> Is tobacco from one grandfathered product, used instead in a different grandfathered format such as a pouch, considered a new product that raises new health questions, or substantially equivalent to existing grandfathered products? UST has taken issue with FDA's "not substantially equivalent" determination for a new Copenhagen product and sued the agency. Photo: U.S. Smokeless Tobacco Co.

Rethinking the Substantial Equivalence Process

Will the FDA's ugly duckling receive a court-ordered makeover?

>BY BRYAN HAYNES

The FDA's Substantial Equivalence (SE) process was intended to be a simplified, expedited process for approval of so-called "new tobacco products" (products that were not on the market as of February 15, 2007, or that have changed in any way since then). The concept is to compare the new product to a "grandfathered" product (one that was on the market as of February 15, 2007), and to show that any differences do not "raise different questions of public health."

Since it started in 2011, this ostensibly simplified comparison has devolved into an ungainly process in which very few cigarette brands have received premarket approval and that has stymied even the largest tobacco companies. Industry has criticized the evolving and opaque nature of the FDA's information requirements, as well as the fact that the FDA still has not identified—seven years later—the standards applicable to SE submissions. Even relatively minor changes to products receive extensive (and arguably unnecessary) scrutiny, with companies being forced to expend substantial resources to justify any changes to their products, including legally-mandated changes to "fire safe" cigarette paper.

FDA HINTS AT AN SE OVERHAUL

The FDA has recently indicated that it intends to make some changes to the SE process. In FDA Commissioner Scott Gottlieb's July 28, 2017 announcement regarding a "comprehensive approach to nicotine and tobacco," he indicated that the FDA intends to "advance rules that will lay out what needs to be in applications for Substantial Equivalence." Commissioner Gottlieb also announced that he would direct the FDA Center for Tobacco Products (CTP) to "explore other aspects of the current application review process." He stated that CTP has been asked to consider whether its review of so-called "provisional" SE reports (reports for products that were introduced between February 15, 2007 and March 22, 2011) "is an effective use of its resources" and suggested that in the future CTP may not continue its review of certain provisional SE reports.

More recently, in the March 15, 2018 announcement of an Advance Notice of Proposed Rulemaking that would mandate lower nicotine in combustible cigarettes, Commissioner Gottlieb elaborated on the contemplated SE overhaul:

> *"We also plan to release soon a framework for how we'll address the so-called provisional substantial equivalence applications. These are for products that entered the market during a grace period set up in the law and for which companies submitted reports to demonstrate that the new product has the same characteristics as a predicate product, or has different characteristics, but such differences do not cause the new product to raise different questions of public health. These 'provisional' products can remain on the market unless the FDA finds them not substantially equivalent. Our new framework aims to provide more clarity by delineating between individual provisional applications which the FDA intends to continue to review to reach a final determination on whether they can remain on the market and those provisional applications that the agency does not intend to review further and which can continue being sold."*

This suggests that the FDA could soon develop a framework where cer-

tain provisional products are no longer subject to premarket review, while the FDA would continue its review of other provisional products. The precise dividing line between the two categories of products will have significant consequences for regulated companies, and the industry anxiously awaits more clarity on the FDA's new framework.

It is not clear when the FDA will issue the contemplated rulemaking around SE standards or specify its new standards regarding review of provisional SE reports. Many have noted that the FDA is notoriously slow in implementing policy changes. In the meantime, one major tobacco company is attempting to force the FDA's hand through the courts.

UST SUES THE FDA REGARDING SE STANDARDS

On February 2, 2018, U.S. Smokeless Tobacco Company (UST), the smokeless tobacco arm of Altria Group, filed a lawsuit in the United States District Court for the District of Columbia, challenging the FDA's issuance of "Not Substantially Equivalent" (NSE) Orders for a new, portioned moist smokeless product, Copenhagen Bold Wintergreen Flavor Packs (Copenhagen Bold). This appears to be the first lawsuit challenging the FDA's denial of an SE submission for a specific product.

The Copenhagen Bold SE submission compared the new product, a portioned smokeless tobacco in pouches with a grandfathered product in the same format (pouched smokeless tobacco) but containing different tobacco. UST had considered using a different grandfathered product—a loose tobacco product with the exact same blend and formula as Copenhagen Bold—but the FDA discouraged UST from doing so because the grandfathered product was in a different format. At the FDA's suggestion, UST designated the grandfathered loose tobacco product with the exact same tobacco blend and formula as Copenhagen Bold as a "surrogate" product.

The FDA ultimately issued NSE Orders for the Copenhagen Bold products. In doing so, the FDA apparently ignored data regarding the surrogate product containing the exact same tobacco but in a different format. The FDA apparently reasoned that UST could use surrogate product data only when the predicate product was not available to be tested. Because data on the predicate product was available, the FDA refused to consider information regarding the surrogate product.

The NSE Orders found that there were "different questions of public health" between Copenhagen Bold and the grandfathered predicate in the same format but containing different tobacco. The FDA's NSE Orders apparently did not dispute that the risks of Copenhagen Bold were within the range of risks in the smokeless tobacco market. Nor did the FDA dispute that putting identical grandfathered loose tobacco into mesh pouches reduces both nicotine and toxicants. The FDA's determination apparently was based on a legal finding that the FDA can consider only a comparison between the new product and a single predicate, and that the market for smokeless tobacco products as a whole is irrelevant to the SE inquiry.

UST's lawsuit challenges the FDA's determination on several grounds. UST critiques the SE process in its entirety, stating that "FDA's vague, inconsistent and ad hoc standards for substantial equivalence are arbitrary, capricious, and in violation of due process." The Complaint notes that a fundamental requirement of due process is for agencies to provide regulated parties with fair warning of prohibited or mandated conduct. UST asserts that the FDA has not met this standard in that it has failed to issue regulations establishing the requirements and standards for SE. Nor has the FDA (even in non-binding guidance) delineated any standards for the ultimate "different questions of public health" determination. Without any practical guidelines for regulated parties, and with a history of opaque and inconsistent determinations, UST asserts that the SE process falls short of constitutional requirements.

UST also challenges the specifics of the SE process, as applied to the NSE determination issued for Copenhagen Bold. UST asserts that this determination is "arbitrary and capricious" and contrary to the Family Smoking Prevention and Tobacco Control Act. UST specifically critiques the FDA's practice of comparing the individual characteristics of new and predicate products, as opposed to focusing on whether the new product "as a whole" raises different questions of public health. UST also critiques the FDA's improper exclusion from its analysis any data other than data from a single predicate in the same format, such as data pertaining to the market as a whole, or data pertaining to surrogate products in different formats.

THE FUTURE OF SE

Both UST's lawsuit and the FDA's own pronouncements indicate that the SE process is due for, and will likely receive, a much-needed makeover. Whether the FDA will overhaul the process voluntarily, or be forced by court action, remains to be seen. It is also difficult to predict the precise manner in which the process will change. Both the FDA and industry appear to agree that the process needs to be more clearly defined so that the industry has a better understanding of the FDA's standards. UST's lawsuit could result in further clarity regarding the ultimate evidentiary requirements for SE marketing orders. Irrespective of the outcome of the litigation, the FDA seems intent to overhaul the manner in which it reviews provisional products, which would provide little solace to companies seeking to introduce entirely new products, but could afford some relief to companies who introduced products between February 2007 and March 2011. Stay tuned for further developments. S

Troutman Sanders Tobacco Team, Troutman Sanders LLP, *1001 Haxall Point, Richmond, Va. 23219, Tel: (804) 697-2206, Fax: (804) 697-1339, Web: www.troutmansanders.com, Email: bryan.haynes@troutmansanders.com.*