



Consultation Response on Proposed Nicotine Restrictions

Thursday March 4th 2021

Hon. Patty Hajdu,
Minister of Health,
House of Commons
Ottawa, ON K1A 0A6

Minister Hajdu,

The Vaping Industry Trade Association of Canada (VITA) is pleased to submit our response to Health Canada's consultation on reducing the maximum allowable nicotine concentration in vaping products from the current legal limit of 66mg/ml to the proposed limit of 20mg/ml (70% reduction).

VITA is deeply concerned that this proposal, if enacted will have significant negative impacts from a harm reduction and economic perspective, while failing to achieve its stated objective of reducing youth vaping rates.

We are hopeful that our recommendations will help inform policy decisions that will respect our international treaty obligations and support Canada's goal of reducing smoking rates below 5% by 2035.

Best Regards,

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About VITA:

Canada's largest trade association representing the vaping industry's manufacturers, importers, distributors and retailers, VITA is committed to working with stakeholders and governments to set and uphold regulations for vaping products in Canada. Our approach is based on credible evidence, science, facts, and logic. In our efforts to responsibly grow and defend the category, the Association is committed to collaborating with Health Canada and other regulatory bodies to identify best practices and to inform the development of evidenced-based regulations.

Canada's Vaping Industry: The Legislative Path to Regulation:

On May 23rd, 2018, the Act to amend the Tobacco Act and the Non-smokers' Health Act and make consequential amendments to other Acts received royal assent, bringing the Tobacco and Vaping Products Act (TVPA) in to force. This created a policy framework which allowed the legal and highly regulated sale of nicotine vaping products in Canada.

This was an outflow of Vaping: Toward a Regulatory Framework for E-Cigarettes in 2015, which found broad support from witnesses for the regulation of the category as a reduced risk consumer product.

Various other regulations under the TVPA have been made since this time, including restrictions on public facing advertising and product labelling at a federal level.

All provinces have enacted additional legislative/regulatory regimes intended to restrict access to youth.

These recent legislative and regulatory steps have ensured that in no part of Canada is it legal for:

Youth to buy or consume nicotine vaping products.

Youth to be exposed to marketing materials related to vaping products.

Since the recent creation of a highly regulated framework to legally access vaping products, a significant and diverse industry has emerged including a range of different access points. These access points include:

- 1400 dedicated specialty vape shops which are predominantly small independently owned businesses.
- 27, 240 gas and convenience stores.
- 200 domestic manufacturers of E-liquid.
- Approximately 10-15 large distributors.

While the convenience store and gas station channels are the largest access point for vaping products, the direct economic/employment footprint is difficult to fully quantify because they provide a range of other goods.

However, when one considers only the specialty vape channel, manufacturers, and distributors, of which the vast majority would fall under the definition of small business, VITA can estimate, based on the average number of employees within these respective operations, that:

- Approximately 7000 Canadians are directly employed within the specialty vape channel and ancillary areas such as e-liquid manufacturing and distribution.

Reduced Risk and Better Outcomes:

Vaping is not harm free and should never be presented as a completely safe, or harmless product. It is however significantly less harmful than smoking combustible cigarettes.

According to Health Canada:

- Vaping products deliver nicotine in a less harmful way than smoking cigarettes.
- Vaping products may reduce health risks for smokers who cannot or will not quit using other methods.
- Vaping products contain a very small fraction of the 7,000 chemicals found in tobacco smoke, and where present, they are at significantly reduced levels.¹

This view is informed and supported by the majority opinion in the global scientific community that vaping is significantly less harmful than smoking. For example:

- Public Health England's 2015 evidence report found that, in their "While vaping may not be 100% safe, most of the chemicals causing smoking-related disease are absent and the chemicals which are present pose limited danger."²
- In 2018 the US National Academies of Sciences, Engineering and Medicine (NASEM) found that the available evidence suggests e-cigarettes are far less harmful than combustible cigarettes.³
- According to the Royal College of Physicians (UK), the available data suggests that vaping products "are unlikely to exceed 5% of those [risks] associated with smoked tobacco products and may well be substantially lower than this figure."⁴

¹ Health Canada, "Vaping and Quitting Smoking", <https://www.canada.ca/en/health-canada/services/smoking-tobacco/vaping/smokers.html>, Canada, March 4th, 2021

² McNeill A, Brose LS, Calder R, Hitchman SC, Public Health England, E-cigarettes, A Report Commissioned by Public Health England" https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/733022/E-cigarettes_an_evidence_update_A_report_commissioned_by_Public_Health_England_FINAL.pdf, August 2015

³National Academies of Sciences, Engineering and Medicine, <https://www.nap.edu/catalog/24952/public-health-consequences-of-e-cigarettes> 2018.

⁴ Royal College of Physicians, Nicotine Without Smoke: Tobacco Harm Reduction. <https://www.rcplondon.ac.uk/projects/outputs/nicotine-without-smoke-tobacco-harm-reduction>, accessed March 1st, 2021.

Due to this significant disparity in harm, vaping has become an effective tool for many adult smokers seeking to reduce their risk associated with the consumption of nicotine.

The Canadian Tobacco and Nicotine Survey (CTNS) data indicates that over 1 million adult Canadians, have used a vaping product in the last 30 days, compared with an estimated 4.5 million adult smokers.⁵

This is positive, as increasingly, evidence is emerging that demonstrates that vaping is one of the best ways, if not the best way, to transition smokers away from combustible cigarettes.

For example, a 2021 comparison of the efficacy of vaping vs nicotine replacement therapy (NRT) in England found that vaping was approximately twice as effective in encouraging quitting smoking.⁶

Vaping is Not for Youth or Non-Smokers:

As detailed, vaping's purpose is linked to the category's efficacy as a tool for adult smokers to reduce risk. Vaping is not intended for youth, non-smokers and in no case should its usage by minors be allowed or encouraged.

In each Canadian province, and at the federal level, it is illegal to sell vaping products to minors and evidence demonstrates that the primary youth access points are predominantly through social sharing and online access from unregulated international suppliers.

VITA believes that enhanced enforcement of current restrictions, coupled with robust youth education around the potential harms of vaping is the best targeted approach to minimize youth uptake.

To this end, VITA has actively been working with member companies and service providers to ensure that beyond physical age verification, sophisticated id scanning technology is available and in field in as many locations as possible.

⁵ Government of Canada, Canada Gazette, <https://gazette.gc.ca/rp-pr/p1/2020/2020-12-19/html/reg3-eng.html>, December 19th, 2021.

⁶Public Health England, Vaping In England: 2021 Evidence Review, <https://www.gov.uk/government/publications/vaping-in-england-evidence-update-february-2021/vaping-in-england-2021-evidence-update-summary>, February 23rd, 2021.

Impact of Proposed Regulation on Small Business and Harm Reduction:

The reduction of maximum nicotine concentrations in vaping products by approximately 70% will have significant negative economic and harm reduction outcomes for Canada, if implemented.

According to Health Canada's own research, 62% of all current nicotine containing vaping products sold are above the proposed limit of 20mg/ml which are consumed by 75% of the vaping population.⁷

While Health Canada's background report suggests that the majority of current vapers are expected to migrate to lower strength products; the lived experience in provinces such as Nova Scotia, which implemented a nicotine cap and flavour ban last April, paints a far more troubling picture of unintended consequences.

Specifically, that vapers will turn back to cigarettes and the unregulated illicit market. This will result in increased smoking rates, coupled with expansion of the illicit and unregulated market.

Nova Scotia: The Unintended Consequences of Prohibition:

In April of 2020 Nova Scotia implemented a comprehensive flavour ban and nicotine cap of 20mg/ml. The stated purpose of this proposal was to combat youth vaping rates by ensuring that vaping products are not appealing to youth.

However, the primary outcome appears to have made the product less effective for adults trying to reduce risk, shutting down much of the legal and regulated vaping sector, leaving unregulated and illegal youth access points largely unaffected.

Since the implementation of these restrictions:

- The Atlantic Convenience Store Association President, Mike Hammond, indicated that local retailers saw a significant spike in the purchase of legal tobacco cigarettes for the first time in years.⁸
- Neilson Data showed an immediate near-term increase of the sale of legal tobacco cigarettes of over 25% following the implementation of a nicotine cap and flavour ban.⁹
- Abacus polling data showed that 30% of vapers were at risk of migrating back to smoking after successfully switching to vaping.

⁷Government Of Canada, Canada Gazette <https://canadagazette.gc.ca/rp-pr/p1/2020/2020-12-19/html/reg3-eng.html> December 19th, 2021.

⁸Matt Brand, *Cigarette Sales Increasing in Atlantic Canada, Halifax Today* <https://www.halifaxtoday.ca/local-news/cigarette-sales-in-nova-scotia-increasing-atlantic-convenience-stores-association-2792516> , October 15th, 2021

⁹ Nielsen Data, "Cigarette sales from Nielsen Canada, 2017-2020", September 24th, 2020

While the increase in cigarette sales also driven by a temporary reduction in the illegal cigarette market during COVID border and supply chain disruptions. It appears that the nicotine cap/flavour restriction on vaping was a factor as well.

The transition of adult vapers returning to smoking has had a devastating impact on the specialty vape market, resulting in the immediate closure of 50% of local vape shops. Without a successful conclusion to the ongoing legal challenges in the province, VITA expects the permanent closure rate to grow to at least 85% of the Nova Scotia vape shop sector.

Despite this immediate increase in cigarette sales and the rapid contraction of the legal vape market, VITA is unaware of any evidence to demonstrate a reduction in youth consumption on any significant scale. This appears to validate industry's long-standing position that the legal market is not the primary access point for youth and that reducing the efficacy of vaping products for adult smokers is not an appropriate or effective policy to address youth vaping.

Risk's of Vapers Returning to Smoking: The Unintended Consequences of Prohibition:

If one assumes a migration of only 25% of adult vapers back to smoking due to decreased effectiveness, using the most recent CTNS data, then up to 259,000 adult Canadian vapers could turn back to smoking (when also calculating the impact of a potential future flavour restriction combined with a lower nicotine cap).

Health Canada appears to acknowledge this risk in the Regulatory Impact Analysis Statement (RIAS), when they state that *"After the proposed Regulations come into force, it is anticipated that some dual users who currently use vaping products above 20 mg/mL nicotine would not substitute their vaping product purchases with lower concentrations of nicotine. **They would choose to purchase more cigarettes**"*¹⁰.

While the scale of this transition from vaping to smoking cannot fully be calculated, the RIAS clearly states that it is highly likely outcome. The reduction in the efficacy of vaping as a reduced risk tool will mean that *"...Some current smokers who would try vaping products may find that vaping products at 20 mg/mL nicotine or below are not satisfying to them and could therefore end up being dual users or remain smokers. These persons would continue to be exposed to harmful chemicals from the long-term use of tobacco products."*¹¹

While Health Canada accepts that these measures are likely to lead some dual users to return to smoking, it does not recognize the equal likelihood that some of those who switched completely to vaping would also return to smoking. This leads us to ask the

¹⁰Government of Canada, Canada Gazette, <https://gazette.gc.ca/rp-pr/p1/2020/2020-12-19/html/reg3-eng.html>, December 19th, 2021.

¹¹ Government of Canada, Canada Gazette, <https://gazette.gc.ca/rp-pr/p1/2020/2020-12-19/html/reg3-eng.html>, December 19th, 2021.

question; How many adult Canadian vapers is the government willing to leave behind before it stops its efforts to degrade the efficacy of reduced harm vaping products?

This is at complete variance to Canada's stated goal of reducing the proportion of smokers to 5% by 2035.

Unrealistic Implementation Timeframe at Variance to International Convention:

Like many Canadian industries, the vaping sector is integrated globally, with hardware and e-liquid manufactured in a wide variety of locations. Significant revisions to product types and forms as is proposed will require substantial adjustment in international logistics and manufacturing processes to ensure that a sufficient volume of compliant products are available. This transitional difficulty is enhanced by the simple fact that there is a global pandemic which has impacted the international economy.

As Canada has long held the position that a strong, rules based international trading system is vital to our national self interest and is a key priority of our foreign policy¹², VITA was surprised to see the government propose a 15-day implementation period on this regulatory change.

Considering that Canada, as a signatory to the World Trade Organization (WTO) is obligated under section 2.12 (*Agreement on Technical Barriers to Trade*) to provide a "reasonable interval" of not less than six months between the final publication of regulations and their implementation, VITA cannot understand why Canada would propose a timeline which appears in direct contravention of our treaty obligations; especially at a time when we expect other countries to uphold and adhere to their obligations to us.

Canada, as a signatory to the new iteration of the North American Free Trade Agreement, CUSMA, committed that "[i]f feasible and appropriate, each Party shall endeavor to provide an interval of more than six months between the publication of a final technical regulation ... and its entry into force".¹³

While a majority of e-liquid sold on the Canadian is domestically produced, the vast majority of the closed pod devices common in both vape shops and c-stores have their e-liquid made and filled in outside Canada.

Should Health Canada arbitrarily impose an implementation window at variance to our global trade obligations to the WTO and to our largest trading partner, VITA believes that it will indicate to the world that Canada's commitment to a rule based international trading system is not earnest and does not need to be reciprocated.

¹² https://www.international.gc.ca/trade-commerce/trade_topics-domaines_commerce/policy_101_fondements_politique.aspx?lang=eng

¹³ USMCA, Chapter 11, Articles 11.3 and 11.8, available online at <https://www.international.gc.ca/tradecommerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/11.aspx?lang=eng>.

A Wide Range of Global Governance Models:

It appears to VITA that the proposed maximum limit of 20mg/ml of nicotine was based on the limit in place in the European Union, as opposed to a detailed domestic review with the aim of finding the right balance between ensuring the continued effectiveness of vaping and reducing youth uptake.

VITA believes this approach fails to fully recognize that there is no current international consensus on the appropriate nicotine level in vaping products and that more work must be done to find a level appropriate for Canada.

Examples at variance to the proposed limit include:

- Our largest trading partner, the United States limits nicotine levels to 59mg/ml.
- New Zealand which limits nicotine to 5% (approximately 50mg/ml).

In addition, the *Elicitation of Expert Judgements on the Behavioural Impacts of a Nicotine Standard from 2017*, which Health Canada has indicated was instrumental in supporting the 20mg/ml recommendation stated that only one of the experts consulted had extensive knowledge of the Canadian tobacco/vaping market and our tobacco control framework.¹⁴

¹⁴ Elicitation of Expert Judgements on the Behavioural Impacts of a Nicotine Standard, 2017

A Better Approach: VITA Recommendations:

Based on the significant implications of this policy proposal on Canada's obligations under various international treaties, the domestic vaping industry and Canada's commitment to reduce smoking rates to below 5% by 2035, VITA recommends the following:

1. Canada does not proceed with a 20mg/ml nicotine limit. Instead, we encourage Health Canada to rapidly convene a working group including industry experts, harm reduction advocates and scientific leaders with knowledge of the Canadian vaping sector to determine an appropriate recommended nicotine limit that balances retaining the effectiveness of vaping as a reduced risk option while limiting appeal for youth.
2. Enhance and expand enforcement of current regulatory regimes in the interim, coupled with expanded youth education around the potential risks of vaping.
3. Adhere to the spirit and letter of our international treaty obligations and provide industry at least 6 months in terms of implementation.
4. Authorize the use of pre-approved relative risk and comparative statements for vaping products which had already gone through consultation years ago. By preventing vaping companies from adult only advertising about the reduced risk of vaping, it makes it more difficult to change the narrative that vaping is for adult smokers to reduce their risk only, and not for youth and non-smokers.