

“TOXIC MARKETING CLAIMS AND THEIR DANGERS”

**Hearing Before the Senate Committee on Commerce, Science, and Transportation’s
Consumer Protection, Product Safety, and Data Security Subcommittee**

Tuesday, August 3, 2021

Testimony of Joshua H. Stein
Attorney General, State of North Carolina

Senator Blumenthal, Senator Blackburn, and distinguished members of the subcommittee:

Thank you for inviting me to testify at this hearing on “Toxic Marketing Claims and Their Dangers,” a topic that has long been of interest to me and one that I am grateful is getting the attention that I believe it needs. Toxic marketing claims are a concerning blight on our efforts to protect consumers, but in recent years, the tactics used to market e-cigarettes and other non-combustible nicotine products have targeted a particularly vulnerable population among us: youth.

I want to start by framing the issue we are discussing today. This is the story of one of North Carolina’s own. In 2018, a 16 year old kid would wake up in his bed in Durham, North Carolina, with his hand wrapped around his JUUL device. The very first thing he did when he woke up: Take a puff. Then he would take a few more puffs while getting ready for school, eating breakfast, and going to school. Throughout the day, he would continue to take puffs from the e-cigarette product. He would use it between classes in the bathroom, with friends in his car. He would use it after sports practice, after dinner, while he was working on his homework. He would routinely sleep with it under his pillow. In fact, the only time he said he did not use the product was when he was sleeping.

This story is not unique. This is the life of many high schoolers in our State—and indeed, throughout the country.

I came to this issue from a very personal place. A few years ago, both my sons were in high school, and my daughter in middle school. And I learned about the resurgence of rampant teen dependence on nicotine from them and from my friends’ stories about their kids. Everyone was unanimous that the kid-friendly dessert- and fruit-flavored products made to look like sleek, concealable USB devices and marketed through slick advertising campaigns on social media with young, hyper-cool models and influencers using e-cigarette devices and having the time of their lives were taking our nation’s young people by storm and creating a new generation of young people dependent on nicotine.

I. The History of Tobacco Use Among Youth

In 1992, 17.2% of high school seniors reported having smoked daily during the past 30 days. By 1997, that number had increased to 24.6%. In other words, by 1997, nearly one-quarter of high-school seniors were habitual cigarette smokers.¹

¹ Pampel, F., Aguilar, J., *Changes in Youth Smoking, 1976-2002: A Time-Series Analysis*, *Youth Soc.* 2008; 39(4): 453-479, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2696267/>.

We have known for decades that virtually all cigarette smoking begins before 18 years of age.² Virtually no initiation of cigarette smoking actually occurs after 26 years of age. Initiation of cigarette smoking often occurs early in adolescence.³

Young people in the 1970s, 1980s, and 1990s did not discover and adopt cigarette-smoking on their own. They were targeted by some of America’s biggest companies. A 1981 research report by Phillip Morris confirmed that it “is important to know as much as possible about teenage smoking patterns and attitudes. Today’s teenager is tomorrow’s potential customer, and the overwhelming majority of smokers first begin to smoke while still in their teens.”⁴ Cigarette manufacturers created cartoon figures, employed tactics that portrayed cigarette use as glamorous and cool, and promoted tobacco products in a variety of flavors that were attractive to youth. Joe Camel, the Marlboro Man, and Willie the KOOL Penguin were all household names.

In November 1998, the attorneys general of 46 states, five U.S. territories, and DC entered into an agreement with the four largest cigarette manufacturers in the United States. This Master Settlement Agreement forbade the cigarette manufactures from targeting youth by banning cartoons, transit advertising, most forms of outdoor advertising, product placement in media, branded merchandise, most free product samples, and most sponsorships.⁵

The marketing restrictions demanded by the MSA, together with intensive public and private efforts—including legal restrictions, workplace policies, public-education campaigns, and other public initiatives—powered a steep decline in tobacco use among the public as a whole, including youth. By 2017, the prevalence of smoking had declined by approximately 67% from 1965, and only 14% of adults and approximately 5% of high-school students smoked cigarettes.⁶ It was one of the most successful public health victories of the last quarter century.

² U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994).

³ *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*, Patterns of Tobacco Use Among U.S. Youth, Young Adults, and Adults, available at <https://www.ncbi.nlm.nih.gov/books/NBK294302/>.

⁴ Johnston ME, *Young Smokers Prevalence Trends, Implications and Related Demographic Trends* (Mar. 31, 1981); Philip Morris (PM) Bates 1000390803.

⁵ Master Settlement Agreement, available at <https://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf>.

⁶ American Cancer Society, *Cigarette Smoking at Record Low Among American Adults* (Nov. 9, 2018), available at <https://www.cancer.org/latest-news/cigarette-smoking-at-record-low-among-american-adults.html>.

By 2019, those hard-won gains had evaporated like a puff of smoke. In 2018, there were 1.5 million new underage e-cigarette users. Now, 23.6% of high school students and 6.7% of middle school students use tobacco products.

II. My Office’s Lawsuit Against JUUL

In 2018, my Office launched an investigation into one e-cigarette company in particular—a pioneer in the industry that experienced rapid growth and market dominance within just two years.

I learned from friends that their high-school-aged children were in the midst of the throes of nicotine dependency: they were experiencing depression, a sharp decline in academic performance, academic and social difficulties at school that required them to switch schools, and eventually, dependency that required medical intervention. Through my conversations with other students, parents, and educators, I further learned that e-cigarette use and the resulting nicotine dependency were widespread problems in classrooms and at home.

JUUL’s marketing tactics seemed particularly insidious: While JUULs and other e-cigarettes seemed ubiquitous in schools—so much so that school bathrooms were referred to as “JUUL rooms”—most adults who did not have frequent interactions with young people remained unaware of the product or its popularity. It seemed as though JUUL and similar e-cigarette companies had targeted its products to young people specifically, while gaining little traction among adults.

After my Office’s investigation, in 2019, I filed the first state lawsuit against JUUL alleging that JUUL designed, marketed, and sold its e-cigarette products in a manner that targeted young people, including teens. This was evident through JUUL’s product design: it was sleek, easily concealable, looked like a USB key, and was deemed the “iPhone” of e-cigarettes.⁷ JUUL also targeted young people by infusing its nicotine-filled vaping liquids with flavors that appealed to youth—flavors like mango, coco mint, cool cucumber, crème brulee, and fruit medley.⁸ JUUL also targeted young people by using a patented salt formula that reduced the bitterness of the product and harshness on the user’s throat. In fact, in the instructions JUUL included in its starter kit, JUUL exhorted new users to not be discouraged if they found their first puffs too harsh and unappealing; new users just needed to try enough to find their “perfect puff.”⁹ JUUL even built an easter egg into its device called “Party Mode,” which allowed users

⁷ Kaplan, S., *Juul Is Fighting to Keep Its E-Cigarettes on the U.S. Market*, The New York Times (July 5, 2021), available at <https://www.nytimes.com/2021/07/05/health/juul-vaping-fda.html>.

⁸ Muthumalage, T., Lamb, T., Friedman, M.R. et al., *E-cigarette flavored pods induce inflammation, epithelial barrier dysfunction, and DNA damage in lung epithelial cells and monocytes*, Sci Rep 9, 19035 (2019), available at <https://doi.org/10.1038/s41598-019-51643-6>.

⁹ See, e.g., <https://twitter.com/juulvapor/status/1050816470350000129>.

to take a puff from their device and shake the JUUL device, creating a kaleidoscope of flashing lights.

JUUL's marketing decisions, which were a result of deliberate planning and forethought, also targeted youth. The company launched itself through the now-infamous Vaporized! campaign, which was focused on selling a lifestyle of being young, cool, popular, attractive, confident, and modern. The marketing campaign focused on digital and print advertising that featured young, attractive, hyper-cool models at parties, hanging out with each other and having fun. JUUL then took this campaign on a roadshow to create buzz about the product by inviting cool, youthful attendees to attend parties at which JUUL gave away its product for free, hiring "brand ambassadors" to help host these events, and achieving viral participation and generating amplifying buzz on social media.

This early marketing took on a life of its own. Even after JUUL pulled its Vaporized! campaign, the damage had been done: sales rose 700% in JUUL's first year on the market.¹⁰ The second year, sales ballooned 641% over sales in the first year.¹¹ By 2018, JUUL had cornered 75% of the e-cigarette market and was the standard-bearer for the industry.¹²

On June 28, 2021, North Carolina became the first state in the nation to hold JUUL accountable in our fight against the teen vaping epidemic. My Office entered a consent judgment with JUUL that extracts commitments from JUUL across five different areas.

First, JUUL will no longer be able to sell e-cigarette products in any flavor not approved by the FDA. This is critical to ensuring that it cannot continue to market to youth by producing products in flavors that are attractive to children.

Second, JUUL will have to change the way it markets its products. It will abandon any marketing strategies and content that appeals to young people. All models must be at least 35 years old. It will stop using social media advertising, influencer advertising, outdoor advertising near schools, and it will stop sponsoring cultural events or concerns. JUUL will also not make any health or therapeutic claims in its advertising or marketing materials unless specifically authorized by the FDA.

¹⁰ Brodwin, E., *The precarious path of e-cig startup Juul: From Silicon Valley darling to \$24 billion behemoth under criminal investigation*, Business Insider (Oct. 31, 2019), available at <https://www.businessinsider.com/juul-timeline-from-startup-to-tobacco-company-challenges-bans-2019-9>.

¹¹ Center for Disease Control and Prevention, Press Release, *Sales of JUUL e-cigarettes skyrocket, posing danger to youth* (Oct. 2, 2018), available at <https://www.cdc.gov/media/releases/2018/p1002-e-Cigarettes-sales-danger-youth.html>.

¹² Kaplan, S., *Juul Is Fighting to Keep Its E-Cigarettes on the U.S. Market*, The New York Times (July 5, 2021), available at <https://www.nytimes.com/2021/07/05/health/juul-vaping-fda.html>.

Third, JUUL is now required to make major changes to the way it sells its products, both online and at retail. It must now use state-of-the-art independent age verification systems to ensure that customers who purchase its products online are of legal age. JUUL will also have to make sure its third-party sales partners sell only to customers who are of legal age by instituting point-of-sale verification systems that use bar codes to verify IDs and by using a retailer-compliance program that will require JUUL to hire young adults to perform mystery shopping at approximately 1,000 stores per year with sanctions for any retailer found to be in violation.

Fourth, in addition to these important conduct-related provisions, JUUL has agreed to pay North Carolina \$40 million. These funds will be used for proven programs to help youth quit e-cigarettes and to prevent youth from using e-cigarettes. These funds will make a meaningful difference in the lives of thousands of North Carolina teens who are struggling with e-cigarette dependence.

Finally, JUUL will provide for a North Carolina document depository at a public university where the public can access JUUL's documents that we have secured through our litigation. We hope that this transparency will ensure that nothing is swept under the rug involving JUUL's conduct and that it will help prevent another youth epidemic from being created again.

My hope is that with this consent judgment, we will be able to keep this nicotine delivery device out of kids' hands, keep its chemical vapor out of their lungs, and keep its nicotine from poisoning and addicting their brains.

III. Forging a Pathway Forward

I am very proud of what my Office has been able to achieve in our lawsuit against JUUL. We have secured commitments from JUUL—backed by threat of court sanction—to stop marketing to youth, to stop using images or models that would attract youth, to stop marketing on channels popular among youth, to stop marketing flavors that are attractive to youth, to strengthen online age verification procedures so that youth cannot buy JUUL products online, and to get serious about ensuring that retailers are following the law to keep these nicotine products out of the hands of youth. And we have been able to secure monetary commitments from JUUL that we will use to help people who are already dependent on JUUL products and to ensure that we stem the tide of youth dependence.

But, quite candidly, this game of whack-a-mole is untenable.

The problem of unfair or deceptive marketing of e-cigarette and other tobacco products requires a solution that combines *both* regulation and enforcement. And we in States need the assistance of our federal partners.

We need our federal partners to help regulate the industry at large. We need industry-wide standards to prohibit manufacturers and retailers of nicotine products from marketing to youth. We need industry-wide standards to prohibit manufacturers and retailers of nicotine products from being able to sell products in youth-friendly dessert- and fruit-flavors like bubblegum, mango, mint, and menthol. We need industry-wide standards to prohibit manufacturers and retailers of nicotine products from being able to sell products in strong

nicotine concentrations that tend to accelerate dependence, particularly among youth. We need our federal regulatory partners to help us make clear, in no uncertain terms, that marketing nicotine products to youth is impermissible. This is why I am leading a multistate effort to persuade the FDA to impose these types of restrictions on all companies manufacturing and selling nicotine products in the United States.

And we need our federal partners to join us in driving home the message that marketing nicotine products to youth will not be tolerated by helping us enforce existing consumer protections. One of the biggest differences between the combustible cigarette market in the 1990s, when the MSA was entered, and the nicotine market now is that the nicotine market is no longer controlled by four companies. While I am proud of our work against JUUL, there are many companies just like JUUL out there, using the same business model and marketing tactics. While my Office has taken action against several of them and driven them out of North Carolina, there are still others operating in our State and others. And there are dozens of other companies that manufacture and sell other nicotine products, like disposable e-cigarettes, nicotine pouches, and non-combustible tobacco products, using the same business model and marketing tactics. The states cannot do all this work alone and need the help of the federal government, just as the federal government needs the states. We ask that the FTC to enforce existing federal consumer protection laws by investigating the actions of e-cigarette and other nicotine manufacturers and retailers and their marketing practices that target youth.

We have done this before. When faced with an epidemic of teen tobacco use, we have come together, pushed back, and made great progress in reversing that trend. We can do it again. All we need is a unified commitment by the states and our federal partners to use the tools available to us to achieve this result. I am confident that using this whole-of-government approach, we can, once again, curtail the effects of nicotine dependence on our youth.

Thank you again for inviting me to testify today. I look forward to your questions.

* * *