



1400 EYE STREET, N.W. • SUITE 1200 • WASHINGTON, DC 20005  
PHONE (202) 296-5469 • FAX (202) 296-5427

---

December 24, 2015

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**

The Campaign for Tobacco-Free Kids submits these comments in response to the Federal Trade Commission's (FTC) request for public comment regarding proposed collection of information from e-cigarette marketers and manufacturers. We strongly support FTC's proposal to collect and report e-cigarette manufacturers' annual sales and marketing expenditures, which will provide critical data to researchers, policy-makers, advocates and the general public.

**The proposed collection and reporting of e-cigarette data is necessary and useful**

FTC has collected sales and marketing data from the five largest cigarette and smokeless tobacco companies since 1967 and 1987, respectively, providing valuable information on the industry's activities. In 2012 (the most recent year for which data are available), the tobacco industry spent \$9.6 billion—or more than \$26 million per day—on marketing and promotion of cigarettes and smokeless tobacco.<sup>1</sup> This information is widely used by public health professionals, researchers, the media, policymakers, and government agencies at local, state and federal levels to emphasize the significant investment tobacco companies make to market their products, highlight the impact this marketing has on youth and adult tobacco use, and support tobacco control policies.<sup>2</sup> Expansion of data collection to include e-cigarettes is needed to inform these same stakeholders about the nature and extent of the e-cigarette industry's marketing practices and allow for the ability to monitor trends in marketing and sales, as well as inform policy and regulatory decision-making.

Currently, e-cigarette manufacturers promote their products in the absence of marketing or advertising restrictions like those that apply to cigarettes under the Master Settlement Agreement ("MSA") or regulations promulgated pursuant to the Family Smoking Prevention and Tobacco Control Act ("Tobacco Control Act") that were designed to protect youth from cigarette and other tobacco marketing.<sup>3</sup>

Accurate data on the extent of e-cigarette marketing will lend critical information to what by many accounts is a troubling picture of current marketing practices for e-cigarettes. Echoing the marketing practices of tobacco companies from decades ago (many of which are now banned for cigarettes), there is significant concern that e-cigarettes are being aggressively marketed in ways that appeal to youth. Many of the themes pervasive in today's e-cigarette advertisements imitate those that made cigarettes popular decades ago.<sup>4</sup> Across marketing avenues, e-cigarette companies promote and build the image of e-cigarettes by portraying e-cigarettes as symbols of glamour, sex appeal, maturity and rugged independence, implicitly associating the products with an adolescent's idealized life style.<sup>5</sup>

Since e-cigarette companies are not currently required to report their marketing and promotional expenditures to FTC or another government agency, the exact amount spent to advertise and promote these products is uncertain. However, independent research from Kantar Media released in a report by Truth Initiative shows a 20-fold increase in e-cigarette advertising expenditures in recent years, from \$5.6 million in 2010 to \$115.3 million in 2014.<sup>6</sup> Other studies have also documented this significant increase in spending.<sup>7</sup> While third-party media tracking companies such as Kantar Media are able to report some data on e-cigarette marketing, this expenditure data cannot provide a comprehensive understanding of the e-cigarette industry's marketing and promotional activities. Such reports exclude smaller companies, from which FTC is proposing to collect data, as well as categories of information beyond traditional channels. For example, the available marketing data underestimates the true extent of e-cigarette advertising, since categories such as social media, sponsored events, price discounting and point of sale advertising are not included. In addition, data on expenditures alone cannot capture the total reach and impact of e-cigarette advertising and promotional efforts, particularly with the reliance on social media, where reach is broad while expenditures are minimal.

Even with limited information about the true extent of e-cigarette marketing, it is clear that these advertising efforts are effectively reaching youth and young adults. A recent study found that 82 percent of 12-17 year olds and 88 percent of 18-21 year olds reported seeing e-cigarette advertising in 2015.<sup>8</sup> There is strong evidence establishing a link between tobacco marketing and youth smoking. A key finding of the 2012 Surgeon General Report was the conclusion that there is a causal relationship between the advertising and promotional efforts of the tobacco companies and the initiation and progression of tobacco use among young people.<sup>9</sup> In 2014, the U.S. Surgeon General reiterated this finding, stating that, "...advertising and promotional activities by the tobacco companies cause the onset and continuation of smoking among adolescents and young adults."<sup>10</sup>

Recent data also suggest that youth are continuing to use e-cigarettes in large numbers. National data released by the U.S. Centers for Disease Control and Prevention (CDC) and the Food and Drug Administration (FDA) show that youth use of electronic cigarettes tripled from 2013 to 2014, and now exceeds use of regular cigarettes. Current e-cigarette use among high school students increased from 4.5 percent in 2013 to 13.4 percent in 2014 (it was just 1.5 percent in 2011). A similar increase was seen among middle school students – current e-cigarette use increased from 1.1 percent in 2013 to 3.9 percent in 2014. According to the survey, approximately 2 million high school students and 450,000 middle school students currently use e-cigarettes.<sup>11</sup>

### **Ways to enhance quality, utility and clarity of the information to be collected**

The Federal Register Notice addresses devices generally referred to as electronic cigarettes or e-cigarettes, but it is important to note that the term “electronic cigarettes” often covers a wide variety of products now on the market. The variety of products available and the names of the products continue to evolve. In addition to e-cigarettes, these products are also referred to as cig-alikes, hookah pens, e-hookah, vape pens, tank systems, personal vaporizers, and mods. For the purposes of this data collection, the term “e-cigarettes” should be interpreted broadly to represent the entire category of products, including e-liquid and cartridge refills that are sold separately.

While FTC proposes collecting data from “approximately five large and ten small industry members,” it is unclear how those industry members will be determined and what criteria will be used to categorize the companies according to size. The e-cigarette market is diverse and continues to change. While the cigarette market is dominated by a small number of large companies and subsidiaries, the e-cigarette market ranges from subsidiaries of major tobacco manufacturers to small independent operations. Therefore, it is critical for FTC to clarify the criteria that will be used to select the companies, and to represent the various facets of the industry in its data collection. Those advertising e-cigarette products could include manufacturers, distributors and retailers (including online, traditional and specialty retailers). FTC should be able to capture the “large” companies by requesting information from the companies with the highest sales. In selecting the subset of “small” companies, the agency should seek representation by geographic region and by type of company or outlet, including online and vape-shops.

Specialty retailers such as vape shops are an important part of the e-cigarette market, selling the products, product components, and a wide variety of e-liquid or e-juice for use with the device. Some vape shops also create or mix their own e-liquids and may provide opportunities for users to make their own e-liquids. Although there is much anecdotal information on the increasing number of vape shops throughout the United States, there is little information on the actual number of stores, their market share or their marketing expenditures. We recommend that a subset of vape shops be included in the request for data collection in the small manufacturer category.

Importantly, this proposal by FTC does not obviate the need for FDA to collect information on e-cigarettes to inform consumers and provide critical information to enhance the Agency’s regulatory activities. FTC should coordinate with FDA on data collection and reporting for key information categories where FDA has jurisdiction once the deeming rule is finalized. Such coordination can assure consistency in measures and help facilitate timely data collection. Standardized and comprehensive collection and reporting of information on the sales and marketing practices of e-cigarettes is critical to inform future regulation and youth prevention efforts.

### **Categories of Information Collected by FTC**

The responses below address several of the questions posed by FTC regarding the specific types of data to be collected from e-cigarette manufacturers and marketers.

#### ***FTC should collect information on sales and giveaways of e-cigarette products.***

It is important to collect data on both sales and giveaways of e-cigarette products, particularly since there is currently limited information available on the total size of the e-cigarette market. Current estimates of e-cigarette sales do not differentiate giveaways, and there are currently no federal restrictions on the sampling of e-cigarettes and related products (although in its proposed deeming rule, FDA sought to prohibit free sampling of e-cigarettes).

#### ***FTC should collect data covering a broad range of marketing categories, including product placements.***

E-cigarette marketing uses many of the same channels and strategies used by the cigarette and smokeless tobacco companies. FTC should start by collecting data for the same marketing categories reported for cigarette and smokeless tobacco. This replication will allow researchers, policy-makers and the public to monitor trends over time across products. These categories include: newspapers, magazines, outdoor, transit, point-of-sale, promotional allowances, sampling distribution, specialty item distribution, public entertainment, direct mail, endorsements & testimonials, coupons & retail-value added, internet, company website, paid product placement, sponsorships, and social media.

In addition, FTC should collect information on expenditures for television and radio advertising, which is permitted for e-cigarettes but prohibited for cigarette and smokeless companies. FTC should also allow for additional categories to accommodate the rapidly changing marketing landscape for e-cigarettes.

#### ***Additional efforts are needed to prevent youth from exposure to e-cigarette marketing.***

It is clear that any age-screening mechanisms currently in place are not adequately preventing youth from being exposed to e-cigarette advertising and promotions. According to a 2015 study of youth and young adults by Truth Initiative, 82 percent of teens (12-17 years old) and 99 percent of young adults (18-21 year olds) had seen an e-cigarette advertisement in at least one media channel.<sup>12</sup> This data also points to the placement of e-cigarette advertisements on TV networks, magazines, websites, and events popular with youth.

The online platform presents particular concerns for youth exposure, given that 92 percent of teens (ages 13-17) use the internet daily, and more than half (56%) go online several times a day.<sup>13</sup> In addition, over three-quarters (76%) of teens report use of at least one social media platform,<sup>14</sup> platforms which the e-cigarette industry widely uses for both free and paid product promotion. Without restrictions and enforcement mechanisms in place to effectively limit youth access to online and social media marketing, youth can easily view e-cigarette marketing and have the opportunity to purchase these products without proof of age.<sup>15</sup> E-cigarettes are not subject to the federal PACT (Prevent All Cigarette Trafficking) Act's internet sales age verification requirements, so internet sales are regulated

on a state-by-state basis. A recent study in North Carolina, which has an age verification law for online sales of e-cigarettes, found that only five out of 98 attempts by teens to buy e-cigarettes online were blocked by online vendors' attempts to verify customer age, indicating 93.7% of e-cigarette vendors failed to properly verify their customers' ages.<sup>16</sup> Even if companies ultimately claim to have robust age-screening mechanisms, it is clear that the mechanisms in place are not adequate to limit access to e-cigarette advertising and to the products themselves.

***In many cases, FTC should collect data that distinguishes between various product characteristics and types of sales.***

- **FTC should collect data on various types of products.** Given the range of e-cigarette products on the market, FTC should differentiate between products in its data collection and reporting. This includes, for example, disposable devices, refill cartridges, refillable devices such as tank systems and e-liquids used in such refillable devices. There is emerging evidence describing how different types of products (e.g., disposable vs. tank systems) are used by consumers. As the industry continues to evolve, it will be critical to monitor which products are most popular. Further, because different companies sell different types of products (the major tobacco companies tend to offer disposable and cartridge types, while independent companies tend to make more of the tank systems or mods), reporting about these variations should be separated between large and small manufacturers.
- **FTC should collect and report data by three distinct e-cigarette flavor categories.** Since their introduction to the US market, the variety of e-cigarette flavors available has grown exponentially. As of January 2014, researchers had identified more than 7,700 unique e-cigarette flavors available online, with an average of more than 240 new flavors being added per month.<sup>17</sup> In addition to the more traditional candy and fruit flavors like cherry and chocolate, the e-liquid solutions are also being sold in such kid-friendly options as cotton candy, root beer float, and banana split. Vape shops can offer an even wider assortment of flavors as well as allow patrons to mix their own preferred flavor combinations.<sup>18</sup>

It is important for FTC to collect data on e-cigarette flavors because evidence suggests that flavors are a key reason youth try and use e-cigarettes. The 2013-2014 Population Assessment of Tobacco and Health (PATH) study found that 81 percent of 12-17 year olds who had ever smoked an e-cigarette used a flavored e-cigarette the first time they tried the product, and 85.3 percent of current e-cigarette users used a flavored product in the last month. Further, 81.5 percent of current youth e-cigarette users said they used e-cigarettes "because they come in flavors I like."<sup>19</sup>

While flavors are important, it would present an unnecessary burden to collect and report data on the thousands of available flavors. In addition, given that FTC only intends to collect data from fifteen manufacturers, a detailed list of flavors would not be representative of the industry and would be of limited utility. We recommend that the FTC specifically collect the sales volume of products in three separate categories: tobacco flavors, mint or menthol flavors, and other

flavors to encompass other common fruit and candy flavors as well as unique flavor combinations that otherwise may be difficult to define because the product name does not explicitly define the type of flavor. Categorizing in this way will streamline data collection and reporting, as well as eliminate the overlap that might result from more limited flavor categories.

The flavor categories should also be reported by small and large companies, since the large companies tend to sell a limited number of flavors (e.g., Vuse, which only sells five flavors) compared to smaller manufacturers.

- **FTC should collect data on various nicotine strengths.** E-cigarettes and refill liquids contain widely varying levels of nicotine. Nicotine is a highly addictive drug that can have lasting damaging effects on adolescent brain development and has been linked to a variety of adverse health outcomes for the developing fetus.<sup>20</sup> There is no reliable information available on sales by nicotine strength, making collection of these data important. We recommend that FTC request data on all levels of nicotine products sold, including non-nicotine products, but only report that information in ranges.
- **FTC should collect data on how e-cigarette products are sold, including sales over the internet.** More information is needed about how most e-cigarette products are purchased. Data collected on sales and give-aways of e-cigarette products should differentiate between the amount or proportion of products sold online directly to consumers and other types of sales (i.e., through a more traditional distribution chain of manufacturer to distributor to brick-and-mortar retailer to consumer).

## Conclusion

The Campaign for Tobacco-Free Kids supports FTC's proposal to collect and report data on the sales, marketing activities, and expenditures for the new and evolving e-cigarette industry. All manufacturers and marketers should have ready access to the information requested, including their sales volume and marketing expenditures. Further, any burden manufacturers claim as a result of this data collection and reporting must be considered against the status quo where nearly all young people have seen e-cigarette advertising, and youth use of e-cigarettes has increased significantly, now exceeding the use of regular cigarettes. It is critical to gain a better understanding about the e-cigarette industry and the marketing and promotional activities that can impact youth use of these products. We urge timely collection and release of these sales and marketing data.

---

<sup>1</sup> U.S. Federal Trade Commission (FTC). *Cigarette Report for 2012, 2015*, <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-cigarette-report-2012/150327-2012cigaretterpt.pdf>; See also, FTC, *Smokeless Tobacco Report for 2012, 2015*, <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-smokeless-tobacco-report-2012/150327-2012smokelesstobaccortpt.pdf> [Data for top 5 manufacturers only.]

<sup>2</sup> Our organization, for example, uses the FTC's published data to discuss trends in marketing expenditures—both overall and by specific expenditure categories—in many of our fact sheets, which are made publicly available at [www.tobaccofreekids.org/facts\\_issues/fact\\_sheets/toll/tobacco\\_kids/marketing/](http://www.tobaccofreekids.org/facts_issues/fact_sheets/toll/tobacco_kids/marketing/). Additionally, the data from the FTC is an integral part of the Campaign's annual report on how States have spent the money they receive from the 1998 Master

Settlement Agreement (see “*Broken Promises to Our Children: A State-by-State Look at the 1998 State Tobacco Settlement 17 Years Later*”, <http://www.tobaccofreekids.org/microsites/statereport2016/>).

<sup>3</sup> Section III of the Master Settlement Agreement of 1998 (“MSA”) between the major tobacco companies and 46 States, Washington, DC, and 5 territories contains numerous restrictions on the advertising, marketing, and promotion of cigarettes and roll-your-own tobacco, including restrictions on targeting youth. The MSA applies to approximately 95 percent of cigarettes sold in the United States. Similar provisions apply to smokeless tobacco products under the Smokeless Tobacco Master Settlement Agreement. See also: Family Smoking Prevention and Tobacco Control Act, Pub. L. 111-31, 123 Stat. 1776, 21 U.S.C. §387 et seq (2009).

<sup>4</sup> See *7 Ways E-Cigarette Companies Are Copying Big Tobacco’s Playbook*, [http://www.tobaccofreekids.org/tobacco\\_unfiltered/post/2013\\_10\\_02\\_ecigarettes](http://www.tobaccofreekids.org/tobacco_unfiltered/post/2013_10_02_ecigarettes).

<sup>5</sup> The U.S. District Court for the District of Columbia concluded that the tobacco companies’ marketing of cigarettes was intended to “burnish. . .the image of their youth brands to convey rugged independence, rebelliousness, love of life, adventurousness, confidence, self-assurance and belonging to the ‘in’ crowd. *U.S. v. Philip Morris USA, Inc.*, 449 F.Supp.2d at 616.

<sup>6</sup> Legacy, *Vaporized: E-Cigarettes, Advertising, and Youth*, April 2014, [http://legacyforhealth.org/content/download/4542/63436/version/1/file/LEG-Vaporized-E-cig\\_Report-May2014.pdf](http://legacyforhealth.org/content/download/4542/63436/version/1/file/LEG-Vaporized-E-cig_Report-May2014.pdf). Truth Initiative, *Vaporized: Youth and Young Adult Exposure to E-Cigarette Marketing*, November 2015, <http://truthinitiative.org/sites/default/files/VAPORIZED%20-%20FINAL%20VERSION.pdf>.

<sup>7</sup> Kornfield, R, et al., “Rapidly increasing promotional expenditures for e-cigarettes,” *Tobacco Control*, Published Online First, doi: 10.1136/tobaccocontrol-2014-051580, April 30, 2014. See also: Dutra, L, *Adolescent E-cigarette Use: What We Already Know*. 2014 data from Kantar Media. Presentation at the FDA “Electronic Cigarettes and the Public Health: A Public Workshop,” June 1, 2015.

<sup>8</sup> Truth Initiative, *Vaporized: Youth and Young Adult Exposure to E-Cigarette Marketing*, November 2015, <http://truthinitiative.org/sites/default/files/VAPORIZED%20-%20FINAL%20VERSION.pdf>.

<sup>9</sup> HHS, *Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General*, 2012, <http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/index.html>.

<sup>10</sup> HHS, *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*, 2014, <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/>.

<sup>11</sup> U.S. Centers for Disease Control and Prevention (CDC), “Tobacco Use Among Middle and High School Students — United States, 2011-2014,” *Morbidity and Mortality Weekly Report (MMWR)* 64(14):381-385, April 2015, [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6414a3.htm?s\\_cid=mm6414a3\\_e](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6414a3.htm?s_cid=mm6414a3_e). Current use is defined as use on at least one day in the past 30 days. The 2014 NYTS modified the question structure for e-cigarettes, including a new preamble to the e-cigarette section and changes to the question wording. Some of the increase in prevalence could be the result of these changes.

<sup>12</sup> Truth Initiative, *Vaporized: Youth and Young Adult Exposure to E-Cigarette Marketing*, November 2015, <http://truthinitiative.org/sites/default/files/VAPORIZED%20-%202012%202%2015%20-%20FINAL.pdf>.

<sup>13</sup> Lenhart, A, et al., *Teens, Social Media & Technology Overview 2015: Smartphones facilitate shifts in communication landscape for teens*, April 9, 2015, [http://www.pewinternet.org/files/2015/04/PI\\_TeensandTech\\_Update2015\\_0409151.pdf](http://www.pewinternet.org/files/2015/04/PI_TeensandTech_Update2015_0409151.pdf).

<sup>14</sup> Lenhart, A, et al., *Teens, Social Media & Technology Overview 2015: Smartphones facilitate shifts in communication landscape for teens*, April 9, 2015, [http://www.pewinternet.org/files/2015/04/PI\\_TeensandTech\\_Update2015\\_0409151.pdf](http://www.pewinternet.org/files/2015/04/PI_TeensandTech_Update2015_0409151.pdf).

<sup>15</sup> Durbin, RJ, et al., *Gateway to Addiction? A Survey of Popular Electronic Cigarette Manufacturers and Targeted Marketing to Youth*, April 14, 2014, [http://www.durbin.senate.gov/public/index.cfm/files/serve/?File\\_id=81d14ff7-f2f6-4856-af9d-c20c0b138f8f](http://www.durbin.senate.gov/public/index.cfm/files/serve/?File_id=81d14ff7-f2f6-4856-af9d-c20c0b138f8f).

<sup>16</sup> Williams, RS, et al., “Electronic Cigarette Sales to Minors via the Internet,” *JAMA Pediatrics*, published online March 2, 2015.

<sup>17</sup> Zhu, S-H, et al., “Four Hundred and Sixty Brands of E-cigarettes and Counting: Implications for Product Regulation,” *Tobacco Control*, 23(Suppl 3):iii3-iii9, 2014.

<sup>18</sup> Johnson, A, “Up in smoke? Alamanca e-cigarette store operators concerned about proposed regulations,” Times-News, April 30, 2014, <http://www.thetimesnews.com/news/top-news/up-in-smoke-alamance-e-cigarette-store-operators-concerned-about-proposed-regulations-1.313005>. The website for VapeRite ATL also boasts that customers can “mix well over 100,000 possible flavor and mix type combinations” [<https://atlanta.vaperite.com/#vape-bar>, accessed May 30, 2014].

<sup>19</sup> Ambrose, BK, et al., “Flavored Tobacco Product Use Among US Youth Aged 12-17 Years, 2013-2014,” *Journal of the American Medical Association*, published online October 26, 2015.

<sup>20</sup> U.S. Department of Health and Human Services (HHS), *The Health Consequences of Smoking: 50 Years of Progress. A Report of the Surgeon General*, CDC, Office of Smoking and Health (OSH), 2014, <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/index.html>. See also: CDC Office on Smoking and Health, “Electronic Nicotine Delivery Systems: Key Facts,” July 2015. Accessed November 19, 2015. <http://www.cdc.gov/tobacco/stateandcommunity/pdfs/ends-key-facts2015.pdf>