

‘What the hell are you waiting for?’ Senators grill FDA, DOJ about lack of action on youth vaping epidemic



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6 minute read

Published 6:01 PM EDT, Wed June 12, 2024

At Wednesday's hearing, Sen. Dick Durbin holds up what he says is an unauthorized flavored e-cigarette product that his staff bought at a vape shop just a mile from FDA headquarters.

[Pool video](#)

CNN —

Republicans and Democrats on the [US Senate Judiciary Committee](#) showed rare agreement Wednesday as they took to task the US Food and Drug Administration and the US Department of Justice for what they described as inaction on the country's youth vaping epidemic.

Nearly three years ago, a federal court ruled that the FDA was violating the Tobacco Control Act by allowing e-cigarette products that did not have FDA pre-authorization to stay on the market.

An FDA official testified Wednesday that the topic was a “top priority,” but the agency has missed the September 2021 deadline that the court set to for the agency to complete its review of e-cigarette makers' applications to sell their products.

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Since that time, [one study](#) found, an estimated 2.1 million children have used e-cigarettes regularly, and the majority use flavored products.

“After the court-ordered deadline passed on September 9, 2021, the FDA could have ordered every single unauthorized e-cigarette off the market, and that's what it should have done,” Sen. Dick Durbin, D-Illinois, told Dr. Brian King, director of the FDA's Center for Tobacco Products, at Wednesday's hearing. “Instead, thousands of unauthorized e-cigarettes flooded the market.”

In fact, Durbin said, his staffers found vapes in flavors like Red Bull, strawberry, dragonfruit and watermelon bubble gum at a shop just a mile from FDA headquarters.

“Not a single one of these products has been authorized by the FDA. None of them. These illegal products, clearly designed for kids by their flavors, are being sold” even in the shadow of FDA headquarters, he said.

Placing one of the products in front of him, Durbin asked how the FDA could let such sales happen.

“The volume of those applications and the volume of the market requires us to prioritize our enforcement efforts,” King testified.

Sen. Marsha Blackburn, R-Tennessee, also told the representatives from the FDA and the Department of Justice that she was displeased.

“I think it’s disappointing to hear you kind of talk in circles about what you are planning to do, but you haven’t established a plan, and you’re not certain what your way forward is going to be,” she said.

King said the FDA has received 27 million applications for e-cigarette products. But unlike with companies that make drugs and medical devices, which pay user fees that fund the agency’s work, the FDA is not allowed to collect fees from e-cigarette makers. King asked the Senate committee for the authority to fund this increased workload.

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“The rapidly evolving tobacco product landscape presents an unprecedented time and resource challenge that no other center at FDA has ever faced,” King said.

Since June, the FDA has authorized only [23 e-cigarette](#) products – none of them flavored – and has denied many more. Hundreds of thousands of additional applications are still pending.

From 2020 to 2023, there was a 1,500% increase in flavored tobacco products sold in the US, said Sen. John Cornyn, R-Texas. He also brought in flavored vape products that his staffers bought, including watermelon bubble gum, apple melon berry and one called Tyson Heavyweight.

“Dr. King, those are clearly designed for consumption by children, correct?” Cornyn asked.

“I can’t speak to the intent of the manufacturer, but I can say that flavors do appeal to kids. Ninety percent of youth who use e-cigarettes use flavored varieties,” King testified.

About 10% of high school-age adolescents and nearly 5% of middle school students use e-cigarettes, [according to the US Centers for Disease Control and Prevention](#). Over the past five years, there has been a 60% decline in the number of middle and high school students using e-cigarettes, King said. But when they do vape, teens and young adults are much more likely to use flavored e-cigarettes than adults.

“More work is definitely needed,” he testified.

Enforcement of the law is the other challenge, the FDA and DOJ said at the hearing. The FDA has conducted thousands of inspections of e-cigarette manufacturers and distributors resulting in nearly 900 warning letters, King said. More than 500 warning letters have gone to retail stores, King said, but if the letters are ignored that’s as far as the FDA can go, so it must rely on the DOJ and other agencies. It was only this week that the FDA and several law enforcement agencies [announced](#) that they were creating a task force that will use the criminal and civil tools available to fight the illegal sale and distribution of e-cigarettes.

RELATED ARTICLE FDA, Justice Department crack down on sale of illegal e-cigarettes by forming new task force

“What in the hell have you been waiting for?” Durbin asked Arun Rao, deputy assistant attorney general for the Civil Division’s Consumer Protection Branch in the Department of Justice.

“Senator, we have been acting on a number of fronts,” Rao replied. He said the Justice Department has been working with the US Marshals Service and the FDA on seizures of illegal products, but he admitted that “many manufactures have exploited the premarket authorization process.”

Rao testified that many manufacturers whose products have been denied FDA authorization make minimal alterations and resubmit for approval. Some overseas e-cigarette makers will also misrepresent shipments in an effort to slip past regulators, and some stores make their own products.

“Taken together, these factors have made illegal e-cigarettes all too accessible,” Rao said.

Many products come from China, but that country has banned flavored e-cigarettes, and the products are not sold in Chinese stores – a point that wasn’t lost on the committee.

“You can’t sell them in China, but you can sell them in the United States and essentially victimize and addict our children to these nicotine delivery devices,” Cornyn said.

Nicotine is highly addictive and hurts kids, testified Dr. Susan Walley, immediate past chair of the American Academy of Pediatrics’ Section on Nicotine and Tobacco Prevention and Treatment. Nicotine can permanently hurt a teen’s developing brain, [studies show](#), impairing working memory and attention.

Flavored products are too tempting and easy to access, said Walley, who brought with her a flavored e-cigarette product called OMG Blow Pop that she said she purchased within walking distance of a school.

“Simply put, this is unacceptable,” she said. “We need the federal government to get these illegal products off the market.”

Even representatives of the vaping industry testified that they were unhappy with the FDA's authorization process.

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“This is a hot mess right now,” said Tony Abboud, executive director of the Vapor Technology Association. He complained that there was no clear pathway through the approval process and said that without one, “we are going to persist in having an illicit market.”

A high school senior, Josie Shapiro of Seattle, told the committee that vaping products are too easy to access. She said she started vaping after several friends did.

“They thought vapes were harmless because of the fun flavors and colorful packaging,” Shapiro testified.

Shapiro said she has tried to quit several times, but vaping has taken over her and her friends' lives.

“I've felt completely out of control, helpless and alone,” she said. “I couldn't spend quality time with my friends without thinking about when we were going to get our next hit.”