

**Federal Trade Commission
Supporting Statement
Cigarette and Smokeless Tobacco Data Collection
OMB Control # 3084-0134**

(1) Necessity for Information Collection

Beginning in 1967, the Federal Trade Commission (“FTC” or “Commission”) submitted annual reports to Congress on cigarette sales and marketing pursuant to the Federal Cigarette Labeling and Advertising Act. 15 U.S.C. §§ 1331-1341 (“Cigarette Reports”). Beginning in 1987, the FTC submitted biennial reports to Congress on smokeless tobacco pursuant to the Comprehensive Smokeless Tobacco Health Education Act. 15 U.S.C. §§ 4401-4408 (“Smokeless Tobacco Reports”). The reports were based on data submitted by the largest cigarette and smokeless tobacco manufacturers of products sold in the United States.

The Federal Reports Elimination and Sunset Act of 1995¹ allowed the agency to decide whether to continue publishing these reports. In response to a request for public comment,² many public health and tobacco control advocates cited the importance and utility of the FTC’s reports, and the Commission has continued to issue them annually.

More than fifteen years ago, the Commission decided to address its information requests to the ultimate parent of each of the leading cigarette and smokeless tobacco manufacturers in order to ensure that no relevant data from affiliated companies went unreported. This increased the number of separately incorporated entities required to provide data, bringing the requirements within the scope of the Paperwork Reduction Act (“PRA”). The current Office of Management and Budget (“OMB”) clearance under the PRA runs through December 31, 2020, which the Commission seeks to extend for three years.

(2) Use of the Information

The Commission will use the information collected to publish periodic reports on cigarette and smokeless tobacco (collectively referred to as “tobacco”) sales and marketing.³ To the FTC’s knowledge, the information published in these reports is not available from any other source.

The information requests the Commission intends to issue will seek data regarding, inter alia: (1) the tobacco sales of the companies that receive its information requests (“the recipients”); (2) the types of products sold; (3) how much the recipients spend advertising and promoting their tobacco products, and the amounts spent in each of several specified expenditure

¹ Pub. L. No. 104-66, Section 3003(a)(1), 109 Stat. 734.

² 66 Fed. Reg. 18,640 (April 10, 2001).

³ See, for example, the most recent reports under the existing PRA clearance at <https://www.ftc.gov/reports/federal-trade-commission-cigarette-report-2018-smokeless-tobacco-report-2018>. See also related FTC Press Release, *FTC Releases Reports on Cigarette and Smokeless Tobacco Sales and Marketing Expenditures for 2018* (Dec. 30, 2019), <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-releases-reports-cigarette-smokeless-tobacco-sales-marketing>.

categories; (4) whether the recipients are involved in the appearance of their tobacco products in television shows, movies, or Internet videos (“product placement”); (5) how much the recipients spend on advertising intended to reduce youth tobacco use; and (6) the events, if any, during which the recipients’ tobacco brands are televised. The information will be sought under the authority of Section 6(b) of the FTC Act, 15 U.S.C. § 46(b).

(3) Information Technology

Improved information technology may assist in gathering and producing this information. Consistent with the aims of the Government Paperwork Elimination Act, 44 U.S.C. § 3504 note, and with past practice, the FTC will request that much of the responsive data be compiled using spreadsheet software using data fields already defined by the Commission. In addition, the Commission will continue to allow the recipients to deliver their responses by electronic mail, should they choose to do so, rather than preparing conventional submissions that must be delivered through the mail or via courier service.

(4) Efforts to Identify Duplication

There is no reliable information available elsewhere that can be used for these purposes. In particular, the Food and Drug Administration (“FDA”) is not collecting cigarette or smokeless tobacco sales and marketing expenditure data like that required by the Commission’s 6(b) Orders.

(5) Efforts to Minimize the Burden on Small Organizations

The requests to the four largest cigarette and the five largest smokeless tobacco manufacturers will not have a significant impact on a substantial number of small entities.

Wherever possible, the FTC will attempt to minimize the time commitment necessary to respond to the information requests. The FTC will consider proposals for use of information technology that may reduce burden.

(6) Consequences of Not Conducting the Collection or Conducting Less Frequently

If the information is not collected, the FTC will not have the data necessary to prepare the reports. The burden of the information collection has been reduced as much as possible, and the information is collected no more frequently than once per year.

(7) Circumstances Requiring Collection Inconsistent with Guidelines

The reporting requirements are consistent with all the applicable guidelines contained in 5 C.F.R. § 1320.5(d)(2).

(8) Consultation Outside the Agency

Consistent with 5 C.F.R. § 1320.8(d), the FTC recently published a notice seeking public comment on the proposed collections of information, *see* 85 Fed. Reg. 38,139 (June 25, 2020), and is doing so again contemporaneously with this submission.

In response to the June 25, 2020 Notice, the Commission received comments from the Campaign for Tobacco-Free Kids (“CTFK”), the American Lung Association (“ALA”), Truth Initiative, and Altria Client Services (“Altria”).

CTFK

The CTFK comment specifically noted the utility and importance of the Commission’s Cigarette and Smokeless Tobacco Reports, and urged the agency to continue collecting and reporting industry sales and marketing expenditure data, which CTFK stated provide “critical data to researchers, policymakers, advocates and the general public.” CTFK additionally observed:

The FTC is currently the only public source for data on cigarette and smokeless tobacco companies’ marketing and promotional expenditures. No other agency collects and publishes such information directly from the companies, making the FTC reports the most accurate and reliable assessment of tobacco marketing and promotion expenditures available.

CTFK at 1.

CTFK, however, suggested certain modifications to the Commission’s reports. Specifically, CTFK recommended that the Commission: (1) clarify in which category coupons that consumers obtain online are to be counted; (2) report data on a company-specific or brand-specific basis, rather than on a fully-aggregated basis; (3) require manufacturers to report expenditures related to corporate sponsorships and advertisements; and (4) publish reports within one year of data collection. *Id.* at 2. CTFK also requested that the FTC extend its data collection to include electronic cigarettes (“e-cigarettes”) and cigars.⁴

The Commission’s proposed Orders clarify that expenditures on coupons delivered online should be reported together with coupons delivered by other means. The full impact of couponing by the major cigarette and smokeless tobacco manufacturers can only be seen if expenditures for all coupons are reported together, regardless of how those coupons are delivered to consumers.

Regarding CTFK’s suggestion that data be reported on other than a fully-aggregated, nationwide basis, the cigarette and smokeless tobacco companies assert that those data are confidential and, as CTFK acknowledges, the Commission cannot publicly release trade secrets or certain commercial or financial information. *Id.* at 2, n.2.

The Commission has for a number of years required the recipients of its 6(b) Orders to report certain expenditures related to corporate sponsorships and advertisements made in the

⁴ Two other commenters, ALA and Truth Initiative, made the same suggestion. The collection of data regarding e-cigarettes or cigars is beyond the scope of this supporting statement. Note though that the FTC has a separate ongoing study on e-cigarettes. See FTC Press Release, *FTC to Study E-Cigarette Manufacturers’ Sales, Advertising, and Promotional Methods* (Oct. 3, 2019), <https://www.ftc.gov/news-events/press-releases/2019/10/ftc-study-e-cigarette-manufacturers-sales-advertising-promotional>.

name of the company, rather than any of its brands.⁵ The Commission has not included those data in its Cigarette and Smokeless Tobacco Reports, and has therefore decided to cease collecting this information.

Regarding CTFK's suggestion to publish reports within one year of data collection, the Commission always strives to publish the Cigarette and Smokeless Tobacco Reports as quickly as possible. It takes the recipients of its 6(b) Orders time to submit their reports and they may request extensions, such as this year due to the COVID-19 pandemic. After reviewing the resulting reports, staff often has to go back to one or more of the 6(b) Order recipients for clarifications or corrections. The data also requires analysis, and the reports require writing and review and approval at multiple levels. The Commission does in fact usually publish the Cigarette and Smokeless Tobacco Reports well within a year of when the data is first submitted.

ALA

The ALA comment stated that the Commission's Cigarette and Smokeless Tobacco Reports provide "valuable information on cigarette and smokeless tobacco products sales and marketing that is used on an ongoing basis in the Lung Association's education and public policy activities related to preventing and reducing tobacco use." ALA at 1. ALA additionally observed:

These data are also important for public health officials and other organizations working to reduce the terrible burden caused by tobacco. By understanding how much tobacco companies spend on marketing and the distribution channels they use, it allows public health officials to determine where and how best to deliver tobacco prevention and cessation messages.

Id.

Truth Initiative

Truth Initiative's comment stressed the critical importance and utility of the Cigarette and Smokeless Tobacco reports. Truth Initiative at 1. It said that the reports provide information that is not available elsewhere and is not duplicative of other data collections. *Id.* Truth Initiative believes the reports often provide the basis for strong public health policies with regard to tobacco use and marketing and such policies save lives. *Id.*

Truth Initiative, however, suggested certain modifications to the Commission's reports. Specifically, Truth Initiative recommended that the Commission: (1) collect information regarding heated tobacco products with its cigarette Orders; (2) collect information regarding low nicotine cigarettes; (3) reinstate previously asked questions requesting lists of new and discontinued cigarette products; (4) collect information regarding nicotine pouches and lozenges

⁵ Both the cigarette and smokeless tobacco Orders required the recipients to report expenditures on "public entertainment events (including, but not limited to, concerts and sporting events) bearing or otherwise displaying the name of the Company or any variation thereof but not bearing or otherwise displaying the name, logo, or an image of any portion of the package" of any of its cigarettes or smokeless tobacco products, or otherwise referring to those products.

that do not contain tobacco; (5) collect information regarding the flavors of smokeless tobacco products; (6) clarify that streaming shows are included in questions about product placement; (7) define “youth” as persons younger than 18 years of age and “underage” as persons younger than 21 years of age. *Id.* at 2-6.

The Commission agrees that heated, non-combusted tobacco products are an important emerging segment of the tobacco market. The Commission plans to monitor these products and will consider whether and how best to collect information about these products when the market has further developed to make such information collection warranted.

As for Truth Initiative’s suggestion that the Commission collect information regarding low-nicotine cigarette products, none of the current recipients of the cigarette Orders sell such products. The Commission’s Cigarette Reports focus on the largest cigarette manufacturers and do not attempt to present a complete picture of the cigarette market. There are numerous smaller manufacturers and importers of cigarettes to which the Commission does not direct its cigarette Orders. The Commission does not intend, at this time, to seek information specifically regarding low nicotine cigarettes or to direct an Order to the one company that has expressed an intention in marketing such products.

In 2017, the Commission determined that it no longer needed lists of cigarettes first sold or discontinued in a calendar year and it does not see a sufficient basis to revisit that decision.

As the Truth Initiative notes, nicotine pouches and lozenges are currently being marketed by some of the major smokeless tobacco companies, and are an important emerging segment of the tobacco market. *Id.* at 4. The Commission will add a question to its smokeless tobacco Orders about total unit and dollar sales of these products to help the agency assess whether collection of more complete information about such products would be warranted.

Given the information presented by the Truth Initiative regarding the popularity of flavored smokeless tobacco, especially among youth (*id.* at 4), and the Commission’s collection of flavor information regarding cigarettes (and recently e-cigarettes) the Commission will modify its smokeless tobacco 6(b) Orders to seek information regarding the flavors of smokeless tobacco products.

The Commission believes that its product placement questions that ask about “motion picture(s)” and “television show(s)” cover “original shows streamed via the internet.” On the other hand, the Commission sees no harm in clarifying that is the case and intends to do so.

The Truth Initiative correctly points out that the federal minimum age to purchase tobacco is now 21. *Id.* at 6. The Commission will use the term “underage persons” in lieu of “youth” in its 6(b) Orders and define “underage persons” as persons younger than 21 years of age.

Altria

Altria stated that the Commission should no longer collect any information from cigarette and smokeless tobacco manufacturers “due to the Food and Drug Administration’s ... extensive, active regulatory authority over tobacco products under the Family Smoking Prevention and Tobacco Control Act.” Altria at 1. Because FDA has the authority to require tobacco product

manufacturers to submit additional information to promulgate additional regulations regarding advertising and promotion of tobacco products, Altria calls the Commission's collections "superfluous" and unnecessary "burdens." *Id.* at 2. Altria also contends that "responding to FTC's collection requests requires several full-time employees (across multiple departments and operating companies) to spend weeks compiling data, revising reports, and reviewing ledgers before preparing for submission to FTC" and that this effort takes "far longer than 180 hours" estimated by the Commission as the "average annual burden on manufacturers." *Id.* at 2.

The FTC staff and FDA staff have a long tradition of working together on the many areas where the two agencies share jurisdiction. However, since the FDA is not collecting cigarette or smokeless tobacco sales and marketing expenditure data like that required by the Commission's 6(b) Orders, there is no overlap or duplication with respect to such data. The Commission intends to continue collecting cigarette and smokeless tobacco sales and marketing expenditure data. To the extent that in the future FDA duplicates the FTC's data collection, the FTC can modify or cease its collection.

Altria contends that the Commission underestimates its burden in responding to the FTC's information collection and that its burden is "far longer than 180 hours." The Commission's burden estimate of 180 hours was an average for the nine largest recipients of the Commission's information request. The recipients vary greatly in size, in the number of products that they sell, and in the extent and variety of their advertising and promotion. Our burden estimate clearly stated that the very largest recipients might require hundreds of hours. Altria, which owns Philip Morris USA and the U.S. Smokeless Tobacco Co., says on its website that its "tobacco companies ... have been the undisputed market leaders in the U.S. tobacco industry for decades."⁶ Altria's comment is consistent with the number of hours that its Philip Morris subsidiary previously told FTC staff that it spent complying with the Commission's cigarette Order. All the other tobacco companies that responded to the FTC staff's latest inquiries reported spending substantially fewer hours. We also note that Altria is the recipient of two 6(b) Orders, one for cigarettes and one for smokeless tobacco. Because the Commission did not obtain an estimate from the U.S. Smokeless Tobacco Co., to err on the side of caution, the Commission will increase its burden estimate from 1,980 hours to 2,940 hours.

(9) Payments and Gifts to Respondents

There is no provision for payments or gifts to respondents.

(10) & (11) Assurances of Confidentiality/Matters of a Sensitive Nature

In connection with the information requests, the Commission will receive information of a confidential nature. Under Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), such information will be protected from disclosure while it remains confidential commercial information. Individual company information will be anonymized and/or aggregated so that it cannot be disaggregated to disclose information about any submitter.

⁶ See www.altria.com/about-altria?src=megaspotlight.

(12) Estimated Annual Hours and Labor Cost Burden

Although the Commission plans to seek information from the four largest cigarette companies and the five largest smokeless tobacco companies in 2021 and the ensuing two years of requested clearance, this burden estimate is based on the Commission issuing up to fifteen 6(b) information requests per year, involving as many as twenty entities.⁷ This conservative estimate is designed to anticipate future changes in these markets that might warrant obtaining data from other industry members.

These cigarette and smokeless tobacco companies vary greatly in size, in the number of products that they sell, and in the extent and variety of their advertising and promotion. Prior input from the recipients, paired with staff's knowledge, suggests that smaller companies would require from 30 to 80 hours to gather, organize, format, and produce their responses per information request, while the very largest companies might require hundreds of hours. To err on the side of caution, the Commission has increased its estimate of the hours that the four largest recipients⁸ of the Commission's information requests will take to comply with them from 1,620 hours per year to 2,400 hours per year, averaging 400 hours per information request.⁹

Staff estimates that for the smaller companies -- burden should not exceed 60 hours per company or 540 hours, cumulatively, per year. Thus, overall estimated burden for a maximum of 15 information requests is 2,940 hours per year.¹⁰ These estimates include any time spent by separately incorporated subsidiaries and other entities affiliated with the ultimate parent company that has received the information request.

It is not possible to calculate precisely the labor costs associated with this data production, as they entail varying compensation levels of management and/or support staff among companies of different sizes. The estimate assumes that personnel with technical training will handle most of the tasks involved in the data collection process, although legal personnel will likely be involved in preparing the actual submission to the Commission. Staff has applied an average hourly wage of \$100/hour for the combined labor classifications. Thus, estimated total labor costs for up to 15 information requests is \$294,000 per year.

⁷ Since three and possibly more of these 6(b) recipients are parent companies that have separately incorporated subsidiaries or affiliates that the FTC anticipates or expects that the parent companies will transmit the collection instrument to and seek information from, the proposal to send up to 15 6(b) Orders could equate to 20 "persons" under the PRA. *See* 5 CFR 1320.3(c)(4) ("[ten or more persons]...refers to the persons to whom a collection of information is addressed by the agency within any 12-month period, and to any independent entities to which the initial addressee may reasonably be expected to transmit the collection of information during that period, including...separately incorporated subsidiaries or affiliates.").

⁸ There are two tobacco companies that receive both a cigarette Order and a smokeless tobacco Order.

⁹ These hourly burden estimates for the larger recipients include calculations associated with the separately incorporated subsidiaries or affiliates.

¹⁰ Again, the proposal to send up to fifteen 6(b) Orders equates to 20 "persons" under the PRA.

(13) Estimated Annual Capital or Other Non-labor Costs

The capital or other non-labor costs associated with the information collection are minimal. Although recipients may have to preserve relevant business records to accommodate the Commission's information requirements, they already have the means in place to do so.

(14) Estimate of Cost to the Federal Government

Staff estimates that the total cost each year to the FTC's Bureaus of Consumer Protection and Economics of collecting and analyzing this information is approximately \$25,000. This estimate is based on the assumption that about seven percent of an attorney work year is devoted to those tasks. The cost in attorney time will be approximately \$11,000. In addition, about 10 percent of an economist's work year, approximately \$14,000, will be devoted to processing the data submitted.

(15) Changes in Burden

As discussed above, the burden estimate has been adjusted upward from 1,980 hours per year in 2017 to 2,940 hours per year in 2020. This correspondingly leads to an increase in estimated labor costs from \$198,000 in 2017 to \$294,000 in 2020.

(16) Statistical Use of Information/Publication of Results

The information provided by the respondents will be used to prepare annual reports that will be publicly released. The collection of the information will begin after the completion of the OMB review process. Commission staff estimates that the first annual cigarette and smokeless tobacco reports using such information will be completed and publicly released in February 2022.

The proposed data collections do not employ statistical methods such as sampling or imputation. The Commission does not attempt to describe the sales and marketing activities of either the cigarette or the smokeless tobacco industry as a whole. Instead, the Commission has focused only on the largest players in each market.

The Commission could attempt to perform reporting that is statistically representative of the entire cigarette and smokeless tobacco industries, but doing so would first require preliminary surveys of the respective industries to identify as many participants as possible, and then to gather information on their sales and marketing expenditures. Conducting those preliminary surveys would impose a burden on the recipients, many, if not most, of which – other than prior recipients of the Commission's 6(b) Orders – are likely to be small entities with low sales and even lower marketing expenditures. This would also require significant additional agency resources, delaying timely completion of the FTC's reports. Issuing the 6(b) Orders to those very small entities could impose a significant burden upon them. Further, given the Commission's belief that the responses provided by the four largest cigarette manufacturers and the five largest smokeless tobacco manufacturers represent the vast majority of the industries' sales and marketing expenditures, the result would likely not be very different from that produced by the FTC's proposed data collections. Accordingly, the Commission believes that employing a statistically representative approach is not in the public interest, because it would impose additional burdens far exceeding its benefits.

(17) & (18) Failure to Display the OMB Expiration Date/ Exceptions to Certification

Not applicable.