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Recommended Citation

Lindsey C. Dastrup, & Jacqueline M. McNamara, *Tobacco Control and Snus: Time to Take a Stand*, 11 J. Health Care L. & Pol'y 127 (2008).

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TOBACCO CONTROL AND SNUS: TIME TO TAKE A STAND

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INTRODUCTION

If you are like most Americans, you have never heard of snus. But if you are part of the public health community, you have found yourself in the midst of a bitter debate over the potential role snus may play in tobacco cessation and harm-reduction efforts. Snus (rhymes with juice) is a smokeless, spitless, moist-ground tobacco product that has been manufactured in Sweden for over a century but is new to the U.S.¹ It comes in small, teabag-like pouches that a user discreetly places behind the upper lip for half an hour to an hour while the product delivers nicotine to the body.²

The current debate about snus is a result of the fact that some public health advocates argue that the product is safe enough to be recommended as an alternative to smoking, and point to the “Swedish experience” to support the claim

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1. Snus is a form of smokeless tobacco, but is distinguishable from other types of smokeless tobacco that have been sold in the U.S. for decades. The primary traditional types of U.S. smokeless tobacco are chewing tobacco and dry or moist snuff. They are primarily used orally and require spitting. Ctrs. for Disease Control & Prevention, Smoking & Tobacco Use, http://www.cdc.gov/tobacco/data_statistics/Factsheets/smokeless_tobacco.htm (last visited Mar. 23, 2008). Snus is a form of moist snuff that does not require spitting. J. Foulds et al., *Effect of Smokeless Tobacco (Snus) on Smoking and Public Health in Sweden*, 12 TOBACCO CONTROL 349, 349–50 (2003). Snus currently being sold in the U.S. is pouched and flavored. See Camel Snus, <http://www.camelsnus.com> (follow “All About Snus” hyperlink; then follow “Got Questions” hyperlink) (last visited Mar. 23, 2008). The tobacco in snus has a different taste from the tobacco in other smokeless tobacco products because of snus’s unique manufacturing process. Foulds et al., *supra* at 349–50.

2. Foulds et al., *supra* note 1, at 349.

that the U.S. may realize an overall public health benefit from the introduction of snus.³ Other public health experts, however, believe that no tobacco product should ever be promoted, and support continued use of the “no safe tobacco product” message.⁴ Given the less-than-certain health effects of snus,⁵ the questionable effect that the product would have on the tobacco-use habits of Americans, and the contentious prospect of the public health community and “Big Tobacco” teaming up, the heated nature of the debate is understandable. Nevertheless, the public health community must devise a way to respond cohesively to the new tobacco threat that is snus or risk losing the progress made in tobacco control over the past several decades.

This comment expounds upon the debate about snus and discusses various steps that the public health community, together with appropriate government officials, legislators, policymakers, and the legal community, should take to address the introduction of snus to the U.S. market. First, the comment provides an overview of the debate about snus, concluding that although the case for promoting snus as a harm-reduction measure may be initially appealing, snus is more likely to add to the U.S. tobacco problem than help solve it.⁶ Therefore, the public health community should have no part in promoting snus.

Next, this comment offers pragmatic suggestions on how tobacco control advocates can minimize the potential adverse effects of snus. First, banning snus from the U.S. market is the most direct way to further the goals of tobacco control; however, for political reasons, this approach may be unrealistic.⁷ Thus, this comment argues for the need to pass the proposed legislation currently before Congress that would grant the Food and Drug Administration (FDA) authority to regulate tobacco products and would enable the agency to ensure that snus sold in the U.S. meets certain product standards and is not marketed to young people.⁸ Federal regulation of tobacco products is vital to help prevent snus from becoming the next public health crisis, but whether or not the legislation is passed, states must independently pursue tobacco control strategies to deal with the potential negative effects of snus. This comment briefly discusses such strategies, which include levying appropriate taxes on the sale of snus, launching effective counter-marketing

3. Sweden, which has the highest rate of snus use, also has the lowest rate of smoking and smoking-related diseases of any developed country. B. Rodu et al., *Tobacco Use Among Swedish Schoolchildren*, 14 TOBACCO CONTROL 405, 405 (2005).

4. E.g., David E. Nelson et al., *Trends in Smokeless Tobacco Use Among Adults and Adolescents in the United States*, 96 AM. J. PUB. HEALTH 897, 902 (2006).

5. See Foulds et al., *supra* note 1, at 351–53 (demonstrating that there is no consensus on the harms of smokeless tobacco as evidenced by different conclusions drawn from multiple smokeless tobacco studies).

6. See *infra* Part I.

7. See *infra* Part II.A.

8. See *infra* Part II.B.

campaigns to continue efforts that discourage tobacco use in general and snus use in particular, ensuring that snus marketing complies with the Master Settlement Agreement (MSA) provisions prohibiting marketing of tobacco products to youth, and using state consumer protection laws to challenge any misleading or deceptive claims the tobacco industry may make in marketing snus.⁹ Finally, this comment explains the need to counterbalance the introduction of snus as a new and attractive form of tobacco for use by smokers when they cannot smoke by introducing and promoting new low-cost nicotine replacement therapy (NRT) products that appeal to consumers.¹⁰

I. OVERVIEW OF THE DEBATE ABOUT SNUS

*“[P]ublic health professionals and policymakers need to decide whether to focus effort on restricting access to the most harmful products (smoked tobacco products), or focus much time, energy, and legislation on restricting access to the least harmful products, that under some circumstances can produce a net public health benefit.”*¹¹

Snus is the Swedish word for “smokeless tobacco.”¹² Snus has been manufactured in Sweden for decades using a process unlike the manufacturing process traditionally used by makers of smokeless tobacco in the U.S. Instead of being fire-cured and fermented, the tobacco contained in snus is treated with steam to kill bacteria, and then packaged in cans and refrigerated.¹³ This process produces a smokeless tobacco product with significantly lower levels of cancer-causing tobacco-specific nitrosamines (TSNAs) than other forms of smokeless tobacco.¹⁴

Five years ago, snus was sold almost exclusively by one Swedish company only to Scandinavian consumers.¹⁵ In 2006, however, the two largest American cigarette manufacturers entered the U.S. smokeless tobacco market, unveiling new products also called snus. R.J. Reynolds introduced “Camel Snus” in May 2006 for test-marketing in Portland, Oregon, and Austin, Texas, and expanded test-marketing to an additional half dozen cities in 2007.¹⁶ R.J. Reynolds announced

9. See *infra* Part II.C.

10. See *infra* Part II.D.

11. Foulds et al., *supra* note 1, at 358 (emphasis added).

12. ANN BOONN, CAMPAIGN FOR TOBACCO-FREE KIDS, SMOKELESS TOBACCO IN THE UNITED STATES I (2007), <http://tobaccofreekids.org/research/factsheets/pdf/0231.pdf>.

13. Foulds et al., *supra* note 1, at 349.

14. Dorothy K. Hatsukami et al., *Changing Smokeless Tobacco Products*, 33 AM. J. PREVENTIVE MED. (SUPP.), at S368, S369 (2007).

15. Jonathan Foulds & Lynn Kozlowski, Commentary, *Snus—What Should the Public-Health Response Be?*, 369 LANCET 1976, 1978 (2007).

16. Jane L. Levere, *No Smoke, No Foul? Critics Disagree*, N.Y. TIMES, Aug. 9, 2006, at C5; Richard Craver, *Reynolds Picks Raleigh to Test Snus*, WINSTON-SALEM J., June 14, 2007, at D1. Camel snus comes in spice, frost, and original flavors. Camel Snus, *supra* note 1. Although is it refrigerated

plans to test-market Camel Snus in ten additional metropolitan areas in 2008.¹⁷ Philip Morris introduced “Taboka” for test-marketing in Indianapolis, Indiana, in July 2006, and introduced “Marlboro Snus,” a similar product, for test-marketing in the Dallas/Fort Worth, Texas, area in August 2007.¹⁸ In March 2008, Philip Morris introduced Marlboro Snus for test-marketing in Indianapolis and discontinued its test-marketing of Taboka.¹⁹

Members of the tobacco control community have recognized the potentially huge, yet uncertain, ramifications of this introduction by the two most powerful players in the U.S. tobacco industry—players who, in the past, have proven their ability to attract consumers and manipulate the market.²⁰ Will the introduction of snus in the U.S. produce a new category of tobacco users and thereby undermine the progress tobacco control has made in labeling tobacco use as an aberrant behavior? Will the interest in snus come from current smokers who find it useful for satisfying their nicotine craving when they cannot smoke, thereby undercutting the public health advantage of clean indoor air laws that encourage smokers to quit? Or will snus be used mainly by ex-smokers who would otherwise have continued smoking and by new tobacco users who would otherwise have started to smoke? Such questions are of vital importance in determining how the public health community should respond to the marketing of snus in the U.S. Public health experts, however, are divided on the answers.

The debate over snus is very much tied to the argument about harm-reduction in general in the tobacco control community. Proponents of a harm-reduction strategy argue that prevention and cessation programs cannot be expected to

prior to sale, it does not need to be refrigerated after purchase. Hatsukami et al., *supra* note 14, at S369–70.

17. R.J. Reynolds Expands Snus Tests, csnews.com, Mar. 10, 2008, http://www.csnews.com/csn/cat_management/tobacco/article_display.jsp?vnu_content_id=1003722971 (last visited Mar. 29, 2008). The new markets include Washington, D.C., Baltimore, Maryland, and Chicago, Illinois. *Id.*

18. BOONN, *supra* note 12, at 3. Marlboro Snus is offered in rich, mild, mint, and spice flavors and does not require refrigeration. Philip Morris USA, Marlboro Snus Fact Sheet, http://www.philipmorrisusa.com/en/cms/Products/Smokeless_Tobacco/Marlboro_Snus/default.aspx (last visited Mar. 23, 2008); Hatsukami et al., *supra* note 14, at S370.

19. PM USA Expands Marlboro Snus to Indianapolis, csnews.com, Jan. 11, 2008. Liggett Group, a subsidiary of Vector Group Ltd., plans to test-market its own version of snus under the *Grand Prix* label in seven U.S. cities starting in May 2008, including Portland, Oregon, Dallas/Fort Worth, Texas, and Indianapolis, Indiana. Unlike the American-made R.J. Reynolds and Philip Morris snus products, however, this “premium” product will be manufactured in Sweden. Liggett Group to Introduce Grand Prix Snus, Offers Premium Quality Smokeless Tobacco Product at Value Pricing, Feb. 26, 2008, <http://www.vectorgroupltd.com/newsArticleGroup.asp?pvNewsId=211> (last visited Apr. 3, 2008).

20. See Hatsukami et al., *supra* note 14, at S375 (concluding that oral tobacco products are manufactured and marketed to appeal to smokers); Simon Chapman, Commentary, *Repealing Australia’s Ban on Smokeless Tobacco? Hasten Slowly*, 188 MED. J. AUSTRALIA 47, 48 (2008) (“The tobacco industry has shown itself to be resourceful, rapacious and duplicitous in the service of sales maximisation . . .”).

eliminate smoking completely, and therefore tobacco products that provide a less harmful alternative to cigarettes should be promoted to inveterate smokers.²¹ On the other side of the debate, public health experts note the disastrous consequences of promoting the “light” or “low tar” cigarette as a reduced-harm measure, an approach that enabled the tobacco industry not only to undermine cessation and prevention efforts,²² but to thrive financially from the growth of a whole new segment of the cigarette market.²³ The following sections discuss the two sides of the debate and the evidence that supports them.

A. Snus's Harm-Reducing Potential

*“If the goal of tobacco control is to reduce tobacco-related disease, rather than tobacco use per se, then the promotion of snus use by inveterate smokers is a promising public health policy.”*²⁴

Despite a significant decline in smoking prevalence in the past several decades, millions of Americans continue to smoke. From 1965 to 2004, the percentage of males who smoked declined from 52% to 23%, and the percentage of smoking females declined from 34% to 19%.²⁵ Although these figures seem promising, in absolute numbers the smoking problem has not improved: 45 to 50 million Americans still smoke, and there are approximately 438,000 smoking-related deaths each year.²⁶ Looking at these numbers, harm-reduction proponents see the potential to help millions of smokers through the promotion of reduced-harm tobacco products such as snus.²⁷

There is no debate that use of smokeless tobacco products, especially snus, involves fewer health risks than smoking; the debate is about the extent of risk reduction and what difference it should make for tobacco control strategy. Certain

21. L.T. Kozlowski et al., *Commentary, Some Practical Points on Harm Reduction: What to Tell Your Lawmaker and What to Tell Your Brother About Swedish Snus*, 12 TOBACCO CONTROL 372, 372 (2003); see also Sherry Emery et al., *Characterizing and Identifying “Hard-Core” Smokers: Implications for Further Reducing Smoking Prevalence*, 90 AM. J. PUB. HEALTH 387, 387, 393 (2000) (describing the existence of a “hard-core smokers” group that may never quit and may require “specifically tailored” tobacco control efforts).

22. J.E. Henningfield et al., *Regulatory Strategies to Reduce Tobacco Addiction in Youth*, 12 TOBACCO CONTROL (SUPP.), at i14, i17 (2003).

23. See Edward L. Sweda, Jr. et al., *Light Cigarette Lawsuits in the United States: 2007* (2007), available at <http://www.tobaccolawcenter.org/documents/lightcigarettes.pdf> (discussing the U.S. Department of Justice’s light cigarette lawsuit against the tobacco industry and Judge Gladys Kessler’s findings of fact in *U.S. v. Philip Morris*, 449 F. Supp. 2d 1 (D.D.C. 2006)).

24. Coral E. Gartner et al., *Should the Health Community Promote Smokeless Tobacco (Snus) as a Harm Reduction Measure?*, 4 PLOS MED. 1138, 1139 (2007) (emphasis added).

25. Brad Rodu & William T. Godshall, *Tobacco Harm Reduction: An Alternative Cessation Strategy for Inveterate Smokers*, HARM REDUCTION J., Dec. 21, 2006, <http://www.harmreductionjournal.com/content/pdf/1477-7517-3-37.pdf>.

26. *Id.*

27. *Id.*

studies have estimated snus use to be 90% less harmful than smoking.²⁸ Like other smokeless tobacco products, snus does not involve the risk of lung cancer and respiratory diseases that smoking does.²⁹ Unlike other smokeless tobacco products, evidence suggests that snus does not increase the risk of oral cancer.³⁰ Because snus delivers similar amounts of nicotine as cigarettes, snus does not decrease the risks associated with nicotine use, such as adverse health effects in pregnancy, possible cardiovascular problems, and addiction.³¹ Other consequences of snus include oral lesions and dental caries.³² Lesions are common among snus users but rarely become malignant and seem to disappear after snus use ceases.³³

There are some disquieting health findings related to snus use. One is an increase in the risk of pancreatic cancer, with one study estimating that using snus doubles the risk; although this increased risk is not as great as that caused by smoking.³⁴ In addition, a recently published study found an association between Scandinavian moist snuff use and gastro-esophageal cancer.³⁵ Compared to non-tobacco users, snus users who had reportedly never smoked were found to have 3.5 times an increased risk of esophageal squamous cell carcinoma (compared to 5.2

28. Foulds & Kozlowski, *supra* note 15, at 1976; David T. Levy et al., *The Relative Risks of a Low-Nitrosamine Smokeless Tobacco Product Compared with Smoking Cigarettes: Estimates of a Panel of Experts*, 13 CANCER EPIDEMIOLOGY, BIOMARKERS & PREVENTION 2035, 2038 (2004).

29. Foulds et al., *supra* note 1, at 352–53; Juhua Luo et al., *Oral Use of Swedish Moist Snuff (Snus) and Risk for Cancer of the Mouth, Lung, and Pancreas in Male Construction Workers: A Retrospective Study*, 369 LANCET 2015, 2017 (2007).

30. Foulds et al., *supra* note 1, at 351.

31. *Id.* at 350–53; see, e.g., Martin Lindström, *Nicotine Replacement Therapy, Professional Therapy, Snuff Use and Tobacco Smoking: A Study of Smoking Cessation Strategies in Southern Sweden*, 16 TOBACCO CONTROL 410, 415 (2006) (finding that the majority of Swedish smokers who used snus as a cessation tool to quit smoking “continued to use snus daily to a very great extent,” and concluding “[t]his may be regarded as a potential health problem, considering the fact that the health effects of daily snus use are not undisputed and partly remain to be investigated.”).

32. Foulds et al., *supra* note 1, at 351. Use of other forms of smokeless tobacco is also a risk factor for developing oral lesions. S.L. Tomar et al., *Oral Mucosal Smokeless Tobacco Lesions Among Adolescents in the United States*, 76 J. DENTAL RES. 1277, 1281–82 (1997).

33. Foulds et al., *supra* note 1, at 351.

34. Foulds & Kozlowski, *supra* note 15, at 1977. Other smokeless tobacco products have also been found to increase the risk of pancreatic cancer. *Smokeless Tobacco Causes Oral and Pancreatic Cancer; Nitrosamines Classified as Human Carcinogens*, NCI CANCER BULL. (Nat’l Cancer Inst.), Nov. 30, 2004, at 3, available at http://www.cancer.gov/NCICancerBulletin/NCI_Cancer_Bulletin_113004.pdf. Thus far, it is not clear whether there is a significant difference between the increased risk of pancreatic cancer caused by snus versus other smokeless tobacco products. See Paolo Boffetta et al., *Smokeless Tobacco Use and Risk of Cancer of the Pancreas and Other Organs*, 114 INT’L J. CANCER 992, 993 (2005) (noting that there are some U.S. studies which found an association between pancreatic cancer and smokeless tobacco products even though the studies are of low statistical power).

35. Kazem Zendehelel et al., *Risk of Gastroesophageal Cancer Among Smokers and Users of Scandinavian Moist Snuff*, 122 INT’L J. CANCER, 1095, 1099 (2008) (“Although some uncertainty remains regarding the causality and the strength of the association as well as the generalizability to other populations than Swedish men, . . . at present, Scandinavian snus cannot be considered to be without a carcinogenic risk.”).

times for cigarette smokers) and a 40% excess risk of non-cardia stomach cancer (virtually equal to that for cigarette smokers).³⁶

Snus use has been part of the Swedish culture since the late 1800s and over the years has been both more and less popular than smoking among the Swedes.³⁷ Public health experts, however, are particularly fascinated by the changing habits of cigarette and snus use by Swedish men over the past two decades. During that time, cigarette consumption declined appreciably while use of snus significantly increased.³⁸ One study collected data from 1986 to 1999 and found that overall tobacco consumption by Swedish males remained stable at about 40% during this period; however, the prevalence of male smoking decreased from 23% to 14% while the proportion of snus users increased from 22% to 30%.³⁹ Although snus use has mainly been a “guy thing” in Sweden, prevalence of snus use among women increased from 2% to 6% during this period, and smoking prevalence declined from 27% to 22%.⁴⁰ In 1999, Sweden became the first country to meet the World Health Organization’s (WHO) target for smoking prevalence at a figure below 20%.⁴¹

A 2003 study by Jonathan Foulds and colleagues sought to determine whether snus played a significant role in Sweden’s success in reducing smoking.⁴² The study concluded that a comparison of the smoking and snus use patterns of men (large reduction in smoking and big increase in snus use) and women (little snus use and smaller smoking reduction) is “strongly suggestive of snus having a direct effect on the changes in male smoking and health.”⁴³ The study also estimated the net effect of snus use in Sweden on public health. Noting the substantial reduction in the incidence of smoking-related diseases among Swedish men, including a lower rate of male lung cancer than any other developed nation, the study concluded that the net effect was positive, and described the “Swedish experience” as “a concrete example in which availability of a less harmful tobacco product has probably worked to produce a net improvement in health.”⁴⁴ The study also rejected the claim that snus could be a “gateway” product for smoking, meaning

36. *Id.* at 1096, 1097.

37. Brad Rodu, Am. Council on Sci. & Health, Swedish Tobacco Use: Smoking, Smokeless, and History (May 12, 2004), http://www.acsh.org/factsfears/newsID.362/news_detail.asp.

38. Foulds et al., *supra* note 1, at 353.

39. *Id.* at 354.

40. *See id.* at 354, 358.

41. Rodu, *supra* note 37. According to the United Nations Development Programme, Sweden’s adult smoking prevalence for 2002–2004 stood at approximately 18% for women and 17% for men. United Nations Development Programme, Human Development Report 2007/2008: Prevalence of Smoking, Women, <http://hdrstats.undp.org/indicators/87.html> (last visited Mar. 23, 2008); United Nations Development Programme, Human Development Report 2007/2008: Prevalence of Smoking, Men, <http://hdrstats.undp.org/indicators/88.html> (last visited Mar. 23, 2008).

42. Foulds et al., *supra* note 1, at 349.

43. *Id.* at 354.

44. *Id.* at 354–55, 358.

that using snus would lead a person to start smoking cigarettes later on.⁴⁵ Instead, the study described evidence suggesting that individuals in Sweden “who start using snus are less likely to become smokers”⁴⁶

The sale of snus is currently banned in the European Union (E.U.) (except for Sweden) and in Australia.⁴⁷ A 2007 study by Coral Gartner and colleagues examined the likely effect on public health were snus to be introduced in Australia.⁴⁸ The study noted that while an individual can achieve substantial health gains by switching from cigarettes to snus, or taking up snus instead of smoking, a positive effect on health at the population level is likely only if snus is used mainly by people who would otherwise have continued or commenced smoking, and not by people who would otherwise have become or remained tobacco free.⁴⁹ Relying on expert predictions that the group most likely to take up snus would be current male smokers, the study concluded that the introduction of snus would be more likely to produce a net benefit than a net harm.⁵⁰

Some harm-reduction proponents are likely to seize upon the Gartner study as one more valid rationale for not opposing the introduction of snus in the U.S., but rather to promote snus use among inveterate smokers who want to reduce their health risks.⁵¹ Others in the harm-reduction camp have criticized the public health community’s failure to provide information to smokers about smokeless products that constitute a less harmful alternative to cigarettes, citing the individual’s right to relevant health information and arguing that the “no safe tobacco product” message violates that right.⁵² Because snus is new to the U.S. and because it is associated with positive aspects of the Swedish experience, the argument that the public health community should promote snus as a smoking alternative is gaining momentum. Foulds and Kozlowski assert that “[i]t is a perverse public-health policy that makes an addictive drug widely available in its most harmful form, yet bans or fails to properly inform consumers of availability of that drug in a much less harmful form.”⁵³

45. *Id.* at 357.

46. *Id.*

47. Foulds & Kozlowski, *supra* note 15, at 1977.

48. Coral E. Gartner et al., *Assessment of Swedish Snus for Tobacco Harm Reduction: An Epidemiological Modeling Study*, 369 LANCET 2010, 2011 (2007).

49. *Id.* at 2012.

50. *Id.* at 2012–14. *But see* Chapman, *supra* note 20, at 47 (“The potential for [low nitrosamine smokeless tobacco products] to reduce health risks for [inveterate smokers] needs balancing against any collateral negative effects of reintroducing smokeless tobacco.”).

51. *E.g.*, Gartner et al., *supra* note 24, at 1138.

52. L.T. Kozlowski & B.Q. Edwards, “*Not Safe*” is Not Enough: Smokers Have a Right to Know More Than There is No Safe Tobacco Product, 14 TOBACCO CONTROL (SUPP.), at ii3, ii3 (2005).

53. Foulds & Kozlowski, *supra* note 15, at 1977–78.

B. *The Problem with Snus*

“Snus is less dangerous than cigarettes . . . but it is very hard to find anything more dangerous than cigarettes.”⁵⁴

Those who oppose promoting snus as a harm-reduction product not only dispute some of the scientific and epidemiological claims made about snus, but also dispute the fact that such claims matter from a tobacco control perspective. While noting that the potential harm of snus, especially American snus,⁵⁵ is still uncertain, and that snus may not have been a significant factor in the Swedish experience of declining cigarette use, opponents also argue that even if snus did produce a public health benefit in Sweden, the realities of the U.S. tobacco culture and regulatory climate necessitate discouraging rather than encouraging snus use in this country.

From a scientific standpoint, those who oppose any promotion of snus argue that the studies concluding snus is not linked to oral cancer are not reliable and better studies not funded by smokeless tobacco manufacturers are needed to evaluate the risks associated with snus.⁵⁶ Past studies on the health risks of smokeless tobacco involve methodological limitations, an inability to estimate precise risks, and inconsistent findings.⁵⁷ Furthermore, no studies have yet been done to estimate the health risks of the types of snus products being sold in the U.S. Opponents of snus also emphasize that all smokeless tobacco products deliver cancer-causing TSNA and there is no reason to believe that U.S. snus contains the same TSNA levels as Swedish snus, especially given that Swedish snus exported to the U.S. has been found to contain higher TSNA levels than snus sold in Sweden.⁵⁸

From an epidemiological standpoint, opponents of snus promotion dispute the claim that snus would be used by smokers to effectively stop smoking and that it would not be taken up by a significant number of non-tobacco users.⁵⁹ Although the

54. Tom Hundley, *Snuffing Out Smokes*, CHI. TRIB., Sept. 16, 2007, at C1 (emphasis added) (quoting Goran Pershagen, Professor Envtl. Hygiene at Stockholm’s Karolinska Inst.).

55. See Hatsukami et al., *supra* note 14, at S371 (“Products manufactured in Sweden and sold in the U.S. also show some variability and higher levels of [tobacco-specific N-nitrosamines] than snus products sold in Sweden.”).

56. S.L. Tomar et al., Commentary, *Declining Smoking in Sweden: Is Swedish Match Getting the Credit for Swedish Tobacco Control’s Efforts?*, 12 TOBACCO CONTROL 368, 369 (2003) [hereinafter Tomar et al., *Commentary*]. Thus far, many of the studies conducted have been industry funded. Kevin Helliker, *Should Snuff Be Used as a Tool to Quit Smoking?*, WALL ST. J., Sept. 16, 2006, at A1. In addition, the relevant research question of whether people who switch from smoking to using snus reduce their risks for death or disease has not been adequately studied. Scott L. Tomar, *Epidemiologic Perspectives on Smokeless Tobacco Marketing and Population Harm*, 33 AM. J. PREVENTIVE MED. (SUPP.), at S387, S389 (2007) [hereinafter Tomar, *Epidemiologic Perspectives*].

57. Tomar et al., *Commentary, supra* note 56, at 368 (noting two studies with questionable methodologies and selective reporting of findings).

58. Hatsukami et al., *supra* note 14, at S370–71.

59. News & Views, *Smokeless Tobacco: Harm Reduction Debatable*, 58 CANCER J. CLINICIANS 4, 4 (2008) (“There is no evidence that smokers will switch to smokeless tobacco products and give up smoking.”) (quoting Michael Thun, M.D., Vice President Epidemiology & Surveillance Res., Am.

Swedish experience is referenced as support for these propositions, many experts are highly critical of the claim that snus was more than a minor cause of Sweden's success in reducing smoking prevalence. Factors more likely to have produced the significant decrease in smoking were Sweden's strong public health campaign discouraging smoking,⁶⁰ the significantly lower price of snus compared to cigarettes,⁶¹ and Sweden's complete ban on tobacco product advertising.⁶² In addition, the data commonly cited to support the notion that Swedes substituted snus use for smoking do not take into account the substantial proportion of Swedish men who smoke on less than a daily basis. Although the proportion of *daily* smokers in Sweden is low (9.3% of men and 13.3% of women), the proportion of *current* smokers remains high (33.4% of men and 30.2% of women).⁶³ Thus, snus may have served as a partial substitute for smoking among men, but it has not significantly contributed to overall cessation.⁶⁴

The significant increase in snus use, on the other hand, may have been greatly influenced by Swedish pop culture and the perception that snus enhances athletic performance and is not particularly harmful to health.⁶⁵ Snus use is a major part of the culture of Sweden's most popular sports, soccer and hockey, and the use of snus by several high-profile sports stars may have influenced a generation of boys to use snus.⁶⁶ This explanation is consistent with one study's finding that the groups quitting smoking in Sweden during the 1990s were not the ones taking up snus.⁶⁷ The study found that males between the ages of sixteen to twenty-four, the group most likely to begin daily snus use during that period, were also the group with the smallest decline in daily smoking.⁶⁸

Regardless of what effect snus may have had on smoking and public health in Sweden, many members of the U.S. tobacco control community are unconvinced that the Swedish experience should affect their approach to snus because that experience cannot be replicated in the U.S. First, the regulatory environment in

Cancer Soc'y); Chapman, *supra* note 20, at 47 ("With youth smoking prevalence at an all-time low . . . the industry would be vitally interested in the potential of [low nitrosamine smokeless tobacco products] to rekindle tobacco use in the group which is its future customer base.").

60. Hundley, *supra* note 54.

61. B. Rodu et al., *Evolving Patterns of Tobacco Use in Northern Sweden*, 253 J. INTERNAL MED. 660, 665 (2003).

62. MATT BARRY, CAMPAIGN FOR TOBACCO-FREE KIDS, THE UNITED STATES ISN'T SWEDEN: WHY UST'S EFFORTS TO MAKE COMPARATIVE HEALTH CLAIMS, IN THE CONTINUED ABSENCE OF FDA REGULATION OF ALL TOBACCO PRODUCTS, WON'T WORK AND THREATENS PUBLIC HEALTH 2 (2006), <http://www.tobaccofreekids.org/research/factsheets/pdf/0283.pdf>.

63. Tomar, *Epidemiologic Perspectives*, *supra* note 56, at S391.

64. *Id.*

65. Rodu, *supra* note 37.

66. *Id.*

67. Tomar et al., *Commentary*, *supra* note 56, at 368.

68. *Id.*

Sweden, where the manufacture, shipping, storage, and marketing of snus is highly regulated, is very different from that in the U.S., where the agencies that regulate other consumer products currently lack the authority to regulate tobacco.⁶⁹ In addition, the history and culture of cigarette and smokeless tobacco use is different in the two countries. Sweden has a long history of snus use, and smoking there has never been as prevalent as it has been historically in the U.S. and other developed countries.⁷⁰

In the U.S., smokeless tobacco was recognized as a major public health problem in the 1980s, after an extensive marketing campaign by the tobacco industry succeeded in significantly boosting sales.⁷¹ The public health community was successful in curbing this trend, and smokeless tobacco use, especially among adolescents, decreased significantly: just 2.3% of the population used smokeless tobacco in 2000.⁷² In light of the positive progress that has been made in reducing the use of both smokeless tobacco products and cigarettes in the U.S., many public health experts argue it would be counterproductive to endorse smokeless tobacco use under any circumstance.⁷³

Some experts also argue that rather than providing support for snus as a harm-reduction measure, the Swedish experience is more accurately citable as an example of the potential serious adverse effects from the unregulated promotion of snus. Although Sweden has a long history of snus use, in the 1960s snus was a dying habit with the average user being an old, poorly educated man from a rural area.⁷⁴ Less than 10% of young men and boys used snus.⁷⁵ However, at that time, Swedish Tobacco Company launched a massive and unprecedented advertising campaign in which it introduced new products, updated its packaging, and succeeded in redefining snus use as a fashionable habit, especially among sportsmen and athletes.⁷⁶ The result was that use of Swedish snus, which had been declining for fifty years, began to increase sharply, doubling in less than four years. Snus use among men aged fifteen to nineteen increased from 11% in 1969 to 22%

69. BARRY, *supra* note 62, at 2. The U.S. Supreme Court ruled in 2000 that the Food and Drug Administration (FDA) lacked authority to promulgate tobacco sales practices regulations. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126–27 (2000). Cigarettes are specifically exempted from the following federal laws: Hazardous Substances Act, 15 U.S.C. § 1261(f)(2) (2000); Fair Packaging and Labeling Act, 15 U.S.C. § 1459(a)(1) (2000); Consumer Product Safety Act, 15 U.S.C. § 2052(a)(1)(B) (2000); Toxic Substances Control Act, 15 U.S.C. § 2602(B)(iii) (2000); and Controlled Substances Act, 21 U.S.C. § 802(6) (2000).

70. Rodu, *supra* note 37.

71. Nelson et al., *supra* note 4, at 897.

72. *Id.* at 899 tbl.1, 901.

73. *Id.* at 902.

74. Paul Nordgren & Lars Ramstrom, *Moist Snuff in Sweden—Tradition and Evolution*, 85 BRIT. J. ADDICTION 1107, 1108 (1990).

75. *Id.*

76. *Id.*

in 1973.⁷⁷ During that period, snus use among men over age thirty did not change.⁷⁸ Thus, the Swedish experience provides strong evidence that when aggressively promoted, snus can be effectively characterized as a fashionable habit among young men, leading to a sudden increase in use.

Several other factors weaken the argument for promoting snus as a harm-reduction measure in the U.S. First, the majority of the harm-reduction potential of snus can only be realized if snus use helps smokers stop smoking; however, it has not been established that snus is an effective aid to quitting.⁷⁹ There is no evidence that current smokers would find snus to be a suitable substitute for cigarettes, and unless snus is an acceptable substitute, it is no more likely to help people quit smoking than any other cessation method.⁸⁰ Historically, U.S. smokers do not become smokeless tobacco users.⁸¹ A cigarette is the best nicotine-delivery device there is, and the notion that U.S. smokers would find snus to be a satisfactory substitute for smoking is purely conjectural.⁸²

There is cause for concern, however, that rather than being an effective smoking-cessation tool, snus would actually promote the continued use of cigarettes. Strong support for this is that R.J. Reynolds and Philip Morris expect snus to be used alongside cigarettes and are primarily marketing snus for use in situations when smokers are not permitted to smoke.⁸³ The significant investment involved in developing and beginning to market snus was not undertaken by these companies to appeal to the current market of smokeless tobacco users, which is small; rather, it was undertaken to respond to the steady decline in smoking rates and the prevalence of smoking restrictions by providing smokers with the “ability

77. *Id.* at 1108, 1109 tbl.1.

78. *Id.* at 1109 tbl.1.

79. Martin McKee et al., Correspondence, *Swedish Snus for Tobacco Harm Reduction*, 370 LANCET 1206, 1206 (2007). *But see* Lindström, *supra* note 31, at 412, 415 (finding that primarily Swedish young men successfully used snus as a smoking cessation tool in 2000–2004).

80. *See* sources cited *supra* note 59; *cf.* Lindström, *supra* note 31, at 412, 415 (finding that women, middle-aged, and older people in Sweden who successfully quit smoking in 2000–2004 preferred more traditional nicotine replacement therapy to snus as a cessation aid).

81. BARRY, *supra* note 62, at 2.

82. Smoking results in the fastest rate of nicotine delivery to the body. Hatsukami et al., *supra* note 14, at S374. If smokeless tobacco were a suitable substitute for smoking, indoor smoking bans and health concerns probably would have already resulted in a notable switch from cigarettes to smokeless tobacco. Lynn T. Kozlowski, *Effect of Smokeless Tobacco Product Marketing and Use on Population Harm from Tobacco Use*, 33 AM. J. PREVENTIVE MED. (SUPP.), at S379, S384 (2007).

83. Hatsukami et al., *supra* note 14, at S375. Philip Morris is marketing its snus products to appeal to “adult smokers who are interested in smokeless tobacco alternatives to cigarettes.” PhilipMorrisUSA, Marketing Approach, <http://www.philipmorrisusa.com/en/smokeless/> (follow “Marketing Approach” hyperlink) (last visited Mar. 23, 2008). R.J. Reynolds is marketing snus using the slogan: “A different way to enjoy tobacco. Pleasure for wherever!” Snus Camel, <http://www.snuscamel.com> (last visited Mar. 23, 2008).

to enjoy tobacco when they otherwise can't or choose not to smoke."⁸⁴ Thus, the introduction of snus is more likely to increase the dual use of cigarettes and snus and to provide smokers with fewer reasons to quit rather than give smokers an additional tool to help them quit.

The second factor that cuts against the argument for promoting snus as a harm-reduction tool is that the remainder of the reduced-harm potential of snus can be attained only if non-tobacco users who would have otherwise started smoking take up snus instead. Given that the use of smokeless tobacco can be a gateway to cigarette use in the U.S., this result is unlikely. Studies show that using smokeless tobacco is a risk factor for cigarette smoking as well as other drug addictions, and that use of smokeless tobacco predicts future cigarette smoking for a number of American as well as Swedish youth.⁸⁵ Indeed, a fundamental risk of addictive drugs in general is that there is a strong tendency to progress to more aggressive forms of delivery.⁸⁶ Many public health experts question how any health care professional could seriously advocate taking up oral tobacco as a means of preventing smoking and liken such an approach to "advocating oral opioid narcotics such as codeine as a means of avoiding heroin use."⁸⁷ It does not seem at all farfetched that youth who started using tobacco in the form of snus would be more willing to try smoking and get their nicotine fix in that way.

Third, snus is not an appropriate harm-reduction tool because the introduction of snus in the U.S. is not only unlikely to result in any public health benefit, but also will likely have a negative effect on public health by attracting new users who otherwise would not have used any form of tobacco. Such users are most likely to be young people who decide to experiment with snus because tobacco industry marketing makes it appear attractive and safe, and because underage consumers can

84. See Conference Call by Reynolds Am., Inc., with Dianne Neal, CFO, Reynolds Am., Inc., in Winston Salem, N.C. (Oct. 25, 2007), <http://seekingalpha.com/article/51448-reynolds-american-q3-2007-earnings-call-transcript> (suggesting a correlation between low cigarette sales volume and the "pioneering" of spitless tobacco products). R.J. Reynolds's Camel Snus website provides age-verified visitors with examples of circumstances when they can snus but would not be able to smoke, such as on an airplane, at a club, or on a ski lift. Snus Camel, <http://www.snuscamel.com/CSN/dtclgin.jsp?brand=CSN> (last visited Mar. 24, 2008). The website also notes that, in addition to being smokeless and spitless, snus leaves a user's hands free so the user can enjoy other activities, such as dancing and flirting. *Id.* (follow "Meet Inga" hyperlink; then follow "Inga's Introduction to Snus" hyperlink).

85. Tomar et al., *Commentary, supra* note 56, at 368; Henningfield et al., *supra* note 22, at i15 ("Smokeless tobacco use . . . is a risk factor for cigarette smoking."). Compare Lindström, *supra* note 31, at 413 (noting that, although the study at issue was designed to determine the effect of snus use on smoking cessation, "snus use may have . . . an adverse and addictive effect in relation to smoking initiation.") with H. Furberg et al., *Is Swedish Snus Associated with Smoking Initiation or Smoking Cessation?*, 14 TOBACCO CONTROL 422, 423 (2005) (finding that snus use among Swedish twins in study was not associated with smoking initiation).

86. Henningfield et al., *supra* note 22, at i20.

87. Tomar et al., *Commentary, supra* note 56, at 369.

use it discreetly.⁸⁸ Proponents of snus as a harm-reduction method tend to disregard this probable effect by noting that a substantial number of people would have to take up snus for every smoker who switched to snus in order to produce a net harm to public health.⁸⁹ However, this explanation disregards the overarching goal of tobacco control—preventing initiation and promoting a continual decline in all forms of tobacco use⁹⁰—and suggests a willingness to relinquish much of the progress the tobacco control movement has made over the past several decades. The tobacco control community’s success in reducing the prevalence of cigarette and smokeless tobacco use can be attributed to many factors, including: 1) labeling tobacco use as an aberrant and unpopular behavior (because of the smell, spitting, etc.),⁹¹ 2) educating people about the serious negative health consequences of tobacco use,⁹² 3) uncovering the tobacco industry’s deceptive and manipulative practices,⁹³ and 4) passing laws that limit the places smokers may smoke.⁹⁴ Promoting snus as a harm-reduction measure seriously threatens to undermine all of these successes by: 1) providing a way to use tobacco that is discreet and does not involve unpopular side effects,⁹⁵ 2) shifting the focus away from the harm caused by all forms of tobacco toward the relative “safety” of a particular tobacco product,⁹⁶ 3) helping the tobacco industry reinvent itself as ostensibly socially responsible and concerned about consumers,⁹⁷ and 4) eliminating the incentive smoke-free indoor air laws provide for smokers to quit by providing a product that can be used “wherever.”⁹⁸ To summarize, the promotion of snus may have serious unintended consequences that work against many of the factors that have led to successful tobacco control and thus may add to the tobacco problem rather than providing a partial solution.⁹⁹

88. BOONN, *supra* note 12, at 4.

89. Gartner et al., *supra* note 48, at 2012–13.

90. *Id.* at 2010.

91. Ernst L. Wynder, *Interrelationship of Smoking to Other Variables and Preventive Approaches*, in 17 RESEARCH ON SMOKING BEHAVIOR 67, 72 (Murray Jarvik et al. eds., Monograph No. 17, 1977).

92. *E.g.*, B.C. MINISTRY OF HEALTH SERVS., BC’S TOBACCO CONTROL STRATEGY 4 (2004).

93. *See* K. Cummings & R. Pollay, *Exposing Mr. Butts’ Tricks of the Trade*, 11 TOBACCO CONTROL (SUPP.), at il (2002).

94. *E.g.*, Jennifer Steinhauer, *Bloomberg Seeks to Ban Smoking in Every City Restaurant and Bar*, N.Y. TIMES, Aug. 9, 2002, at A1 (noting New York City’s efforts to ban smoking in restaurants and bars, highlighting the laws passed in California and Delaware to ban smoking in virtually every workplace, and citing statewide bans on smoking in restaurants in Maine, Utah and Vermont).

95. Wendy Koch, *As Cigarette Sales Dip, New Products Raise Concerns*, USA TODAY, Aug. 7, 2007, at A1.

96. *Id.*

97. Philip Morris USA, *supra* note 83; R.J. Reynolds, *Our Guiding Principles and Beliefs*, <http://www.rjrt.com/values/respCore.asp> (last visited Mar. 23, 2008).

98. Snus Camel, *supra* note 83.

99. The alternative view of the Swedish experience as an example of the potential adverse effects of the unregulated promotion of snus supports the prediction that promoting snus will simply add to the

Even if snus does increase the chances of successfully quitting cigarette use for some smokers, it is certainly not a necessary—let alone critical—component of an overall effective tobacco control program.¹⁰⁰ To the contrary, introducing snus into the mix could undermine tobacco control efforts in states such as California,¹⁰¹ Washington,¹⁰² and Oregon,¹⁰³ each of which has realized great strides in reducing smoking rates by implementing a range of comprehensive anti-tobacco policies such as clean indoor air laws;¹⁰⁴ cigarette tax hikes;¹⁰⁵ media and counter-marketing campaigns;¹⁰⁶ broad access to cessation programs, including quit-lines, reduced

tobacco use problem. The U.S. and Norwegian experiences with moist snuff also support this prediction. See Tomar, *Epidemiologic Perspectives*, *supra* note 56, at S395 (noting that the growth in popularity of moist snuff in the U.S. and Norway simply added to the burden of tobacco use).

100. McKee et al., *supra* note 79, at 1206.

101. See Kenneth E. Warner et al., *Tobacco Control Success Versus Demographic Destiny: Examining the Causes of the Low Smoking Prevalence in California*, 98 AM. J. PUB. HEALTH 268, 268 (2008) (noting that California's tobacco control programs resulted in an impressive 33% decrease in adult smoking prevalence between 1988 and 2005—from 22.8% to 15.2%). For analysis of the California Tobacco Control Program's impact on adult smoking prevalence, see Karen Messer et al., *The California Tobacco Control Program's Effect on Adult Smokers: (1) Smoking Cessation*, 16 TOBACCO CONTROL 85 (2007); Wael K. Al-Delaimy et al., *The California Tobacco Control Program's Effect on Adult Smokers: (2) Daily Cigarette Consumption Levels*, 16 TOBACCO CONTROL 91 (2007).

102. From 2001 to 2005, Washington State realized a 4.9% decline in adult smoking prevalence (from 22.5% to 17.6%), compared to a nationwide decline of 1.8% (22.7% to 20.9%) for the same period. Julia A. Dilley et al., *Effective Tobacco Control in Washington State: A Smart Investment for Healthy Futures*, PREVENTING CHRONIC DISEASE, Jul. 2007, at 1, 1–3, http://www.cdc.gov/pcd/issues/2007/jul/pdf/06_0109.pdf. A study of Washington State's reduction in adult and youth smoking prevalence after a decade of stagnation attributed such strides to the implementation of a comprehensive tobacco control strategy complemented with adequate financial investment. *Id.* at 4–6.

103. See News Release, Or. Dep't of Hum. Servs., Oregon Adult, Youth Smoking Drops 41 Percent in Decade: DHS (Feb. 1, 2008), <http://www.oregon.gov/DHS/news/2008news/2008-0201.shtml> (providing the following changes in Oregon tobacco consumption patterns from 1996 to 2006: “22 percent fewer adults smoke; 59 percent fewer 8th graders smoke; 46 percent fewer 11th graders smoke, and 30 percent fewer pregnant women smoke”; and overall cigarette consumption declined 31 percent).

104. California Indoor Clean Air Act of 1976, CAL. HEALTH & SAFETY CODE §§ 118875, 118885, 118890 (West 2006) (prohibiting smoking in publicly owned buildings and health facilities); Oregon Indoor Clean Air Act, OR. REV. STAT. §§ 433.845–850 (2005) (prohibiting smoking in public places and employment areas); WASH. REV. CODE ANN. § 70.160.030 (West Supp. 2008) (prohibiting smoking in public and employment places).

105. See ANN BOONN, CAMPAIGN FOR TOBACCO FREE KIDS, MAP OF STATE CIGARETTE TAX RATES (2007), <http://tobaccofreekids.org/research/factsheets/pdf/0222.pdf>; ERIC LINDBLOM & ANN BOONN, TOBACCO FREE KIDS, STATE CIGARETTE TAX INCREASES SINCE JANUARY 1, 2002 (2007), <http://tobaccofreekids.org/research/factsheets/pdf/0239.pdf> (noting that California's cigarette tax is 87 cents per pack, Oregon's tax is \$1.18, and Washington's tax is \$2.25).

106. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., DESIGNING AND IMPLEMENTING AN EFFECTIVE TOBACCO COUNTER-MARKETING CAMPAIGN 13 (2003) *available at* http://www.cdc.gov/tobacco/media_communications/countermarketing/campaign/00_pdf/cmc_chapter1.pdf; NANCY MUELLER ET AL., THE WASHINGTON PROFILE: A REVIEW OF WASHINGTON'S TOBACCO

cost services for treatment,¹⁰⁷ and public/private health care partnerships; and school grounds bans and education programs.¹⁰⁸

If snus is to be promoted as a nicotine substitute for people trying to quit smoking, it is unclear what advantages snus would provide over nicotine gum and patches.¹⁰⁹ Medicinal nicotine is certainly less harmful than snus and has been shown to be an effective aid to quitting; therefore, it should be made more available and promoted more effectively before the public health community considers allowing snus into new markets.¹¹⁰ Many public health experts see an inherent problem in promoting any type of tobacco use, especially when other options are available that have yet to be fully utilized.

II. WHAT THE DEBATE MEANS FOR TOBACCO CONTROL IN THE U.S.

*The debate comes down to “whether snus should be encouraged as a safer alternative to smoking, or discouraged as just another harmfully addictive tobacco product.”*¹¹¹

The argument for promoting snus as a harm-reduction measure perhaps has some surface appeal; however, the preceding section reveals its serious flaws. Because promoting snus as a harm-reduction measure in the U.S. involves at least a substantial possibility (and more likely a significant probability) of producing a net harm rather than a net benefit for public health,¹¹² the public health community should abandon such an approach and continue to focus on reducing access to and the appeal of tobacco products in general. Such an approach does not, however, justify withholding relevant health information from consumers, such as the fact that substituting smokeless products for cigarettes reduces health risks for individual smokers.¹¹³ It simply eschews any form of actual promotion of any tobacco product and focuses on the public health dangers of all tobacco products rather than their relative benefits.

Such an approach makes sense when considering whom the tobacco control community is dealing with regarding snus—R.J. Reynolds and Philip Morris—the

PREVENTION AND CONTROL PROGRAM JUNE 2002, at 3 (2003), available at <http://repositories.cdlib.org/context/tc/article/1062/type/pdf/viewcontent/>.

107. MATT BARRY, CAMPAIGN FOR TOBACCO-FREE KIDS, TOBACCO CESSATION WORKS: AN OVERVIEW OF BEST PRACTICES AND STATE EXPERIENCES 3–4 (2003), available at <http://www.tobaccofreekids.org/research/factsheets/pdf/0245.pdf>; Dille et al., *supra* note 102, at 3.

108. BARRY, *supra* note 107; Wash. State Dep’t of Health, Preventing Youth from Beginning Tobacco Use, <http://www.doh.wa.gov/tobacco/youth/youth.htm> (last visited Mar. 24, 2008).

109. Hundley, *supra* note 54.

110. McKee et al., *supra* note 79, at 1206; *see also infra* Part IV.

111. Hundley, *supra* note 54 (emphasis added).

112. *See supra* notes 79–99 and accompanying text.

113. Kozlowski & Edwards, *supra* note 52.

two biggest names in “Big Tobacco.”¹¹⁴ These companies, especially Philip Morris, have tried to reinvent themselves as more socially responsible and consumer-friendly than their pasts demonstrate.¹¹⁵ Although there is no doubt that these companies are consumer-oriented in the sense that they want to appeal to paying consumers and will do whatever it takes to do so—whether it be creating reduced-exposure cigarettes or smokeless tobacco products—there is good reason to be skeptical about the possibility that Big Tobacco’s interests could coincide with those of the tobacco control community, given the fact that the companies’ bottom lines depend on keeping consumers hooked on harmful tobacco products and attracting new users. In discussing the introduction of Taboka to the market, the CEO of Philip Morris remarked: “[W]e are optimistic about our ability to grow our business by continuing to strengthen our core brands and by complementing this growth with new revenue and income sources for the future.”¹¹⁶ This goal, while good for Philip Morris stockholders, is in direct opposition to the goals of the tobacco control community.

Given the importance of protecting against the serious potential effects snus may have on public health if allowed to be introduced and marketed on a wide scale in the U.S., the public health community, in conjunction with lawmakers and the legal community, must work to effectively and cohesively respond through measures that will minimize the availability, appeal, and use of snus, particularly among youth. The most effective method of promoting these goals would be to enact a complete ban on the sale of snus in the U.S.

A. *Enacting a Ban on Snus*

“Snus is not a smoking cessation aide, it’s a smoking prolongation aide. It’s also a fairly blatant method of recruiting young people to tobacco.”¹¹⁷

A number of countries have placed bans on smokeless tobacco products, including Australia, New Zealand, and all E.U. countries except Sweden.¹¹⁸

114. Mike Beime, *Big Tobacco Gets Tough – New Tactics After Imposed Marketing Restrictions*, BRANDWEEK, May 14, 2001, http://findarticles.com/p/articles/mi_m0BDW/is_20_42/ai_74699216.

115. P.A. McDaniel & R.E. Malone, *Understanding Philip Morris’s Pursuit of U.S. Government Regulation of Tobacco*, 14 TOBACCO CONTROL 193, 194 (2005). For more information on Philip Morris’s social responsibility public relations campaign in the early 2000’s, see Mitch Zeller, Remarks at Symposium of “Safer” Tobacco Products: Reducing Harm or Giving False Hope? (Apr. 20, 2007), (transcript available in the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy, University of Maryland School of Law).

116. Michael E. Szymanczyk, Chairman & CEO of Philip Morris USA Inc., Remarks at the Prudential Consumer Conference (Sept. 7, 2006), *available at* <http://mydiscountcigarette.com/Smokepedia/folder-Nr-24/Remarks-by-Michael-E-Szymanczyk-Chairman-and-CEO-Philip-Morris-U.245.0.html>.

117. Andre Picard, *We Need More Tobacco Like a Hole in the Head*, GLOBE & MAIL, Oct. 4, 2007, at L6 (emphasis added).

118. Chapman, *supra* note 20, at 47.

Australia enacted a national ban on the sale of smokeless tobacco products in 1991 to prevent the tobacco industry from building demand for a rarely-used form of tobacco known to cause cancer.¹¹⁹ In 1992, the E.U. banned the sale of most smokeless tobacco products, including snus, to protect public health by preventing people from starting to use a new tobacco product.¹²⁰ Currently, pressure from the tobacco industry as well as harm-reduction proponents to remove these bans is strong, especially the ban on low-nitrosamine smokeless tobacco products such as snus.¹²¹ E.U. officials, however, say it would be unlikely for any new research to justify legalizing a substance proven to increase the risk of cancer and cardiovascular disease.¹²² Officials maintain that the focus should be on motivating smokers to break their nicotine dependence, and allowing snus on the market would help sustain dependence on tobacco products.¹²³

The best approach for the U.S. to take would be to adopt a similar policy and simply outlaw the sale of snus in this country. This approach would prevent the probable negative consequences of snus on public health discussed above and would eliminate the need for tobacco control advocates to fight individual battles with the tobacco industry in areas such as marketing, sales to minors, flavored additives, and reduced-harm claims. The biggest advantage of this approach is that it is consistent with the goal of tobacco control in the long term. Rather than providing only a short-term harm-reduction strategy with the introduction of snus, which is likely to backfire, banning snus would eliminate one tobacco problem before it becomes deep-rooted and would allow the tobacco control community to continue focusing on existing problems.¹²⁴

Regardless of whether using snus is safer than smoking, snus is still a harmful tobacco product—a type of product Americans do not need more of. As discussed, this product is extremely unlikely to produce a net public health benefit in the U.S. because it promotes continuation and initiation of tobacco use, not cessation.¹²⁵ Rather than using the Swedish experience to suggest that U.S. smokers will switch

119. *Id.*

120. Eric Eyre, *Smokeless Snus Now Sold in State*, CHARLESTON GAZETTE, Sept. 19, 2007, at 1C. Sweden obtained an exemption from the ban when it joined the E.U. three years later. *Id.*

121. Chapman, *supra* note 20, at 47; Rory Watson, *BAT Calls for Ban on 'Snus' to be Lifted*, TIMES, Oct. 3, 2007, at 44, available at http://business.timesonline.co.uk/tol/business/industry_sectors/consumer_goods/article2577805.ece.

122. Nathalie Vandystadt, *EP Wants More Research on Dangers of Snus*, EUROPOLITICS, Oct. 26, 2007, at 11, 11.

123. *Id.*

124. See Ziad Arabi, *An Epidemic that Deserves More Attention: Epidemiology, Prevention, and Treatment of Smokeless Tobacco*, 100 S. MED. J. 890, 891 (2007) (explaining that if smokeless tobacco use replaces smoking in areas where smoking is banned, “the smoking epidemic will simply be replaced with [a smokeless tobacco] epidemic[.]” defeating one of the purposes of lobbying for smoke-free environments).

125. See *supra* Part I.B.

to snus, which the above discussion has discredited, the Swedish experience can be cited for the fact that snus has the potential to appeal to a large segment of the population and produce its own tobacco control crisis. Instead of waiting to see how and when such a crisis may happen in the U.S., the threat snus presents should be eliminated by a ban on its sale in the U.S. before—as happened in Sweden¹²⁶—it becomes too late. In the U.S., the dramatic health consequences of smoking have been known for almost 50 years.¹²⁷ Yet because of the prevalence and social acceptability of smoking and the cultural—though erroneous—notion of a “right” to smoke, smoking remains a leading public health challenge and effective regulation of the tobacco industry has yet to be enacted.¹²⁸ Rather than allowing the same sort of pattern to develop with snus, the best step to take is to ban the sale of snus in the U.S.

Banning snus is not as odd a proposition as it may sound. Indeed, it is not uncommon for a state to ban a specific type of tobacco product if the legislature determines that the particular product presents a unique threat to public health or safety. For example, several states ban the sale of clove cigarettes.¹²⁹ Others ban the sale of bidis,¹³⁰ a “cigarette made by rolling tobacco by hand in a dried leaf from the tendu tree (a member of the ebony family).”¹³¹ Most recently, Maine banned the sale of hard snuff¹³² and, with some exceptions, flavored cigars and cigarettes.¹³³ At

126. See *supra* notes 37–41 and accompanying text.

127. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 852 (D.D.C. 2006) (“[O]ver the course of more than 50 years, Defendants lied, misrepresented, and deceived the American public . . . about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents . . . with little, if any, regard for individual illness and suffering . . .”).

128. Michele Tyler, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783, 783 (1998) (discussing the right to smoke, second-hand smoke exposure and the efforts of states to enact smoking regulations); see also Samantha K. Graff, *There is No Constitutional Right to Smoke: 2008*, at 5 (Mar. 2008), available at <http://tclconline.org/documents/consitutional-right.pdf> (summarizing that there is no Constitutional right to smoke and that government regulation of tobacco need only be rationally related to a legitimate government goal).

129. *E.g.*, FLA. STAT. ANN. § 859.058 (West 2000); MD. CODE ANN. CRIM. LAW § 10-106 (LexisNexis 2002); N.M. STAT. ANN. § 57-2-14 (LexisNexis 2000); UTAH CODE ANN. § 76-10-105.3 (2003).

130. *E.g.*, 720 ILL. COMP. STAT. ANN. 685/4-a-5 (West 2003); N.D. CENT. CODE § 12.1-31-10 (Supp. 2007); VT. STAT. ANN. tit. 7 § 1003 (2005); W. VA. CODE ANN. § 16-9A-9 (LexisNexis 2006) (“The Legislature finds that young people in this State have been enticed into smoking or using tobacco products by first using or experimenting with . . . bidis. Recognizing that the use of bidis is an emerging public health problem the Legislature hereby adopts a public policy that . . . ‘bidis’ should not be imported, sold or distributed . . .”).

131. Nat’l Cancer Inst., Dictionary of Cancer Terms, http://www.cancer.gov/Templates/db_alpha.aspx?CdrID=389458 (last visited Mar. 24, 2008) (“Most bidis are made in India and they come in different flavors.”).

132. ME. REV. STAT. ANN. tit. 22, § 1560–A (Supp. 2007) (“[H]ard snuff’ means a smokeless, dissolvable tobacco product in lozenge, bit or tablet form that contains as an ingredient compressed,

least twenty-five states have banned the sale of cigarettes that do not meet certain fire safety standards.¹³⁴ Therefore, there is nothing preposterous about proposing a ban on the sale of snus before the product creates a serious public health problem in the U.S.

Although a complete ban on the sale of snus is the best alternative from a public health standpoint, reality suggests that it is also an unlikely one. The cultural notion of a right to smoke may already carry over into a notion of a similar right to use smokeless tobacco products. In addition, the argument that it is “perverse” to ban the least harmful forms of an addictive substance, while flawed, has superficial appeal that is likely to mobilize a significant number of decision makers. Therefore, it is imperative to consider other ways in which the tobacco control community, policymakers, and legislators can respond to snus and minimize its adverse effects on individual and public health.

B. Granting the FDA Authority to Regulate Tobacco

*“Every day another 1,200 lives are lost [to tobacco] and more than 1,000 children become regular smokers. . . . It only makes sense, then, that the FDA—an agency charged with protecting the health and safety of the public—should be given regulatory authority over tobacco.”*¹³⁵

Most members of the tobacco control community, recognizing that only so much can be done to fight Big Tobacco without comprehensive regulation by the U.S. government, are calling for congressional approval of The Family Smoking Prevention and Tobacco Control Act (FSPA), which is concurrently before the House and Senate.¹³⁶ While the legislation is not ideal, and Congress could

powdered tobacco with nicotine, that is intended for human consumption and that is not regulated as a food or drug or approved as nicotine replacement therapy.”)

133. *Id.* § 1560-D (West Supp. 2007). The exception is made for flavored cigars or cigarettes that were on the market prior to 1985 for which the Attorney General concludes that the “characterizing flavor and the associated packaging, promotion and brand style do not directly or indirectly target youth or encourage the initiation of smoking.” *Id.* § 1560-D.5. The Family Smoking Prevention and Tobacco Control Act (FSPA) pending before Congress would prohibit the sale of flavored cigarettes and grant the FDA power to prohibit or otherwise limit the sale of flavored cigars or smokeless tobacco. H.R. 1108, 110th Cong. §§ 101(b), 907(a)(1) (2007); S. 625, 110th Cong. §§ 101(b), 907(a)(1) (2007). Other states recently considered legislation to impose bans on various forms of flavored tobacco products. *E.g.*, H.B. 1455, 95th Gen. Assem., Reg. Sess. (Ill. 2007) (introduced in 2007, pending as of Jan. 15, 2008); S.B. 1701, 95th Gen. Assem., Reg. Sess. (Ill. 2007) (referred to Rules Committee as of Dec. 3, 2007); H.B. 2435, 78th Leg., 2d Reg. Sess. (W. Va. 2008) (introduced in House, sent to House Judiciary Committee as of Jan. 9, 2008).

134. For a comprehensive list of states that have passed fire-safe cigarette legislation, see Coal. for Fire-Safe Cigarettes, Adoptions, <http://www.firesafecigarettes.org> (follow “Legislative updates” hyperlink; then follow “Adoptions” hyperlink) (last visited Mar. 24, 2008).

135. Editorial, *FDA Should Accept Responsibility for Regulating Cigarettes*, THE POST-STANDARD (Syracuse, N.Y.), Oct. 10, 2007, at A12 (emphasis added).

136. Edward M. Kennedy, Letter to the Editor, *Regulating Tobacco*, N.Y. TIMES, Aug. 10, 2007, at A18. The two slightly different versions of The Family Smoking Prevention and Tobacco Control Act

certainly do more to advance tobacco control's cause, the proposed legislation is a step in the right direction, as many public health advocates recognize.¹³⁷

Rather than providing the FDA with authority to regulate tobacco as a drug or drug delivery device under the current provisions of the federal Food, Drug, and Cosmetic Act (FDCA),¹³⁸ the proposed legislation creates a new chapter within the FDCA under which tobacco products will be regulated.¹³⁹ This somewhat avoids the incongruence of FDA approval of an inherently dangerous product within a scheme designed to allow the sale of foods and of drugs that treat or cure illness and disease. The proposed legislation does not limit the Federal Trade Commission's (FTC) authority over the advertising and sale of tobacco products, but violations of the FSPA will also be considered unfair or deceptive practices under the Federal Trade Commission Act (FTCA).¹⁴⁰ The FSPA would grant the FDA, acting through the Secretary of Health and Human Services ("the Secretary"), authority over a wide array of issues relating to the manufacture and sale of tobacco products.¹⁴¹ Much of that authority, should the legislation pass, could be exercised to respond effectively to the introduction of snus.

First, the proposed legislation would require premarket review and approval by the FDA before any new tobacco product could be introduced.¹⁴² Under the House version of the FSPA, a "new tobacco product" is one that was not commercially marketed in the U.S. as of February 15, 2007, and is not "substantially equivalent" to an existing product, as delineated in the FSPA.¹⁴³ Because Taboka and Camel Snus were only test-marketed and not commercially marketed as of February 15, 2007, these products would qualify as "new" under the FSPA.¹⁴⁴ Therefore, in accordance with this provision, Philip Morris and R.J. Reynolds would need to submit applications to the FDA containing information

currently being considered by the House and Senate are H.R. 1108, which was approved by the House Committee on Energy and Commerce on April 2, 2008, and S. 625, which was approved by the Senate Health, Education, Labor and Pensions (HELP) Committee on August 1, 2007. News Release, Comm. on Energy & Commerce, Energy and Commerce Committee Approves Landmark Tobacco Bill (Apr. 2, 2008), http://energycommerce.house.gov/Press_110/110nr244.shtml; Diedra Henderson, *FDA Might Get Regulatory Power Over Tobacco*, BOSTON GLOBE, Apr. 2, 2007, at A2.

137. Campaign for Tobacco-Free Kids, FDA Authority Over Tobacco, <http://tobaccofreekids.org/reports/fda> (last visited Mar. 24, 2008).

138. 21 U.S.C. §§ 310–399 (2000).

139. H.R. 1108 § 101; S. 625 § 101.

140. H.R. 1108 § 914; S. 625 § 914; 15 U.S.C. § 45(a)(1) (2000) (prohibiting unfair methods of competition in or affecting commerce as set forth under the Federal Trade Commission Act).

141. H.R. 1108 §§ 101(b), 901; S. 625 §§ 101(b), 901.

142. H.R. 1108 § 910(a); S. 625 § 910(a).

143. H.R. 1108 §§ 910(a)(1), 910(a)(2)(B) (as reported by S. Comm. on Health, March 11, 2008). The Senate version sets June 1, 2003, as the cutoff date. S. 625 §§ 910(a)(1), 910(a)(2)(B).

144. See H.R. 1108 § 910(a)(1)(A). Premarket approval would also apply to Marlboro Snus and *Grand Prix* snus because both products were introduced after February 15, 2007, and only in test-markets. See *supra* notes 16–19 and accompanying text.

about their products' ingredients and manufacturing methods, as well as all information the companies have about the products' health risks.¹⁴⁵ The FDA may deny product approval if the agency determines that there is "a lack of a showing that permitting such tobacco product to be marketed would be appropriate for the protection of the public health," and this determination must be made in light of the "risks and benefits to the population as a whole."¹⁴⁶ At an applicant's request or the Secretary's discretion, the Tobacco Products Scientific Advisory Committee ("Advisory Committee"), established by the FSPA and composed mostly of members of the medical community, will recommend whether the product should be approved before the Secretary makes his or her decision.¹⁴⁷

This process would keep alive the possibility of keeping snus off the market, if the Advisory Committee recommended denying the application and the Secretary agreed. Achieving such a result would likely be an uphill battle, however, for the same reasons that an overall ban on snus is very unlikely. Nevertheless, given the potential serious adverse effects on public health from the introduction of snus discussed above, an applicant may be unable to show that permitting the product to be marketed would be appropriate for the protection of public health. At the very least, through the pre-market approval process the FDA could ensure that any new snus products marketed are no less safe than the least harmful forms of Swedish snus.

Another important provision in the proposed legislation would require FDA approval before any tobacco product could be marketed as a "modified risk" product.¹⁴⁸ A modified risk product includes any product that through labeling, advertising, or actions through the media states or implies that there is a reduced risk of harm or reduced exposure to a substance associated with its use.¹⁴⁹ Although R.J. Reynolds and Philip Morris have thus far not made any reduced-risk claims in marketing their snus products, it has been suggested that Philip Morris supports passage of the FDA bill precisely so it may do so.¹⁵⁰

In approving an application to market a product as reduced risk, the FDA must find that the product, as actually used by consumers, will benefit the health of the population as a whole.¹⁵¹ This provision is key in ensuring that the "light" and

145. H.R. 1108 § 910(b); S. 625 § 910(b).

146. H.R. 1108 §§ 910(c)(2)(A), 910(c)(4); S. 625 §§ 910(c)(2)(A), 910(c)(4).

147. H.R. 1108 §§ 910(b)(2), 918(a)–(b); S. 625 §§ 910(b)(2), 918(a)–(b).

148. H.R. 1108 §§ 911(a); S. 625 § 911(a).

149. H.R. 1108 § 911(b); S. 625 § 911(b). Significantly, this definition includes use of the words "light," "mild," or "low," and therefore would rid the market of the infamous "Marlboro Lights" and other such products (unless they obtained FDA approval). H.R. 1108, § 911(b)(2)(A)(ii); S. 625 § 911(b)(2)(A)(ii). See *infra* note 155 and accompanying text.

150. Mike Beime, *Ahead of the Curve? Philip Morris Trying New Avenues*, BRANDWEEK, Oct. 29, 2007, http://www.brandweek.com/bw/news/packaged/article_display.jsp?vnu_content_id=1003664845.

151. H.R. 1108 § 911(g)(1)(B); S. 625 § 911(g)(1)(B).

“low-tar” cigarette disaster is not repeated.¹⁵² It requires a tobacco manufacturer, through scientific evidence, to demonstrate that its product will produce an overall health benefit, and provides special rules for allowing reduced exposure claims where conclusive evidence of reduced risk is not yet available.¹⁵³ Thus, this requirement could be used to effectively ensure that whatever health claims snus manufacturers make will not be false or misleading, but are estimated to be appropriate for the protection of public health. This provision could also ensure that manufacturers do not refer to the Swedish experience when marketing their products unless they have established that their products contain a similar potential to reduce individual health risks.

Several other provisions of the FSPA are significant. One provision grants the FDA authority to restrict the sale and advertising of a tobacco product to the full extent permitted by the First Amendment if the Secretary determines it would be appropriate for the protection of public health.¹⁵⁴ This is a “catchall” provision that could be used to help ensure that manufacturers do not market snus in a way likely to appeal to youth or to reduce smoking cessation.¹⁵⁵ Other provisions in the FSPA amend the Federal Cigarette Labeling and Advertising Act (FCLAA)¹⁵⁶ and the Comprehensive Smokeless Tobacco Health Education Act (CSTHEA)¹⁵⁷ to require new warning labels on cigarettes and smokeless tobacco products and increase the size of the warnings in proportion to their packaging.¹⁵⁸ Related sections of the FSPA grant the FDA authority to revise the required warning labels to a certain extent, such as by requiring color graphics accompanying the text, if it would promote greater public understanding of the risks associated with product use.¹⁵⁹

152. “Light,” “ultra light,” “low tar,” and similarly described cigarettes were initially manufactured and marketed in response to concerns about tar being one of the primary constituents responsible for the negative health consequences of smoking. See Amy Fairchild & James Colgrove, *Out of the Ashes: The Life, Death, and Rebirth of the ‘Safer’ Cigarette in the United States*, 94 AM. J. PUB. HEALTH 192, 193 (2004). However, these cigarettes proved no less dangerous than their conventional counterparts. As a result, smokers who switched to light cigarettes instead of quitting altogether actually suffered greater harm. See *supra* notes 22–23 and accompanying text.

153. H.R. 1108 § 911(g)(2)–(4); S. 625 § 911(g)(2)–(4).

154. H.R. 1108 § 906(d)(1); S. 625 § 906(d)(1).

155. Current snus marketing in the U.S. is aimed at smokers and encourages using snus as a complement to cigarette use. See *supra* notes 83–84 and accompanying text. Because such use would be unlikely to produce a public health benefit, presumably such marketing could be regulated or proscribed to the extent permitted by the First Amendment.

156. 15 U.S.C. §§ 1331–1341 (2000).

157. 15 U.S.C. §§ 4401–4408 (2000).

158. H.R. 1108 §§ 201, 204, 906(d)(1); S. 625 §§ 201, 204, 906(d)(1). The new warnings must occupy at least 30% of the front and rear panels of the package and 20% of any related advertisements. H.R. 1108 §§ 201(2)(A), 204(b)(2)(A); S. 625 §§ 201(2)(A), 204(b)(2)(A).

159. H.R. 1108 §§ 202, 205; S. 625 §§ 202, 205.

Using these provisions to indeed require graphic warning labels could help discourage youth from using all tobacco products—snus included.¹⁶⁰

Finally, another provision in the proposed legislation mandates that cigarettes not contain any kind of flavoring other than tobacco, menthol, or herbs and spices, and specifically lists a variety of fruit and candy flavors that are prohibited.¹⁶¹ This rule does not apply to smokeless products; however, the FDA may adopt other tobacco product standards that the Secretary finds are appropriate for the protection of public health.¹⁶² It has been recognized that tobacco manufacturers use fruit and candy flavorings in their products primarily as a way to appeal to youth; in fact, internal tobacco company documents state that new smokeless tobacco users (who are likely to be under eighteen years of age) often start by using products that are milder tasting and more flavored.¹⁶³ Therefore, while it would be preferable for the FSPA to explicitly exclude smokeless tobacco manufacturers from using such flavors, this provision at least allows for the possibility that the Secretary would promulgate such a restriction in the future.¹⁶⁴

Although congressional approval of the FSPA in its current form would be a huge step for tobacco control, the proposed legislation nevertheless has shortcomings that cast doubt on how effective it would be in protecting the public health from the harms of tobacco use. To be effective, a bill must do more than

160. Maansi A. Bansal et al., *Do Smokers Want to Know More about the Cigarettes They Smoke? Results from the EDUCATE Study*, 6 NICOTINE & TOBACCO RES. (SUPP.) 289, 300 (2004) (“[E]vidence is now emerging that graphic health warnings . . . are more effective than text-based warnings. . . . [because] . . . viewers [can] imagine the disease more easily . . . [and] perceive the health threat as more likely.”) (citation omitted); E.J. Strahan et al., *Enhancing the Effectiveness of Tobacco Package Warning Labels: A Social Psychological Perspective*, 11 TOBACCO CONTROL 183, 188 fig.5 (2002) (outlining tobacco packaging strategies for enhancing effectiveness of warning labels).

161. H.R. 1108 § 907(a)(1); S. 625 § 907(a)(1).

162. H.R. 1108 § 907(a)(3); S. 625 § 907(a)(3).

163. BOONN, *supra* note 12, at 2–3; accord Carrie M. Carpenter et al., *New Cigarette Brands with Flavors that Appeal to Youth: Tobacco Marketing Strategies*, 24 HEALTH AFF. 1601, 1603–05 (2005) (reviewing industry research on flavored cigarettes); M. Jane Lewis & Olivia Wackowski, *Dealing with an Innovative Industry: A Look at Flavored Cigarettes Promoted by Mainstream Brands*, 96 AM. J. PUB. HEALTH 244, 244 (2006) (discussing tobacco industry flavor innovations); Carmen Phillips, *Young Adults and Flavored Cigarettes: A Bad Combination*, NCI CANCER BULL., Mar. 14, 2006, at 3, 3, available at http://www.cancer.gov/NCICancerBulletin/NCI_Cancer_Bulletin_031406.pdf (discussing tactics used to lure younger adults to smoking). An illustrative Lorillard Tobacco Company memorandum explained that “Tutti Frutti” flavored cigarettes were described as “for younger people, beginner cigarette smokers, teenagers . . . when you feel like a light smoke, want to be reminded of bubblegum.” R.M. MANKO ASSOCS., SUMMARY REPORT NEW FLAVORS FOCUS GROUP SESSIONS 17 (1978), available at <http://tobaccodocuments.org/lor/85093450-3480.html?pattern=85093450-3480#images> (presenting focus group research data to Lorillard Tobacco Company regarding Lorillard’s new tobacco products and flavors).

164. As currently marketed, however, this provision would be unlikely to affect the current offering of Camel Snus products, which come in frost, spice, and original, or Marlboro Snus products, which are manufactured with rich, mild, mint, and spice. Camel Snus, *supra* note 1; Philip Morris USA, *supra* note 18.

create “FDA-approved” traditional tobacco products.¹⁶⁵ One criticism of FDA regulation of tobacco in general is that it would provide an impenetrable litigation shield for the tobacco industry.¹⁶⁶ Although the FSPA contains a provision stating that it should not be read to modify any type of state law liability,¹⁶⁷ an FDA “seal of approval” on tobacco products could nevertheless affect jury decisions and be used to defend against high punitive damage awards in product liability lawsuits.¹⁶⁸

FDA regulation of tobacco could also be used as an effective litigation shield, and an effective public relations tool in general, by companies such as Philip Morris who support the legislation. Indeed, Philip Morris’s support of the proposed legislation has been cited as one of the FSPA’s major flaws.¹⁶⁹ The company’s open support for the legislation is explained by its desire to gain legitimacy through image enhancement; Philip Morris’s polling data found that the percentage of adults with an unfavorable image of the company was substantially reduced with knowledge that the company supported FDA regulation.¹⁷⁰ Besides the company’s desire to redefine itself as socially responsible, Philip Morris probably regarded some form of regulation as inevitable, and thus decided to work to ensure that such regulation was as favorable as possible as well as to alter its practices to comply with such regulation now so as to gain an early advantage over its competitors.¹⁷¹

Another criticism of the proposed legislation is its clear preemption of state and local tobacco regulations.¹⁷² The FSPA contains provisions explaining in what areas the states are preempted from regulating and amending the FCLAA’s preemption section.¹⁷³ According to these provisions, states are preempted from passing regulations involving tobacco product standards, pre-market approval, labeling, and advertising content, among other things, but are not preempted from passing time, place, and manner restrictions on advertising, even if based on smoking and health.¹⁷⁴ The Act does not amend CSTHEA preemption; however, that Act has a narrower preemption provision than the FCLAA.¹⁷⁵ A better approach from a tobacco control standpoint would be to enact a bill with no federal

165. Kozlowski et al., *supra* note 21, at 372.

166. Michael Givel, Commentary, *FDA Legislation*, 16 TOBACCO CONTROL 217, 217 (2007).

167. H.R. 1108 § 917; S. 625 § 917.

168. Givel, *supra* note 166, at 217; *see also* Christopher Banthin & Richard Daynard, *Room for Two in Tobacco Control: Limits on the Preemptive Scope of the Proposed Legislation Granting FDA Oversight of Tobacco*, 11 J. HEALTH CARE L. & POL’Y 57, 58 (2008).

169. *Cheerios Are Regulated—Why Not Cigarettes?*, USA TODAY, Sept. 12, 2007, at 10A.

170. McDaniel & Malone, *supra* note 115, at 194.

171. *Id.*

172. Givel, *supra* note 166, at 217.

173. H.R. 1108, 110th Cong. §§ 917, 203 (2007); S. 625, 110th Cong. §§ 917, 203 (2007).

174. H.R. 1108 § 203; S. 625 § 203.

175. Micah Berman, *Tobacco Litigation Without the Smoke?*, 11 J. HEALTH CARE L. & POL’Y 7, 26 n.114 (2008).

preemption of advertising restrictions; however, preemption of tobacco product standards and pre-market approval regulations is probably necessary.

Despite the FSPA's shortcomings and its backing from Philip Morris, the best option for controlling tobacco in general and responding to snus in particular is to pass the proposed legislation because the current alternative is to do nothing. The Act nearly passed in 2004,¹⁷⁶ and now, four years later, a major federal agency charged with protecting the public health still lacks authority to regulate a product that is one of the leading causes of death among Americans.¹⁷⁷ In the absence of regulation, any smokeless tobacco product can be called "snus."¹⁷⁸ If nothing prevents snus from being introduced across America—as will likely happen sometime in 2008—then, at a minimum, there must be regulation in place that can ensure that no false health claims are made about snus, and that snus is not marketed to youth.

C. *Using Public Health Strategies at the State Level*

*"Increasing smokeless tobacco excise taxes, mass media countermarketing campaigns, school-based and other educational efforts, and prevention and cessation counseling . . . are necessary to sustain the declining use of both smokeless tobacco and cigarettes."*¹⁷⁹

Whether or not the bill granting the FDA authority to regulate tobacco is ultimately passed, state public health officials must use other means to respond to Big Tobacco's introduction and marketing of snus. Price, advertising, and public health messages all significantly influence behavior,¹⁸⁰ and public health officials must control these factors as they relate to snus to prevent snus from causing the next crisis in tobacco control and undermining the progress that has already been achieved.

First, the tobacco control community should work with legislators to pass appropriate excise taxes on snus. Increasing the price of a tobacco product through an excise tax can help reduce the amount consumed by current users as well as discourage initiation, and such effects are particularly pronounced among young people.¹⁸¹ For a tax on snus to have the desired effect, however, manufacturers must not be able to avoid the effect of a price increase by offering more frequent

176. Campaign for Tobacco-Free Kids, *supra* note 137.

177. Ali H. Mokdad et al., *Actual Causes of Death in the United States, 2000*, 291 JAMA 1238, 1239–40 (2004).

178. BOONN, *supra* note 12, at 1.

179. Nelson et al., *supra* note 4, at 903 (emphasis added).

180. Foulds & Kozlowski, *supra* note 15, at 1977.

181. Henningfield et al., *supra* note 22, at i19.

deals, such as buy one/get one free.¹⁸² Manufacturer discounts and free sample offers for potentially reduced-exposure cigarettes such as Eclipse® played a key role in encouraging new users to try those products,¹⁸³ and similar promotions may also have a significant effect on who decides to try snus. Already, R.J. Reynolds has begun offering a free tin of Camel Snus with the purchase of a tobacco product in test-market cities and snus coupons have been distributed to college students.¹⁸⁴ Because these kinds of promotions have the potential to vastly increase the number of people willing to try snus, state officials must act quickly to pass legislation that effectively eliminates such promotions.¹⁸⁵

Second, the tobacco control community should work to send a consistent public health message regarding snus at both the national and the state level. Although the new snus products are still in the test-market stage,¹⁸⁶ more and more tobacco and non-tobacco users across the nation are learning about snus as news sources frequently weigh in on the potential harms and benefits. As Philip Morris and R.J. Reynolds expand their marketing of snus, potential consumers will be presented with sleek and effective marketing strategies to pique their interest. R.J. Reynolds executives realize the importance of consumer education in determining the success of snus, and want to be sure to “do it right.”¹⁸⁷ Thus, public health officials must make sure that these messages are not the only ones that youth and the rest of the public receive. The tobacco control community must get out the message that snus is addictive and unsafe. Rather than presenting snus as a completely different product from cigarettes or other forms of smokeless tobacco, it may be effective to link the products together and thus make use of the current message that tobacco use is an aberrant social behavior. As part of the public health campaign, tobacco control advocates must be careful not to allow snus to be perceived as “in” and not particularly harmful, so that youth, including athletes concerned about their health, will not be interested in and willing to try it.

Third, states can make use of MSA provisions to restrict the way in which R.J. Reynolds and Philip Morris market their new snus products. This approach is vital because as long as these two companies remain in control of marketing snus,

182. Sadly, even price-sensitive consumers will purchase costly tobacco products if they have developed an addiction, which is what tobacco companies hope to achieve with freebies or deep discount-coupons. See Thomas D. MacKenzie et al., *The Human Costs of Tobacco Use*, 330 NEW ENG. J. MED. 975, 976 (1994) (demonstrating that tobacco companies use promotional expenditures to increase consumption through tactics such as distributing free cigarettes).

183. R.S. Caraballo et al., *New Tobacco Products: Do Smokers Like Them?*, 15 TOBACCO CONTROL 39, 41 (2006).

184. *R.J. Reynolds Expands Snus Tests*, *supra* note 17; Eyre, *supra* note 120, at 1C.

185. E.g., CAL. HEALTH & SAFETY CODE ANN. § 118950(a)(10)(b)-(c)(1) (West Supp. 2008) (prohibiting the use of gift certificates, gift cards, and similar offers when used in the distribution of free tobacco products as of Jan. 1, 2008).

186. E.g., Vanessa O’Connell, *Marlboro Brand Goes Smokeless*, WALL ST. J., June 9, 2007, at A3.

187. Conference Call by Reynolds Am., Inc., *supra* note 84.

the introduction of snus is certain to have a negative effect on public health as the companies promote the dual use of cigarettes and snus and seek to expand their consumer base.¹⁸⁸ MSA provisions that restrict the promotion of “tobacco products” apply to the marketing of these new snus products because the MSA definition of “tobacco products” includes both cigarettes and smokeless tobacco, and the snus manufacturers, Philip Morris and R.J. Reynolds, are parties to the MSA.¹⁸⁹ Relevant MSA provisions include the prohibition of youth targeting in tobacco product advertising, the ban on youth access to free samples, and the prohibition of material misrepresentations regarding the health consequences of tobacco products.¹⁹⁰ The youth-targeting prohibition is particularly important. R.J. Reynolds was judicially found to have violated the MSA through its advertising of Camel cigarettes in magazines having substantial teen readership.¹⁹¹ Another case resulted in a settlement between state Attorneys General and R.J. Reynolds in which Reynolds agreed to stop marketing a long list of flavored cigarette products.¹⁹² If Reynolds or Philip Morris were to return to their old (or not-so-old) marketing ways in promoting snus, an action by state Attorneys General to enforce the provisions of the MSA may be successful in stopping them. At the very least, such a lawsuit would bring the companies’ youth-targeting practices to the public’s attention.¹⁹³

Fourth, state Attorneys General can also make use of state consumer protection laws to ensure that R.J. Reynolds and Philip Morris do not make any false or misleading statements with regard to the relative safety of snus. Under consumer protection laws, state Attorneys General may seek an injunction against an entity that has committed an unfair or deceptive trade practice and prohibit the

188. Berman, *supra* note 175, at 47; *see also* Chapman, *supra* note 20, at 48 (“The tobacco industry has shown itself to be resourceful, rapacious and duplicitous in . . . sales maximisation [sic], and any notion that they would be disinterested in the youth market, in providing nicotine substitutes for smoking ‘downtime,’ and in preventing smokers from abandoning tobacco use altogether is naïve.”).

189. Berman, *supra* note 175, at 20–21. Of course, manufacturers not subject to the MSA could not be held to this standard.

190. Nat’l Ass’n of Att’y Gen., Master Settlement Agreement §§ III(a), (g), (r) (1998), *available at* <http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/> (follow “Master Settlement Agreement” hyperlink).

191. *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, No. GIC 764118, 15–18 (Super. Ct. San Diego County June 6, 2002), *available at* http://ag.ca.gov/newsalerts/cms02/02-067-rj_ad_1.pdf (Statement of Decision ordering R.J. Reynolds to pay \$20 million in sanctions and to comply with the MSA’s prohibitions against youth targeting in print advertising).

192. Press Release, Office of N.Y. State Att’y Gen., Attorney’s General and R.J. Reynolds Historic Settlement to End the Sale of Favored Cigarettes (Oct. 11, 2006), http://www.oag.state.ny.us/press/2006/oct/oct11a_06.html. A copy of the Settlement Agreement is available at <http://www.oag.state.ny.us/press/2006/oct/flavored%20settlement.final.pdf>.

193. Berman, *supra* note 175, at 22–25.

entity from making any false or misleading statements in the future.¹⁹⁴ An actionable unfair or deceptive act may include statements that are express or implied, oral or written.¹⁹⁵ Thus, if any of the companies' statements imply that use of snus involves little risk of harm or involves less harm than other forms of tobacco use, states should investigate whether the companies have actual scientific evidence to support those claims.

As discussed above, the public health community has very little information about the health effects of Camel Snus, Marlboro Snus, or Taboka because the products are so new.¹⁹⁶ It is not clear how these products compare to Swedish snus in terms of TSNA and nicotine levels, and the products' long-term health effects also remain unknown.¹⁹⁷ However, it is clear that snus is not a safe product,¹⁹⁸ and to the extent that tobacco companies imply that it is relatively safe without reliable information to substantiate that claim, they are misleading consumers. The outcome of such a claim is not certain to be favorable; however, given the broad purpose of state consumer protection statutes of protecting consumers from injury, a judge could certainly conclude that making implied claims of health benefits without reliable evidence violates such statutes.¹⁹⁹

D. Focus on Improving Alternative Sources of "Clean" Nicotine

"Our lack of greater progress in tobacco control is more the result of failure to implement proven strategies than it is the lack of knowledge about what to do."²⁰⁰

The concept of the public health community promoting an alternative form of nicotine delivery—smokeless tobacco or snus—to decrease smoking raises the question of why such products should be promoted over products that deliver

194. *E.g.*, Consumer Protection Act, MD. CODE ANN., COM. LAW §§ 13-301, 13-406 (West 2002). State consumer protection laws are modeled after the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2000).

195. James C. Miller III, Chairman of the Federal Trade Commission, FTC Policy Statement on Deception (Oct. 14, 1983), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> (defining the FTC's policy on deceptive acts to include "false oral or written representations").

196. See *supra* Part I.B.

197. *Id.*

198. Foulds & Kozlowski, *supra* note 15, at 1977.

199. Several state Attorneys General, led by Vermont's and including Maryland's, have sued R.J. Reynolds under Vermont's consumer protection statute and the MSA claiming that Reynolds has made false and misleading statements regarding the health consequences of using Eclipse®, a potentially reduced-risk cigarette product. Pet. for Contempt & Compl., Vermont v. R.J. Reynolds Tobacco Co., Nos. 744-97 CrC & S-816-98, at 1 (Super. Ct. Chittenden County filed July 26, 2005), available at http://www.atg.state.vt.us/upload/1125510625_Vermonts_Complaint_and_Petition.pdf.

200. Ctrs. for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., 2000 Surgeon General's Report—Reducing Tobacco Use (quoting David Satcher, Surgeon Gen.), http://www.cdc.gov/tobacco/data_statistics/sgr/sgr_2000/sgr_tobacco_aag.htm (last visited Mar. 25, 2008).

nicotine “cleanly,” that is, without the tobacco and other toxic additives.²⁰¹ While harm-reduction advocates support the message that smokeless tobacco is a “safer” alternative to cigarettes, smokeless tobacco products still deliver many known carcinogens and cannot be classified as safe as can NRT, or medicinal nicotine.²⁰² Encouraging NRT over smokeless tobacco not only eliminates health risks, but avoids the possibility of negating the gains the tobacco control movement has made in reducing smoking prevalence should these same advocates begin promoting smokeless tobacco use that could possibly progress to smoking.²⁰³ Those who support using snus as a public health tool must therefore be able to articulate what justifies its promotion as a smoking cessation product over NRT.

III. SMOKELESS TOBACCO IS NOT AN INHERENTLY BETTER CIGARETTE SUBSTITUTE THAN NRT

The primary justification offered for advocating snus or other smokeless tobacco products over NRT is that smokeless tobacco is likely to be more appealing to smokers and thus more likely to be used as a substitute for cigarettes.²⁰⁴ This argument should be given serious consideration because a cigarette substitute can only be effective in reducing tobacco-related harm if smokers actually use it. The argument also highlights a key difference between smokeless tobacco and NRT: smokeless tobacco has been formulated to create and sustain addiction, while NRT has been formulated for smoking cessation and not for long-term use.²⁰⁵ Thus, smokeless tobacco may be a better substitute because it feeds, rather than helps break, the nicotine addiction and tobacco-use habit. However, the addictiveness of smokeless tobacco, including snus, does not answer why smokeless tobacco is a more appealing alternative to NRT. Seventy percent of current adult smokers want

201. McKee et al., *supra* note 79, at 1206. Many people erroneously believe that nicotine is the harmful, cancer-causing substance in tobacco products. Saul Shiffman et al., *Smokers' Preferences for Medicinal Nicotine vs. Smokeless Tobacco*, 31 AM. J. HEALTH BEHAV. 462, 469 (2007).

202. Shiffman et al., *supra* note 201, at 462–63. Although some evidence points to possible disease risk from nicotine, NRT has been judged safe to use, even in the long-term. Lynn T. Kozlowski et al., *Advice on Using Over-the-Counter Nicotine Replacement Therapy—Patch, Gum, or Lozenge—to Quit Smoking*, 32 ADDICTIVE BEHAVIORS 2140, 2142 (2007); Shiffman et al., *supra* note 201, at 462.

203. See Shiffman et al., *supra* note 201, at 469 (comparing medicinal nicotine to smokeless tobacco and noting that smokeless tobacco raises concerns about progression to smoking). Unlike smokeless tobacco, there is no real concern that nonsmokers would respond to promotions of NRT as a smoking cessation tool by taking up NRT and then progressing to smoking. Although it has been suggested that NRT could possibly promote continued smoking by smokers who use it to help satisfy their cravings in smoke-free environments (similar to smokeless tobacco), there are no data supporting this as a public health problem. Kozlowski et al., *supra* note 202, at 2143. In fact, several countries have already accepted such use as an approved indication for NRT. *Id.*

204. Shiffman et al., *supra* note 201, at 463.

205. *Id.* at 470.

to quit smoking, and there is no reason to think they want to quit simply so they can become addicted to another form of tobacco.²⁰⁶

The argument of smokeless tobacco proponents rests on the assumption that current smokers do not mind being addicted to nicotine so much as they mind the health consequences of their addiction, and that if presented with a persuasive case to switch to a less harmful but still somewhat risky tobacco product, many would rather do so than switch to a clean form of nicotine.²⁰⁷ However, this assumption is unwarranted for several reasons. First, as previously mentioned, smokeless tobacco use is not a good substitute for smoking when it comes to satisfying one's need for nicotine.²⁰⁸ Smoking is the best form of nicotine delivery because breathing in smoke through the lungs gives the brain a "rush" of nicotine.²⁰⁹ Smokeless tobacco delivers nicotine more slowly.²¹⁰ In addition, smoking is a distinctive behavior that use of smokeless tobacco products does not replicate; this may also make smokeless tobacco a poor substitute. NRT is also a far from perfect substitute for smoking. However, other than the fact that it does not contain tobacco or the tobacco taste, there is no reason that a medicinal nicotine product could not be formulated to deliver nicotine as effectively as a smokeless tobacco product such as snus.

Second, this assumption is undermined by a study that sought to compare current smokers' interest in smokeless tobacco versus medicinal nicotine as a substitute for smoking and found that smokers expressed a "robust preference" for NRT over smokeless tobacco.²¹¹ The smokers were informed of the relative risks of

206. C. Tracy Orleans, *Increasing the Demand for and Use of Effective Smoking-Cessation Treatments*, 33 AM. J. PREVENTIVE MED. S340, S341 (Supp. 2007). Many NRT products come in varying levels of nicotine to allow a downward step-by-step progression toward a nicotine-free life. MARTIN RAW ET AL., ACTION ON SMOKING AND HEALTH, NICOTINE REPLACEMENT THERAPY 3 (2005), available at http://whyquit.com/NRT/NRT_Guidance_UK_1205.pdf. Snus or other smokeless tobacco products do not offer such benefits.

207. See Shiffman et al., *supra* note 201, at 469 (noting that smokeless tobacco proponents have argued for promoting smokeless tobacco products over medicinal nicotine based on the expectation that current smokers would prefer smokeless tobacco products).

208. Hatsukami et al., *supra* note 14, at S374.

209. Kozlowski et al., *supra* note 202, at 2146. The speed at which a product delivers nicotine to the body depends on the product pH, nicotine content, and route of administration, with cigarette smoking providing the fastest mode of delivery. Hatsukami et al., *supra* note 14, at S374.

210. The speed of nicotine delivery of smokeless tobacco products varies depending on the amount of free-nicotine (determined by nicotine content and pH level) in a specific product. Hatsukami et al., *supra* note 14, at S374–75. Free-nicotine levels vary widely among different smokeless tobacco products and have not yet been studied in the newer products. *Id.* at S375.

211. Shiffman et al., *supra* note 201, at 469. In the study, current smokers were presented with two sets of alternatives between smoke-free tobacco and tobacco-free nicotine. The first set of alternatives presented were "prototypical" forms — nicotine gum and smokeless tobacco. *Id.* at 463. The second set of alternatives presented were relatively novel forms — a lozenge for both NRT and smokeless tobacco. *Id.* In both cases, smokers expressed a preference for medicinal nicotine over smokeless tobacco, although the preference for medicinal nicotine was greater in the first set of alternatives. *Id.* at 469.

smoking and smokeless tobacco and still preferred the non-tobacco form of nicotine, suggesting that lack of information about relative risks is not the only barrier to the appeal of smokeless tobacco.²¹²

IV. NRT PRODUCTS AND THEIR USE MUST EVOLVE TO OFFER A MORE EFFECTIVE CIGARETTE SUBSTITUTE

Numerous studies and clinical trials have established NRT as an effective smoking cessation aid.²¹³ Various forms of NRT are available: the patch, gum, and lozenge are available over the counter; and oral inhalers, nasal spray, and non-nicotine medications in tablet form are available by prescription.²¹⁴ Overall, the products have similar efficacy and have been shown to double the odds of successfully quitting.²¹⁵ But despite the development and increased accessibility of effective NRT, the national annual quit rate has not changed much over the past twenty years.²¹⁶ Although 70% of current U.S. adult smokers say they want to quit, only 40% make a serious attempt each year, and only 15% to 20% of those who attempt to quit use NRT.²¹⁷ Thus, much of the potential of NRT to help smokers quit and reduce population smoking rates is not being realized. The public health community must work together with national and state governments to address the issues that are hindering the potential effectiveness of NRT.

One of the current problems with NRT is that many smokers do not believe it is effective,²¹⁸ and if used in the way currently recommended by the manufacturers, NRT actually may not be effective for many smokers. Currently, NRT labels recommend use for just eight to twelve weeks.²¹⁹ However, smokers should know that using NRT for longer periods is not dangerous; going back to smoking is dangerous.²²⁰ In addition, smokers not succeeding with standard recommended usage of one form of NRT should be encouraged to use a higher dose of NRT or to use more than one type of NRT at the same time—whatever will safely keep them from smoking.²²¹ For example, one safe and effective option to help prevent a

212. *Id.* at 469. The result would not necessarily be the same if the study were conducted with snus; however, the study suggests that current smokers may prefer to substitute cigarette use with use of a non-tobacco product, medicinal nicotine, rather than another tobacco product such as snus. *See id.*

213. Kozlowski et al., *supra* note 202, at 2141.

214. *Id.* at 2144–45.

215. Susan Thomas, *Smoking Cessation Part 2: Nicotine Replacement Therapy*, NURSING STANDARD, Oct. 10, 2007 44, 44.

216. Orleans, *supra* note 206, at S341.

217. *Id.*; Shiffman et al., *supra* note 201, at 463.

218. Kozlowski et al., *supra* note 202, at 2141.

219. *Id.* at 2146.

220. *Id.*

221. *Id.* at 2146–47. The public health community can help by communicating to smokers that NRT is an effective smoking cessation aid and that if NRT has not worked for them in the past, there are other ways to safely use NRT that may be more effective. *Id.* at 2147.

smoking relapse is to use nicotine gum or a lozenge in addition to the patch at a time when it is especially hard to keep from smoking, but many smokers do not realize this.²²²

Another problem with NRT is that the stark regulatory disparity between cigarettes and NRT may lead smokers to believe NRT is more dangerous than it actually is.²²³ NRT is regulated to ensure that it meets quality and safety standards, yet the extensive health warnings and instructions it contains may give some smokers a false sense of risk; by contrast, cigarettes are unregulated and their packages contain only a brief health warning.²²⁴ A false sense of risk regarding NRT is also a result of many smokers' inaccurate belief that nicotine (instead of tobacco) is the toxic agent in cigarettes.²²⁵ Correcting such misperceptions is a crucial step in advancing the effectiveness of NRT as a smoking cessation aid population-wide.

Also hindering the successful use of NRT is its cost. NRT costs significantly more than cigarettes and is not available in small quantities, two factors that may dampen its appeal to or even prohibit its use by smokers, especially those of lower socio-economic status—the same demographic who are most likely to smoke.²²⁶ Fortunately, cost is one factor that can be modified to reduce the burden on smokers attempting to quit using NRT, and reducing cost has been shown to lead to increased utilization. For example, in 1999 the United Kingdom began a comprehensive effort to expand the utilization of NRT to treat tobacco dependence, which included making all NRT products reimbursable.²²⁷ This policy succeeded in increasing the total use of NRT.²²⁸ Advocates of such a strategy point out that just as higher cigarette taxes and prices have been shown to discourage tobacco use, NRT use can be encouraged by making it less expensive.²²⁹ Some state and private insurers in the U.S. have begun to assist smokers with paying for NRT, and such programs have significant potential to increase the number of successful quitters.²³⁰

222. *Id.*

223. *Id.* at 2142.

224. *Id.*

225. Shiffman et al., *supra* note 201.

226. Kozlowski et al., *supra* note 202, at 2142–43.

227. R. West et al., *Impact of UK Policy Initiatives on Use of Medicines to Aid Smoking Cessation*, 14 TOBACCO CONTROL 166, 166 (2005).

228. *Id.* at 169, 171. Key to its effectiveness was that the policy change was widely publicized and was part of a coordinated tobacco control strategy by the Department of Health. *Id.* at 171.

229. Kozlowski et al., *supra* note 202, at 2143. However, reducing the cost of NRT so it is comparable to the cost of smoking may not be enough. Whereas the money a smoker is willing to spend on cigarettes is influenced by addiction and by the pleasure received from smoking, smokers using NRT encounter the discomfort of stopping smoking and must overcome this cost as well when purchasing NRT. *Id.*

230. Shu-Hong Zhu et al., *Smoking Cessation With and Without Assistance*, 18 AM. J. PREVENTIVE MED. 305, 309–10 (2000). When NRT was available by prescription, many consumers paid much less

Finally, and most importantly, the public health, scientific, and regulatory communities must collaborate to develop NRT products that are more appealing to smokers and more responsive to their long-term needs for staying tobacco free. Current medicinal nicotine products contain relatively low doses of nicotine and were developed for short-term use to help smokers quit.²³¹ Thus, there is “much room and opportunity to formulate [new NRT] products with consumer appeal in mind”²³²—products that offer more long-term options for smokers who cannot break their nicotine addiction in just twelve weeks, and that offer a better substitute for cigarettes than snus and other smokeless tobacco products. Developing improved products will also promote NRT use by providing a new option for smokers who have negative impressions about current NRT products or have used them unsuccessfully in the past.

The tobacco control environment has been set so that now is a promising time to capitalize on the potential for NRT products to help smokers quit. Many pieces are in place for a substantial increase in smoking cessation rates, including higher tobacco taxes, clean indoor-air laws, and cessation campaigns in the media.²³³ The tobacco industry is aware of the current strong public anti-smoking attitude and that it is becoming more difficult for smokers to maintain their habit. The industry, in the interest of self-preservation, has responded by introducing a new product—snus—for use when smokers may not or choose not to smoke.²³⁴ The public health community must respond as well. Rather than join forces with the tobacco industry by supporting the use of snus, thereby aiding the industry’s goal of increasing the number of people addicted to tobacco products, the public health community should construct its own response that will serve the goals of tobacco control. Such a response must include developing new NRT products and increasing their accessibility and appeal to smokers through education and price-decreasing measures. If the public health community is going to promote another form of nicotine delivery as an alternative to cigarettes, then it should promote a product that is safe, that is appealing to consumers, and that will not create a new tobacco crisis.²³⁵ Snus does not fit those criteria.

for it because their insurers covered most of the cost. *Id.* Hence, encouraging or legally requiring insurers to cover over-the-counter NRT may help increase access to and use of NRT.

231. KATHLEEN MEISTER, AM. COUNCIL ON SCI. & HEALTH, HELPING SMOKERS QUIT: A ROLE FOR SMOKELESS TOBACCO? 4 (2006), available at <http://www.heartland.org/pdf/19896.pdf>.

232. Shiffman et al., *supra* note 201, at 470. Already, about 6% of smokers who use nicotine gum to help them quit keep using it for at least six months. *Id.* at 463. This suggests that smokers may be interested in more continuous use of NRT products to help them stay smoke free. *Id.* at 470.

233. Orleans, *supra* note 206, at S341.

234. Hundley, *supra* note 54, at C1.

235. Shiffman et al., *supra* note 201, at 470–71 (“If it is deemed appropriate policy to promote alternative forms of nicotine delivery . . . products that are safest and most appealing to smokers should be the focus of such public health strategies.”).

CONCLUSION

*“[T]here is no natural law that says that [thirty] percent of the population should be nicotine addicts.”*²³⁶

The tobacco control community already may be running out of time to craft a cohesive response to the new snus products that R.J. Reynolds and Philip Morris have brought to the market and are preparing to make available and promote on a wide scale. Although some experts argue that snus is relatively harmless—and maybe even beneficial for public health—in reality snus could potentially destroy much of the progress the tobacco control community has thus far achieved. Rather than aid the tobacco industry in its effort to sustain and increase tobacco use in the U.S., the public health community must independently take steps to continue solving the tobacco problem. Because snus is a new step by the tobacco industry to maintain its economic success and increase the appeal of tobacco products to U.S. consumers, the public health community must also take new steps. Such steps include arguing for a ban on snus; supporting passage of the FDA bill currently being considered by Congress; encouraging states to pass taxes on the sale of snus; launch education and marketing campaigns to discourage snus use; and enforce the MSA provisions and consumer protection laws against the tobacco industry in its marketing of snus; and promoting the development of new NRT products that will provide an alternative form of “clean nicotine” for current tobacco users. These steps are consistent with the long-term goals of tobacco control and must be implemented before snus creates a new tobacco crisis in the U.S.

236. Hundley, *supra* note 54, at C1 (emphasis added) (quoting Goran Pershagen, Professor Envntl. Hygiene at Stockholm’s Karolinska Inst.).

