.3d 891, 898-899 (2010).