



FTC Open Commission Meeting - March, 17 2022

Lina Khan:

Good afternoon, everyone, this meeting will come to order. We are meeting in open session today to consider certain items before the commission. As usual, we will begin by hearing from members of the public who wish to share their views or bring any problems to our attention. I'll turn it over to Lindsay Kryzak.

Lindsay Kryzak:

Thank you, Chair Khan. Before we begin, please know that the FTC is recording this event, which may be maintained, used and disclosed to the extent authorized or required by applicable law, regulation or order. And it may be made available in whole or in part in the public record in accordance with the commission's rules. Each member of the public will be given two minutes to address the commission, our first speaker today is Meredith Berkman. Meredith.

Meredith Berkman:

Thank you so much. Good afternoon Chair Khan and commissioners Slaughter, Wilson and Phillips. My name is Meredith Berkman and I'm a co-founder of Parents Against Vaping E-cigarettes, PAVE, a national advocacy and education nonprofit founded by three moms, of which I am one, in 2018 as a grassroots response to the youth vaping epidemic. We represent the millions of families across this country whose lives have been upended by predatory tobacco companies, including JUUL, whose marketing on social media to our kids have left so many of those children severely addicted to nicotine and suffering negative health consequences, the effects of which could impact them for years. First, we want to thank you, and commissioner Phillips in particular, for your focus and attention on this ongoing public health crisis that, frankly, threatens to create the next generation of big tobacco's lifetime customers. We really appreciate your work on this issue. And by way of introduction, I will very briefly explain our backstory because I think it seems relevant to the topic that you are covering today.

Meredith Berkman:

In April of 2018, my then 16 year old son came home from school to tell us that he had attended what he called a mixed message anti addiction talk about JUUL that he found very concerning. When the teachers left the room, common practice when there was an outside group presenting these topics so the kids would speak freely, this educator began telling the students that JUUL, while intended for adults not for them, was, quote, totally safe and he repeated that several times. He said it was 99.9% safer than combustible cigarettes and at the end of this talk, my son and my co-founder Dorian Fuhrman's son, went up to this trusted adult, presumably, to ask more questions, which are, is when this man took out a JUUL, he showed the teenagers, how it worked and referred to it as the iPhone of vapes.

Meredith Berkman:

What concerned my son most of all was that many of his fellow students already were using JUUL and they breathed a collective sigh of relief because they thought, "Well, it is safe." They're being given a free pass. Well, within 24 hours, my friends and I discovered this man was, in fact, a JUUL representative brought in by the outside group and the school had no idea. And as we began researching on the internet, we were shocked to discover not only the duplicity of this company that was advertising on social media platforms where the kids were but adults were not, but also the scope of what became known, months later, as an epidemic.

Meredith Berkman:

And the real problem for us is that these companies continue marketing to kids today and making false claims. At the height of the pandemic, a company known as Puff Bar, which is currently the largest seller to kids, sent out a marketing email with an extremely young looking model who was lamenting receiving parental texts during lockdown and the lack of a Spring Break. I can tell you also that we have discovered and reported, both to you and to FDA, examples of flavored vapes being advertised on Quizlet, which is essentially the Facebook of children's homework websites. We found that more than once in addition to marketing materials for other products like IQOS also presented as learning material on these websites. And again, there are companies out there that are advertising, for example, products that seem intended to confuse consumers about whether or not they are nicotine replacement therapies. I'll refer very quickly to a company named Lucy Gum, which does have FDA approval for one product, yet is advertising flavored lozenges and gums on the same website so it's unclear to consumers.

Meredith Berkman:

And also the marketing today of non-nicotine flavored e-cigarettes that are sold without age gating, in some cases, even over the counter at urban outfitters. So this is a problem, again, that we truly appreciate your focus on, but we also would urge you to continue studying because it is the wild West out there, and companies are given easy access to our kids and we really need your help. Because these are kids who are being told that these flavored products are delicious and are safer than combustible cigarettes and there's no evidence that either is true. Thank you so much.

Lindsay Kryzak:

Thank you Meredith. I know we had a couple other speakers today who are having some technical issues, we will still accept written comments from you through the end of the day today and I'll look out for that in my email. Thank you again, Meredith. And I'll turn it back over to you Chair Khan.

Lina Khan:

Thanks so much Lindsay, and thanks to today's speaker for sharing their very timely views with us. I greatly value getting to hear from participants at this meeting and the comments we receive regularly inform our work, so encourage folks who are interested to continue signing up for subsequent meetings as well. We will now turn to today's meeting agenda, a presentation by staff on the sale, advertising and promotion of e-cigarettes. While the FTC has studied the promotion of cigarettes and tobacco for more than half a century, this is our first report specifically focused on e-cigarettes, reflecting an admirable commitment by the agency to adjust and expand its work to match new market realities.

Lina Khan:

This report is based on information the commission collected by issuing special orders in 2019 to six e-cigarette manufacturers who effectively comprised the entirety of the e-cigarette market. This study is a useful example of how the agency can use its 6(b) authority to examine business practices in market trends, insights that can guide our own work and efforts by other policy makers and can inform the broader public. With that, we welcome Michael Ostheimer from our bureau of consumer protections division of ad practices to share a presentation on the reports findings. Thank you for joining us, Michael, and thanks to the full FTC team who worked on this project. Rosemary Rosso, Richard [inaudible 00:07:29], Serena Viswanathan Brian Rowe, Richard Gold, Elisa Jillson and Rebecca Unruh as well as the broader division of ad practices team. Michael turned it over to you.

Michael Ostheimer:

Thank you, Chair Khan, and commissioners Phillips, Slaughter and Wilson for your prior approval of the commission's first report on e-cigarette sales, advertising and promotion. I appreciate the opportunity to appear before you today and to present on this issue. In 2019, seeing data about the surging popularity of e-cigarette products, the commission decided to study the e-cigarette industry's domestic sales and marketing, as it has for decades studied the cigarette and smokes tobacco industries. The commission issued orders to file special reports under section 6(B) of the FTC Act to six of the country's largest domestic e-cigarette manufacturers, seeking information as to their e-cigarette sales, advertising, and promotional activities for calendar year of 2015, 2016, 2017 and 2018.

Michael Ostheimer:

As of 2018, the order recipients listed here comprised virtually all of the e-cigarette market as the measured by companies, such as the Nielsen Company. The E-cigarette Report, which the commission announces today, provides an aggregated and anonymized summary of the information collected. The blue bars in this first chart showed the dramatic increase in e-cigarette sales between 2015 and 2018, from about \$300 million in 2015 to over \$2 billion in 2018. Most of those sales were cartridge based systems, such as JUUL and Vuse Alto. The red bar show cartridge based sales increasing from \$260 million in 2015 to almost \$2 billion in 2018.

Michael Ostheimer:

The commission found that there was a large shift in popularity from tobacco flavored e-cigarette products to other flavored products, other flavored products include those using fruit, candy and dessert flavors. Tobacco flavored e-cigarette cartridges dropped from 47% of all cartridges sold or given away in 2015 to 21% in 2018. While sales or free samples of other flavored cartridges tripled in just three years from less than 18% in 2015 to 42% in 2018. The most popular other flavored cartridges were fruit flavored cartridges, which represented less than 5% of all cartridges sold or given away in 2015 and almost 30% in 2018, a six fold increase.

Michael Ostheimer:

The second most popular category of other flavored cartridges were candy and dessert flavored. We observed similar flavored trends with disposable e-cigarettes, the data collected also revealed a large increase in the average nicotine concentration of disposable e-cigarettes. As you can see from this chart, in 2015, on average, cartridge based products were nearly twice as potent in nicotine concentration as disposable products. Over the following three years the average nicotine concentration of disposable products went up nearly 60%. The most popular cartridge based products had a higher than average nicotine concentrations. Nicotine free cartridges were not very popular, never representing more than

one fourth of 1% of sales and giveaways. The commission found that its denature and advertising and promotion more than tripled in three years from almost \$198 million in 2015 to about \$644 million in 2018.

Michael Ostheimer:

The blue bars in this chart represents spending on sampling in the distribution of free and deeply discounted e-cigarette products. Such expenditures more than doubled over three years from \$23 million in 2015 to over \$58 million in 2018 that's despite FDA's 2016 prohibition on sampling free e-cigarette products. The increase is because following the ban on free e-cigarette samples, some companies began offering e-cigarette products for \$1 or some other similar highly discounted price. The red bars represent price discounts paid to retailers or wholesalers to reduce the price of e-cigarette products to consumers. These price discounts grew nearly 14 fold over three years from just over \$11 million in 2015 to about \$155 million in 2018. The green bars represent spending on celebrity endorsers, social media influencers, brand ambassadors and other endorsers, such spending went up nearly 15 fold from less than \$290,000 in 2015 to \$4.3 million in 2018.

Michael Ostheimer:

The report contains other interesting information, including the degree to which e-cigarette manufacturers did or did not use age verification. In a minute or so, I'll turn this back over to Chair Khan who will comment upon the significance of the information in the E-cigarette Report. I would like to thank all those who on the E-cigarette Report, my colleague Rosemary Rosso, our supervisor is Richard [inaudible 00:13:20] and Serena Viswanathan, Brian Rowe in the bureau of economics, Richard Gold in the office of the general counsel, Elisa Jillson in the bureau of consumer protection, acting deputy director, Rebecca Unruh and director Sam Levine. I would also like to say thank you Chair Khan and commissioners Phillips, Slaughter and Wilson for the opportunity to present today on the E-cigarette Report.

Lina Khan:

Thanks so much, Michael, for the great presentation and thanks again to the full team. I'll share a quick few reflections on this report and then open it up to my fellow commissioners. So we just heard from Michael, the FTC report released today documents a striking sixfold increase in e-cigarette sales over just three years. A set of public health studies have also observed this trend, capturing, in particular, the prevalence of e-cigarette use among students in both high school and middle school. Given the medical evidence showing that e-cigarette use can lead to nicotine addiction, harm brain development in children and teens, and pose a variety of additional health risks, the trends surfaced by the FTC report are troubling.

Lina Khan:

A few developments in particular jump out and have seemed to invite further attention from policymakers. First, the report shows that the significant increase in e-cigarette sales has coincided with the notable growth in flavored products, with names like bubble pop and strawberry cotton candy. Fruit, dessert, and other similarly flavored products grew from just 14% of cartridges sold in 2015 to more than 47% of cartridges sold in 2018, suggesting that flavored products could be a driver of the steep increase in e-cigarette use by teens.

Lina Khan:

Indeed surveys and studies have repeatedly tied youth vaping to the availability of flavored cartridges. For example, one national survey of high school students found that over 68% of e-cigarette users used flavored e-cigarettes, while other research shows that youth identify these flavors as a primary reason for e-cigarette use. In 2018, the then commissioner of the Food and Drug Administration publicly attributed youth access to flavored tobacco products as a primary factor driving e-cigarette use by adolescents. Our report further suggests that enforcing the FDA's 2020 action, which effectively banned flavored e-cigarette cartridges, could be a key tool for protecting children and teens, and that policy makers may be wise to pursue additional limits on a broader set of flavored e-cigarette products. That FTC report also captures a significant rise in nicotine concentration, showing that manufacturers increase the nicotine concentration of disposable e-cigarettes by 60% in just three years.

Lina Khan:

Studies comparing youth vaping trends across jurisdictions suggest that this rise in nicotine concentration could also be contributing to the rise in e-cigarette use by teens. For example, one study found that the share of youth users in the United Kingdom, which has enacted a strict limit on nicotine content of just 20 milligrams per liter, remained flat during a period when the share of US youth who were e-cigarette users increased. These alarming rates of nicotine may carry serious ramifications for the public leading to long term impairments to brain development in ways that affect the mental and physical health of children.

Lina Khan:

Finally, the growth in e-cigarette use coincides with a massive expansion in efforts by e-cigarette manufacturers to advertise and promote their products with their expenditures tripling in three years. While the FDA has banned manufacturers from distributing free samples of e-cigarette products, an effort explicitly aimed at limiting youth access, manufacturers have sidestep the spirit of that band by distributing deeply discounted samples for \$1 or less. They are also spending heavily to place e-cigarettes in the hands of celebrity endorsers and social media influencers, glamorizing their products much like prior efforts by the tobacco industry. The commission will continue to use its data collection authority to study this market and the agency has already issued orders seeking similar data from e-cigarette manufacturers for 2019 and 2020. I'm hopeful that these studies can inform our enforcement and policy work as well as broader efforts by policy makers, as they take steps to address these troubling trends. Thanks again to our staff or their terrific work on this project. I'll open up the floor to my fellow commissioners to share their thoughts, starting with commissioner Phillips.

Noah Phillips:

Thank you, Madam Chair, for your remarks and for putting this really important work that we are doing on the docket for the public meeting, I really very much appreciate it. Thanks also to Michael Ostheimer and some of the other staff members, you've heard about, for their really great work. Brian Rowe in bureau of economics, Rosemary Rosso, who has been working on these issues for decades. And thanks also to Meredith Berkman, who does incredible work and has over years on this issue. Finally, Lindsay Kryzak does not get the credit she deserves for making the seamless process that we get of getting public input at the meeting. So thanks to all of you.

Noah Phillips:

So you've heard that using our authority under section 6(b), the commission has been tracking cigarette sales and marketing for a long time, that began in 1967 and we've been looking at smokeless tobacco

marketing and sales since 1987. Because of the important information that they provide, these reports have received bipartisan support in Congress, as well as from state, federal and local health officials and members of the public like academics and in the advocacy community. And you've heard already that in 2019, we voted as a commission unanimously to use these study powers to look into e-cigarettes, and what you're seeing today is the beginning of the results of that very important work and I'm glad we're doing that.

Noah Phillips:

But there is more to do, and it's important to note that the report that we just heard about, that we're releasing today, analyzes data from the years 2015 to 2018. The information is, to some extent at this point, outdated. Last March, as the chair mentioned, the FTC issued orders to the five largest manufacturers of e-cigarettes requiring similar sales and marketing data for 2019 and 2020. This work will be ongoing and will help keep us, and you, informed about the sale and marketing of e-cigarettes and I hope we can bring the results of that work to the public soon.

Noah Phillips:

Future reports will illuminate whether regulation, such as the 2019 amendments to the Food Drug and Cosmetics Act, which raised the minimum legal sales age for tobacco products from 18 to 21, influence sales and marketing expenditures. We want to understand how those regulations are playing out. Likewise, data collected before and during the pandemic also may shed light on how companies expenditures changed over time and under very different circumstances. Using the data to inform the public will help us, the FTC, legislators, advocates and others make informed decisions about how best to protect the health of the nation and in particular, the children about whom all of us are so concerned. So I look forward to seeing that report and thanks again to everyone for being here today and all of the great work done on this topic.

Lina Khan:

Thanks so much, commissioner Phillips. Commissioner slaughter.

Rebecca Slaughter:

Thank you so much, Madam Chair. I don't have a ton to add to Michael's excellent presentation, your eloquent comments and the points commissioner Phillips made. I was really just going to make two points. The first is I was really glad when we adapted in 2019 to include e-cigarettes in our annual tobacco report because it reflected us watching and responding to where the markets were going, which was really important. Our longstanding cigarette report had become sort of outdated because of where the markets had moved, so it was exactly the right thing for us to do to fold e-cigarettes in and to go back in time and get data from before the FDA's 2016 policy change so we could really have a baseline and see where the markets were moving. And I agree with commissioner Phillips that this being an ongoing effort will help us see how changes in policy, changes in market behavior, changes in situations like the pandemic affect the markets that we're studying.

Rebecca Slaughter:

So I think that's really important. And the only other point I'd make is I think this kind of annual reporting can be a good a model for us in other areas or other products about which we are concerned, not only about point in time problems, but ongoing trends. So it's something that I think works well for itself and also we can use and think about what other kinds of products or issues would lend themselves

well to annual study and annual reporting to provide some transparency to the public, to policy makers and to the FTC itself in terms of market behavior. So with that, I will thank all the staff who worked very hard on this and look forward to continued engagement.

Lina Khan:

Thanks commissioner Slaughter. Commissioner Wilson.

Speaker 7:

Thank you, Madam Chair. So I'd like to echo your thanks and the thanks of my colleagues to our staff who gathered and analyzed the industry data, compiled the report and presented to us and to the public today. Thank you also to my colleague, commissioner Slaughter, who first suggested in 2018 that we expand our work on the collection of cigarette marketing and advertising information to include e-cigarettes. It was a good suggestion, a timely one and I'm glad that the commission moved forward with that suggestion.

Speaker 7:

The work of our experienced staff in this area enables the commission to broaden its under are standing of the growing e-cigarette market, and to share that knowledge with other policy makers and the public. Chair Khan's remarks underscored, both, the prevalence of e-cigarettes in our youth population and the many concerning trends in this area. As we've seen, this market has grown rapidly in just a few short years, especially among young consumers. My father began smoking when he was 12 and he died of lung cancer at the age of 61, he never had the chance to meet my husband or my two young daughters. And one of my daughters was enticed into e-vaping during her teenage years, so I take a personal interest in studying this area closely. I support commissioner Phillips' call for additional work in this area, and I'm confident that my colleagues will as well. Thank you again to all of the dedicated staff who contributed to this final product.

Lina Khan:

Thanks so much commissioner Wilson, as well as commissioner Slaughter and commissioner Phillips for the thoughtful remarks and thanks again to our staff and the member of the public who had joined us at the beginning. This concludes the official agency business at the commission and the meeting is now adjourned. Hope everybody has a good St. Patrick's Day. Take care.