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December 28, 2015

VIA ELECTRONIC SUBMISSION

<https://ftcpublic.commentworks.com/ftc/electroniccigarettespra/>

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue, N.W.  
Suite CC-5610 (Annex J)  
Washington, D.C. 20580

**Re: Electronic Cigarettes: Paperwork Comment, FTC File No. P144504**

To Whom It May Concern:

Fontem US Inc. (**Fontem**) hereby submits comments in response to the Federal Trade Commission's proposal to send information requests to marketers of electronic cigarettes, as outlined in the Commission's Federal Register Notice of October 27, 2015 (80 Fed. Reg. 65,748). Fontem submits these comments to address the utility, scope and burden imposed on respondents of the Commission's proposed information requests.

As discussed further below, Fontem recommends that the Commission defer its decision to collect the requested information until the U.S. Food and Drug Administration (**FDA**) provides clarification regarding the scope and impact of its deeming regulations pertaining to e-cigarettes. Fontem further believes that the Commission's study will have limited utility because it fails to account for several key players in the e-cigarette industry. More specifically, in order to have an accurate depiction of the sales and marketing activities of the e-cigarette industry, the Commission should consider making data requests of vape stores. To reduce the burden, and increase the utility of the data collected, Fontem recommends that the Commission reduce the level of granularity of the data requested. Specifically, Fontem discourages the Commission from tracking data by flavor, nicotine strength, blister pack and refill pack size. Finally, Fontem notes that responding to the proposed information request would be a considerable burden, and as a likely recipient of the request, strongly encourages the Commission to narrow its scope.

## **A. The Commission's Study is Premature**

The U.S. Food and Drug Administration (**FDA**) has proposed to deem its regulatory authority under the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) as extending to e-cigarettes, on the basis that these products contain nicotine derived from tobacco plants.<sup>1</sup> These regulations, which are expected to be finalized in the near term, will have a significant impact on the marketing of electronic cigarettes and the broader industry. In particular, the regulations could bring the majority of products currently on the market today under the FDA's jurisdiction, and require pre-market tobacco applications for those products. Fontem believes that it would be premature to commence a study – particularly one that will impose significant costs – at a time when the industry is facing significant additional regulation that will alter the way in which it operates. At a minimum, the Commission should consider deferring the study until the FDA's regulatory scheme for the e-cigarette industry has been clarified.

## **B. Scope and Purpose of the Study**

The Commission intends to collect information from five “large” companies and ten “small” industry members. The Commission does not explain how it will distinguish between the two categories. Fontem assumes that, as the marketer of Blu, a leading e-cigarette brand in the industry, it is likely a recipient of the Commission's request. As such, Fontem believes that its comments should be afforded substantial weight.

The number of companies to which the Commission has chosen to issue information requests represents a non-representative sample size for an industry that is highly fragmented and includes players of all sizes. For instance, disposable and rechargeable e-cigarettes are typically sold through “traditional” channels, by retailers that also sell conventional tobacco cigarettes, whereas “mods” and “tank” products, which are often larger and more customizable e-cigarettes, are typically sold in “vape” shops. Vape shops represent a significant portion of the industry – over 50% of all sales of e-cigarettes – and are the fastest growing segment within it. Vape shops sell not only refillable vaporizers, but also a range of flavored liquids (and offer the ability to mix your own) and replacement parts. Even if the ten “small” industry members the Commission intends to target include vape shops, the study will be incomplete as there are literally thousands of independent vape shops in the industry, with considerable variation amongst them as to product ranges, as well as a number of larger chains. Thus, a study that fails to meaningfully account for these key industry players will do little to enable an understanding of the sales and marketing activities of the broader e-cigarette industry. In any event, the fragmented nature of the industry will make data capable of meaningful synthesis elusive.

The Commission fails to articulate a broader purpose for its information request beyond collecting information about the sales and marketing activities of e-cigarette marketers, which is self-evident. However, given this purpose, the Commission should also review e-cigarettes used as a smoking cessation tool, which have a specific marketing objective. In the United Kingdom, for example, the government provides smokers a subsidy toward the cost of purchasing e-cigarettes. Fontem believes that the Commission's study should collect data on other smoking cessation technologies such as nicotine patches and other nicotine replacement medications to provide a more complete picture of smoking cessation products.

## **B. Data Required by Study**

The Commission asks whether the marketing and sales data it seeks to collect should be differentiated by type of product, nicotine content, size and method of sale. Fontem objects to such a granular request. Fontem believes that variations across the industry make such granular data inherently inconsistent and therefore of little

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<sup>1</sup> Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act Regulations on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products, 79 Fed. Reg. 23,142 (Apr. 25, 2014).

or no utility to the Commission. It is likely for this reason that the Commission currently collects only data and information on brand families, rather than individual products, in the cigarette and smokeless tobacco industry. Moreover, as the Commission itself notes, its report will not disclose any company-specific confidential data, which defeats any benefit to the public in having the Commission collect such granular data in the first instance. Below, Fontem identifies a number of concerns with the granularity with which the Commission has proposed to collect data, and offers some less burdensome alternatives.

(i) Flavor

The Commission is considering requesting marketing and sales data distinguished by flavor type (e.g., tobacco, fruit, dessert, beverage, etc.) Fontem strongly discourages the Commission from making such a request. This is because there is no standardized method of reporting flavors across the industry, and flavors are inherently subjective (e.g., one person's blueberry is another's blackberry). Even general categories like "fruit" defy categorization because fruit flavors can straddle categories (e.g., Blu's peach schnapps, which would straddle both the beverage and fruit flavor categories; many desserts are fruit flavored; etc.). Other flavors tend to be so specific and unique that they do not lend themselves to general categories (e.g., LostArt's "Beez Kneez", which also highlights the difficulty in relying strictly on how the product is marketed as a basis of categorizing the flavor). Furthermore, as noted, many vape shops allow customers to create their own flavors. Given these variations, to the extent the Commission chooses to track flavors at all, Fontem suggests they be segmented broadly, into (i) tobacco flavors and (ii) all other flavors.

(ii) Nicotine Strength

The Commission seeks input on whether to collect market and sales data by nicotine strength. Much like product flavor, reporting nicotine strength will not yield data of any utility, as there is no consistency in the reporting of nicotine strength across manufacturers. Fontem encourages the Commission not to track data by nicotine strength, as to do so would not yield any meaningful data.

(iii) Blister Packs

The Commission also seeks input on whether to track sales of blister packs separately from other sales. However, product sizes are not consistent across the industry. For example, Fontem's most popular rechargeable product, the Blu PLUS rechargeable kit, includes one rechargeable pack, two rechargeable batteries and three tanks (all the same flavor), whereas Logic's Power Series Starter kit includes one cartomizer, one rechargeable battery, one USB charger, and two tanks (each a different flavor). Fontem encourages the Commission not to track data on blister packs, as to do so would not yield any meaningful data.

(iv) Refill Packs

The Commission has requested data based on the size of refill packs or cartridges. However, much like blister packs, there is tremendous variation across the industry. There is no consistency as to the number of refills that come with a pack nor is there consistency to the size of the refills. Furthermore, it is impossible to know whether a manufacturer's liquid is being used with its e-cigarette given the existence of e-cigarettes that accommodate third-party liquids. Given these variations, data differentiated by refill pack will be of little utility. To the extent the Commission opts to track this data, Fontem recommends simply tracking data on the total number of refills sold.

**C. Additional Data**

Fontem has observed in the marketplace that a number of its competitors rely heavily on the use of couponing in the promotion of e-cigarettes, and believes that tracking data on coupons should be an important part of any efforts to collect data on marketing expenditures. Fontem does not believe that tracking this information is likely to materially increase the burden of compliance, and notes that this data is tracked as part of the Commission's reports on tobacco cigarettes.

**D. Accuracy of Burden Estimates**

The Commission estimates that the burden of complying with its information request will be 200 hours in the first year, and 150 hours in the following two years, at an hourly cost of \$100. It is difficult to calculate with precision the burden that would be imposed by the Commission's request, because the exact scope of the request is, as of yet, undetermined. However, Fontem believes that the time commitment is likely to be at least as great as the Commission estimates, if not greater. In terms of dollar costs, the actual level of burden is likely to exceed the Commission's estimate, as the true hourly cost is greater than \$100 on a fully-loaded basis. In any event, even using the Commission's burden estimates, the burden on Fontem specifically would be significant. It employs only two information analysts capable of responding to the Commission's request. Thus, responding to the request in the first year would require a full-time commitment of at least approximately two-and-a-half weeks on behalf of the company's only two analysts. This highlights not only the significant burden, but also the opportunity cost of responding to the information request, because during this period the analysts will not be able to focus on their usual responsibilities. For these reasons, Fontem encourages the Commission to limit the scope of information sought from individual recipients of the information request.

Sincerely yours,

/s/ Chris Howard