



## **Response to Advance Notice of Proposed Rulemaking on Non-Face-to-Face Sale and Distribution of Tobacco Products and Advertising, Promotion, and Marketing of Tobacco Products**

*Prepared by:*

**Rebecca S. Willams, MHS, PhD**

**Kurt M. Ribisl, PhD**

**Catherine Jo, BA**

*at* **University of North Carolina at Chapel Hill**

This document is written in response to the advance notice of proposed rulemaking (ANPRM) issued by the Food and Drug Administration: 21 CFR Part 1140 [Docket No. FDA–2011–N–0467] RIN 0910–AG43 for the Non-Face-to-Face Sale and Distribution of Tobacco Products and Advertising, Promotion, and Marketing of Tobacco Products. Drs. Williams and Ribisl have worked together for twelve years, studying the sales and marketing practices of websites that sell tobacco and alcohol products. We have published our research in peer-reviewed journals on the topic<sup>1-5</sup> as well as a chapter in the Institute of Medicine report *Ending the Tobacco Problem*.<sup>6</sup> We have relied on our work and that of others published in the scientific literature to guide our responses to the questions in the ANPRM. We have routinely shared our findings with policymakers in an effort to guide regulatory efforts, and we welcome this opportunity to provide the FDA with our latest findings and help inform the policy making process.

The non-face-to-face sale and distribution of tobacco products have historically undermined the effectiveness of tobacco control policies in two primary ways: facilitating youth access to tobacco by ineffectively verifying the age of customers, and facilitating the evasion of state and federal excise taxes. The Family Smoking Prevention Tobacco Control Act (FSPTCA) gives the FDA authority to restrict the sale and distribution of tobacco products (Sec. 906(d)(1), and with this authority, the FDA can create regulations restricting or even prohibiting non-face-to-face sales. These sorts of tobacco sales should be permitted only if strong policies regulating age verification and tax remittance for online sales can be effectively implemented and enforced.

Considering that nearly all smokers become addicted to tobacco while they are children (FSPTCA, Sec. 2 (4)), preventing youth from starting and continuing to smoke remains a prime objective of the FSPTCA and public health policy at the federal, state, and local level. While the development of effective age verification programs for face-to-face tobacco transactions has been a priority in tobacco control programs for many years, comparatively little attention has been given to the development of effective age verification for non-face-to-face sales, where the potential for evasion of age verification requirements is much greater due to the non-face-to-face nature of the

transaction. As will be described in detail in the ANPRM response that follows, most age verification strategies currently in use by the online tobacco sales industry are ineffective, and those with greater rigor are rarely used. Further research is needed to determine the full extent to which age verification strategies with higher rigor are used and the extent to which they prevent youth access, as well as to develop, and implement, and enforce an effective protocol for verifying the age and identity of customers in non-face-to-face transactions.

A second important issue with regard to non-face-to-face tobacco sales is the evasion of state and federal excise taxes. Smokers (particularly youth smokers) are cost-sensitive, and increasing tobacco prices has been shown to be the most effective way to encourage smokers to quit and/or reduce consumption.<sup>7</sup> In areas where there are high excise taxes, such as New York City, smokers may be paying in excess of \$110 per carton for Marlboros, but the same product can be found online for as cheaply as \$15.60,<sup>8</sup> making the cost savings of buying online very appealing to consumers and undermining the public health benefits of raising taxes in the first place. The availability of cheap cigarettes online also may drive down prices in face-to-face sales as offline sellers attempt to compete with Internet sellers. Internet sellers, particularly those located in areas outside the reach of state and federal law enforcement (i.e., Native American and international sellers) frequently advertise their products (falsely) as being tax-free and flaunt their non-compliance with US laws that require sellers to report details of sales to state and federal authorities to facilitate tax collection from buyers.<sup>6</sup>

In addition to administering regulations related to FSPTCA, the FDA will oversee the enforcement of the 2009 Prevent All Cigarette Trafficking (PACT) Act,<sup>9</sup> which includes provisions requiring age verification at both the points of sale and delivery, as well as for tax collection and reporting purposes. Sellers in several jurisdictions have challenged the legality of some of PACT's provisions, as described in detail in the ANPRM response prepared by the Campaign for Tobacco-Free Kids. The courts' decisions in some cases have been conflicting, with key provisions remaining under challenge, possibly diminishing the potential effectiveness of the PACT Act. Furthermore, there has yet to be an evaluation of whether the provisions of PACT are being complied with and/or effectively enforced, and to what extent remote sellers have found ways to adapt to the new regulations by, for example, arranging product deliveries through carriers not covered by PACT.

Non-face-to-face tobacco sales represent a major challenge to policy efforts to restrict youth access and collect taxes. Unless the FDA can develop, implement, and effectively enforce regulations to ensure that (1) minors are unable to obtain tobacco products through non-face-to-face sales and (2) state and federal taxes are collected on all non-face-to-face sales, such sales should be banned.

## **A. Non-Face-to-Face Sale and Distribution of Tobacco Products**

### **1. Other than direct mail, catalog, and Internet sales, what types of non-face-to-face sales and distribution methods are used to sell or distribute tobacco products to consumers?**

We are unaware of any other types of non-face-to-face sale and distribution methods currently being used for tobacco products. Clearly some vending machine sales meet this criterion, but they are already regulated by the FDA Center for Tobacco Products and have mostly been phased out.

## **2. Do the non-face-to-face sales and distribution methods differ depending on the type of tobacco product being sold (e.g., cigarettes, smokeless tobacco, or other products “made or derived from tobacco” subject to the Tobacco Control Act)? If so, how?**

The primary difference between the online distribution of cigarettes versus other tobacco products is that other tobacco products were not covered by the 2005 ATF agreements with credit card companies, PayPal, FedEx, DHL, and UPS, which banned the processing of transactions for Internet cigarette sales,<sup>10-13</sup> or by the 2009 Prevent All Cigarette Trafficking (PACT) Act, which banned the shipment of cigarettes via the US Postal Service.<sup>9</sup>

Websites for the online distribution of cigarettes and non-cigarette tobacco products, such as cigars and smokeless tobacco, have some overlap, given that some websites sell multiple categories of tobacco products. However, many such websites sell *only* cigarettes *or* smokeless tobacco *or* cigars, and the websites bear some differences from each other.

Our research has focused primarily on Internet *cigarette* vendors (ICVs). In 2011, we found 413 English-language websites selling cigarettes. We conducted content analysis of the 200 most popular vendors (based on visitor traffic) to assess the advertised sales practices of ICVs. The majority (51%) of them were located overseas (most focused on shipping to U.S. customers). Forty-two percent were located on U.S. territory and 7% were located on U.S. Native American reservations. Many cigarette vendors sold non-cigarette products. Eighteen percent sold e-cigarettes, 49% sold cigars, 11% sold smokeless tobacco, and 33% sold loose tobacco. We have not conducted a formal analysis of differences in the payment and shipping (distribution) systems of websites selling different tobacco products, but that would be possible.

## **3. What are the methods used by minors to acquire tobacco products through a non-face-to-face exchange?**

Substantial research evidence has shown that minors can *and do* acquire tobacco products from Internet vendors. Further details are provided below:

### **Minors can successfully buy tobacco products online**

- Bryant *et al* (2002) conducted a study to determine whether a young person could purchase cigarettes from an Internet vendor without providing proof of age. Of the 28 orders received by the vendor, 20 (71%) were filled and 4 orders (14%) were rejected because no proof of age was provided. Four orders were never received by the vendors, and four orders remained un-filled for other reasons. All purchase attempts were made using money orders.<sup>14</sup> Although the study used college students (not minors) to make test purchases, it was the first online purchase study to test age verification. Our team was the first to conduct a research study (described in more detail below) assessing minors' ability to purchase tobacco online using underage buyers.<sup>15</sup>
- Ribisl, Williams, and Kim (2003) conducted a study in which four 11 to 15 year olds attempted to purchase cigarettes from 55 ICVs located in 12 states, using a money order, a parent's credit card, or a prepaid Visa card marketed for teens.<sup>15</sup> Fifty of the 55 Internet vendors sold cigarettes to minors. Vendors sold to minors in 76 of 83 purchase attempts (92% success rate); successful

purchases occurred in 90% of money order purchase attempts and 94% of credit card purchase attempts.

Only nine (11%) vendors requested that the buyer submit a copy of their photo ID, the prevailing standard for age verification at retail outlets.<sup>16</sup> Proof of age was not provided for any vendors, but only four of those nine purchases were refused due to lack of ID. Furthermore, although six (10.7%) vendors stated on their websites that they verify age at delivery,<sup>17</sup> only one package arrived marked “Adult signature required for delivery.” More than 85% of the deliveries in the study were left at the door without any interaction with the recipient. Altogether, youth in this study received 1,650 packs of cigarettes from Internet vendors.<sup>16</sup>

- Jensen *et al* (2004) recruited minors aged 15 to 16 years (n = 36), instructed them to purchase cigarettes over the Internet, using their parents’ credit cards, and surveyed them on their experience. Almost all respondents (96.7%) were able to locate an Internet vendor and order the tobacco product on their own. Over three-fourths of the youths received the product in the mail, and 91% of deliveries were received without requests for proof of age.<sup>18</sup>
- Williams, Ribisl, and Feighery (2006) conducted a purchase survey assessing compliance with California’s law designed to prevent youth access to cigarettes from Internet vendors. The study used an adult buyer but employed a protocol which assessed whether vendors complied with each of the six provisions of California’s law. The study found that none of the 101 vendors from which purchases were made verified the age of the buyer in accordance with California law.<sup>2</sup>

### **Minors do buy tobacco products online**

- Unger, Rohrbach, and Ribisl (2001) conducted a survey on online tobacco purchasing behavior among a representative sample of 10<sup>th</sup> and 12<sup>th</sup> grade students in California (n = 17,181). Although only 2.2% of the respondents reported that they had ever tried to buy cigarettes on the Internet, 32% of those who had tried reported the Internet as the source of their most recent cigarette purchase. Attempts to purchase cigarettes on the Internet were higher among younger respondents, males, frequent smokers, and youth who reported lower perceived availability of tobacco products from retail and social sources.<sup>19</sup>
- Fix *et al* (2006) surveyed ninth grade students in western New York about their tobacco use and purchasing habits in 2000-2001 and 2004-2005 (n = 15,074). In the first wave, 2.3% of current smokers reported ever purchasing cigarettes through the Internet, and 1.7% reported purchasing online in the past 30 days. There was about a three-fold increase by the second wave, when 6.5% of current smokers reported ever purchasing cigarettes through the Internet, and 5.2% reported purchasing in the past 30 days. Approximately 9% reported that they *intended* to buy online in the next 30 days. Those students who were most likely to buy cigarettes online were those who were more frequent smokers and who had greater difficulty obtaining cigarettes from offline sources such as retail stores. Other factors associated with a greater likelihood of buying cigarettes online were male gender, age of 14 years or more, and non-white race.

a. **Which of these methods are minors most successful in using to obtain tobacco products?**

To our knowledge, there have been no empirical studies that have investigated minors' purchase of or success rate in purchasing tobacco products comparing results for websites, direct mail and catalog orders. The most recent studies of minors' online purchasing behavior took place before the passage of the 2005 ATF shipping and payment bans and before the 2009 PACT Act. There has been a gap in research following the PACT Act; further study is needed to assess if age verification systems have improved over time.

b. **What are the best data sources (other than Federal Government surveys) for information about the extent and character of such purchases by minors?**

The National Youth Tobacco Survey asks respondents about the source of the last pack of cigarettes that they bought and lists the Internet as an option.<sup>20</sup> We think that this survey is the best approach for surveillance on this issue, and that questions related to Internet tobacco purchasing should be expanded to provide more in-depth surveillance on the issue.

4. **Since the enactment of the PACT Act, have minors found alternative methods to purchase and/or acquire cigarettes or smokeless tobacco products by a means other than a face-to-face exchange? If so, what are they?**

We are not aware of any studies that have investigated this issue, and we believe that there is a pressing need to study whether *and how* minors purchase tobacco products from remote sellers.

5. **What are the current technologies, procedures, or other methods used to ensure that the purchaser of a tobacco product through a non-face-to-face exchange is an adult, including age and ID verification?**

In our research on Internet tobacco and alcohol sales, we have encountered several categories of strategies used to ensure that the purchaser is an adult. The proportion of the 200 most popular ICVs featuring each strategy in 2011<sup>8</sup> is included as a percentage below.

1. **False claims:** Some vendors *claim* to verify the age of their customers in ways that simply cannot accurately or legally determine buyers' age.
  - a. **Submitting order legally certifies buyer as adult (80%):** Vendor states that by signing or submitting your order, or by even viewing the products on the website, the user is legally certifying that they are of legal age. Example: "By viewing the products on this website, you are legally certifying that you are of legal age to purchase tobacco products."
  - b. **Accepting credit cards ensures buyers are adults (0.5%):** Vendor states that a policy of only accepting credit cards for purchases ensures that buyers are adults because minors cannot obtain credit cards. This is untrue; minors can have prepaid credit cards, cards on accounts opened by their parents, or debit cards on their own checking accounts. In 2003, Visa issued a statement that requiring credit cards for payment for age-restricted products was not an adequate safeguard.<sup>21</sup> Use of this strategy has fallen substantially following the 2005 ATF ban on using credit cards for Internet cigarette sales; in January 2005, prior to the ban, 15% of vendors asserted on their websites that accepting only credit cards for purchases ensured their buyers were adults.<sup>22</sup> In January

- 2011, 0.5% of vendors included such assertions on their websites.
- c. **Age verified using credit card number (1.5%):** Vendor states that they use customers' credit card numbers to verify their age. Online credit card processor Concord EFS confirmed that it is not possible to verify a customer's age using their credit card number.<sup>23</sup>
2. **Self-verification:** Self-verification strategies include those that ask the users to enter their date of birth or to 'verify' or 'certify' by clicking a checkbox or a button that they are of legal age to purchase the products they are buying. In these cases, bypassing age verification is as simple as lying (to a web page) about one's age.
    - a. **Checkbox or button (26.0%):** Vendor requires users to click a checkbox or a button indicating they are 18 or over.
    - b. **Date of birth (37.5%):** Vendor requires users to enter their date of birth on the website.
  3. **Online age verification:**
    - a. **Driver license number (6.0%):** Vendor requires users to type in their driver license number, *presumably* so that it can be verified against government databases of IDs using an online age verification service.
    - b. **Driver license image (8.5%):** Vendor requires users to submit a copy of their driver license via mail, email, or fax, which can be used to verify the ID against government databases or for visual inspection, as described below.
    - c. **Online age verification service (5.5%):** Vendor states that they use an online age verification service (e.g. IDology, IDVerify) to verify the identity details submitted with the purchase against government databases.
  4. **Visual inspection of ID:** Some vendors require customers to mail, email, or fax a copy of their driver license prior to fulfilling an order (see 3b. above). While this ID information could potentially be used in conjunction with an online age verification service (see 3c. above) to verify the ID information against government databases, some vendors rely solely on a visual inspection of an image of the ID to verify age. This strategy is vulnerable to minors using fake IDs or who have altered an ID with a graphics program like Photoshop. Without making purchase attempts, there is no way to discern what proportion of the 8.5% of vendors who say on their websites that they require buyers to submit a copy of their driver license actually verify it against government databases as opposed to relying on a visual inspection of the IDs.
  5. **Age verification at delivery (17.0%):** Seventeen percent of vendors *advertise* on their websites that they require age verification via photo ID at delivery. (The percentage of vendors who actually ship products and require age verification at delivery varies. In our research, we observed that some vendors state that they require age verification at delivery but do not do so in practice, and some ship products with age verification at delivery without having stated on their website that they will do so). Furthermore, in our research we have observed that some vendors paid for the age verification at delivery services offered by UPS and FedEx, whereas other simply typed something such as "Age Verification Required at Delivery" on the return address label without paying for the age verification service. In the latter case, the delivery agent would not be notified of the age verification requirement nor would they be required by company policy to verify the age of the recipient. Moreover, there is evidence that age verification at delivery is ineffectively administered by the companies (FedEx and UPS) that offer it as an option to sellers. In our 2011 underage purchase survey from Internet alcohol vendors,<sup>24</sup> in 47% of cases where UPS or FedEx delivery drivers attempted to verify the age of recipients, they failed, delivering the packages to underage recipients either after merely asking the recipient's age or after examining a vertically-oriented license, which clearly noted in the brightly colored border around the photo the date on which the bearer would turn 21.

6. **Challenge questions:** Some online age and identity verification services, such as Aristotle,<sup>25</sup> IDVerify, ID Verification, PreciseID, ExpectID, and InstantID<sup>26</sup> use “challenge questions” to attempt to verify that the person submitting an application is, in fact, the owner of the ID information being submitted. After a person’s submitted identity information is checked against public records databases and verified as a valid identity, the age verification service then asks questions in an attempt to verify that the submitter is the owner of the ID. Based on information available in public records databases, the applicant is asked several multiple choice questions whose answers are unlikely to be known by anyone else. For example, an applicant might be asked, “Which of these models of automobiles did you own in 1995?” or “With which one of these companies have you ever had a mortgage?” To our knowledge, no studies to date have assessed the use or effectiveness of challenge questions. To do so would require attempting purchases using an ID that could be successfully verified against government databases, to determine whether challenge questions would be offered and whether they would successfully block access.

While challenge questions potentially represent a substantial increase in age verification rigor over simply using ID information to verify that the ID submitted belongs to an adult, it is essential that their efficacy be tested in actual use. Previous studies of online age verification have been limited by placing artificial limitations on the strategies that youth participants may use in their attempts to bypass age verification, such as not allowing participants to commit identity theft by using a friend, parent, or stranger’s ID (despite the fact that real life teens do not face these restrictions). We strongly recommend that the FDA undertake investigations to determine the efficacy of age verification strategies such as verifying ID information in commercially available databases and the use of challenge questions. If these investigations determine that no existing age verification programs effectively prevent youth sales, then FDA should give serious consideration to banning non-face-to-face sales of tobacco products, as any benefits these sales may provide are strongly overshadowed by the increased access to tobacco products they provide to minors.

**a. How effective are these methods at preventing minors’ access to tobacco products through a non-face-to-face exchange?**

We recently conducted a study investigating the ease with which minors could find ways to bypass the online age verification strategies used on tobacco company brand marketing websites.<sup>27</sup> While this study was of brand *marketing* websites – not websites that *sell* tobacco – the types of age verification strategies we encountered were similar to those we have encountered on tobacco vendor websites, and it provides evidence for the effectiveness of different types of youth access prevention strategies.

In the study, 21 youth were given a randomly ordered list of 20 tobacco company brand marketing websites and told to try to gain access to the content, bypassing any age verification they encountered along the way. In an attempt to mimic the real-world situation in which most teens attempting to bypass online age verification find themselves, we did not give them information about the strategies they might encounter nor did we provide suggestions for *how* to bypass online age verification. Instead, we allowed them to search online for information that might help them figure out how to bypass any age verification roadblocks they encountered. They were allowed to use any tactic they could come up with, *except* the illegal

tactics of hacking or identity theft (such as using a parent, friend, or stranger's ID).

To mimic the potential circulation of this sort of information among peer groups, after visiting all of the websites in the study sample, the youth participated in focus groups where they discussed the age verification strategies they had encountered and the tactics they tried (successfully or not) to bypass them. Following the focus groups, they visited each of the websites a second time, in order to determine whether the dissemination of information among the peer group improved their success rates at bypassing online age verification.

In the study, websites that used self-verification strategies granted access to youth nearly all the time. Websites that used no verification or that used a checkbox/button to verify age failed to prevent youth access 100% of the time. Those requiring users to enter their date of birth failed to prevent youth access 82% of the time.

R.J. Reynolds had eight different websites in the study sample. The websites requested (as an *option*) that users submit their social security number or driver license number. Youth were often able to bypass this age verification strategy by searching for and using a website that generated a fake social security number or complete fake identity. They also had success Googling driver license images and using driver license numbers they found alongside their own or a made up name. The fact that made up or unverifiable information resulted in successfully accessing the websites in 42% of attempts indicates that it was unlikely that the submitted information was being verified against government databases.

The most effective strategy encountered in our study for online age verification was in use at Philip Morris's Marlboro.com and three websites for Lorillard's Newport brand. They all required that the buyer submit their driver license number to complete age verification. Unlike with R.J. Reynolds' websites, entering fake or made up driver license information did not grant access to the websites, indicating that it is likely that the submitted information was being verified against government databases. Only one participant was able to bypass the age verification on websites using this strategy (on Marlboro.com), and he was not able to repeat his success on his second visit to the website.

It is worth noting that study participants expressed in the focus groups how easy it was to find driver license images on Google and Yahoo's image search engines. Had they not been barred by study protocol from committing identity theft, the participants suspected that using such a verifiable ID would have allowed them to successfully gain access to the websites. Furthermore, the participants *overwhelmingly* said that not only could they easily gain access to their parents' IDs for use in bypassing online age verification but that they had no qualms about doing so.

Our study results indicated that when youths were not allowed to use another's ID, the most effective strategy for online age verification was requiring submission of a driver license number to be verified against government databases. However, the study also indicated that minors are willing and able to use somebody else's ID to bypass this sort of age verification, so it may not be an appropriate solution.

Because this study was assessing youths' ability to bypass age verification to view website content – not to purchase products – we were unable to assess the effectiveness of age



verification at delivery as a means of preventing youth access. However, we recently conducted a study of Internet alcohol vendors where we had 18 to 20 year olds buy alcohol from 100 vendors to determine the ease with which they could do so without providing any ID other than their own real ID.<sup>28</sup> Many packages in the study were delivered by UPS or FedEx and marked as age verification required at delivery, but the effectiveness of this sort of age verification at blocking youth access seemed to vary widely depending on the delivery drivers. Some participants' delivery drivers diligently checked their IDs and properly refused to deliver their packages, but many left packages at the door without any face-to-face interaction. Some participants reported that their delivery driver handed them packages without asking for ID or even after requesting and being given their real (underage) ID. One participant reported that her delivery driver simply asked her, "You're 21, right?" and, when she said yes, handed her the alcohol package. For age verification at delivery to be effective, companies such as UPS and FedEx need to work with their staff to ensure it gets administered appropriately.

**b. If these methods are not effective, which other technologies, procedures, or methods would work more effectively to prevent minors' access to tobacco products through a non-face-to-face exchange?**

Some online age and identity verification services, such as Aristotle<sup>25</sup>, IDVerify, ID Verification, PreciseID, ExpectID, and InstantID<sup>26</sup> use "challenge questions" to attempt to verify that the person submitting an application is, in fact, the person whose identification information is being submitted. If a person submits identity information that is checked against public records databases and verified as a valid identity, the age verification service then attempts to determine whether the identity belongs to the person who submitted it. Based on information available in public records databases, the applicant is asked several multiple choice questions whose answers are unlikely to be known by anyone else. For example, an applicant might be asked, "Which of these models of automobiles did you own in 1995?" or "With which one of these companies have you ever had a mortgage?"

In the face of challenge questions, using a Googled ID or a parent's identity to bypass online age verification would be unlikely to work, as the youth wouldn't know the answers to the questions. We have not encountered challenge questions in our studies of online age verification; however, participants were not allowed to use real, verifiable adult identities that could have prompted challenge questions.

Further study is needed to determine both the extent to which online tobacco vendors are using challenge questions for age verification *and* how well they work in preventing youth access.

**c. Do these methods differ depending on the type of non-face-to-face exchange (e.g., Internet, direct mail, catalog, telephone, etc.)? If so, how?**

We are unaware of any empirical studies evaluating age verification strategies used in direct mail, catalog, or telephone ordering of tobacco products.

**d. Is requiring an adult (whether or not the person who placed an order) to sign for the delivery of tobacco products adequate to ensure that tobacco products purchased through a non-face-to-face exchange are not delivered to minors? Or, is it necessary to**

**require that the products be delivered only to the person who ordered them? Are there other requirements that could be placed on the delivery of tobacco products to prevent their delivery to minors?**

Requiring that the person who ordered tobacco products sign for them could potentially decrease the likelihood that tobacco products are delivered to minors. A minor could order tobacco products using deceptive tactics (such as using a Googled driver license image) to bypass age verification at the point of order, yet not be able to produce the same identification proving their age and identity at delivery. In such a case, requiring the purchaser to sign for the package and verifying their age at delivery would likely prevent underage buyers from successfully receiving their orders.

Furthermore, allowing delivery of tobacco packages to individuals other than the person who ordered them could lead to adults unwittingly delivering tobacco packages to minors without being aware of what was in them. In our recent study where underage buyers attempted to purchase alcohol from 100 Internet alcohol vendor websites,<sup>24</sup> two alcohol deliveries were delivered to a recipient's middle-aged neighbor when the recipient wasn't home. The neighbor then delivered the packages to the underage recipient, unaware of what was in them. The neighbor unwittingly facilitated the receipt of the alcohol by the underage recipient.

In some households, minors may order products online frequently enough that their parents do not inspect the contents of every package that is delivered for them. In such households, it would be possible for a parent or adult sibling or resident to sign for a package not clearly labeled as containing tobacco products, deliver it to the minor, and never realize that the child had ordered tobacco products.

In light of the above scenarios, it is our recommendation that it be required that deliveries of tobacco products include *both* age *and* identity verification at delivery to help to reduce the likelihood that a minor could successfully obtain tobacco products online.

**6. What payment methods are used for the sale of tobacco products through non-face-to-face exchanges? Do these payment methods differ depending on the type of tobacco product purchased? If so, how?**

In 2008, we conducted a purchase study with the 100 most popular ICVs (based on visitor traffic) to assess their compliance with the 2005 ATF payment and shipping bans.<sup>29</sup> Test purchases were made to assess whether banned payment methods would be accepted and whether orders would be delivered using banned shipping options. Thirty-nine vendors advertised accepting credit cards, but 10 of them didn't actually accept them when orders were attempted. Of the 29 orders placed with credit cards, 24 were successfully received.

The bans were followed by a drop in the use of banned payment methods, but they were also followed by a substantial rise in the use of alternate methods that were comparatively uncommon in the past, such as e-checks, personal checks, and money orders.<sup>30</sup> Furthermore, in the wake of the bans, vendors adapted by offering new forms of payment, like online bill pay and PayPal-like services such as eGold, MoneyGram, and MoneyBookers. While there weren't many vendors accepting these forms of payment, as regulators move to restrict the use of other forms of online payment like e-checks, it is likely that use of these services will increase.

Prior to the ATF payment bans in January 2005, 99% of vendors advertised accepting credit cards on their websites.<sup>1</sup> That dropped to 39% at the time of our purchase survey in 2008.<sup>29</sup> However, the drop was temporary. In 2011, our content analysis<sup>8</sup> of the 200 most popular ICVs found that 82% of vendors advertised accepting credit cards and 4% advertised accepting (also banned) PayPal. Among unbanned payment methods, 29% accepted e-checks, 13% accepted personal checks, and 13% accepted money orders. Thirteen percent of vendors accepted Western Union, 13% accepted bank transfers, 12% accepted the PayPal-like service MoneyGram, and 6% accepted other PayPal-like services.

**7. To what extent are tobacco products sold through a non-face-to-face exchange sold at substantially lower prices than the same types of tobacco products sold through a face-to-face exchange? Do the price differences vary depending on the type of tobacco product purchased? If so, how?**

In our ICV content analysis studies, we track the cost of Marlboro cigarettes because they are the most popular cigarette brand in the world and are found for sale on most cigarette vendor websites. In our 2011 study,<sup>8</sup> the average price of a carton of Marlboros was \$32.61, and Marlboros were available as cheaply as \$15.60. By comparison, individuals living in a high tax locale such as New York City are currently paying in excess of \$110 per carton for Marlboros, making purchasing cigarettes online a considerable bargain.

**8. What means are used to deliver tobacco products sold to consumers through non-face-to-face exchanges?**

In 2005, the ATF shipping bans resulted in UPS, FedEx, and DHL voluntarily agreeing to update their policies to prohibit the delivery of cigarettes to consumers. In our 2008 purchase survey assessing compliance with the bans,<sup>29</sup> only one of 100 vendors advertised a banned delivery method (FedEx), and four orders (3 FedEx, 1 UPS) were delivered by banned shippers. The remaining orders were delivered by the USPS, as it was not a party to the bans. The 2009 PACT Act closed this shipping loophole, making it illegal to ship cigarettes to consumers via USPS. In our 2011 content analysis study,<sup>8</sup> 40% of vendors still advertised delivery via USPS, and 88% advertised delivery through USPS or an international postal service that would be delivered in the U.S. by USPS. Eight percent advertised delivery via UPS, 2% via FedEx, and 1% via DHL.

In the wake of the bans, some vendors have been exploring alternate delivery options, advertising on their websites that they are using other (unnamed) shipping carriers. In some cases they will deliver locally or within their own state only, but others are claiming to be able to ship cigarettes anywhere within the continental United States. NativeBlend.net (and their network of affiliated sites through Sovran Solutions Online) advertises on their homepage the ways in which they skirt the PACT Act, offering an alternate (unspecified) delivery carrier AND immunity from PACT Act reporting requirements. They claim to use a “Private Delivery System,” and claim to be the only “private and reliable” source left from which customers can buy tax-free cigarettes online. While they point out that vendors on reservations are required by PACT to report sales, they claim that they are “legally IMMUNE to reporting requirements” without explaining how. See Figure 1 below for a screen shot taken from NativeBlend.net’s homepage on 1/17/12.

Figure 1. Screenshot from the homepage of NativeBlend.net detailing how they thwart the PACT Act. Screenshot taken 1/17/12.

**The SSO Cigarette Buyers Club**

**Get Cheap Cigarettes and Tobacco with:  
NO STATE TAXES  
NO REPORTS to Anyone EVER  
Cigarettes DELIVERED direct to your Door**

The USA Federal PACT Act is in effect, but we beat it legally.  
PACT Act has destroyed almost all online cheap cigarettes sources.  
Its key elements:

1. The Cigarettes Shipping Obstacle:  
The US Mail system can no longer deliver retail cigarettes in the USA.

2. Taxing and Reporting Your Cigarettes and Tobacco Purchases for TAXATION:  
ALL USA located cigarette vendors - including all those on Reservations - are REQUIRED TO REPORT all sales and customer details to state tax authorities for after-purchase taxation.

**How to get CHEAP CIGARETTES Legally:**

**Our 100% private cigarettes and tobacco buyers club - SSO - is now the only private and reliable online source for ZERO State & Local Tax cigarettes - delivered privately to you in all the lower 48 States in the USA:**

- SSO is DELIVERING cheap Native cigarettes & tobacco to USA members now.
- SSO delivers with its own Private Delivery System - with NO use of US Mail.
- SSO is legally IMMUNE to reporting requirements.
- SSO is TOTALLY PRIVATE, with absolutely NO REPORTING of any kind.
- PRIVACY and NO REPORTING means you get NO SURPRISE TAX BILLS EVER.
- SSO is the ONLY private online cheap cigarettes source for USA smokers today.
- SSO has been delivering Tax-Free smokes in complete privacy since 2007.

Please take note of our [Disclaimer](#).

**Note:**  
**SSO is delivering ALL products to members in ALL 48 lower USA States. Members in HI and AK can order all products except cigarettes.**

a. Do these means of delivery differ depending on the type of non-face-to-face exchange (e.g., Internet, direct mail, catalog, etc.)? If so, how?

We are unaware of any empirical studies of non-face-to-face exchange of tobacco products other than Internet sales.

b. Do these means of delivery differ depending on the type of tobacco product sold? If so, how?

We are unaware of any empirical studies of non-face-to-face exchange of tobacco products other than cigarettes.

c. Do these means of delivery differ depending on the location of the seller and/or purchaser? If so, how?

For the most part, no – but we have seen some cases of websites offering cigarette delivery through local courier services in New York.

**9. What strategies, if any, are used by tobacco product manufacturers to ensure that their tobacco products are not sold or distributed to minors through non-face-to-face exchanges by parties other than the manufacturer?**

None of the major tobacco product manufacturers sell direct to consumers, and we are unaware of any strategies they are using to ensure their products are not distributed to minors via the Internet or other non-face-to-face exchanges. Nat Sherman, which is a smaller manufacturer and also signatory of the Master Settlement Agreement, does sell tobacco products on their website. Following the PACT Act, they stopped selling cigarettes on their website, including a note to customers explaining that they are no longer allowed to ship cigarettes due to PACT and directing them to a store locator so that they can find Nat Sherman cigarettes locally. However, while they no longer sell *cigarettes* on their website, they *do* sell *other tobacco products*, such as cigars and pipe tobacco, and use very lax age verification. As of November 2011, they continue to rely upon a button asking users to click to confirm that they are over 21 to verify customers' age prior to entering the website. In our study of online age verification on tobacco brand marketing websites,<sup>27</sup> Nat Sherman's age verification failed to block youth access to the website 100% of the time. If a user attempts to check out with tobacco products in their shopping cart, they are shown the following message: "We therefore require a valid adult photo ID when purchasing tobacco products. You will be contacted to obtain this information." We have not conducted recent test purchases from NatSherman.com to determine whether and how their age verification for purchases works in practice.

**a. Do tobacco product manufacturers verify the effectiveness of these strategies? If so, how?**

We are unaware of manufacturers' practices in this area. The FDA should require remote sellers of tobacco to provide FDA documentation of all remote sales, going beyond the current requirements for the reporting of sales for tax purposes. Remote sellers of tobacco products should also be required to provide information to FDA on how they verify the age of the buyer and the delivery recipient of their products. The information should be provided in such a way as to allow FDA to verify the information independently (for example, with the Online Age Verification company that provides the service). The FDA and states should also run their own independent compliance checks and test purchases as they do for face-to-face sales under the Synar Amendment.

**b. Are there any data available to verify the effectiveness of these strategies? If so, what are they?**

We are unaware of data on their practices in this area.

**10. How can FDA most effectively partner with other Federal agencies and State, local, territorial, and Tribal governments to prevent the sale and distribution of tobacco products to minors through non-face-to-face exchanges?**

We would suggest that FDA convene meetings with these groups and find out what states are doing to enforce the PACT Act and track its success. It is clear that FDA needs to do better surveillance at the state/federal level to determine how tobacco sellers adapt to new regulations and the extent to which sellers, consumers, and state and federal governments comply with those regulations. The FDA should consult with researchers and program evaluators on the best ways to handle these issues and should partner with independent researchers to conduct state and federal level

surveillance and test purchases from non-face-to-face tobacco vendors similar to those that are conducted with traditional bricks-and-mortar retailers under the Synar amendment. Initially, FDA should engage several pilot states to make test purchases from online tobacco vendors and then initiate enforcement actions against noncompliant sellers. Drs. Williams and Ribisl would be available to work with FDA to coordinate such test purchases (as we have more experience designing and fielding such purchase studies than any other research team in the country), and North Carolina could serve as a pilot state.

## **B. Advertising, Promotion, and Marketing of Tobacco Products**

### **11. What forms of advertising, promotion, and marketing are used to promote the sale of tobacco products through non-face-to-face exchanges?**

- One of the advantages of selling products on the Internet is using email and Internet technology to facilitate word-of-mouth communication among peer social networks.<sup>31</sup> In our studies, we have found that ICVs use several peer-to-peer strategies to attract more customers to their site. In 2011, half of vendors offered mechanisms to refer friends to the site and 21% of vendors included social media sharing links (i.e., Facebook and Twitter).<sup>8</sup> This represented a substantial increase from 2005, when 30% offered ‘refer-a-friend’ mechanisms, 17% included mechanisms for users to link to their sites on their own web pages and profiles, and 4% offered wish lists.<sup>6</sup> Wish lists enable customers to create lists of cigarette and tobacco products that they desire and can make available to friends who might purchase the products for them. The “link-to-us” function enables customers to create a bookmark or link on their own personal website or profile so that interested friends can click on the link, which takes them directly to the ICV site.

Once new customers are at the website, ICVs also use strategies such as “customer testimonials” and “top-selling brands” as a way to share information about other customers’ purchasing patterns and experiences. In 2005, 12% of ICVs utilized customer testimonials and 28% advertised “top-selling brands”. The ease of sharing information via the Internet allows ICVs to utilize strategies that encourage word-of-mouth promotions among peer social networks. Direct peer-to-peer marketing becomes more important in the electronic marketplace because online businesses have only a virtual presence among billions of other web pages, and online tobacco vendors must compete with thousands of webpages directing traffic to other vendors.<sup>6</sup>

- The interactive capabilities of the Internet allow Internet vendors to communicate directly with their customers via email, tailor these communications precisely to individual customers’ needs, and obtain relevant information from customers so that vendors can customize their services and serve their customers more effectively in the future.<sup>32</sup> When we examined use of these features in 2005, approximately 45% of ICVs provided mechanisms for customers to register and create accounts on their websites, allowing the vendors to collect information about their customers’ product and ordering preferences and to store this in their databases so that future interactions with the customer can be personalized. Approximately 40% of ICVs also offered mailing lists, which are emailed newsletters announcing upcoming sales or promotions that can be tailored to individual consumers’ product preferences. Approximately 20% of ICVs also offer automated shipping programs that enable customers to designate how many cigarettes they want delivered on a regular time schedule. All of these features ease the ordering process for

customers and help vendors to build personalized relationships with their customers, which may translate into customer loyalty and retention over time.<sup>6</sup>

- ICVs can attract new customers to their websites by sending out unsolicited email messages (spam) to a wide range of recipients. This is a relatively inexpensive strategy since vendors can purchase lists of tens of thousands of email addresses for only hundreds of dollars.<sup>6</sup> A pilot study analyzing cigarette spam emails found that lower prices (99%) and tax evasion (43%) were most emphasized in the subject line or body of the email message.<sup>33</sup> Commonly used messages for conveying low cost or tax evasion included phrases such as:

“Stop wasting your money on high priced cigarettes, get your cigarettes at a huge discount!” or “I have some very exciting news for you. No longer will you be taxed to death. You can buy premium brand cartons of cigarettes for only \$13.95 a carton. That is \$1.39 a pack for all the top brands.”

Results from this study suggest that ICVs are marketing tax-free prices as the main incentive to purchase cigarettes from their sites. In fact, in 2011, 33% of vendors actively promoted tax-free sales on their websites.<sup>8</sup> A 2006 study found that 46% of smokers reported seeing ads about Internet cigarette sales from mass media sources such as local newspapers or magazines (21%), spam emails (16%), banners or pop-up ads (11%), and Val-U-Pak coupon mailers (11%).<sup>34</sup> Because many of these channels are direct-to-consumer (e.g., spam email, Val-U-Pak coupon mailers), these marketing strategies occur under the radar of many regulatory agencies and should be monitored. Future studies need to examine the extent of these marketing strategies and how they influence smokers’ decisions to purchase cigarettes online.<sup>6</sup>

- In 2008, the tobacco industry claimed that it spent \$13.2 million on company website-related expenses, which was about 0.13 percent of its annual \$9.9 billion advertising and promotional expenditures.<sup>35</sup> Tobacco company *corporate* websites tend to be neutral in tone and provide factual information about their companies. For example, the R.J. Reynolds official website has the latest information about its stock prices, and the Philip Morris USA website has detailed information on health issues, responsible marketing, and its policies, including a section on Internet cigarette sales.

However, tobacco company *brand marketing* websites such as Marlboro.com or Camel.tobaccopleasure.com are a different story. Cigarette brand marketing websites that have been monitored since 2006<sup>36</sup> have included games, contests, downloadable coupons and screensavers, promotional gifts, and downloadable music from popular artists.<sup>37,38</sup> These websites are designed to build relationships with consumers, foster brand loyalty, and reinforce brand identity,<sup>39,40</sup> offering, for example, profiles of musicians and fashion designers, creative functions (e.g., design a tattoo), and discussion forums, all presented in ways that are consistent with the brand’s specific identity.<sup>36,37</sup> In autumn 2011, marlboro.com had a feature allowing users to learn about new music and download free songs, as well as an interactive cowboy roping simulator game, features which may hold broad appeal to smokers and non-smokers alike.

- In 2004, when Brown & Williamson launched its KOOL Mixx hip-hop ad campaign, it also included a web component. The House of Menthol website ([www.houseofmenthol.com](http://www.houseofmenthol.com)) featured information about a national DJ battle competition, free software demos, history of hip-hop, and lists of retail stores where smokers could purchase the special edition KOOL Mixx

cigarette packs. The website was just one element of the marketing campaign, but as the House of Menthol website illustrates, tobacco companies can use the web to provide more promotional offers and aggressively build the brand image with content that is engaging and interactive. Brown & Williamson voluntarily pulled the ad campaign, including the website, after receiving pressure from attorneys general who threatened to sue, claiming that the campaign violated the Master Settlement Agreement because it targeted youth and because it featured merchandise (e.g., a radio) with a cigarette brand name.<sup>6</sup>

- Tobacco companies appear to have varying levels of involvement in and support for Internet tobacco sales and marketing. Philip Morris appears to be the most critical of Internet sales and has successfully filed federal lawsuits against Internet vendors for violating its trademarks (e.g., the Marlboro logo) and illegally selling Marlboros manufactured for export.<sup>41</sup> Philip Morris has also lobbied for legislation that would restrict Internet tobacco sales. One reason that it may want to discourage Internet tobacco sales is related to the fact that buyers are very cost conscious and would begin to purchase deep-discount brands, which takes business away from costlier premium brands such as Marlboro.<sup>41</sup> Other tobacco companies, however, appear to have a more favorable attitude toward the Internet than the market leader.<sup>6</sup>
- Some tobacco companies are using the web to advertise certain brands and to establish a database of smokers.<sup>6</sup> A 2004 study described R.J. Reynolds' efforts to sell Doral cigarettes, their 'savings' brand, on the web at [www.smokerswelcome.com](http://www.smokerswelcome.com). The site, which now redirects to [Doral.tobaccopleasure.com](http://Doral.tobaccopleasure.com), was advertised as "an online community for smokers by smokers" and offered attractive gifts for redeeming Doral pack seals and services, such as online bulletin boards, which helped to engender a sense of community among Doral smokers.<sup>42</sup> Philip Morris operated a similar website, [www.smokersignup.com](http://www.smokersignup.com), where smokers could register and add themselves to Philip Morris' database to receive coupons and other promotional offers via postal mail. As more smokers participate in these direct-marketing programs,<sup>42</sup> tobacco control advocates will have to monitor these practices both offline and online and examine how they influence smokers' attitudes and behaviors. Data from the National Youth Tobacco Survey conducted by the CDC in 2004 showed that 34% of middle school students and 39% of high school students reported seeing advertisements for tobacco products on the Internet.<sup>43</sup> Although Cohen and colleagues called in 2001 for studies to determine the effects of web-based tobacco advertising on the tobacco-related knowledge, attitudes, and behaviors of viewers, to our knowledge, there are no published studies on this topic;<sup>44</sup> further research is needed in this area.

**a. What are the current trends in these forms of advertising, promotion, and marketing?**

We are not aware of any studies beyond those described above that have investigated this issue. There has been a surveillance gap in recent years and in the wake of recent regulatory changes; further research on the issue is needed.

**b. Which of these forms of advertising, promotion, and marketing are appealing to minors?**

We are not aware of any studies beyond those described above that have investigated this issue. There has been a surveillance gap in recent years and in the wake of recent regulatory changes;



further research on the issue is needed.

**c. Are there themes or techniques used in these forms of advertising, promotion, and marketing that are appealing to minors?**

We are not aware of any studies beyond those described above that have investigated this issue. There has been a surveillance gap in recent years and in the wake of recent regulatory changes; further research on the issue is needed.

**12. How are the Internet, e-mail, direct mail, telephone, smartphones, and other communication technologies used to direct tobacco product advertising, marketing, and promotion messages to specific recipients?**

This topic was covered in some detail in our response above to number 11. Websites promoting specific brands and electronic mail marketing have potential to appeal to youth.<sup>45</sup> Brown & Williamson launched their KOOL Mixx hip-hop ad campaign in 2004 and included a website component<sup>6,46</sup> that provided information about a national DJ battle competition, free software demonstrations, history of hip-hop, and lists of retail stores where smokers could purchase the special edition KOOL Mixx cigarette packs. R.J. Reynolds has established websites where smokers participate in online surveys and get entered into sweepstakes as a reward.<sup>42</sup> The Internet was used in the redesign of their Camel brand and Camel Signature Blends, with the Camel website providing tools for users to custom design packs and submit artwork.<sup>47</sup> Although Camel relied on password-protected sites for consumer input, researchers reported that they obtained passwords to the site without ever having to provide proof of age or identity, suggesting that youth may have access to brand marketing occurring online. Youths' ability to bypass the age verification strategies on tobacco brand marketing websites was further supported by our study of online age verification on such websites described above.<sup>27</sup> Camel's website has featured young adult lifestyle content and spotlighted brand-sponsored events.<sup>48</sup>

**a. What are the current trends in these forms of advertising, promotion, and marketing?**

As described above, cigarette brand marketing websites that have been monitored since 2006<sup>36</sup> have included games, contests, downloadable coupons and screensavers, promotional gifts, and downloadable music from popular artists.<sup>37,38</sup> These websites are designed to build relationships with consumers, foster brand loyalty, and reinforce brand identity,<sup>39,40</sup> offering, for example, profiles of musicians and fashion designers, creative functions (e.g., design a tattoo), and discussion forums, all presented in ways that are consistent with the brand's specific identity.<sup>36,37</sup> In autumn 2011, marlboro.com had a feature allowing users to learn about new music and download free songs, as well as an interactive cowboy roping simulator game, features which may hold broad appeal to smokers and non-smokers alike.

**b. Which of these forms of advertising, promotion, and marketing are appealing to minors?**

We are not aware of any recent studies that have investigated the issue of which online marketing techniques for promoting tobacco products are most appealing to youth; research

on the issue is needed.

**c. Are there themes or techniques used in these forms of advertising, promotion, and marketing that are appealing to minors?**

We are not aware of any studies that have investigated this issue specifically, however, arguably all of the forms of promotion and marketing described above would be appealing to minors. A nice description of digital marketing techniques and their potential appeal is featured in *The Role of the Media in Promoting and Reducing Tobacco Use*<sup>49</sup> and the 2012 Surgeon General Report on Tobacco Use among Young People.

**d. To what extent are databases with individual tobacco user information used to direct tobacco product advertising, marketing, and promotion messages to specific recipients?**

We are not aware of any studies beyond those described above that have investigated this issue. There has been a surveillance gap in recent years and in the wake of recent regulatory changes; further research on the issue is needed.

**13. What technologies, procedures or other methods are currently used by the tobacco industry (including, but not limited to, manufacturers, importers, distributors, and retailers) to restrict or minimize a minor's exposure to the forms of advertising, promotion, and marketing of tobacco products described in questions 11 and 12 of section II.B of this document?**

This topic is covered in detail in section A5 above.

**a. How effective are these methods at restricting or minimizing such exposure?**

See section A5.

**b. If these methods are not effective, what other technologies, procedures, or methods would work more effectively to restrict or minimize the exposure of minors to such advertising, promotion, and marketing?**

See section A5.

**c. Would the technologies, procedures, or other methods described in question 13b prevent such tobacco product advertising, promotion, and marketing from reaching adult consumers? If so, what alternatives are available to minimize minors' exposure while still enabling tobacco product information to be communicated to adults?**

See section A5.

**d. To the extent that minors' exposure to tobacco product advertising, promotion, and marketing cannot be eliminated, what restrictions or requirements could be placed on such advertising, promotion, and marketing to minimize its appeal to or influence on minors who are exposed to it?**

To minimize the exposure of minors to such advertising, promotion, or marketing, the FDA should require that such materials available online be hidden behind rigorous age verification roadblocks, including age verification that, at a minimum, requires users to submit a driver license number which must be verified against government databases. Further study of the efficacy of challenge questions in blocking access to youth armed with a parent's ID should be conducted. If they improve the effectiveness of age verification, challenge questions should also be required as a part of the age verification process. Furthermore, to minimize the appeal of these materials to minors, the tobacco industry should be barred from offering games, promotional gifts, and downloadable music on their websites.

- e. Would the technologies, procedures, or other methods described in question 13d of section II.B of this document prevent the communication of tobacco product information to adult consumers? If so, what alternatives are available to minimize minors' exposure while still enabling tobacco product information to be communicated to adults?**

The suggestions described in 13d would not prevent the communication of tobacco product information to adult consumers.

**14. Given the rapid growth of social media (e.g., Facebook, Twitter, YouTube, etc.), how can minors' exposure to tobacco product advertising, promotion, and marketing through these types of media be restricted or minimized?**

We suggest working directly with social media companies (such as those named above) to develop *and ensure enforcement of* policies banning tobacco advertising, promotion, and marketing from their services. Tobacco content could be classified by these services as analogous to pornography (with regard to barring it from the service). For example, Facebook could make it a policy to disallow (and delete) any groups, apps, or advertisements with tobacco content. YouTube could not only refuse tobacco-related advertisements but also block videos focusing on pro-tobacco content. While it may be difficult for a website with user-posted content to effectively police content in this manner, it is feasible, and many user-posted content websites already have features built into their websites enabling users to report inappropriate content (such as pornography or abusive materials). Adding tobacco content to the list of banned content for their websites could easily be added to company policies and Terms of Service documents as well as publicized by the website. For example, YouTube users could use the site's existing "flag as inappropriate" button that appears with all videos to flag pro-tobacco content for review and blocking by YouTube staff.

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