



August 24, 2020

Joseph J. Simons
Chairman
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave, NW
Suite CC-5610 (Annex J)
Washington, DC 20580

Re: Tobacco Reports; PRA Comment: FTC File No. P072108

Dear Chairman Simons:

The American Lung Association appreciates the opportunity to submit comments to the Federal Trade Commission (FTC) regarding the annual collection of information on cigarette and smokeless tobacco sales and marketing by the agency.

The Lung Association is the oldest, voluntary public health organization in the United States and is committed to eliminating tobacco use and tobacco-related disease. Tobacco use is the leading cause of preventable death and disease in the United State, responsible for the deaths of 480,000 Americans annually. An additional 16 million Americans live with a disease caused by tobacco.

The American Lung Association strongly supports the FTC's continued collection of information on sales and marketing from cigarette and smokeless tobacco companies and compilation of their annual reports on the same topic. These reports provide valuable information on cigarette and smokeless tobacco product sales and marketing that is used on an ongoing basis in the Lung Association's education and public policy activities related to preventing and reducing tobacco use. These data are also important for public health officials and other organizations working to reduce the terrible burden caused by tobacco. By understanding how much tobacco companies spend on marketing and the distribution channels they use, it allows public health officials to determine where and how best to deliver tobacco prevention and cessation messages.

In addition, the Lung Association urges the FTC to consider sending similar information requests to manufacturers of other tobacco products, especially e-cigarettes and cigars. The commission has collected and released information on cigar sales and advertising in the past, and has considered collecting information on e-cigarette sales and advertising as recently as 2015. Given the rising youth use of e-cigarettes and the higher use of cigars among African American youth, the Lung Association believes it is especially important for these data to be regularly collected and disclosed.

Cigarette and Smokeless Tobacco Sales and Marketing Information:

As noted in the [Federal Register notice](#) seeking comment, FTC has been collecting domestic cigarette sales and marketing expenditures for over 50 years and smokeless tobacco sales and marketing expenditures for over 30 years. The Lung Association finds the information

collected and disseminated by the FTC on this topic extremely valuable and uses it frequently in its education and public policy activities. The U.S. Surgeon General has concluded that marketing contributes to initiation of tobacco products,¹ and the FTC collection of information on sales and marketing allows the tracking of this information on an annual basis to identify trends that can be shared in our educational materials.

One example of where the information is used by the Lung Association is on its website in an online factsheet called "[Tobacco Industry Marketing](#)." The Lung Association uses both the overall amount of marketing spent by major cigarette and smokeless tobacco companies and some of the detailed breakdowns by category in this factsheet. From July 1, 2019 to June 30, 2020, the website page received over 12,000 pageviews.

The Lung Association has also used the marketing information collected by the FTC in educational materials at the state level. Specifically, in Pennsylvania, the information is used in factsheets distributed to the general public and other interested stakeholders regarding point-of-sale policies for tobacco products to help illustrate the amount major tobacco companies spend on advertising and marketing each year in retail stores.

Without the FTC collection and dissemination of this valuable data on cigarette and smokeless tobacco marketing, the information the Lung Association uses to educate the public and protect youth from tobacco product use would not exist. The Lung Association urges the continuing collection and dissemination of these data by FTC to allow for education of the general public concerning trends around sales and marketing of cigarettes and smokeless tobacco to proceed.

Cigar and E-Cigarette Sales and Marketing Information:

Given the demonstrated utility of the cigarette and smokeless tobacco information already collected by FTC, the American Lung Association strongly encourages the FTC to collect and make available publicly similar information on cigars and electronic cigarettes.

In the past, FTC collected similar sales and marketing information for cigars using the same authorities it uses for cigarettes and smokeless tobacco products.² Cigar smoking can cause many of the same diseases caused by cigarette smoking, including cancers of the lung, oral cavity, larynx and esophagus as well as cardiovascular disease. Those who smoke cigars heavily or inhale deeply also increase their risk of developing chronic obstructive pulmonary disease (COPD), which includes chronic bronchitis and emphysema.³ African American high school students also use cigars at elevated rates (12.3%) compared to high schools students overall (7.6%), according to the Centers for Disease Control and Prevention's 2019 National Youth Tobacco Survey.⁴

Understanding trends in sales and marketing of cigars would help the Lung Association and other stakeholders refine educational strategies to continue to reduce cigar use among both youth and adults.

There have been dramatic increases in electronic cigarette (e-cigarette) use among youth over the past decade. Use among high school students climbed from 1.5% in 2011 to a remarkable 27.5% in 2019, a 1,733% increase. Use among middle school students saw a similar

percentage increase from 0.6% in 2011 to 10.5% in 2019, a 1,650% increase.⁵ Understanding trends in the sales and marketing of e-cigarettes could be crucial to helping to alleviate these alarming increases, which accelerated from 2017 to 2019.

In 2015, FTC proposed collecting similar sales and marketing information from major e-cigarette companies at the time but does not appear to have moved ahead with this proposal. The American Lung Association filed comments with several public health partners at the time applauding FTC for its proposal, and outlining several points to keep in mind as FTC proceeded with collection of these data. Those 2015 comments are included at the end of these comments.

The need for this information has only gotten more acute since 2015 with the dramatic increases in youth e-cigarette use. Unlike combustible cigarettes, there is no regulation of e-cigarette marketing at the national level and ENDS may be advertised on television. Youth and young adults are widely exposed to e-cigarette marketing and have high awareness of ENDS.⁶

The Lung Association once again strongly encourages FTC to collect and make publicly available information on e-cigarette sales and marketing to help identify trends behind the dramatic increases in youth e-cigarette use the country is experiencing. A whole new generation of kids faces the prospect of becoming addicted to e-cigarettes, which also makes them susceptible to starting smoking cigarettes.⁷

In conclusion, the American Lung Association strongly supports the continued collection and public dissemination of information on sales and marketing by major cigarette and smokeless tobacco companies. We encourage the agency to pursue similar data collection and public dissemination for cigars and e-cigarettes.

Thank you for the opportunity to submit comments.

Sincerely,



Harold P. Wimmer
National President and CEO

¹ U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health; 2012.

² Federal Trade Commission. Cigars Should Have Health Warnings; FTC Says. 1999; <http://www.ftc.gov/news-events/press-releases/1999/07/cigars-should-have-health-warnings-ftc-says>. Accessed August 13, 2020.

³ National Cancer Institute. Smoking and Tobacco Control Monographs. Monograph 9: Cigars: Health Effects and Trends. 1998. NIH Pub No 98-4302.

⁴ Wang TW, Gentzke AS, Creamer MR, et al. Tobacco Product Use and Associated Factors Among Middle and High School Students —United States, 2019. MMWR Surveill Summ 2019;68(No. SS-12):1–22.

DOI: <http://dx.doi.org/10.15585/mmwr.ss6812a1external icon>.

⁵ Centers for Disease Control and Prevention. National Youth Tobacco Survey, 2011–2019. Analysis by the American Lung Association Epidemiology and Statistics Unit using SPSS software.

⁶ Wang TW, Gentzke AS, Creamer MR, et al. Tobacco Product Use and Associated Factors Among Middle and High School Students —United States, 2019. MMWR Surveill Summ 2019;68(No. SS-12):1–22.

DOI: <http://dx.doi.org/10.15585/mmwr.ss6812a1external icon>.

⁷ National Academies of Sciences, Engineering, and Medicine. 2018. [Public Health Consequences of E-Cigarettes External](#). Washington, DC: The National Academies Press.

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December 28, 2015

Edith Ramirez, Chairwoman
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave NW
Suite CC-5610 (Annex J)
Washington, DC 20580

RE: Electronic Cigarettes: Paperwork Comment, FTC File No. P144504

Dear Chairwoman Ramirez,

On behalf of the undersigned organizations, we thank you for the opportunity to provide comments on the Federal Trade Commission's (FTC) request for comment on proposed information requests to marketers of electronic cigarettes, or electronic nicotine delivery systems (ENDS). Like the Tobacco Reports which contain valuable information regarding sales and marketing expenditures for cigarettes and smokeless tobacco products, we agree that FTC must begin collecting the same information from ENDS marketers.

Since 1967 and the passage of the Federal Cigarette Labeling and Advertising Act, FTC has collected information on the sales and marketing expenditures of cigarettes and reported that information to Congress. In 1987, the Comprehensive Smokeless Tobacco Health Education Act required similar reports on smokeless tobacco products. When those provisions expired, FTC continued to collect the data under the authority of Section 6(b) of the FTC Act, 15 U.S.C. § 46(b).¹ Using the same authority in 1999, FTC published similar data on cigar products.² FTC proposes now to use its authority to collect marketing and sales data on ENDS. We applaud this proposal and urge FTC to begin this data collection, and make it publicly available as soon as possible.

There has been tremendous growth in the marketing of ENDS since 2010. Unlike combustible cigarettes, there is no regulation of e-cigarette marketing at the national level and ENDS may be advertised on television. Youth and young adults are widely exposed to e-cigarette marketing and have high awareness of ENDS.

Not only are youth aware of ENDS, use of ENDS has increased significantly. The 2014 National Youth Tobacco Survey (NYTS) found that 13.4% of high school students and 3.9% of middle school students in the United States reported past 30-day use of electronic cigarettes.³ According to data from the National Health Interview Survey (NHIS), past 30-day use of e-cigarettes among 18-24 year olds was 5.1% and 3.7% among adults overall in 2014.⁴

In a recent report from Truth Initiative, *Vaporized: Youth and Young Adult Exposure to E-Cigarette Marketing*, 82% of 12-17 year olds and 88% of 18-21 year olds report having seen an ad in at least one marketing channel in 2015. Awareness of e-cigarette advertisements remains highest in retail establishments (convenience stores, supermarkets, or gas stations), followed by television and online. Television was the second biggest source of e-cigarette advertising awareness with approximately 50% of youth reporting seeing an ad, suggesting advertisers may be purposefully reaching this audience. E-cigarette advertising expenditures increased significantly, by 52%, from 2013 to 2014, reaching \$115.3 million in 2014.⁵ However, the data in *Vaporized* includes only paid media spending as reported by Kantar Media and does not include paid social media, some digital, or point-of-sale promotion of ENDS. As a result the report most likely significantly understates the total value of ENDS media expenditures.

We know that marketing contributes to initiation of conventional tobacco products.⁶ While more research is needed, we already see early evidence that likewise, ENDS marketing contributes to openness to trying ENDS, and may contribute to initiation.^{7,8} Further, many in the ENDS industry have taken their advertising cues from the conventional tobacco industry. The themes, messages and images that were used by the conventional tobacco industry to appeal to youth audiences such as celebrity endorsements, sexual innuendo, and appeals to freedom, adventure and expression have been co-opted by some ENDS manufacturers.^{9,10} That makes FTC's data collection all the more important.

The limited amount of data available on what is really happening in ENDS marketing would be bolstered by the FTC's data collection – which would include obtaining data directly from the manufacturers themselves. FTC's Cigarette Reports and Smokeless Tobacco Reports provide invaluable data and insight into the marketing tactics of the tobacco industry. The information has been used as the basis for life-saving public policies. With the explosion of ENDS on the market and because ENDS are not currently regulated, nor do they have any of the advertising and marketing restrictions imposed on cigarettes and smokeless tobacco products, the public health community must have reliable data to likewise monitor the marketing tactics of ENDS manufacturers and develop policies to prevent youth use of these products. For all these reasons, we recommend that FTC begin by collecting 2015 data, publish the first report as soon as possible, and collect and report the data annually thereafter.

Below we respond to several of the questions posed by FTC in the Federal Register Notice of this information collection proposal. While a proposed information request

order that includes the proposed questions that would actually be asked of ENDS companies was not available, we have assumed that the proposed order would use the most recent Order to File Special Report for cigarette companies (OMB Control No. 3084-0134) as a template.

1. FTC should use a broad definition of ENDS.

In the Federal Register Notice, FTC noted that they would begin collecting information on products known as electronic cigarettes or e-cigarettes. Unlike cigarettes, it is important to broadly define these products, since there is wide variation in the product category. That is why we have used the term electronic nicotine delivery systems (ENDS) throughout these comments, because the term “e-cigarette” does not always capture the entire breadth of this product category. The ENDS category includes products with quite varied mechanical characteristics, as well as varied nicotine strengths and flavors, with products known as e-cigarettes, vape pens, hookah pens or e-hookah, mods, tank systems, and personal vaporizers. Some of the products are disposable and resemble cigarettes and others use pre-filled and closed cartridges. Still others use refillable tank systems that do not look like cigarettes, and the category continues to evolve with new products entering the market at a rapid pace. We urge FTC to ensure that marketing data will be captured from all products that fall into the ENDS category, as well as related products including the liquid solution used in these products, sometimes referred to as “e-liquid” or “e-juice”. We recommend that FTC send its request for information to as wide a range of ENDS manufacturers as possible.

2. FTC should increase the number of companies solicited for sales and marketing data.

FTC indicated that it would send the information requests to “five large and ten small industry members.” While we agree it is important to obtain information from both large and small companies, it is unclear from the Federal Register Notice how those industry members would be determined. In order to clarify which large companies will receive the information requests, we recommend FTC base the determination on market share, based on sales data. We recommend FTC send information request orders to the top 10 large companies with the highest sales as well as to any ENDS companies owned by the major tobacco companies.

Because of the diversity of the ENDS market, we recommend that FTC should collect data from various types of ENDS advertisers, which would include manufacturers of ENDS as well as those that distribute/sell them to consumers, both on line and in stores. In order to better capture the widest swath of the ENDS industry, in addition to the 10 companies with the highest sales volume, we also recommend sending the information request order to a geographically dispersed selection of 20 manufacturers, distributors and retailers (both brick and mortar and online), including “vape shop” specialty retailers. FTC may wish to choose retailers for this category using sales levels by geographic region, and sales by type of retail outlet (vape shops, online retailers, etc.).

Vape shops are stores where consumers can buy an ENDS device, as well as the liquid solution for use with the device. While these are often single-store owned, vape shops, as a whole, seem to represent a significant portion of the ENDS market. The vape shop category is relatively new, and while their sales volume (particularly for individual stores) does not rise to the level of the “large” category as discussed above, this sector of the ENDS market is very important and information about their marketing practices is needed. This information is not available through any other source, so FTC’s resultant ENDS report would be the best and possibly only source for this data.

Unlike the cigarette industry where the market is concentrated in a small number of big companies that rarely change from year to year, currently the ENDS industry consists of hundreds of companies, ranging from brands owned by large tobacco companies to small, “mom and pop” operations. Additionally, as mentioned earlier, the industry landscape changes rapidly with updated technology and new products in the category. Thus, in a given year one company may boost sales and its advertising, only to have a different company emerge the next year and take their place. For example, one recent study showed that between August 2012 and December 2013, there were 10.5 new brands and 242 flavors per month.¹¹ Another study showed that between 2012 and 2013, some brands, including 21st Century Smoke and Mystic reported decreases in sales while Blu and Logic exhibited sales increases.¹² Using sales data as the criteria for each of the categories for which it collects data will ensure the FTC ENDS reports capture the products that consumers are actually using. Further, increasing the number of companies from which information is requested from the proposed 5 large and 10 small companies, to 10 large and 20 small companies will paint a fuller picture of the marketing tactics employed by this extremely varied market.

3. Categories of Information Collected by FTC

A. FTC should collect ENDS sales and giveaway data.

With regard to the categories of information FTC intends to collect, we agree that information on “sales and giveaways of [ENDS] and related products (e.g., refill cartridges and e-liquids)” should be collected. This is particularly important since currently there are no federal restrictions on sampling of ENDS and related products. That may change once the Food and Drug Administration’s (FDA) deeming regulation bringing ENDS under FDA’s jurisdiction is finalized. The proposed deeming rule bans free samples of the newly regulated products.¹³ Even if this ban goes into effect, there are other types of giveaways, and FTC should collect all information on products given away.

B. Expenditures on all marketing channels should be collected.

We recommend that FTC collect data on all marketing channels – rather than “various media” as stated in the Federal Register Notice. Because ENDS do not have the same kinds of marketing and advertising restrictions on them that cigarettes and smokeless

tobacco products do, their marketing tactics are much broader than those of cigarette and smokeless tobacco companies.

In its orders to cigarette and smokeless manufacturers, FTC usually asks about marketing and advertising in newspapers, magazines, outdoor, transit, point-of-sale, public entertainment in both adult-only and general audience venues, sponsorships, endorsements and testimonials, direct mail, telephone, audio-visual media, internet and website, and social media. It also asks about the amount spent on price discounts, promotional allowances to retailers, wholesalers and others, sampling distributions, branded and non-branded specialty item distributions, and coupons. All these categories should be included in the information request order to ENDS companies. However, there are differences in ENDS marketing than conventional cigarette marketing that make collecting data on some of these and other marketing channels all the more important.

First and perhaps most visibly, ENDS companies can advertise on television and radio whereas that is prohibited for cigarette and smokeless companies. It is important that all television and radio advertising is captured by the information request.

While the point-of-sale marketing channel is used by the smokeless and cigarette industries, little data exists on how much is spent at the point-of-sale by ENDS manufacturers and marketers, and at least one study has shown that this channel is the number one source of awareness for ENDS among youth.⁵ Not all reviews of marketing spending include point-of-sale data.^{5,14} The FTC information request order presents an important opportunity to gather vital information about this marketing channel. This is critical because point-of-sale marketing has been associated with smoking initiation among adolescents.^{15,16} There is concern that point-of-sale advertising may have the same effect on youth uptake of ENDS.^{17,18}

Another marketing channel where more data is needed is ENDS marketing on social media. Further, when gathering social media expenditures, FTC should be clear that spending on engagement buys (expenditures that ensure all of a manufacturer or retailer's social media followers or a targeted group of those followers, see a post), as well as acquisition buys (expenditures to reach people who are not already part of a manufacturer or retailer's followers) on social media are included. While little data exists on the expenditures or reach of social media promotion, some studies show that Twitter seems to be an important platform for marketers of ENDS. The majority of tweets about ENDS offer price promotions and a substantial amount contain smoking cessation messages.^{19,20} One study found that about a third of all ENDS-related tweets included a discount code.¹⁹ Clearly more information is needed and the data gathered by the FTC information request could shed some much needed light on this aspect of marketing.

Another online form of marketing used by ENDS retailers is Search Engine Marketing (SEM), where companies pay search engines in order to receive higher search results. FTC should ensure that this type of marketing is included in the marketing spending

reports. We recommend collecting data on this type of marketing as a separate category from both digital marketing and social media marketing, because the structure and delivery of this type of marketing differs from social media marketing, and other forms of digital advertising, such as digital display messages or other mobile advertising.

In addition to the above list of marketing channels, these products are marketed using a wide range of marketing channels that are not always used by the cigarette or smokeless industries. For example, some companies use experiential marketing or guerilla marketing, which takes place in public places such as busy street corners, shopping centers, parks or beaches in order to directly interact with consumers.^{21,22} Another type of marketing employed by the ENDS industry includes Native Advertising (ads made to look like content of the publication, i.e. a “news” article on a news site or magazine).²³ Further, while cigarette and smokeless brand sponsorships of sporting events and other cultural events are prohibited both by the Master Settlement Agreement (MSA) between most states and territories and the tobacco industry²⁴ and by the Food, Drug and Cosmetic Act, as amended by the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act),²⁵ such sponsorships are not prohibited for ENDS products. This is not lost on ENDS manufacturers, including Blu, one of the larger companies formerly owned by Lorillard and currently owned by Imperial Tobacco, which has sponsored an IndyCar race car.²⁶

The need for this information to be gathered and then made publicly available by FTC is great. We urge FTC to begin this data collection in 2016, and release its review of the data in 2017.

For future reports, FTC may wish to consider also asking companies to pull their earned media/marketing impressions, including the type, location, outlet and dates. These types of communications could include, but are not limited to op-eds, letters to the editor, and general media coverage. This type of information provides added insight into which markets and populations ENDS companies target, and often support paid marketing outreach.

C. FTC should collect data on all types of product placements.

ENDS manufacturers increasingly use product placements and brand integrations including those in broadcast, movies, digital and experiential media, video games, apps, etc., to put their products in front of potential consumers²⁷ and all product placements must be captured thoroughly. Such practices are banned for most cigarettes by the MSA. There is a robust body of research demonstrating that exposure to smoking in movies increases the likelihood that a young person will begin to smoke.^{28,29} In fact, 44% of adolescents who start smoking do so because of smoking images they have seen in the movies.³⁰ While data on ENDS use in movies, television, or video games has not yet been connected to ENDS or other tobacco initiation among youth, as with other forms of advertising and marketing, there is concern that such placements would have a similar impact on youth initiation of tobacco products. The information collected

by FTC would provide important data with regard to product placements and help lay the groundwork for effective policies to prevent normalization of tobacco use.

D. FTC should collect data on age-screening mechanisms employed by ENDS manufacturers.

All the signatories of this comment agree that youth should not be exposed to tobacco products, including ENDS. Therefore, strong measures to ensure that youth cannot access ENDS should be developed. At this time, 48 states and two territories have established a minimum age of sale (usually 18) for ENDS.³¹ However, we know that youth are accessing and using these products at increasing rates. Currently there are no regulations preventing youth from purchasing products online. At least one study in North Carolina showed that youth have no problems accessing ENDS websites, and that 76.5% of their purchase attempts were successful. Furthermore, that same study showed that there was little to no age-verification upon delivery, with 95% of deliveries left at the door, where anyone could have received the package.³² Clearly a gap in youth access restrictions exists. Data collected by FTC with regard to preventing youth exposure to ENDS advertising and promotions would provide a strong basis upon which to build and strengthen youth access policies. It is especially important to gather data with regard to efforts preventing youth access to free samples, because, as stated above, until FDA finalizes the deeming regulation, there are currently no federal restrictions on free samples of ENDS.

We agree that FTC should ask the ENDS companies about their data collection activities. In this age of digital media and media targeting, businesses from all sectors monitor where their customers and potential customers go online and what behaviors they undertake. This is of particular concern when it comes to ENDS companies gathering data on those under 18. In order to protect youth from being targeted for products that are illegal for them, companies should have measures in place to prevent collecting personal data from those under 18.

Further, FTC may wish to consider asking ENDS companies submit data on the composition of their social media networks (age, geographic location, and other demographic information), so we can better understand who they are reaching through this outlet.

4. FTC should collect differentiated data with regard to most aspects of ENDS.

In order to get the fullest picture of how the ENDS industry markets the various products in this category, we recommend that FTC collect fairly detailed data on all the areas listed in the Federal Register. More specifically, we recommend the following with regard to differentiation of reporting:

A. The various types of products sold and given away should be collected separately.

As we stated previously, the ENDS product category is very diverse. If the sales and giveaway data is not differentiated according to type of product, (such as, but not limited to, disposable devices, closed systems, cartridge refills, refillable devices and e-liquids), we will not have a clear picture of what is happening in the ENDS category. Further, as the industry evolves it will be important to see which products are rising to the top in terms of sales and which are not successful. Limited data exists on this, with one study showing that between 2012 and 2013, sales of disposable ENDS products increased, accounting for less than half of all sales in 2012 and over two-thirds of all sales by 2013.¹²

B. Nicotine strengths should be differentiated.

FTC should collect data on nicotine strengths through this information collection. Many ENDS contain nicotine. Nicotine can alter nerve cell functioning in developing organisms, especially during fetal, early childhood and adolescent stages of development and thus, should not be used by youth or pregnant women.^{35,36} Nicotine may also be harmful for people with specific medical conditions including cardiovascular disease and diabetes. It is important to know whether products with high, low or no nicotine are being sold. To ease data collection, FTC may wish to consider listing ranges of nicotine levels such as 0 mgs/ml of nicotine, 1-7 mgs/ml, 8-18 mgs/ml, and 19 mgs/ml and over. While studies have shown that the nicotine levels listed on the package are not always consistent with the nicotine level actually in the product,^{37,38} it will nonetheless be helpful to know the nicotine level consumers intended to purchase. This information is not easily found from other sources, making the need for FTC to collect it all the more important.

C. FTC should identify three major flavor categories and collect data and report the number of ENDS sold or given away in each of those categories.

Essentially all ENDS have a characterizing flavor, such as tobacco, menthol, fruit or candy flavor. As of January 2014, there were nearly 8,000 flavors.³⁹ Menthol cigarettes have been shown to appeal to young people⁴⁰⁻⁴² and facilitate the transition from experimentation to regular smoking.⁴³ It is likely that flavors in other tobacco products, including ENDS, also facilitate tobacco trial and longer-term use. Evidence indicates that flavors are viewed as an attractive characteristic of ENDS,⁴⁴ and youth and adults cite flavors as a reason for ENDS use.⁴⁵⁻⁴⁷ In 2013-2014, 85.3% of U.S. youth aged 12-17 who had used ENDS in the past 30 days reported using a flavored e-cigarette.⁴⁸ The prevalence of flavored ENDS use among adults is not currently available at the national level.

Because of the wide variety of flavors, and because flavors seem to be one of the reasons youth and adults try ENDS, FTC must gather information on flavored ENDS. However, it would be nearly impossible to collect such information on all the nearly 8,000 flavors. Therefore, we recommend that FTC use the following flavor categories for the purposes of this information collection:

- Tobacco Flavors

- Mint or Menthol Flavors
- Other Flavors

Nearly all, if not all, lines of ENDS products have tobacco flavors as well as mint or menthol flavors and one study showed that in 2013, they were the most popular flavors sold.¹² The “Other Flavors” category would include, but not be limited to brands flavored to taste like clove, spice, candy, fruit, chocolate, alcohol (such as wine or cognac), beverages (such as coffee), or other sweets. By keeping this category broad, it would avoid confusion over which category to put a flavor such as “Strawberry Margarita” – and whether that should be a fruit flavor or an alcohol flavor. It would also capture flavors that are less easy to categorize such as “Dr. Venkman” or “Tiger’s Blood”. These categories would most easily capture the breadth of flavors available, and make it easier for industry and FTC to count all the flavors.

D. Sizes and liquid capacities of ENDS should be collected.

Similarly, it will be important to know the sizes and liquid capacities of disposable e-cigarettes, cartridges and e-liquids sold and given away. As noted above, while not a carcinogen, some adverse health effects are associated with nicotine exposure. Further, nicotine is an addictive substance that is easily absorbed through the skin as well as through the oral mucosa and the lungs. Knowing the sizes and liquid capacities could help determine the range of sizes sold, which are most popular, and help make determinations on whether limitations on the sizes sold are needed for public safety. It is not clear that this information is available elsewhere, so FTC’s collection of this data would be critical. Again, FTC may wish to collect this data in ranges of sizes and liquid capacities, rather than try to collect data on every single size, but some differentiation should be reported.

E. FTC should collect data regarding how the products are sold (e.g. to wholesalers and distributors for sale at brick and mortar stores, via the internet, etc.).

As we stated above, currently there are no regulations preventing the sale of ENDS via the internet. Nor are there regulations required to establish strong age-verification systems for non-face-to-face interactions, something the signatories of this letter fully support. What is more, until the deeming regulation is finalized, there is no federal minimum age that would apply to all sellers of ENDS, whether brick and mortar stores, or internet or other non-face-to-face retailers, to prevent youth from accessing these products. While a majority of states have minimum age laws for purchasing ENDS, there are still a few states that do not. Not surprisingly, as was previously noted, youth are accessing these products easily from the Internet as well as from other sources. While some sites, usually those owned by large tobacco companies, have a strong age-verification system, this is not true across the ENDS category. The age verification systems for most ENDS-related and ENDS-selling websites are essentially non-existent. In many cases, one simply needs to click a link saying they are 18 and above, with no further verification.⁴⁹

Regardless of whether the products are sold to youth or to adults, it will help the public understand the full impact of ENDS marketing tactics to know through which channel the products are purchased. Because this data is not easily available to the public through other sources, it is critical that FTC collect data on how/where a product was sold.

5. Data on products sold and products given away should be collected separately.

FTC currently collects data on products sold and products given away separately in its Cigarette Report. We recommend that FTC extend this practice to its data collection on ENDS. As stated previously, until the deeming regulation is finalized there are no restrictions on giving free samples of ENDS products, or other ENDS giveaways. Collecting data on sales and products given away separately is important to determine to what extent free samples and giveaways are used. Even after the deeming regulation is finalized this question will remain important to determine what other sorts of giveaways besides free samples the companies may be employing.

6. FTC should consider additional cartridges sold to be refills, regardless of whether they were part of the same SKU or not.

The marketing and research experts we consulted agreed that any cartridges beyond one, even if sold within the same package, should be considered refills. For example, if a package contains the device with four cartridges, three of the cartridges should be considered refills. Often those additional cartridges are marketed as refills by the manufacturers themselves. However, these experts did not think it mattered whether those cartridges were part of the same SKU as the device itself or if they were packaged within the same blister pack.

7. FTC should collect data on state-by-state sales and advertising of ENDS and related products.

FTC should collect sales data on a state-by-state basis. This is data that should be easily available from both large and small companies. Indeed, online retailers, no matter how small would have sales data down to the zip code level.

In terms of advertising, we understand that, in general, the major ENDS companies may be national advertisers, and therefore cannot report many categories of marketing and advertising, such as magazine advertising, on a state-by-state basis. Further, in the case of digital and social media that data would not be available on a state-by-state basis. However, because many of the ENDS companies are smaller and often have more targeted advertising plans, there are occasions where advertisers make more targeted, local advertising buys – in local television, radio, magazines and newspapers, as well as out-of-home, guerilla marketing, native advertising, etc. These kinds of advertising would be important for the public to know about on a state-by-state basis and spending on such advertising can be easily tracked by the industry. Similarly,

point-of-sale advertising is also easily traced to the state level. While advertising and marketing tracking agencies such as Kantar and Nielsen can track spending to individual media markets, there are gaps in what data these tracking systems can provide. In particular, these systems are unreliable when it comes to advertisement placement tracking or discounting, making the FTC ENDS Report the only reliable source of this data, particularly on a state-by-state basis. We understand that the data collected and reported by FTC on a state-by-state basis would not include national buys, but it is important to collect data on any geographically targeted buys, when that data is available.

8. ENDS companies should be able to provide the recommended data requested.

In its Federal Register Notice, FTC asks if the ENDS companies could provide the amount of data FTC detailed in the Notice. We urge the FTC to resist any pleas from the ENDS industry that the data is too burdensome to provide. The information in the Notice, as well as the additional information we recommended above for FTC to request, is all information that ENDS manufacturers with good business practices would have available. While the smaller manufacturers and some of the vape shops may not have quite as big or as varied marketing budgets, they will know how much they have spent on marketing in the forms recommended above. Further, they should know how much of each type of product they have sold. It is simply basic good business practice to know which products have been sold and through which channels those sales took place.

9. FTC should enter into an agreement with FDA and coordinate this data collection with FDA.

Given that the information garnered from this data collection will be used by the public health community, and in particular by FDA to promulgate regulations with regard to these products, we suggest that FTC coordinate the data collection with FDA. Further, because FTC has rather limited resources with which to collect this data, and given its importance to FDA's work, we encourage FTC to enter into an agreement with FDA to provide some of the funding for this data collection. Moreover, because of the wide variety of ends products and the nature of the market, this data is likely to be more difficult to collect than the data for cigarettes and smokeless tobacco. Entering into an agreement with FDA will ensure that the data is as robust and thorough as possible, and can be used to best protect public health.

Conclusion

The signatory groups are pleased that FTC has undertaken the process to start collecting sales and marketing data for ENDS products. In many cases this data is difficult to find, and in some cases is not available from any other source. While the varied nature of the ENDS market may make the information slightly more difficult to collect, FTC's past experience in developing the cigarette and smokeless reports

provide a strong background and template from which to work. We urge FTC to begin this data collection starting with 2015 data and disseminate the results as soon as possible. This market is growing too fast to wait any longer. We know that marketing has an impact on youth initiation of tobacco products, and the data supplied in an ENDS Sales and Marketing Report will lay the foundation upon which to build strong policies to protect youth from ENDS products. We look forward to reading the report soon.

Sincerely,

American Academy of Pediatrics
American Heart Association
American Lung Association
Campaign for Tobacco-Free Kids
Tobacco Control Legal Consortium
Truth Initiative

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