

FDA Should Restrict Internet Sales of All Tobacco Products Including E-Cigarettes

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The proposed FDA deeming rule fails to propose restrictions that would effectively prohibit youth from purchasing any covered tobacco products, including e-cigarettes, through Internet sales. The proposed rule discusses the importance of having age restrictions and face-to-face age verification, including visual inspection and confirmation of identification cards prior to tobacco purchase. The goal of this minimum age and identification restriction is to “reduce youth initiation of tobacco use, thereby reducing the number of people who suffer from tobacco-related illnesses and death” (FR 23160). By verification, the FDA is requiring that tobacco retailers must “verify by means of photographic identification containing the bearer’s date of birth that no person is younger than 18 years of age” (FR 23204; 1140.14). **This requirement is completely meaningless for Internet sales, whereby it is easy for youth to simply lie about their age, provide false identification, and circumvent this age verification requirement.**

The sale of all tobacco products through the Internet must be completely restricted. Simply restricting the sale of tobacco products to those 18 and over does not go far enough, given how easily youth can and do circumvent the verification process.

This age and identification restriction will only be successful if such policies are applied to all sales of all tobacco products. Unfortunately, the FDA does not extend this logic to also restricting the sale of tobacco products on the Internet.

Clear Omission of Restriction of Internet Sales

The FDA deeming rule fails to propose any restrictions on the Internet sales of any covered tobacco product, including new electronic cigarettes (e-cigarettes), cigarillos and cigars. Given the arguments and evidence we provide below, **it is clear that the sales of all tobacco products through the Internet must be prohibited.**

Despite their stated goal to “prevent sales to underage youth,” “reduce the public health burden of tobacco use on the American public, including youth” (FDA press release, April 24, 2014), and to “curb initiation of other tobacco products among youth” (FR 160 <<check cite>>), the FDA in their new deeming rule (FR 44396) fails to take an essential step to restrict the sale of tobacco products through the Internet. Failing to restrict Internet sales defeats the purpose of the law, which is to reduce the population level public health impact of tobacco use, which inherently includes reducing all tobacco use among youth. Further, not restricting Internet sales thwarts any positive effects on public health that might otherwise be gained by the proposed restrictions prohibiting sale of tobacco products to youth under 18.

The FDA Acknowledges the Importance of Restricting Youth Access to Tobacco.

In the Deeming Rule, the FDA cites research arguing for the importance of restricting sales to adolescents, and that such restrictions significantly reduce youth use of tobacco products. They state, “A literature review found that every intervention that prevented the sale of tobacco to minors has been associated with an observed reduction in tobacco product use by youth” (FR 23160; DiFranza, 2012).

The FDA goes on to explain that by reducing youth access to tobacco, they are not only reducing use, but reducing overall supply and sharing among peers: “the disruption of commercial distribution to youth ‘creates supply shortages, driving up the cost of tobacco on the street and discouraging sharing among peers as smokers protect their supply’” (FR 23160; DiFranza, 2012). Further, the FDA provides ample evidence that restricting youth access to tobacco significantly reduces use (FR 23160; Altman et al., 1999; DiFranza, Carlson & Caisse, 1992; Jason et al., 1991; Hinds, 1992).

The FDA also provides evidence that “when youth access [restriction] laws exist and are enforced, youth users of tobacco, particularly beginning users, may resort to social sources of tobacco (such as friends, parents or strangers) or to stealing... (FR 23161; Cummings et al., 2003); and that perceived acceptability to tobacco products results in higher levels of use (FR 23161; Doubeni et al., 2008). This evidence clearly supports the notion that we must restrict youth access to all tobacco products through all means, including the Internet. Indeed, as the FDA argues, “The absence of such requirements for covered tobacco products could give youth a false sense of security about the safety of those products sold without these restrictions” (FR 23162). **Despite the FDA themselves citing studies supporting the importance of restricting youth access, the FDA fails to utilize their own literature in their deeming rule, literature that clearly supports complete restriction of tobacco use to youth.**

Youth Under Age 18 Purchase Tobacco on the Internet.

There is sufficient evidence demonstrating that youth under age 18 purchase tobacco products on the Internet. Indeed, the Internet serves as a significant means of acquiring tobacco for youth, with Internet sales serving as a way to circumvent the age restrictions

and face-to-face age verification requirements, given that age verification is virtually non-existent and meaningless. Fix et al. (2006) showed that Internet sales of tobacco increased significantly among 9th grade students living in New York State. In 2004-2005, youth were 2.6 times more likely to purchase cigarettes over the Internet than were similar students just 4-5 years earlier. The rates went from 1.6% in 2001 to 5.2% in 2005. Moreover, 9% reported that they intended on purchasing cigarettes through the Internet (see also Abrams et al., 2003). Using a large representative sample of 10th and 12th graders in California, Unger and colleagues showed that 2.2% of the youth had tried to buy cigarettes on the Internet, and 32% of those who had tried cigarettes rated the Internet as their most recent source for cigarettes. Internet sales were highest among younger adolescents, males and frequent smokers. As Internet use explodes among youth, these numbers are almost certainly much larger today.

Additional evidence for the importance of full restriction of Internet sales of tobacco products has been provided to the FDA over the past year (Docket Number: FDA-2011-N-0467; <http://www.regulations.gov/#!docketDetail;D=FDA-2011-N-0467>). In particular, Drs. Williams, Ribisl, and Jo, from the University of North Carolina, provide ample evidence that youth do purchase tobacco on the Internet, and can do so easily without age verification. The FDA has had this evidence, yet did not apply the findings to their deeming rule.

Easy to Circumvent Age Restrictions.

While age verification for Internet sales can occur in a number of ways, it is extremely easy for an adolescent under age 18 to circumvent these age restrictions. For example, some websites simply require the user to click on a button verifying that he/she is over 18, or to enter his/her birth date and click on a button to verify or certify this date. These processes are the most common methods for age verification; however, it is easy for anyone under age 18 to bypass the age restriction by simply lying about their age. Other websites require online age verification via entering a driver's license number, or copying their actual license and submitting those through the website. While somewhat more effective than the simple check or click system, this process is used and enforced less often, and still allows for an adolescent under age 18 to submit a false driver's license or ID card. Still other Internet tobacco sales websites require age verification at the time of delivery. However, these policies are rarely enforced, and when they are, it is still easy for an adolescent to provide false proof of age (see Ribisl et al., 2002; Williams, 2014).

Williams and colleagues (2006) examined compliance with state laws explicitly regulating the sales of cigarettes via the Internet, and found little compliance of the law. Another study noted that almost all (96.7%) of underage youth were easily able to purchase tobacco online, compared with 12%-17% being able to purchase tobacco from other commercial venues (Jensen et al., 2004). Malone and Bero (2000) reported that only 36 of the 141 Internet sites examined prohibited the purchase of cigars to minors. Adolescents 11-15 years old were easily able to purchase cigarettes on the Internet, 93.6% were successful at obtaining cigarettes on the Internet using credit cards, and 88.9% were able to complete their Internet sales using money orders. Age was never

verified in these transactions (Ribisl et al., 2003). Ribisl and colleagues (2002) reported that almost 20% of cigarette-selling websites do not say sales to minors are prohibited, more than half require only that the buyer say they are of legal age (e.g., by clicking a button that says “I am over age 18”), another 15% require only that the buyer types in their date of birth, and only 7% require any driver’s license information. Attorneys general from at least 15 states have conducted Internet stings and found that children as young as 9 years old were able to purchase cigarettes easily, with a New York sting operation finding that 24 of 26 websites sold to kids under 18 (Unger et al., 2001). A *JAMA* study found that more than 96% of minors aged 15-16 were able to find an Internet cigarette vendor and place an order in less than 25 minutes, with most completing the order in seven minutes (Jensen et al., 2004).

Internet Advertisement is Pervasive.

Failing to restrict Internet sales of all covered tobacco products is also problematic given that youth are constantly exposed to the extensive amount of advertising of these products on the Internet. As shown in the Figures below, advertisement of tobacco products on the Internet continues. Of particular concern is the advertisement of e-cigarettes, and especially ads with particular appeal to youth, such as those promoting candy and other flavored e-cigarettes (see also the Stanford Research into the Impact of Tobacco Advertising (SRITA); <http://srita.stanford.edu>).

Internet and social media marketing of tobacco products, including the more recent addition of e-cigarettes and other new products, is exploding, causing Internet sales of e-cigarettes and other tobacco products to skyrocket.

Failure to Include Accessories in their Restrictions of Sales.

The FDA states in section 1140.14(b)(3) that they are prohibiting retailers from using “electronic or mechanical devices,” including vending machines to sell covered tobacco products (FR 23162, 23178, 23204). FDA rationalizes this restriction by stating that by allowing sale of tobacco products through devices such as vending machines, the verification of age cannot be made. Specifically, the FDA states, “because the proposed rule would prohibit retailers from selling covered tobacco products to individuals without verifying that they are at least 18 years of age...” therefore it would not be “logical to allow such individuals to purchase such products from vending machines or other mechanical devices” (FR 23178).

Despite this restriction on “electronic or mechanical devices,” the rule fails to include “accessories” such as tanks and cartridges needed for the use of e-cigarettes. Failing to restrict the sales of these accessories is a major omission as purchasing these devices is necessary for e-cigarette usage. Thus, these products must be regulated, as currently there is no standardization or regulation of the quality of these products, the composition of what is included in these products, or the safety of these products. Indeed, there are recent reports that some of the accessories used with e-cigarettes,

such as the tanks, have exploded and therefore pose harm to the user and others around. Further, young children, toddlers and babies are finding the separate components of e-cigarettes, such as the cartridges, and sucking on them, resulting in use by children as well as the possibility of nicotine poisoning. **Thus, not only the tobacco products but also all accessories related to the use of these products must be regulated, must involve age restrictions and prohibitions for anyone under age 18, and must be prohibited for sales through the Internet.**

Unintended Consequence of Tax Evasion.

In addition to the inability to accurately and adequately verify the purchaser's age, selling tobacco products through the Internet provides a way for the purchaser and the tobacco industry to avoid Federal and State taxes. This reduced or lack of taxation results in lower priced tobacco products. Jensen and colleagues showed that a carton of cigarettes sold for \$23 on the Internet, compared to \$43 in the store. Cigar prices are also significantly lower when purchased through the Internet compared to brick and mortar stores, with Internet sale of cigars occurring through the use of money orders, cashier checks, and cash on delivery (Malone & Bero, 2000). Internet sites owned by American Indians sell tobacco for about 1/5th the price found in grocery stores (Hodger et al., 2004). A qualitative study demonstrated that smokers bought cigarettes online in part because of the lower prices (Kim et al., 2006). Since youth are particularly price sensitive (Nikag & Chaloupka, 2014; Ross & Chaloupka, 2002), accessing cigarettes and other tobacco products on the Internet only serves to increase the likelihood that youth will be drawn to and can more easily access and afford tobacco when purchased through the Internet.

Conclusions.

FDA's exception for Internet sales in its newly proposed restrictions supposedly aimed at preventing youth sales demonstrates a complete misunderstanding of youth purchasing behavior. The FDA needs to remove this loophole from its final rule and, instead, prohibit **all** Internet sales of tobacco products. Prohibition is far superior to age verification restrictions, given that even requiring that Internet sales of all tobacco products be subject to the same-face-to-face verification that the FDA proposes for all other sellers is not sufficient, and that youth can and do easily circumvent the age restrictions and verifications. Thus, the **FDA should Prohibit internet sales of all tobacco products.**

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Examples of the many advertisements for e-cigarettes on the Internet (obtained from http://tobacco.stanford.edu/tobacco_main/ecigs.php on May 15, 2014):

