



September 6, 2018

Via Electronic Submission

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

Re: *Docket No. USTR-2018-0026-0001: Comments Concerning Proposed Action Pursuant to Section 301*

Dear Ambassador Lighthizer:

Thank you for providing the Vapor Technology Association (“VTA”) the opportunity to appear and orally testify before the Office of the United States Trade Representative (“USTR”) last month. Today, we are equally grateful for the opportunity to present USTR the unique perspective of the VTA in response to USTR’s *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*, under Docket No. USTR-2018-0026-0001, and pursuant to the *Extension of Public Comment Period Concerning Proposed Modification of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, pursuant to Docket No. USTR-2018-0026-1848.

I. Introduction of the Vapor Technology Association

The Vapor Technology Association is the leading U.S. non-profit industry trade association whose 600+ members are dedicated to developing and selling high quality vapor products that provide adult consumers with a safer alternative to traditional combustible cigarettes. VTA represents the industry-leading manufacturers of vapor devices, e-liquids, flavorings, and components, as well as the largest wholesalers, distributors, importers, and e-commerce retailers, in addition to hundreds of hard-working American brick-and mortar retail store owners throughout the United States.

As is the case with the vapor industry in general, many of the VTA’s members are small businesses that have invested in their communities, have built businesses, have created significant employment opportunities and have substantially contributed 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 who have implemented strict standards to prevent youth access to vapor products. The state vapor associations that are working directly with VTA on developing sound policy, implementing marketing standards, and preventing youth access to vapor products 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 and its members have 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 our continuing efforts to frame sound policy governing our rapidly growing industry, the VTA presents the following comments to the USTR.

II. Vapor Parts Covered By HTS Subheading 8543.90.88 Should Be Removed from Further Tariff Consideration and Eliminated from the Published Annex.

The VTA submits these comments in opposition to the proposed Harmonized Tariff Schedule (“HTS”) subheading 8543.90.88 “Parts: (other than printed circuit assemblies) of electrical machines and apparatus, having individual functions, nesoi” as set forth in the

Annex. For purposes of this opposition, the VTA is specifically opposed to the tariff on the parts of personal electronic vaporizing devices which are separately classified in as 8543.90.88.50 and 8543.90.88.60, which would *adversely affect over 10,000 U.S. businesses and over 10 million U.S. consumers of vapor products* by imposing a 10% or 25% tariff on these finished consumer products.

In the Docket Submission, 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 8543.90.88. In other words, the products covered by this subheading should be removed from the Annex for the same reasons other similarly situated products were removed from the original list.

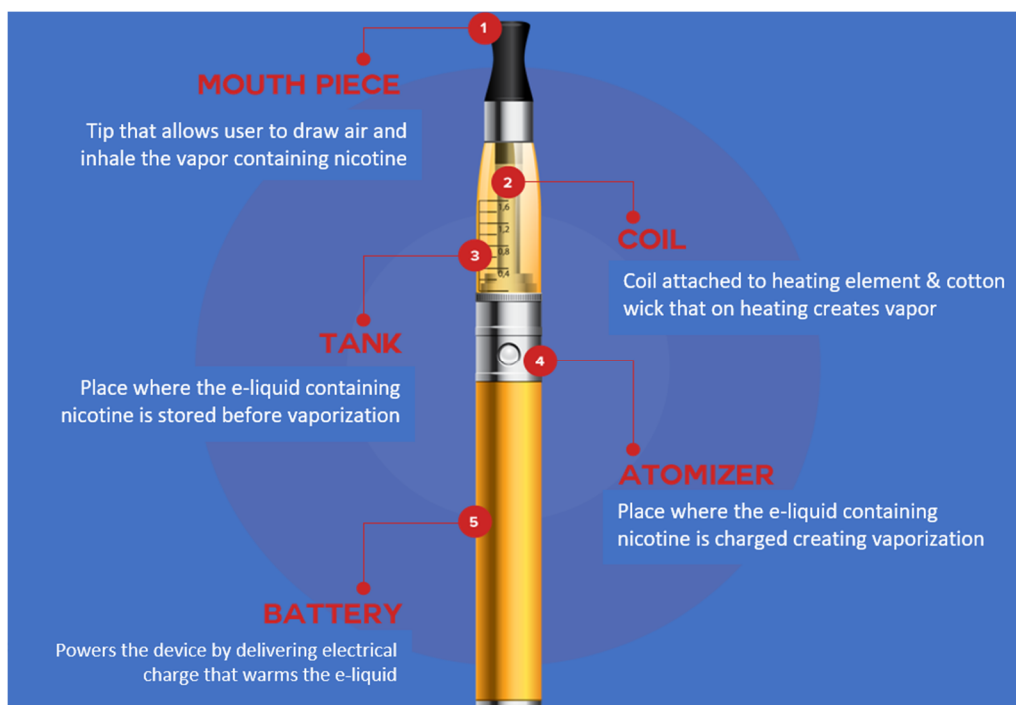
There are five principal reasons why the proposed tariffs on vapor devices should not be imposed. *First*, the tariff does not involve the types of products that implicate any concerns of Chinese technological advancement or the “Made in China 2025” program and, due to U.S. regulations, the devices being sold in the U.S. are already technologically antiquated. *Second*, since China invented the technology back in 2003, the tariff could not limit their access to it in any way. *Third*, no U.S. manufacturing alternative exists and any new U.S. manufacturer seeking to set up shop would be barred by FDA regulations from doing so. *Fourth*, the proposed tariff would decimate U.S. small businesses by putting enormous pressures on them or by imposing an enormous tax hike (of 10% or 25%) imposed on consumers. *Fifth*, the 25% tax would directly harm public health in the U.S. since millions of Americans are using vapor devices to move away from deadly cigarettes.

A. Vapor Devices and Their Parts Do Not Involve Sensitive Technologies the U.S. Must Protect and Already Are Technologically Antiquated.

While e-cigarettes and vapor products are proving to be groundbreaking technology for the purposes of smoking cessation, they do not come close to resembling or implicating any of the industrial, aerospace, computer science, or artificial intelligence technologies about which the Administration is concerned. Low-tech vapor devices simply have no comparison to the technologies which may be implicated in the Made in China 2025 program.

In fact, vapor devices and parts have been lumped into the catch-all category “Electrical machines and apparatus, having individual functions *not specified or included elsewhere in this chapter,*” near the end of a lengthy Chapter 85. *See*, Harmonized Tariff Schedule of the United States (2018) Revision 8, Chap. 85, p. 84.

A vapor device is comprised of five principal components: (1) a mouthpiece; (2) a metal coil around which liquid absorbing cotton is wrapped for heating by an electrical charge; (3) a tank (a clear cylinder that hold the e-liquids); (4) an “atomizer” (or cartomizer) where liquid that may contain nicotine is charged or heated; and (5) a “mod” or power source which typically includes a battery and regulates power. The graphic depicts one type of vapor product but virtually all vapor devices include these principal components which are imported and sold separately to the consumer.



The mere fact that a finished consumer vapor product is being tariffed alongside particle accelerators is entirely incongruous. In fact, solely from technological sophistication perspective, vapor products are more akin to the other products in HTS subheading 8543 which are *not* being tariffed, such as machines and apparatus for electroplating, electrolysis or electrophoresis.

B. Since China Invented Vapor Technology the Tariff Will Do Little to Nothing to Limit or Prevent Their Access.

A tariff on vapor parts as proposed in this Section 301 investigation will do little to protect the U.S. from any technology transfer and/or loss of intellectual property since the technology and intellectual property already is well known in China. The Administration has

made it a priority in their investigation to counter the Made in China 2025 initiative and, specifically, to ensure that tariffed products address concerns about technology transfer, intellectual property, and innovation: “China has shown that it will not respond to action at a \$50 billion level by addressing U.S. concerns *with* China's acts, policies, and practices involving technology transfer, intellectual property, and innovation.” Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, July 18, 2018.

However, through this tariff policy this U.S. cannot limit or prevent China's access to any of the technology involved in vapor products for one simple reason: vapor product technology was invented in China in 2003; *not the U.S.* Since then, most of the innovation of vapor technology devices has occurred in China, *not the U.S.* Even if a Chinese manufacturer does not own the intellectual property involved in vapor device design, because manufacturers in China have been working with and on vapor device design, innovation, and manufacturing of the products they already have exposure and access to the technology and intellectual property.

To complicate the Administration's position, the strict regulations being enforced by the FDA have quite literally *frozen* the U.S. marketplace and prevented any new companies from setting up shop in the U.S. On August 8, 2016, the FDA's expansive and onerous Deeming Regulation has effectively banned the manufacture and sale of any new or modified vapor devices or parts in the U.S. Instead, the only vapor devices and parts that can be sold in the U.S. are those that already were on the market on August 8, 2016. That means, today and for the past two plus years, the only vapor products sold are devices first designed in 2014 or 2015, making those products in technological terms antiquated and getting older by the day.

To make matters worse, there is no relief in sight. As discussed further below, for this and other reasons, the possibility that any U.S. company elects to start manufacturing vapor devices and parts is negligible and, therefore, there is no current “U.S.” vapor technology which could be “lost” to any foreign country, much less China.

C. 98% of the Vapor Parts Proposed to be Tariffed Are Imported from China and No U.S. Manufacturing Alternative Exists or Is Plausible.

While one might argue that the imposition of a 25% tariff could give an advantage to U.S. businesses looking to compete with foreign based companies, that is simply not true in this case since no U.S. companies manufacture vapor products. According to the General Accounting Office, more than 92% of vapor devices are manufactured in China.¹ On August 23, 2018, the Administration's 25% tariff on these devices went into effect even though there was and is no viable alternative, much less any U.S. alternative, for the entire U.S. industry to obtain quality vapor products.

¹ ELECTRONIC CIGARETTES: U.S. Imports in 2016, GAO-17-515R, at page 6; Published: Apr 24, 2017. Publicly Released: May 24, 2017. <https://www.gao.gov/products/GAO-17-515R>

As set forth in this latest tranche of proposed tariffs, the vapor industry would be hit again with a 10% or 25% tariff. As was the case for vapor devices, no U.S. manufacturing alternative exists for the manufacture of the vapor parts which are covered by 8543.90.88.50 and 8543.80.88.60. Again, as set forth in the GAO Report (see insert), the percentage of vapor parts imported from China under the applicable two 10-digit HTS subheadings is 98%.²

Table 3: Customs Value of U.S. E-cigarette Imports by Country of Origin and Product in 2016
41 countries, in millions of dollars

Country	Liquid		Devices		Parts		Total by country
	With 5 percent or more of nicotine ^a	With less than 5 percent of nicotine ^b	With nicotine ^c	Without nicotine ^d	With nicotine ^e	Without nicotine ^f	
China	24.671	1.581	53.865	125.987	26.157	80.750	313.010
Canada	0.139	0.084	-	11.214	0.016	0.103	11.556
Mexico	-	-	-	9.403	-	0.032	9.435
Germany	-	0.191	0.017	1.612	0.006	0.174	1.999
United Kingdom	0.744	0.110	0.030	0.605	0.009	0.124	1.621
Israel	0.453	-	-	0.246	-	0.158	0.856
France	0.153	0.241	0.003	0.176	0.008	0.073	0.654
Austria	0.100	0.115	0.055	0.136	0.025	0.191	0.620
Japan	0.197	0.112	0.005	0.148	-	0.025	0.487
Switzerland	-	0.104	-	0.104	0.003	0.183	0.393
Other (31 countries)	0.161	0.353	0.057	0.710	0.077	0.268	1.627
Total by product	26.618	2.889	54.032	150.339	26.302	82.078	342.257

As a matter of basic business practicality, given that 98% of vapor parts are imported, even the most aggressive U.S. company looking to start up and compete in this space would need a clear path to do so. Unfortunately, there is no established pathway to market in U.S. because this Administration’s regulations currently ban the sale of new vapor devices on the U.S. market without first obtaining a pre-market authorization from the FDA.

As of today, the requirements for such a premarket authorization are entirely in flux as the FDA announced more than one year ago that it would be changing the requirements. With history as a guide, any new premarket authorization requirements are going to require the expenditure of tens of millions of dollars within a cumbersome process that will take *no less than (and likely much more than) three to four years* to complete. As such, there is no available pathway to market today for any U.S. company wishing to take advantage of the imposition of tariffs.

Given that there are zero U.S. manufacturing companies that would be benefited in any way by the imposition of tariffs on vapor devices, it is clear that the proposed tariffs on vapor parts can only harm the 10,000 U.S. companies that have created a new and remarkable industry in the U.S. in the past 7 years.

² ELECTRONIC CIGARETTES: U.S. Imports in 2016, GAO-17-515R, at page 6; Published: Apr 24, 2017. Publicly Released: May 24, 2017. <https://www.gao.gov/products/GAO-17-515R>

D. The Proposed Tariff on Vapor Parts Will Further Decimate U.S. Businesses and Hurt American Consumers.

The vapor technology industry has been growing rapidly in the United States as an entirely new distribution chain of more than 10,000 U.S. businesses employs hundreds of thousands of Americans. To be clear, the vapor technology industry represents 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 (now tariffed) and vapor components (proposed to be tariffed) 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 conservatively between 60,000 and 90,000 American workers. All of these segments are now directly threatened with the implementation of the August 23 tariff and the doubling down of the latest proposed tariff.

It is important to understand that, unlike the majority of other parts covered under this subheading 8543.90.88, the vapor parts being tariffed are *finished consumer products that are imported and sold to the end user*. Virtually every other “part” being tariffed under the same subheading is a constituent or component that is not sold individually to any end user. For that reason, the additional costs of the tariffed can be absorbed at different points of the production chain, prior to distribution.

But, in the case of vapor parts which are imported and sold directly to consumers, there are few if any other cost absorbers. Because no U.S. companies produce these electronic devices and parts, small business owners will have nowhere to turn for less costly products. In other words, if retailers want to stay in business, they are going to have to spend an additional 10-25% just to carry inventory. These carrying costs can wreak havoc on any

U.S. VAPOR COMPANIES

- 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

small business owner who is struggling to manage month to month and whose employees are working paycheck to paycheck.

Reduced cash flow for any small business means being forced to choose between reducing workforce or perhaps closing businesses altogether: “Margins on products are already low, to maintain margins we’d have two choices, raise prices or cutting employees’ hours,” said Matthew Milby, who owns two Maryland vape shops under the name Smoke Free Nation. He predicted some shops would be put out of business.”³ *The threat to thousands of U.S. small businesses is real.* Recently, in the State of Pennsylvania, the imposition of a 40% inventory tax which severely depleted the store capital forced the closure of more than 100 vape shops.⁴

All of the distribution, wholesale, and small business operations that are running on thin margins could never absorb the full tariff and, since they have no alternatives for sourcing the products, their options will be limited to what would amount to a radical increase in price at the retail level. In other words, there is a high likelihood that the tariff imposed, whether it be 10% or 25%, is passed on directly to the consumer at the point of sale. Moreover, because in some states excise taxes are calculated on an ad valorem basis, American consumers could find themselves paying a tax upon a tax.

The Administration has made clear that the imposition of tariffs should not impact U.S. consumers and has properly removed items from previous lists of numerous proposed tariffs when they would impact consumers. The Administration should do the same in this case of HTS 8543.90.88 (50) and (60) since they likewise adversely affect consumers.

To complicate matters even further, this tranche of tariffs is compounding the problem that was created by the prior list since in addition to the completed kits being taxed at 25%, the current proposal would impose a tariff on all of the replacement parts, such as coils, which consumers use regularly and purchase on a weekly basis. Moreover, unlike other consumer products, such as mobile phones, consumers will purchase multiple mods and multiple tanks (in addition to replacing coils weekly). Thus, there is a dramatic multiplier effect on the consumer from the imposition of this tariff.

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.

³ Tariffs on Chinese goods could batter the U.S. vaping industry, Kara Carlson, Reuters, August 8, 2018, <https://www.reuters.com/article/us-usa-trade-china-vaping/tariffs-on-chinese-goods-could-batter-the-u-s-vaping-industry-idUSKBN1KT2AV>

⁴ Paulina Dedaj, Fox News, Pennsylvania's vape tax: Good for state, bad for business? September 6, 2017, <http://www.foxnews.com/us/2017/09/06/pennsylvanias-vape-tax-good-for-state-bad-for-business.html>

E. Additional Tariffs on Vapor Parts Will Be Detrimental to Health of Millions of Americans.

Adding a 25% tariff on the various personal electronic vaporizing devices will thwart gains in public health. 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.** (Levy, et al., 2017.)⁵ This conclusion was further bolstered by the rigorous analysis of the National Academies of Sciences, Engineering, and Medicine (“NASEM”)⁶ which, in January 2018, published the following material findings regarding e-cigarettes:

- “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.” (NASEM Report at 604.)
- “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.**” (NASEM Report at 617.)
- “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.**” (NASEM Report at 11, 487.)

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.”⁷

⁵ 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.

⁶ National Academies of Sciences, Engineering, Medicine. 2018. Public Health Consequences of E-Cigarettes. <https://www.nap.edu/resource/24952/012318ecigaretteConclusionsbyEvidence.pdf>

⁷ 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>

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.”⁸ Our friends in the United Kingdom 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.

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 2009⁹, 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.

Finally, just this past week, a study was published in the International Journal of Chronic Obstructive Pulmonary Disease “suggests that electronic cigarette (EC) use may reverse some of the harm resulting from tobacco smoking in patients with chronic obstructive pulmonary disease (COPD). Furthermore, EC use may ameliorate objective and subjective COPD outcomes, which may persist in the long term.”¹¹

III. The Solution

Subheading 8543 covers, “Electrical machines and apparatus, having individual functions *not specified or included elsewhere in this chapter.*” See, Harmonized Tariff Schedule of the United States (2018) Revision 8, Chap. 85, p. 84. For the reasons noted above, vapor devices and parts are simply *unlike* any other electrical device or part covered by subheading 8543 in that the vapor parts proposed to be tariffed under 8543.90.88.50 and 8543.90.88.60 – and, for that matter, the vapor devices already tariffed under 8543.77.99.30 and 8543.77.99.40 – are *finished consumer products* and there is an entirely new and growing industry comprised of 10,000 plus U.S. companies that is currently in place to sell these specific products to consumers. The same cannot be true for most if not all of the other products being tariffed alongside vapor devices and parts under subheading 8543.

⁸ Statement of Commissioner Gottlieb, April 24, 2018.

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).

¹¹ Electronic Cigarette Use May Reverse the Harm Resulting From Tobacco Smoking in COPD Patients, Even in the Long Term, Poloso, R., et al., International Journal of Chronic Obstructive Pulmonary Disease, Volume 2018:13 Pages 2533—2542, August 28, 2018, DOI <https://doi.org/10.2147/COPD.S161138>

Accordingly, the Administration should consider exercising its inherent authority to create a *new* subheading which more appropriately recognizes the uniqueness of this important product category, the strength of this growing industry, and the importance of ensuring American consumers access to the products rather than lumping them into a catch all subheading.

For all the foregoing reasons, the Vapor Technology Association respectfully requests that the United States Trade Representative exempt from the proposed tariff list HTSUS subheadings 8543.90.88.50 and 8543.90.88.60 or, in the alternative, *reclassify* the parts included under the referenced subheadings within a new subheading covering vapor devices under 8543.77.99.30 and 8543.77.99.40 and vapor parts under 8543.90.88.50 and 8543.90.88.60.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tony Abboud". The signature is written in a cursive, flowing style.

Tony Abboud
Executive Director
Vapor Technology Association