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# E-Cigarettes Go Mainstream



As “vaping” moves rapidly through the typical phases of market success, is this young industry ready for the challenges and opportunities ahead? **>BY TROUTMAN SANDERS TOBACCO TEAM**

Every successful product, particularly in the tobacco industry, travels a recognizable path to market success. Typically, there are four distinct phases as a product becomes a success in the marketplace: introductory, market displacement, establishment, and consolidation.

First, during the introductory phase, the product is viewed as a novelty but is relatively ignored by the established players in the marketplace, as well as the media and regulators.

Second, during the market displacement phase, the product appears to gain a foothold in the marketplace and draws some attention from the media and regulators.

Third, during the establishment phase, as the product gains more ground in the marketplace, established marketplace holders begin to view the product as threatening, the media decides to sensationalize the product and regulators look for ways to eliminate it.

Fourth, during the consolidation phase, after the product has rebuffed attempts to eliminate it, regulators look for ways to tax the product.

E-cigarettes appear to be developing a marketplace along the typical evolutionary path of most products.

The first phase for e-cigarettes was relatively brief. During this introductory phase, e-cigarettes were viewed as a way for smokers to return to their workplaces, restaurants, and public buildings, rather than being relegated to standing outside in the cold. During this phase, e-cigarettes quickly obtained a consumer following.

During the second phase, market displacement, e-cigarettes secured their own corner of the tobacco market and even developed their own catch name, “vaping.” As e-cigarettes have become more well-known, however, they are moving into the third phase.

Even though the product has been on the market less than eight years, e-cigarettes are already entering the third phase of market development—establishment—as e-cigarettes have enjoyed increasing popularity in the media and in Hollywood. As with traditional cigarettes, e-cigarettes’ publicity and popularity will correlate to increased regulatory activity.

The Food and Drug Administration has decided to regulate e-cigarettes as a tobacco product, rather than under the strict regulations reserved for medical devices. Most commentators have viewed this as a “victory” for e-cigarettes. This view of the developing regulatory environment, however, overlooks the broad reach of the FDA and, more importantly, overlooks the various other regulatory schemes at both the state and local level relative to this product.

For example, one California ordinance already defines the term “smoke” to include both tobacco smoke and electronic cigarette vapors—regardless whether the vapors actually contain any carcinogen: Crescent City, California Code of Ordinance 9.17.020. (Codified through Ordinance No. 756 passed on May 3, 2010). And, New Jersey specifically bans the use of e-cigarettes wherever regular smoking is prohibited.

These attempts to ban e-cigarette smoking, grounded on the alleged dangers of second-hand smoke, are ripe for a constitutional challenge, based on the fact that the vapor from e-cigarettes does not contain carcinogens.

The standard for challenging an indoor smoking ban on constitutional grounds requires that the challenger “establish that no set of circumstances exists under which the Act would be valid,” (U.S. v. Salerno, 1987). This means that a challenger must show “the invalid applications of a statute ‘must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep,” (Washington v. Glucksberg, 1997; Stevens, J., concurring). Constitutional challenges thus must overcome a heavy presumption in favor of the constitutionality of state laws (Hodel v. Indiana, 1981). Social and economic legislation, like that involved in indoor smoking bans, is presumed to be rational and this presumption “can only be overcome by a clear showing of arbitrariness and irrationality,” (Hodel v. Indiana, 1981).

A law fails this rational basis test if it is “wholly irrelevant to the achievement of the state’s objective,” (McGowan v. State of Md., 1961), or “so unrelated to the achievement of any combination of legitimate purposes that a court can only conclude that the legislature’s actions were irrational.” Hodel, 452 U.S. at 332. On the other hand, a law has a “rational basis” if it is rationally related to any conceivable government purpose, whether or not stated in the law or contained in the legislative record (F.C.C. v. Beach Communications, Inc., 1993).

Although the burden on the party bringing a constitutional challenge to a smoking ban is heavy, it is one that may be carried in this case. Indeed, attorneys general in at least two states already have issued rulings which suggest that such a challenge would be successful.

Consider for instance, a ruling from the Arkansas Attorney General in which he found that the Arkansas Clean Indoor Air Act cannot be used to

regulate the locations where e-cigarettes can be used. The Attorney General noted that the “act is aimed at prohibiting tobacco usage in certain public places as to reduce secondhand smoke exposure,” and determined that “[b]ecause no smoke is emitted when an e-cigarette is used, and an e-cig does not involve any lighted tobacco product or any other lighted plant material . . . [t]he Arkansas Clean Indoor Air Act does not regulate where this type of nicotine injection system may be used,” (Opinion No. 2009-072).

Similarly, the Virginia Attorney General has ruled that the Virginia Indoor Clean Air Act cannot be used to regulate e-cigarettes. The act “prohibits smoking in a variety of locations.” The Attorney General noted that “an e-cigarette does not involve the ‘inhaling, or exhaling of smoke,’” because e-cigarettes emit water vapor and “[w]ater vapor containing traces of particulate matter, such as water evaporating from a tea kettle, is not

ordinarily understood to be ‘smoke.’” Additionally, “[a]n e-cigarette does not function in manner of a traditional cigarette because it functions electrically rather than via combustion of a material such as tobacco.” Finally, the Attorney General noted that “an e-cigarette is battery powered and is not “lighted” as that term is commonly understood. No flame is involved in its operation.” Thus, the Attorney General concluded “that using an e-cigarette does not fall under the definition “smoke” or “smoking” for purposes of [the Virginia Indoor Clean Air Act],” (Opinion No. 10-029).

This reasoning by two attorneys general could be used to challenge the rational basis for regulations that attempt to ban the use of e-cigarettes indoors.

If the e-cigarette industry is effective at challenging regulatory efforts at the state and local level, as it already has been with the FDA, and attempts to ban the use of e-cigarettes are successfully

rebuffed, industry leaders must be ready for phase four of new market development. This next and last phase of a product’s establishment in the marketplace will involve regulators, most likely at the state and local level, seeking ways to tax the product. In this case, the taxing mechanism likely will be similar to the scheme currently in place for tobacco products.

Those in the e-cigarette industry must be prepared to provide these tax developments at both the state and local level. Without an organized effort by e-cigarette proponents, in all likelihood, efforts to tax e-cigarettes to leverage additional government revenue for various programs will meet with little resistance. **S**

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