



July 23, 2018

VIA ELECTRONIC FILING (www.regulations.gov)

Ambassador Robert E. Lighthizer
U.S. Trade Representative
600 17th St. NW
Washington, DC 20508

Re: Docket No. USTR-2018-0018: Comments Concerning Proposed Action Pursuant to Section 301

Dear Ambassador Lighthizer:

As the voice of the vapor products industry in the United States, the Vapor Technology Association ("VTA") is grateful for the opportunity to present the following in response to the Office of the United States Trade Representative's ("USTR") Request for Comments: Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation.

I. Introduction

The Vapor Technology Association is the leading U.S. non-profit industry trade association whose members are dedicated to developing and selling high quality vapor products that provide adult consumers with a safer alternative to traditional combustible cigarettes. Our trade association represents the leading manufacturers of personal electronic vaporizing devices – commonly known as vapor devices, ENDS, or e-cigarettes – manufacturers of e-liquids, flavorings, and components, as well as wholesalers, distributors, importers, and e-commerce and brick-and-mortar retailers.

As is the case with the vapor industry in general, many of the VTA's members are small businesses that have created significant employment opportunities in their local communities and that contribute substantially to local and state economies. Specifically, the VTA is proud to claim as its members 22 independent state vapor trade associations and their member companies, the majority of which are small businesses and retailers. The state vapor associations that are working directly with VTA include the following:

Arizona Smoke Free Business Alliance
Arkansas Vape Advocacy Alliance
Breathe Easier Alliance of Alabama

California Smoke Free Organization
Florida Smoke Free Association
Georgia Smoke Free Association
Indiana Smoke Free Alliance
Iowans For Alternatives to Smoking Tobacco
Kentucky Smoke Free Association
Louisiana Vaping Association
Maryland Vapor Alliance
Montana Smoke Free Association
Nevada Vaping Association
Ohio Vapor Trade Association
Oregon Vapor Trade Association
Pink Lung Brigade (Washington)
Smoke Free Alternatives Coalition of Illinois
South Dakota Smoke Free Association
Tennessee Smoke Free Association
Texas Vapor Coalition
Utah Smoke Free Association
Virginia Smoke Free Association

The VTA has been at the forefront of the most critical issues confronting the vapor industry and has specifically attacked the issue of ensuring that vapor products are properly marketed towards adults only. To that end, the Board of Directors of VTA developed the industry's first comprehensive set of marketing standards – the VTA Marketing Standards for Membership – which we presented to FDA in January of this year. As part of its continuing efforts to frame sound policy governing our rapidly growing industry, the VTA presents the following comments to the USTR.

II. VTA's Opposition to Harmonized Tariff Schedule 8543.70.99

The VTA submits these comments in opposition to the proposed Harmonized Tariff Schedule (“HTS”) subheading 8543.70.99 “other machinery” in Annex C. For purposes of this opposition, the VTA is specifically opposed to the tariff on personal electronic vaporizing devices (“vapor devices”, “ENDS products”, or “e-cigarettes”), classified in tariff numbers 8543.70.99.30 and 8543.70.99.40, which would adversely affect over 10,000 U.S. businesses and over 10 million U.S. consumers of vapor products by imposing a 25% tariff on these finished consumer products.

In the Supplementary Information in this Docket, the USTR noted:

USTR and the Section 301 Committee have carefully reviewed the public comments and the testimony from the three-day public hearing. In addition, and consistent with the Presidential directive, USTR and the interagency Section 301 Committee have

carefully reviewed the extent to which the tariff subheadings in the April 6, 2018 notice include products containing industrially significant technology, including technologies and products related to the “Made in China 2025” program. Based on this review process, the Trade Representative has determined to narrow the proposed list in the April 6, 2018 notice to 818 tariff subheadings, with an approximate annual trade value of \$34 billion.

Importantly, the primary reasons on which the USTR removed products from the original list apply equally to HTS subheading 8543.79.99. In other words, the products covered by this subheading should be removed from Annex C for the same reasons other similarly situated products were removed from the original list.

There are four principal reasons why the proposed tariffs on vapor devices should not be imposed. First, the tariffs would directly result in harm to the public health as these products are helping Americans move away from deadly cigarettes. Second, these products do not have alternate sourcing suppliers. Third, the tariff would directly hurt consumers both economically and personally. Finally, the tariff does not involve the types of products that implicate any concerns of Chinese technological advancement or the “Made in China 2025” program.

A. Proposed HTS 8543.70.99 Would Be Detrimental to Public Health.

The vapor products affected by HTS 8543.70.99 are uniquely situated and should not receive additional tariffs because doing so would be detrimental to the health of U.S. citizens. Adding a 25% tariff to personal electronic vaporizing devices will thwart significant gains in public health in recent years. Under no circumstances, should tariffs be imposed while U.S. consumers are relying on vapor products to assist them in quitting and/or reducing their smoking.

As a category, vapor products are deemed by many to be significantly safer than traditional combustible tobacco products and thus present a significant harm reduction opportunity. U.S. researchers recently published a study in *Tobacco Control* concluding that switching from traditional cigarettes to e-cigarettes would annually prevent between 1.6 million and 6.6 million premature deaths in the United States.¹ This conclusion was further bolstered by the rigorous analysis of the National Academies of Sciences, Engineering, and Medicine (“NASEM”)² which, in January 2018, published the following material findings regarding e-cigarettes:

¹ Levy DT, Borland R, Lindblom EN, Goniewicz ML, Meza R, Holford TR, Yuan Z, Luo Y, O’Connor R, Niaura R, Abrams DB, 2018 Potential deaths averted in USA by replacing cigarettes with e-cigarettes. *Tob. Control* 2018 Jan;27(1):18-25. doi: 10.1136/tobaccocontrol-2017-053759. Epub 2017 Oct 2.

² National Academies of Sciences, Engineering, Medicine. 2018. Public Health Consequences of E-Cigarettes. <https://www.nap.edu/resource/24952/012318ecigaretteConclusionsbyEvidence.pdf>.

- “There is **conclusive evidence** that completely substituting e-cigarettes for combustible tobacco cigarettes **reduces users’ exposure to numerous toxicants and carcinogens** present in combustible tobacco cigarettes.”³
- “There is **substantial evidence** that completely switching from regular use of combustible tobacco cigarettes to e-cigarettes results in **reduced short-term adverse health outcomes in several organ systems.**”⁴
- “The evidence about harm reduction suggests that **across a range of studies and outcomes, e-cigarettes pose less risk to an individual than combustible tobacco cigarettes.**”⁵

In fact, this June the American Cancer Society stated that vapor products are “closer to nicotine-replacement therapies than to combustible tobacco products” and “are likely to be much less harmful than combustible tobacco products.”⁶

As recently as April 24, 2018, Commissioner Gottlieb of the U.S. Food & Drug Administration (“FDA”) stated that FDA “see[s] the possibility for ENDS products . . . to provide a potentially less harmful alternative for currently addicted individual adult smokers who still want to get access to satisfying levels of nicotine without many of the harmful effects that come with the combustion of tobacco” and that e-cigarettes “may offer a potentially lower risk alternative for individual adult smokers.”⁷ Our friends in the UK similarly have found that the hazard to health arising from long-term use of ENDS products is less than five percent of the comparable harm resulting from the use of traditional combustible products.⁸ Fortunately, adult smokers in the U.S. have been availing themselves of this opportunity en masse. The Centers for Disease Control reports that the number of smokers as a percentage of the U.S. population has dropped dramatically from 20.6% in 2009,⁹ when ENDS products first gained traction in the United States, to only 15.5% as of 2016.¹⁰ Today, some 10.2 million U.S. adults regularly use vapor products – many to move away from deadly combustible cigarettes.

³ NASEM Report at 604.

⁴ NASEM Report at 617.

⁵ NASEM Reports at 11, 487.

⁶ The American Cancer Society public health statement on eliminating combustible tobacco use in the United States, Douglas, Clifford, et al, June 11, 2018, <https://onlinelibrary.wiley.com/doi/full/10.3322/caac.21455>.

⁷ Statement of Commissioner Gottlieb, April 24, 2018.

⁸ See, e.g., <https://www.gov.uk/government/publications/e-cigarettes-and-heated-tobacco-products-evidence-review>.

⁹ CDC, Trends in Current Cigarette Smoking Among High School Students and Adults, United States, 1965–2014, available at:

https://www.cdc.gov/tobacco/data_statistics/tables/trends/cig_smoking/index.htm.

¹⁰ CDC Press Release, Smoking is down, almost 38 million American adults still smoke (Jan. 18, 2018).

B. The Proposed Tariffs Would Devastate the U.S. Vapor Industry – Especially Since No Other Manufacturing Alternative Exists.

Vapor devices, which are used to aerosolize e-liquids, are manufactured almost exclusively in China. According to the government’s own numbers, 91% of such products are manufactured in China.¹¹ For that reason, the proposed tariff of 25% on these products would decimate this young and burgeoning U.S. industry.

The vapor technology industry has been growing rapidly in the United States as an entire distribution chain in the U.S. has grown to include tens of thousands of businesses generating hundreds of thousands of jobs. In fact, vapor technology is the first fully vertical industry – including *importers, wholesalers, component part manufacturers, suppliers, and retail brick-and-mortar stores* – that has ever challenged the traditional tobacco industry.

On one end of the distribution chain are nearly 10,000 brick-and-mortar vape shops which depend on a diverse array of vapor devices that are imported from China. These vape shops – many of which are *veteran-owned* and *woman-owned* businesses – exist every corner of every state in the country, and they employ *tens of thousands* of Americans with good paying jobs.

Between the U.S. small businesses, e-liquid manufacturers, distributors, wholesalers, component part suppliers, and importers, the vapor industry employs between 60,000 and 90,000 U.S. workers. All of these segments would be directly threatened with the implementation of such a significant tariff on a finished consumer product.

Importantly, no U.S. companies produce these electronic devices so these small businesses will have nowhere to turn for cost effective products.

Moreover, any company outside of China wishing to enter this market would be unable to do so under the current FDA regulatory regime, which prohibits the entry of “new products” to the U.S. market absent marketing authorization. This authorization requires a manufacturer to meet

U.S. VAPOR

- 10,000 Vape Shops
 - Veteran-owned
 - Family-owned
 - Woman-owned
- 1,000 e-liquid manufacturers
- 60 – 90,000 full time jobs
- > 10 million square feet of commercial lease space
- Generates > \$100M in:
 - Sales taxes
 - Payroll taxes
 - Unemployment insurance taxes
 - Excise taxes
 - SS / Federal taxes

¹¹ ELECTRONIC CIGARETTES: U.S. Imports in 2016, GAO-17-515R: Published: Apr 24, 2017. Publicly Released: May 24, 2017. <https://www.gao.gov/products/GAO-17-515R>.

extensive premarket application requirements, which are as of yet undefined but no doubt would take at least two years to complete.

Further, setting aside the regulatory restrictions, the lead time to procure specialty equipment to manufacturer these products would be at least six months – without taking into account the time, resources, and training it would take to bring online a new manufacturing facility.

So, in the end, the imposition of the proposed tariffs on vapor devices would simply eliminate a growing and job-producing market and dismantle the growing import, distribution and retail network that has been created in the last few years in the U.S. and that has generated tens of thousands of jobs, and tens of millions of dollars of taxes for the national and state economies.

C. Proposed HTS 8543.70.99 Will Hurt Consumers.

The Administration has made clear that the imposition of the identified tariffs should not impact U.S. consumers and has properly removed items from the initial list (List 1) of numerous proposed tariffs when they would impact consumers. The Administration should do the same in this case of HTS 8543.70.99 (30) and (40) since they likewise adversely affect consumers.

Unlike many of the tariffs being imposed on raw materials and components, the tariff in question here would be imposed on a finished consumer product. For that reason, the imposition of a 25% tariff would directly and radically increase the retail price of a vapor device, placing the burden of the tariff squarely on the U.S. consumer.

At retail, vapor devices in the United States can run on average anywhere from \$30.00 for a basic device to \$100.00 for a more advanced device. Thus, a 25% increase on these devices would drive the average cost to a U.S. citizen up to \$37.50 to \$125.00 for one device. This problem is complicated by the fact that most vapor consumers in the U.S. own more than one vapor device, which means that the adverse tariff impact would be double or triple the added cost for each American.

D. Vapor Devices Do Not Implicate the Types of Sensitive Technologies the U.S. is Concerned With Protecting.

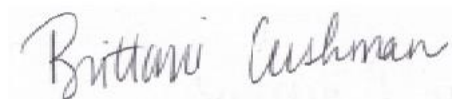
While e-cigarettes are proving to be groundbreaking technology for the purposes of smoking cessation, they clearly do not involve the types of industrial, sensitive or artificial intelligence technologies about which our country is rightly concerned in protecting. Instead,

they represent the first opportunity that our country has to fundamentally change Americans' addiction to cigarettes.

E. Conclusion

For all of the foregoing reasons, the Vapor Technology Association respectfully requests USTR exempt from the proposed tariff list HTSUS subheadings 8543.70.99.30 and 8543.70.99.40.

Respectfully submitted,

A handwritten signature in cursive script that reads "Brittani Cushman". The signature is written in black ink on a white background.

Brittani Cushman
President, Board of Directors
Vapor Technology Association