TESTIMONY OF GREGORY CONLEY

SECTION 301 COMMITTEE – JULY 24 / 25, 2018 MEETING

JULY 16, 2018

Members of the committee:

On behalf of the American Vaping Association, a nonprofit organization that advocates for policies that encourage adult smokers to switch to reduced risk nicotine products like vaping products, I am writing to urge the committee to reject attempts to increase HTS No. 854.370.99.30 and HTS No. 854.370.99.40. Increasing tariffs on vaping products will do great harm to American small businesses, while doing nothing to empower American companies to manufacture these products themselves.

I. Tariffs Should Not Stand in the Way of Adult Smokers Looking to Quit

Over forty years ago, Dr. Michael Russell wrote in the British Medical Journal, "Smokers smoke for the nicotine, but die from the tar." Simply put, while nicotine can create dependence in users, it is not a carcinogen and does not meaningfully contribute to the death and disease that is caused by the habitual inhalation of cigarette smoke.

Data from the Centers for Disease Control & Prevention (CDC) tell us what many in public health have been saying for years – vaping products are not only growing in popularity as an alternative to cigarettes, but many users are finding success in quitting smoking. Indeed, a 26-month study of 15,943 adult smokers undertaken by the CDC found that vaping is the most popular cessation tool on the market. Furthermore, smokers using vapor products were more likely to successfully quit versus those using conventional methods like the nicotine gum and patch.[1]

The National Academy of Sciences (NAS) recently released a FDA-commissioned report on the health effects of vapor products. The conclusions reached by the NAS are similar to those of respected organizations like the Royal College of Physician and

[1] Craver, R. "CDC report shows more smokers try to quit with e-cigs than nicotine replacement products." Winston Salem Journal. April 18, 2017. <https://www.journalnow.com/business/business_news/local/cdc-report-shows-more-smokers-try-to-quit-with-e/article_a33383f3-5300-5178-9f14-28b52884c45c.html>

Public Health England, both of which have estimated vaping to at least 95% safer than smoking. While agreeing that there are unknowns, the NAS concluded that e-cigarettes "contain fewer toxicants" compared to cigarettes, "show significantly less biological activity in a number of in vitro, animal, and human systems," that they may be useful as a smoking cessation tool for adult smokers, and that vaping will result in an overall public health benefit under most scenarios.

A rapid rise in the tariffs assessed on these products will narrow the price differential between combustible cigarettes and vaping products. This will only serve to discourage adult smokers from switching to these harm reduction products. Indeed, one study on price elasticity estimated that for rechargeable e-cigarettes – the bulk of the e-cigarette market today – every 10% price increase will decrease sales by 19%.[2]

II. Clarity is Needed on the Products Impacted by this Tariff

In the lead up to this hearing, our organization has been contacted by multiple journalists seeking to understand the potential consequences of these proposed tariff hikes. Regrettably, we have been unable to give clear and complete answers to many of their questions. Even professionals in the field of importing have given conflicting answers on what exact product classes are being impacted.

As the U.S. Government Accountability Office (GAO) explained its report on e-cigarette imports, the current HTS codes for vaping products have existing for less than three years.[3] In that time, no government agency has published information that would truly assist exporters and importers in determining what distinguishes an "e-cigarette device" (a class subject to the new tariffs) from an "e-cigarette part" (a class not subject to the new tariffs).

The distinction between a device and a part may seem intuitive, but in an industry with such varied products, it is actually very difficult to draw a bright line rule for classifying these products. In discussing both e-cigarette devices and parts, the Harmonized Tariff Schedule does note that an e-cigarette "unit consists of all the parts necessary to vaporize, either assembled or in a kit or set, including battery, tank, and atomizer."[4] However, it is far from clear what the legal effect of this language is, and what particular HTS code that "unit" definition refers to.

Just one example of the confusion: Many American companies import what they would call "devices." Notwithstanding their chosen descriptor, these devices are imported without batteries, tanks, atomizers, or nicotine or non-nicotine liquid. Without the

[2] Huang J, et. al. *The impact of price and tobacco control policies on the demand for electronic nicotine delivery systems*. Tobacco Control 2014.

[3] "Electronic cigarettes: U.S. Imports in 2016." GAO-17-515R. April 24, 2017. <https://www.gao.gov/assets/690/684227.pdf>

[4] "Chapter 85 – Harmonized Tariff Schedule." United States International Trade Commission. <https://hts.usitc.gov/view/Chapter%2085>

addition of parts and components by American consumers, the product is nothing more than a box with some electrical components in it. While the product may be typically referred to as a "device," it is properly classified as a "part" because it is not complete a unit?

This lack of clarity does not just present a potential legal issue for individual importers. It also presents a serious competitive issue. When faced with confusion over whether the hiked tariffs apply to their products, the importers that are focused on long-term survival and ethical business practices will err on the side of compliance. Others, however, will jump at the opportunity to use this ambiguity to classify their products under a HTS code that is not subject the tariff hikes. For every importer that is found to be engaged in illegal practices, dozens more will profit from being able to get products into the United States other HTS codes.

III. Regulatory Uncertainty Will Prevent American Manufacturing

In the decade that vaping products have been available on the American market, virtually all manufacturing of vaping devices has taken place in China. Unlike in other industries, Chinese manufacturers did not muscle out American competitors by exploiting cheap labor practices. It was their intellectual property that created this industry and their manufacturing firms have been responsible for much of the innovation in this industry.

Indeed, a synergy has developed between Chinese manufacturers of vaping devices and American manufacturers of the nicotine-containing and nicotine-free e-liquids that are used in vaping devices. Hundreds or thousands of American manufacturers of e-liquid rely on Chinese devices, parts, and components. Without Chinese-made devices, tens of thousands of American jobs in the vaping product industry would not exist today.

To be clear, we are supportive of American manufacturing and would be thrilled to see devices being manufactured in America. However, actions taken by the Obama Administration essentially foreclose all possibilities of this manufacturing coming to America.

In 2014, the Obama Administration's FDA Center for Tobacco Products released a regulation that is often referred to as "the deeming rule." This rule classifies vaping products and e-liquids, as well as parts and components, as "tobacco products." In its initial form, this rule would have required retroactive premarket review applications to be filed by all manufacturers of all vaping products by August 8, 2018. The cost of compliance with this rule is so high that the Smoke-Free Alternatives Trade Association estimated to the Wall Street Journal that it would put 99% of the industry out of business.[5]

[5] Mickle, Tripp. "FDA Cloud Hangs Over Vape Shops." Wall Street Journal. July 7, 2015. <https://www.wsj.com/articles/SB10130211234592774869404581088451777513530>

Under the Trump Administration, FDA Commission Scott Gottlieb had the foresight to delay the retroactive application deadline for non-combustible products to August 8, 2022. While we are thankful for Commissioner Gottlieb's delay, the fact remains that this industry is still living on borrowed time. Whether it is four years, six years, or ten years, the FDA's requirements are so expensive and time-consuming that there is no hope of survival for all but the largest companies unless the FDA takes additional actions to lower the regulatory burden.

This regulatory uncertainty is not just impacting business owners in their decisions about the future. It is also impacting the willingness of banks and investment firms to get involved with the vapor industry. Even if intellectual property rights could be obtained from Chinese firms, manufacturing devices in the United States is still not a cheap proposition. One manufacturer estimated that the cost to setup a new factory would be in the range of $50 million. An industry not facing closure could potentially raise those funds, but this will not happen in the vapor industry due to the cloud of uncertainty that is hanging over this industry.

IV. Conclusion

A rapid rise in the tariffs assessed on vaping products will only result in a tax increase on American businesses and consumers. Worse, it will narrow the price differential between combustible cigarettes and vaping products, which will discourage adult smokers from switching to these harm reduction products.

Regulatory certainty could result in more American manufacturing of vaping products. Absent regulatory reform at the FDA, though, increases in tariffs will just make it harder for Americans to compete, and wipe out any gains made by business owners thanks to the tax cuts signed by President Trump.

For the reasons explained above, we encourage the committee to reject the proposed tariff increases on HTS No. 854.370.99.30 and HTS No. 854.370.99.40.

Sincerely,

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