The Office of
Minnesota Attorney General Keith Ellison
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September 25, 2024

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Dear Mr. Gross, Mr. Garofalo, Mr. Nustad, Mr. Spross, Mr. Klatt, Mr. Briant, and Mr. Chesak:

The Office of the Minnesota Attorney General ("AGO") is in receipt of your September 9, 2024, correspondence regarding the AGO's August 29 letter to retailers and distributors regarding sales of e-cigarettes and oral nicotine products in Minnesota.

First, the AGO's goal is to secure voluntary compliance with Minnesota law from tobacco retailers and distributors. This includes voluntary compliance with longstanding Minnesota consumer protection laws that prohibit unfair and deceptive marketing and sales of products, as well as Minnesota's new prohibition on deceptive vapor products. The purpose of the letter was to put businesses on notice of the legal status of many e-cigarette and nicotine products under new state law so that they could ensure their practices comply with the law.

To address the enforcement concerns you raise, the AGO clarifies that it plans to utilize its enforcement authority[1] against the types of "blatantly illicit" products that your letter identifies that run afoul of Minnesota law. Under Minnesota's new prohibition on deceptive vapor products, that includes e-cigarette products that, through appearance, flavor, branding, advertising, or otherwise:

[1] The AGO has authority to enforce consumer protection laws by filing a lawsuit seeking injunctive relief, restitution and/or disgorgement of money received related to the sale of illegal products, civil penalties, and recovery of attorney fees and costs. *See* Minn. Stat. § 8.31.

- Imitate, describe, depict, or use the terms for a food or brand of food commonly marketed to minors, including but not limited to candy, desserts, or beverages;
- Imitate, describe, depict, or use the terms for school supplies commonly used by minors, including but not limited to erasers, highlighters, pens, and pencils; or
- Imitate, describe, depict, or use the terms for a product based on or depicting a character, personality, or symbol known to appeal to minors, including but not limited to a celebrity; a character in a comic book, movie, television show, or video game; and a mythical creature.

2024 Minn. Laws Chapter 114, Art. 3, §§ 50-51. And, under Minnesota's consumer protection laws, this would also include e-cigarette or oral nicotine pouch products marketed deceptively or that appeal to persons under the age of 21 in such a way as to offend Minnesota public policy, be unethical, oppressive, or unscrupulous, or be substantially injurious to Minnesota consumers. *See, e.g.*, Minn. Stat. §§ 325F.69 and 325D.44. Illustrative examples of e-cigarette products that appear to offend the above-referenced Minnesota law can be viewed here: https://www.ag.state.mn.us/Office/Communications/2024/docs/VapingProducts_Examples.pdf.

Second, contrary to the assertions in your correspondence, the AGO is not seeking to directly enforce the federal Food, Drug, and Cosmetic Act or the Tobacco Control Act. Instead, our August 29 letter stated clear federal law: e-cigarette and oral nicotine pouch products without FDA authorization are not legally authorized for marketing and sale in the United States.[2] The FDA's exercise of enforcement discretion does not alter the fact that only 34 products and four oral nicotine pouch products have been authorized by the FDA to be marketed and sold in the United States. As your letter notes, "[t]he FDA has publicly stated that tobacco products for which a marketing authorization order has not been issued are subject to federal enforcement action." Accordingly, companies that manufacture, distribute, and sell products without FDA authorization do so at their own peril, particularly given that a federal taskforce has recently been formed to address sales of unlawful and unauthorized e-cigarettes. An additional purpose of the AGO's August 29 letter was to ensure businesses were aware of the above-referenced federal law.

To reiterate, the AGO does not intend to take enforcement actions against businesses for selling e-cigarette or nicotine pouch products where the FDA has exercised its enforcement discretion in a manner that appears to permit continuing sales—unless the marketing and sales violate applicable state laws such as those referenced above. For example, as you know, the AGO has clarified that it will not take enforcement action against businesses selling JUUL e-cigarette products in Minnesota (which lack PMTA-authorization) so long as such products are sold in compliance with the AGO's settlement with JUUL and applicable Minnesota age-restriction and

[2] Dr. Brian King, Director of the Center for Tobacco Products at the FDA, reinforced the FDA's position concerning the above-referenced federal law with this statement at a Congressional hearing on September 10, 2024: "We regularly engage with retailer orgs and again, we've got a list of authorized products, and if it's not on that list right now, of 34, it's on the market illegally and they shouldn't be selling it." *See* https://www.youtube.com/live/nZYVdY8GgAo?si=NsKcEvN7_6M2K587&t=9170.

commercial tobacco sales laws.[3] But to be clear, even if products are under FDA review or have been authorized by the FDA for marketing, that does not inoculate their manufacturers, distributors, or retailers from liability for conduct related to the marketing or sale of such products that is illegal under Minnesota state law, including Minnesota's new deceptive vapor products law referenced above.[4] And if the FDA has not permitted continued sales of a given product—for example, products for which no PMTA is pending or the PMTA has been denied—marketing such illegal products risk violating attendant state laws and policies.

To the extent your organizations have members with questions about whether certain products may be subject to FDA enforcement discretion or are otherwise allowed to be marketed, we encourage your members to follow the FDA's direction to "discuss with [product] suppliers . . . the current status of any particular tobacco product's application or any product's marketing authorization."[5] Your members may also wish to reach out to the FDA's Office of Small Business Assistance, which provides technical and other non-financial assistance to small tobacco product businesses. They can be contacted as follows:

FDA/CTP Office of Compliance and Enforcement
Document Control Center
Building 71, Room G335
10903 New Hampshire Ave. Silver Spring, MD 20993
E-mail: SmallBiz.Tobacco@fda.hhs.gov
Phone: 1-877-287-1373 (Monday-Friday, 9:00 a.m. - 4:00 p.m. ET)

Third, the AGO respectfully disagrees that reducing the availability and use of flavored e-cigarettes and nicotine pouch products is harmful to public health or would "push many Minnesotans back to smoking cigarettes." The use of flavored e-cigarettes and oral nicotine pouch

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[3] One such provision of the Consent Judgment prohibits JUUL from selling flavored e-cigarette products in Minnesota beyond its current tobacco and menthol flavored products. Consent Judgment at ¶ 9, *State of Minnesota v. JUUL Labs, Inc., et al.*, Court File No. 27-CV-19-19888 (Hennepin County Dist. Ct. May 24, 2023)

[4] The federal Food, Drug, and Cosmetic Act provides that states may "enact, adopt, promulgate, *and enforce* any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this subchapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age . . . ." 21 U.S.C. § 387p(a)(1) (emphasis added); *see also N. Carolina ex rel. Stein v. Eonsmoke LLC*, 423 F. Supp. 3d 162, 169 (M.D.N.C. 2019) ("Read together, the three provisions [of the Family Smoking Prevention and Tobacco Control Act]—preservation, preemption, and saving—protect state authority to enforce some laws relating to tobacco products and in no way indicate that Congress intended to completely preempt state involvement in tobacco regulation.").

[5] Food and Drug Administration, *Deemed New Tobacco Product Application Lists*, https://www.fda.gov/tobacco-products/market-and-distribute-tobacco-product/deemed-new-tobacco-product-applications-lists.

products continues to be a public health epidemic in Minnesota and across the country. As noted in the CDC study you cited, e-cigarettes are still the most used tobacco product by youth and the increased youth use rate of oral nicotine pouch products has "become concerning." Removing illegal and unauthorized e-cigarette and oral nicotine pouch products from the market would help continue the downward trend of youth nicotine use, stop the initiation of many Minnesota kids to nicotine products, and prevent those kids from switching to cigarettes later in life.

Finally, we ask that you provide a copy of this letter to your members because the AGO would like to clarify its request for recipients to respond to its August 29 letter. The AGO is asking recipients to confirm in writing that they will comply with the Minnesota laws referenced above with respect to their advertising, selling, or distributing of e-cigarettes and nicotine pouches to Minnesota consumers. Recipients may respond in two ways:

- Emailing the AGO at vaping@ag.state.mn.us; or
- Completing an online form at https://www.ag.state.mn.us/Vaping/Compliance.

Thank you for your attention to this important matter.

Sincerely,

JESSICA WHITNEY
Deputy Attorney General