

Date of Hearing: August 20, 2019

ASSEMBLY COMMITTEE ON HEALTH
Jim Wood, Chair
AB 1639 Gray – As Amended August 13, 2019

SUBJECT: Tobacco products.

SUMMARY: Prohibits tobacco retailers and online retailers from selling flavored electronic cigarettes, unless the retail location does not permit any person under 21 years of age to enter the store, or the online retailer uses an age verification process to establish that the purchaser is 21 years of age or older. Exempts electronic cigarettes with tobacco, mint, or menthol from those limitations, and sunsets those limitations on January 1, 2022. Prohibits a person under the age of 21 from entering a tobacco store, as defined. Prohibits an electronic cigarette manufacturer from advertising or promoting electronic cigarettes to a person under 21 years of age, and places various other restrictions on the display, packaging, and promotion of electronic cigarettes. Increases the civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes tobacco products to persons under 21 years of age. Contains an urgency clause to ensure that the provisions of this bill go into immediate effect upon enactment. Specifically, **this bill:**

- 1) Prohibits a tobacco retailer and an online retailer from selling flavored electronic cigarettes, except as follows:
 - a) Electronic cigarettes with tobacco, mint, or menthol flavors;
 - b) A tobacco retailer in a retail location that does not permit any person under 21 years of age to be present or to enter the premises at any time; and,
 - c) An online retailer, if the online retailer uses an age verification process to establish that the purchaser of the flavored electronic cigarettes is 21 years of age or older.
- 2) Authorizes the Department of Public Health (DPH) to assess civil penalties for a violation of the provisions in 1) above consistent with DPH's existing authority and appeals process.
- 3) Sunsets the provisions described in 1) and 2), above on January 1, 2022.
- 4) Defines the following, for purposes of certain sections of this bill:
 - a) "Electronic cigarette" as either of the following:
 - i) An electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, including, but not limited to, an electronic cigarette, vape pen, cigar, or pipe (excludes hookahs from this definition); or,
 - ii) A component, part, or accessory of an electronic cigarette, whether or not sold separately.
 - b) "Online retailer" as any person who sells tobacco products directly to the public through orders placed on the internet.

- 5) Revises existing DPH enforcement against tobacco retailers that sell tobacco to any person under 21 years of age by requiring DPH to conduct random, onsite sting inspections of at least 20% of the total number of licensed tobacco retailers; and, in the event of a violation, requires DPH to conduct a second sting inspection at that site within six months of the first violation, and a third sting inspection within 12 months of the first violation. Requires DPH to enlist the assistance of persons under 21 years of age in conducting these enforcement activities.
- 6) Requires a person engaging in the retail sale of tobacco products to check the identification of a tobacco purchaser using age verification software or an age verification device if the purchaser appears to be under 27 years of age.
- 7) Increases the amount of civil penalties an enforcing agency may assess against any person, firm, or corporation that sells, gives or in any way furnishes tobacco, cigarettes, or paraphernalia that is designed for smoking or ingesting tobacco, tobacco products, or controlled substances, and shortens the timelines between penalties as follows:
 - a) For a first violation a penalty range of \$1,200 to \$1,800 (was \$400 to \$600);
 - b) For a second violation within a 36-month period, a range of \$3,000 to \$4,000 (was \$900 to \$1,000 within a five-year period); and,
 - c) For a third or subsequent violation within a 36-month period, a range of \$5,000 to \$6,000 (was \$3,000 to \$4,000 for a fourth violation, or \$5,000 to \$6,000 for a fifth violation, within a five-year period.)
- 8) Increases the length of license suspensions required to be implemented by the California Department of Tax and Fee Administration (CDTFA), upon notice of a civil penalty by DPH, in accordance with the following schedule:
 - a) A 60-day suspension for the first violation (was 45 days for a third violation at the same location within a five-year period); and,
 - b) A 90-day suspension for a second violation at the same location within a 36-month period (was 90 days for a fourth violation at the same location within a five-year period).
- 9) Prohibits a person under 21 years of age from entering a tobacco store. Defines a tobacco store as a retail business that meets all of the following requirements:
 - a) Primarily sells tobacco products;
 - b) Generates more than 60% of its gross revenues annually from the sale of tobacco products and tobacco paraphernalia; and,
 - c) Does not sell alcoholic beverages or food for consumption on the premises.
- 10) Prohibits an electronic cigarette manufacturer from advertising, promoting, or packaging electronic cigarettes in a manner that does either of the following:
 - a) Is intended to encourage persons under 21 years of age to use an electronic cigarette; or,

- b) Is attractive to persons under 21 years of age, including, but not limited to, by showing any of the following:
 - i) Cartoons;
 - ii) An image, character, or phrase that is similar to one popularly used to advertise to children;
 - iii) A video game, movie, video, or animated television show known to appeal primarily to persons under 21 years of age;
 - iv) An imitation of candy packaging or labeling; or,
 - v) The terms “candy” or “candies,” or other variants in spelling, such as “kandy” or “kandeez,” and the terms of common dessert foods, including, but not limited to, “milkshake,” “cupcake,” and “thin mint.”
- 11) Prohibits a person from displaying on an electronic cigarette, or its packaging, an indication or illustration, including a brand element that could cause a person to believe that the product is flavored, if there is reasonable belief that the indication or illustration could be appealing to persons under 21 years of age, and prohibits the sale of such an electronic cigarette.
- 12) Places various restrictions on the advertising and promotion of electronic cigarettes, including, but not limited to: a) by means of packaging in a manner that could cause a person to believe that health benefits may be derived from the use of the electronic cigarette, unless approved by the federal Food and Drug Administration (FDA); b) by comparing the health effects arising from the use of the electronic cigarette or from its emissions with those arising from the use of other tobacco products; or, c) through a testimonial or endorsement.
- 13) Prohibits paid or unpaid sponsorships of concerts, sport events, and any event with an intended audience having a significant percentage of persons who are under 21 years of age.
- 14) Requires DPH and the Department of Education, on or before January 1, 2021, to report to the Legislature, the Senate Committee on Health, and the Assembly Committee on Governmental Organization on all of the following:
 - a) The use of electronic cigarettes in California among persons under 21 years of age;
 - b) The impact of flavored electronic cigarette products on the interest of persons under 21 years of age in trying electronic cigarettes;
 - c) The perception of, and reasons for, the attraction to specific flavors of electronic cigarettes; and,
 - d) The perceived health impacts of electronic cigarette use.
- 15) Sunsets the provision described in 14) above on January 1, 2024.

EXISTING LAW:

- 1) Requires DPH to establish and develop a program to reduce the availability of “tobacco products,” as defined, to persons under 21 years of age through authorized enforcement activities, as specified, pursuant to the Stop Tobacco Access to Kids Enforcement Act (STAKE Act).
- 2) Requires all persons engaging in the retail sale of tobacco products to check the identification of tobacco purchasers, to establish the age of the purchaser, if the purchaser reasonably appears to be under 21.
- 3) Permits an enforcing agency, as specified, to assess civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes to another person who is under 21 any tobacco product, instrument, or paraphernalia that is designed for the smoking or ingestion of tobacco products, as specified, ranging from \$400 to \$6,000 for a first, second, third, fourth, or fifth violation within a five-year period.
- 4) Defines “smoking” as inhaling, exhaling, burning, or carrying any lighted or heated cigar, cigarette, or pipe, or any other lighted or heated tobacco or plant product intended for inhalation, whether natural or synthetic, in any manner or in any form. Includes the use of an electronic smoking device that creates an aerosol or vapor, in any manner or in any form, or the use of any oral smoking device for the purpose of circumventing the prohibition of smoking.
- 5) Defines “tobacco product” as a product containing, made, or derived from tobacco or nicotine that is intended for human consumption, as specified, including an electronic device that delivers nicotine or other vaporized liquids to the person inhaling from the device, and any component, part, or accessory of a tobacco product, whether or not sold separately. Prohibits any product approved by the FDA for sale as a tobacco cessation product or for other therapeutic purposes, as specified, from being deemed a tobacco product.
- 6) Requires CDTFA, under the Cigarette and Tobacco Products Licensing Act, to administer a statewide program to license cigarette and tobacco products manufacturers, importers, distributors, wholesalers, and retailers. Prohibits selling tobacco products without a valid license, and makes violations punishable as a misdemeanor. Requires retailers to obtain a separate license for each retail location that sells cigarettes and tobacco products and to pay an annual license fee of \$265.

FISCAL EFFECT: This bill has not yet been analyzed by a fiscal committee.

COMMENTS:

- 1) **PURPOSE OF THIS BILL.** According to the author, with more than 3.5 million middle school and high school students reporting e-cigarette use in 2018, vaping has become the new smoking among American youth. There are now 2.5 times more children using JUUL and other e-cigarette brands compared to traditional cigarettes. With a 78% increase in use amongst high schools students between 2017 and 2018 alone, there is significant momentum behind what has to be called an epidemic. The author states that this bill represents a comprehensive plan that would get e-cigarettes out of the hands of children, penalize those

who sell to kids, regulate marketing that appeals to minors, and restrict sales in locations where children are present. The author contends that this is unquestionably the toughest reform aimed at combating youth vaping in any of the 50 states. The author points out this bill is about the health and well-being of kids and utilizes proven tools to help ensure these addictive products don't end up in the hands of young people, and concludes that is the start, not the conclusion of our efforts as a Legislature to tackle this important issue.

- 2) **BACKGROUND.** Electronic cigarettes (e-cigarettes) are a diverse product class of battery-powered devices designed to deliver a combination of nicotine, flavorings, and other additives via an inhaled aerosol. Since their entry into the US marketplace in 2007, e-cigarettes have rapidly evolved in product design, marketing, and availability. According to the Centers for Disease Control and Prevention (CDC), in 2014, researchers identified more than 460 e-cigarette brands and 7,700 e-liquid flavors. These products are now widely distributed through traditional retail outlets, vape shops, and online retailers.

This surge in product availability coincided with increased e-cigarette use, particularly among current and former adult smokers. E-cigarette use increased 900% among U.S. high school students from 2011 to 2015, and e-cigarettes surpassed conventional cigarettes as the most commonly used tobacco product among this group. The CDC states that the prominent use of e-cigarettes among U.S. youth has been attributed in part to the heavy marketing of these products with youth-resonating themes, as well as the widespread availability of youth-appealing flavors. The CDC also notes that nicotine is harmful to developing brains: younger users are more likely to become addicted, have more difficulty quitting and are at higher risk for addiction to other substances in the future. Young adults who use e-cigarettes are more than four times as likely to begin smoking cigarettes within 18 months compared with their peers who do not vape.

California monitors smoking rates among high school students using the California Student Tobacco Survey, administered by DPH on a biennial basis. One in eight California high school students currently use tobacco products, with the most used product among all students being electronic smoking devices (ESDs {10.9%}). Of those that currently use tobacco, an overwhelming majority use ESDs (84.3%). In addition, 86.4% of youth tobacco users reported using flavored tobacco products.

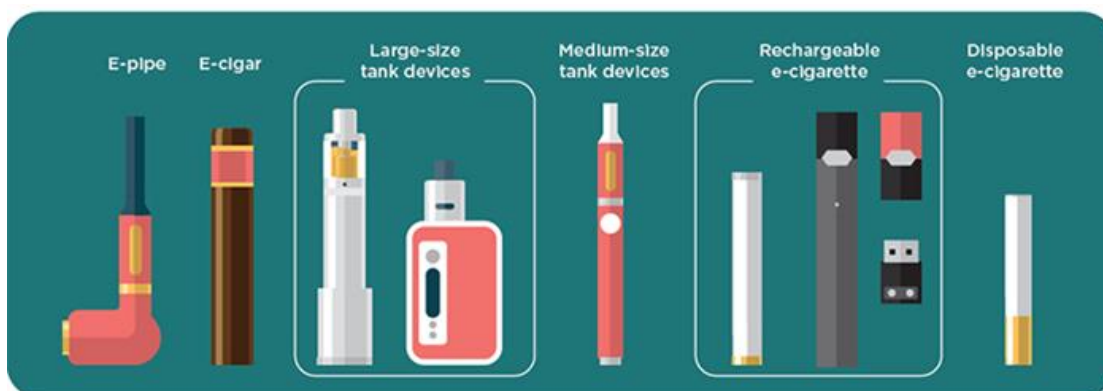
- a) **Flavored tobacco products.** Existing law prohibits the sale of electronic cigarettes to individuals under age 21, but does not limit or restrict the types of flavors of electronic cigarettes. This bill limits the sale of flavored electronic cigarettes, with the exception of tobacco, mint, and menthol flavors, to stores that only allow persons 21 years or older to enter, and to online retailers that use age verification software to ensure purchasers are over 21 years of age. The exception of mint and menthol flavors from those restrictions will continue to allow access to these products in over 30,000 retail locations in the state.

Over 30 cities in California have passed local ordinances that ban the sale of flavored tobacco products. For example, the City of San Francisco recently banned the sale of all flavored tobacco products and e-cigarettes, including mint and menthol.

- b) **Youth flavored tobacco use.** Use of e-cigarettes, now the most popular tobacco product among teens, has jumped 78% among high school students compared with 2017, with 20.8% (more than 3 million) of high schoolers now using e-cigarettes, according to new

FDA data. The data also shows that more than half of those high schoolers (51.2%) use menthol- or mint-flavored e-cigarettes. Research has demonstrated that flavored tobacco products play an important role in youth vaping. Almost a third of the middle and high school students who used e-cigarettes in 2016 said the availability of flavors is a main reason they used the products, according to a report from the CDC and the FDA. A study that included both middle and high school students found that 43% of youth who ever used e-cigarettes tried them because of appealing flavors. The majority of youth e-cigarette users think they vaped only flavoring, not nicotine, the last time they used a product, according to an annual national survey of more than 40,000 students from the University of Michigan *2016 Monitoring the Future* study, even though 99% of e-cigarettes sold in most brick-and-mortar stores contain nicotine.

- c) **A favorite flavor: Mint.** A Truth Initiative® survey of more than 1,000 people between 12 and 17 years old and more than 500 people between 18 and 24 years old found that mint is a top flavor among young JUUL users who had used JUUL in the past 30 days. Among the youngest users, 12- to 17-year-olds, 16% used the mint flavor the last time they used a JUUL, behind only fruit (26%) and mango (25%). For those between 18 and 21 years of age, mint was the most popular flavor, with nearly a third, or 32% using mint the last time they vaped, followed by mango (31%) and fruit (22%).
- d) **Vaporizers, e-cigarettes, and electronic nicotine delivery systems (ENDS).** According to the FDA, vapes, vaporizers, vape pens, hookah pens, electronic cigarettes (e-cigarettes or e-cigs), and e-pipes are some of the many terms used to describe ENDS. ENDS are noncombustible tobacco products. These products use an “e-liquid” that may contain nicotine, as well as varying compositions of flavorings, propylene glycol, vegetable glycerin, and other ingredients. The liquid is heated to create an aerosol that the user inhales. ENDS may be manufactured to look like conventional cigarettes, cigars, or pipes. Some resemble pens or USB flash drives. Larger devices, such as tank systems or mods, bear little or no resemblance to cigarettes.

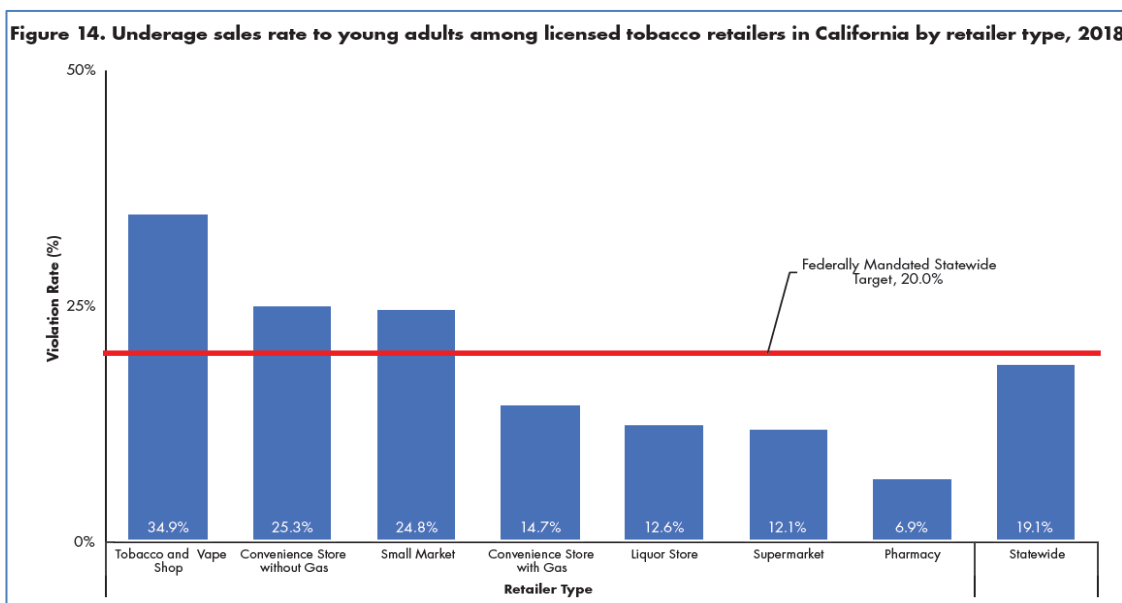


- e) **Increased FDA oversight of e-cigarettes.** In September of 2018, Dr. Scott Gottlieb, the FDA Commissioner at the time, declared that youth vaping is now an epidemic, and the FDA initiated the Youth Tobacco Prevention Plan, which focuses on preventing youth access to tobacco products, curbing the marketing of tobacco products aimed at youth, and educating teens about the dangers of using any tobacco products. The FDA then issued 12 warning letters to companies that continued to advertise and sell products to youth. The FDA also sent letters to five ESD manufacturers whose products were sold to

kids during the FDA’s ramped up enforcement period: JUUL, Vuse, MarkTen, blu e-cigs, and Logic, which comprise 97% of the e-cigarette market. The FDA requested that these companies provide robust plans on how they will address the widespread use of their products by minors or face increased enforcement.

On Wednesday, August 14, 2019, the Vapor Technology Association, an industry group representing 800 vaping companies (including JUUL), filed suit against the FDA to delay May’s deadline to submit e-cigarettes for approval.

- f) **Underage tobacco sales.** In 2016, California raised the minimum legal sales age for tobacco products to 21. According to a June 2019, study published in *JAMA Pediatrics*, although FDA regulation requires retailers to check ID for all persons under 27 years of age, 49.8% of tobacco and vape shops failed to check ID for under-age decoys when decoys attempted to purchase vape products. The study used data from the 2018 sample of the California Tobacco Control Program’s Young Adult Tobacco purchase Survey. According to the DPH 2019 report, *California Tobacco Facts and Figures*, tobacco and vape shops have the lowest compliance with this law, with one out of three tobacco and vape shops selling to underage minors.



Retailers of cigarettes and tobacco products in California must have a Cigarette and Tobacco Products Retailer’s License. As of June 9, 2016, state law expanded the definition of a tobacco product for cigarette and tobacco products retail licensing purposes to include nicotine products, electronic nicotine or other vaporized liquid delivery devices, and any component, part, or accessory of a tobacco product. Effective January 1, 2017, any retailer that sells any product included in the expanded definition of tobacco products is required to obtain and maintain a Cigarette and Tobacco Products Retailer’s License from the CDTFA in order to engage in the retail sale of these products. A retailer’s license is valid for a 12-month period, is not assignable or transferable, and must be renewed annually. A license fee payment is required for each retail location at initial registration, every year at the time of renewal. Many cities also have local licensing requirements, which may be more restrictive than state licensing requirements.

- g) **The STAKE Act and enforcement.** In 1992, Congress passed Section 1926 of Title XIX of the federal Public Health Service Act, commonly called the Synar Amendment. The Synar Amendment requires states to pass and enforce laws that prohibit the sale of tobacco to individuals under 18 years of age. It also requires federal alcohol and substance abuse block grant funding to be applied to enforce state law in a manner that can reasonably be expected to reduce the illegal sales rate of tobacco products to minors. Up to 40% of the block grant funding can be withheld from states for not complying with the Synar Amendment. In September 1994, the STAKE Act was signed into law to address the increase in tobacco sales to minors and fulfill the federal mandate. The STAKE Act created a new statewide enforcement program authorizing regulatory actions against businesses that illegally sell tobacco to minors.

This bill requires DPH to increase their random, onsite sting inspections to at least 20% of the total number of licensed tobacco retailers; and, in the event of a violation, to conduct a second sting inspection at that site within six months of the first violation, and a third sting inspection within 12 months of the first violation.

According to DPH, they conducted 4,675 compliance inspections and collected \$265,100 in civil penalties in fiscal year (FY) 2018-19. Currently, DPH is required to notify the CDTFA within 60 days of the final adjudication of a firm's third, fourth, or fifth violation within a five-year time frame, however, DPH did not have any retailers that fit these criteria in FY 2018-19. DPH received an additional \$1.9 million in local assistance funding in FY 2019-20 to allocate grants to local entities for enforcement activities.

According to CDTFA as of August 1, 2019, there are 30,685 registered cigarette and tobacco retail locations.

- h) **JUUL.** Introduced in 2015, JUUL is an ENDS device that uses disposable e-liquid pods containing nicotine salts to deliver high concentrations of nicotine. According to the Campaign for Tobacco-Free Kids, JUUL's popularity has grown dramatically in the last two years, with unit sales increasing more than 600% in 2017. In mid-2016, dollar sales share for JUUL products was less than 5%, but by the end of 2017, JUUL sales had surpassed all other companies' products. JUUL is now more popular than the e-cigarette brands manufactured by the major tobacco companies (blu, Vuse). According to the most recent data, JUUL has about three-quarters of the e-cigarette market share. In December 2018, Altria (the parent company for Philip Morris) announced that it was purchasing a 35% share in JUUL Labs for \$12.8 billion and valued the company at \$38 billion.
- i) **Not classified as a cessation device.** According to a June 2019 study published in *Tobacco Control*, "JUUL use and reasons for initiation among adult tobacco users," few adult smokers are using the product, and even fewer are using it to quit smoking. Of the 15% of adult tobacco users who have tried JUUL, only about one-third used the product as a way to quit. Thirty-two percent reported that they used JUUL because family, friends or colleagues use it. The number who tried JUUL to quit smoking is even lower for young adult smokers; just one in five between the ages of 18 and 24 first tried the product to quit combustible tobacco. JUUL is not an FDA approved smoking cessation device. JUUL's website characterizes the product as a "switching" product. Smoking cessation products are intended to help smokers quit smoking. Some products contain nicotine as an active ingredient and others do not.

These products include over-the-counter options like skin patches, lozenges, and gum, as well as prescription medicines. They are regulated through the FDA's Center for Drug Evaluation and Research, which ensures that the products are safe and effective and that their benefits outweigh any known associated risks.

- ii) **House Committee on Oversight and Reform on JUUL marketing practices.** On July 24 and 25 of 2019, the House Committee on Oversight and Reform held hearings regarding JUUL's marketing practices. It was noted that JUUL gave the Richmond, California Police Athletic League \$90,000 to offer the company's vaping education program to middle school and high school students who faced suspension for using cigarettes. The Committee also presented documents detailing the company's plan to recruit celebrity "influencers" to spread the word about the devices during their early days on the market. During the second hearing, two high school students testified that a JUUL representative had presented a seminar in school characterizing JUUL products as healthy.

After the FDA increased oversight, JUUL announced in November 2018 that it was taking action to curb youth access, such as selling flavored JUUL pods on its website only; using an enhanced online age verification system; shutting down its Facebook and Instagram accounts; and, using its Twitter account for non-promotional communication only

- iii) **JUUL-sponsored ballot initiative in San Francisco.** In May of 2018, JUUL filed paperwork to begin collecting signatures for an initiative to, "comprehensively authorize and regulate the retail sale, availability, and marketing of vapor products in the City and County of San Francisco." However, according to the UCSF Center for Tobacco Control Research and Education, JUUL's initiative would preempt and overrule stronger, existing San Francisco laws, including San Francisco's ban on flavored tobacco products, including e-cigarettes, and all flavors of e-cigarettes.

- i) **Tobacco advertising restrictions.** Federal law banning cigarette advertisements on television and radio went into effect in 1971; however, smokeless tobacco products were not banned until 1986. The Master Settlement Agreement (MSA) is an accord reached in November 1998 between the state Attorneys General of 46 states (including California), five U.S. territories, the District of Columbia, and the five largest tobacco companies in the U.S. concerning the advertising, marketing, and promotion of tobacco products. In addition to requiring the tobacco industry to pay the settling states approximately \$10 billion annually for the indefinite future, the MSA also set standards for, and imposed restrictions on, the sale and marketing of cigarettes by participating cigarette manufacturers. Under the MSA, states must pass laws requiring non-participating manufacturers to make payments to the state based on their cigarette sales, and, to diligently enforce the payments requirements by tracking all cigarettes sold in the state. Recent efforts at the state and local level have focused on restricting the sale of tobacco products instead of advertising practices to avoid First Amendment challenges.
- j) **FDA required warning labels for covered tobacco products.** As of August 10, 2018, "covered tobacco products" are required to have warning labels. A "covered tobacco product" is any tobacco product deemed under the FDA final rule to be subject to the Federal Food, Drug, and Cosmetic Act, but excludes any component or part that is not

made or derived from tobacco. For example, cigars, liquid nicotine, hookah/waterpipe tobacco, and pipe tobacco are considered “covered tobacco products,” while vaporizers or pipes that are not pre-loaded with tobacco or a tobacco-derived substance are not. Roll-your-own tobacco, cigarette tobacco, or covered tobacco products (except cigars and pipe tobacco) manufactured, packaged, sold, offered for sale, distributed, or imported for sale or distribution within the United States must bear the required warning statement on the tobacco product package label:



"WARNING: This product contains nicotine. Nicotine is an addictive chemical."

If the product, for example, e-liquid, is too small for the required label, the label can be on the packaging instead, as illustrated above. The FDA proposed rule on labeling requirements announced on August 15, 2019, for cigarettes packages and advertising does not apply to e-cigarettes.

- k) **Local ordinances.** Over 30 California cities have ordinances that ban the sale of flavored tobacco products, including cigars, little cigars, pipe tobacco and electronic cigarettes. The ordinances vary from city to city, for example, the City of Sacramento ordinance bans flavored tobacco products, including menthol cigarettes and e-cigarettes. San Francisco recently banned the sale and distribution of e-cigarettes in the city entirely. In 2014, the City of Healdsburg was the first city in California to pass an ordinance limiting tobacco sales to persons 21 years or older.
- l) **Recent studies on effects of e-cigarette use.** A survey of recent studies, published in 2019 in the *American Journal of Respiratory and Critical Care Medicine*, *Journal of the American College of Cardiology*, and *Cardiovascular Toxicology*, found that e-cigarette aerosol with nicotine caused a significant increase in heart rate and arterial stiffness, having an acute impact on vascular and pulmonary function. A Yale study published in July of 2019 in the *American Journal of Preventative Medicine*, focused on the effects of the common flavoring vanillin, which is banned from combustible cigarettes, but allowed in e-cigarettes, and was found to irritate airways when combined with the acetals (molecules) in the aerosol, also known as vapor, produced by JUUL. A March 2018 Dartmouth study, published in the peer reviewed *Public Library of Science Journal*, concluded that, based on existing scientific evidence related to e-cigarettes and optimistic assumptions about the relative harm of e-cigarette use compared to cigarette smoking, e-cigarette use currently represents more population-level harm than benefit. The study also shows that, for every additional adult who quits smoking using e-cigarettes; there are 80

additional youth who initiate daily tobacco use through e-cigarettes.

- 3) **SUPPORT.** The Association of California Healthcare Districts (ACHD) supports this bill, stating that it goes further to regulate electronic cigarette manufacturers consistent with regulations for cigarettes and cannabis product including by prohibiting any advertisement intended to encourage youth to use an electronic cigarette; prohibiting the imitation of candy packaging or labeling and prohibiting the use of those terms; as well as preventing claims of “health” benefits that may be derived from the product’s use. ACHD notes that 80% of young people who have ever used tobacco started with a flavored product, and for these reasons, ACHD is pleased to support this bill.
- 4) **OPPOSITION.** The Tobacco Education and Research Oversight Committee (TEROC), an advisory committee within DPH, is opposed to this bill. TEROC opposes the exemption of mint and menthol flavors from the e-cigarette sales restriction because these flavors are extremely enticing to youth and their availability will appeal to new users and young smokers and vapers. TEROC is also unclear as to why the definition of e-cigarette differs from existing California law by omitting hookah. TEROC notes that under the STAKE Act, the definition of tobacco products includes electronic cigarettes and hookah.

Common Sense Kids Action (CSKA) is opposed to this bill, stating that it does nothing to disrupt some of the most common paths to teen addiction. CSKA implores the authors to slow the rushed nature of this measure, engage stakeholders and experts, and allow for the necessary public deliberation as the legislature pursues the strongest possible law to protect children and teen from the dangers of e-cigarettes.

- 5) **OPPOSE UNLESS AMENDED.** American Cancer Society Cancer Action Network INC., American Heart Association, American Lung Association in California, and Tobacco - Free Kids Action Fund (the Coalition) are opposed to this bill unless it is amended. The Coalition states that while this bill claims to address the recent epidemic of youth e-cigarette use, it undermines the work being done across the state to truly address it, specifically by leaving out numerous products and key flavors used to cause youth to become addicted to nicotine. The Coalition notes that more than four out of five young adults ages 18 to 24 who have ever used tobacco reported that their first product was flavored, the exemption of menthol and mint flavors are extremely disturbing, and that half of current high school e-cigarette users report using a menthol flavored product. The Coalition is also concerned that the definition of an e-cigarette excludes e-hookah, which is inconsistent with current law and should be included in the bill.
- 6) **CONCERNS.** The California Fuels & Convenience Alliance (CFCA) is neutral on this bill, however have expressed concerns. CFCA states that this bill includes unnecessary restriction on where flavored e-cigarettes can be sold by limiting these products to 21 and over shops. CFCA notes that this restriction unfairly harms convenience stores, which have a well-documented and proven track record of success in keeping age-restricted products out of the hands of minors.
- 7) **RELATED LEGISLATION.**
 - a) AB 739 (McCarty and Wood) prohibits a tobacco retailer from selling, offering for sale, or possessing with the intent to sell or offer for sale, a flavored tobacco product, as

defined. AB 739 makes a violation of this prohibition an infraction punishable by a fine of \$250 for each violation, and states the intent of the Legislature that these provisions not be construed to preempt or prohibit the adoption and implementation of local ordinances related to the prohibition on the sale of flavored tobacco products. AB 739 was held without a hearing in the Assembly Committee on Governmental Organization.

- b) SB 38 (Hill) prohibits a tobacco retailer, or any of the tobacco retailer's agents or employees, from selling, offering for sale, or possessing with the intent to sell or offer for sale a flavored tobacco product, as specified. SB 38 was placed on the Senate Inactive file at the request of the author.
- c) SB 39 (Hill) requires a tobacco product to be delivered only in a container that is conspicuously labeled as being a tobacco product, and that requires the signature of a person 21 years of age or older; and requires, before completing a delivery, a specified entity to obtain the signature of a person 21 years of age or older upon delivering the product to the recipient's or purchaser's address, as specified. SB 39 is pending a vote on the Assembly Floor.
- d) SB 538 (Rubio) requires electronic cigarette manufacturers, beginning April 1, 2020, to submit a written physical description and photograph of each electronic cigarette sold by that manufacturer to DPH. Contains an urgency clause to ensure that the provisions of this bill go into immediate effect upon enactment. SB 538 is set to be heard in Assembly Health Committee on August 20, 2019.

8) PREVIOUS LEGISLATION.

- a) SB 835 (Glazer) of 2018 would have implemented a ban on smoking and disposing of tobacco products at state parks and established an infraction punishable by a fine of up to \$25 for a violation. SB 835 was vetoed by the Governor who stated, in part: "I have vetoed similar measures in each of the last two years. Third time is not always a charm. My opinion on the matter has not changed. We have many rules telling us what we can't do and these are wide open spaces."
- b) SCR 143 (Pan) of 2018, would have encouraged major motion picture studios to give a Restricted (R) rating to any new film designed for viewing by children and adolescents that shows or implies smoking or tobacco use. SCR 143 failed passage in the Assembly Health Committee.
- c) AB 1097 (Levine) of 2018, was substantially similar to SB 835. AB 1097 was vetoed by the Governor, who issued the same veto message as SB 835.
- d) SB 386 (Glazer) of 2017, would have prohibited the smoking of cigarettes, cigars, pipes, and other tobacco products at state parks and state coastal beaches, as specified, and established that a violation is an infraction with a fine of up to \$100. SB 386 was vetoed by Governor Brown who stated, in part: "Such a far-reaching prohibition in every state park and on every state beach is too broad. In addition, the fine prescribed in SB 386 for lighting one cigarette is excessive. If people can't smoke even on a deserted beach, where can they? There must be some limit to the coercive power of government."

- e) AB 725 (Levine) of 2017 would have prohibited smoking of tobacco products on state coastal beaches and at state parks, as specified, and established that a violation is an infraction with a fine of up to \$50. AB 725 was vetoed by Governor Brown who issued the same veto message as for SB 386.
- f) SB 1333 (Block) of 2016, would have prohibited the smoking of tobacco products on state coastal beaches and at state parks, as specified, and established that a violation is an infraction with a fine of up to \$250. SB 1333 was vetoed by Governor Brown who stated the complete prohibition in all parks and beaches is too broad, and a more measured and less punitive approach might be warranted.
- g) SBX2 5 (Leno), Chapter 7, Statutes of 2016, recasts and broadens the definition of “tobacco product” to include Electronic Smoking Devices (ESDs), and extends current restrictions and prohibitions against the use of tobacco products to ESDs.
- h) SBX2 7 (Hernandez), Chapter 8, Statutes of 2016, increases the minimum legal age to purchase or consume tobacco from 18 to 21. Removes penalty provisions for those under 21 in possession of tobacco and exempts military personnel from the age increase.
- i) ABX2 7 (Stone), Chapter 4, Statutes of 2016, extends the workplace-smoking ban and closes loopholes, among other things, to address secondhand smoke.
- j) SB 977 (Pan), Chapter 537, Statutes of 2016, prohibits a person from smoking a tobacco product, as defined, within 250 feet of a youth sports event, as defined. Broadens the definition of “smoke or smoking” in existing law.
- k) SB 591 (Pan) of 2015, would have imposed an additional cigarette tax at a rate of \$2.00 per package of 20 cigarettes, and a corresponding rate for a cigarette tax stamp. SB 591 was placed on the Inactive File on the Senate Floor and no further action was taken.
- l) AB 768 (Thurmond), Chapter 779, Statutes of 2015, prohibits, commencing December 1, 2016, the use or possession of smokeless tobacco products, as defined, on the playing field of a baseball stadium during a professional baseball game or practice.
- m) SB 648 (Corbett) of 2013, would have extended the restrictions and prohibitions against the smoking of tobacco products to include restrictions or prohibitions against ESDs in various places, including, but not limited to, places of employment, school campuses, public buildings, day care facilities, retail food facilities, and health facilities. SB 648 failed passage in the Assembly Appropriations Committee.

9) SUGGESTED AMENDMENTS.

- a) **Flavored e-cigarettes.** As currently drafted, this bill limits the sale of flavored e-cigarettes in some tobacco retail settings, however the bill exempts mint, menthol, and tobacco flavored e-cigarettes from those limitations. Given the evidence of an epidemic of youth use of flavored e-cigarettes, the popularity of mint among youth, as well as the increasing number of communities working to implement local ordinances which ban the sale of all flavored tobacco products, the Committee may wish to strike Section seven

(which adds Section 119409 to Health & Safety Code) from the bill, and revert to existing law.

- b) **Definition of electronic cigarette.** As currently drafted, the definition of electronic cigarette does not include any reference to products or accessories that contain nicotine, potentially exempting the sale of flavored e-liquid from the provisions of this bill. The Committee may wish to amend this bill to clarify that the definition of electronic cigarette includes flavored e-liquids and pods, with or without nicotine.
- c) **Age verification.** As noted by the author, “[T]his bill represents a comprehensive plan that would get e-cigarettes out of the hands of children, penalize those who sell to kids, regulate marketing that appeals to minors, and restrict sales in locations where children are present.” Tobacco retailers have the lowest compliance with current law prohibiting the sale of tobacco products to persons under 21 years of age. In order further the intent of this legislation, the Committee may wish to amend this bill to require all retailers to check and verify ID for every tobacco product sale, regardless of whether or not the purchaser appears to be over 27 years of age.
- d) **Report.** As currently drafted, this bill requires DPH and the Department of Education to report to the Legislature regarding the use of electronic cigarettes in California among persons under 21 years of age; the impact of flavored electronic cigarette products on the interest of persons under 21 years of age in trying electronic cigarettes; the perception of, and reasons for, the attraction to specific flavors of electronic cigarettes; and, the perceived health impacts of electronic cigarette use. DPH currently surveys youth regarding their tobacco and ENDS use on a biennial basis, and there is a growing body of research regarding the use, effects, and real harm of e-cigarettes. The Committee may wish to remove the duplicative requirement for the report from this bill.

REGISTERED SUPPORT / OPPOSITION:

Support

Association of California Healthcare Districts, and Affiliated Entity Alpha Fund

Opposition

Common Sense Kids Action
Tobacco Education and Research Oversight Committee

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