STATE OF NEW YORK

9110

IN ASSEMBLY

February 7, 2024

Introduced by M. of A. L. ROSENTHAL -- read once and referred to the Committee on Health

AN ACT to amend the public health law and the tax law, in relation to prohibiting the storage of flavored vapor products near where vapor or tobacco products are sold at retail or wholesale

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions 1, 17 and 18 of section 1399-aa of the public health law, subdivision 1 as amended by chapter 13 of the laws of 2003, and subdivisions 17 and 18 as added by section 2 of part EE of chapter 56 of the laws of 2020, are amended to read as follows:

1. "Enforcement officer" means the enforcement officer designated pursuant to article thirteen-E of this chapter to enforce such article and hold hearings pursuant thereto; provided that in a city with a population of more than one million it shall also mean an officer or employee or any agency of such city that is authorized to enforce any local law of such city related to the regulation of the sale of **cigarettes,** tobacco products**, or vapor products** to minors.

17. "Vapor products" means any noncombustible liquid or gel, regardless of the presence of nicotine therein, that is manufactured into a finished product for use in an electronic [~~cigarette, including any~~] device **that delivers vapor which is inhaled, including any refill, cartridge, device, or component thereof,** that contains **or is intended to be used with** such noncombustible liquid or gel. "Vapor product" shall not include any device, or any component thereof, that does not contain such noncombustible liquid or gel, or any product approved by the United States food and drug administration as a drug or medical device, **as those terms are defined in the federal food, drug, and cosmetic act,** or manufactured and dispensed pursuant to [~~title five-A~~] **article three, four, or five** of [~~article thirty-three of this chapter~~] **the cannabis law**.

18. "Vapor products dealer" means a person licensed by the commissioner of taxation and finance to sell vapor products [~~in this state~~]**, or a person or business required to obtain such license**.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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§ 2. Subdivision 2 and paragraph (f) of subdivision 3 of section 1399-ee of the public health law, as amended by section 6 of part EE of chapter 56 of the laws of 2020, are amended to read as follows:

2. If the enforcement officer determines after a hearing that a violation of this article has occurred, [~~he or she~~] **or that a state or local health official was denied access to a retail store including all product display and storage areas, for the purpose of evaluating compliance with this article, they** shall impose a civil penalty of a minimum of three hundred dollars, but not to exceed one thousand five hundred dollars for a first violation, and a minimum of one thousand dollars, but not to exceed two thousand five hundred dollars for each subsequent violation, unless a different penalty is otherwise provided in this article. The enforcement officer shall advise the retail dealer that upon the accumulation of three or more points pursuant to this section the department of taxation and finance shall suspend the dealer's registration. If the enforcement officer determines after a hearing that a retail dealer was selling tobacco **or vapor** products while their registration was suspended or permanently revoked pursuant to subdivision three or four of this section, [~~he or she~~] **they** shall impose a civil penalty of twenty-five hundred dollars.

(f) Surcharge. A [~~two~~] **four** hundred [~~fifty~~] dollar surcharge to be assessed for every violation will be made available to enforcement officers and shall be used solely for compliance checks to be conducted to determine compliance with this section.

§ 3. Subdivision 1 of section 1399-ff of the public health law, as amended by chapter 100 of the laws of 2019, is amended to read as follows:

1. Where a civil penalty for a particular incident has not been imposed or an enforcement action regarding an alleged violation for a particular incident is not pending under section thirteen hundred ninety-nine-ee of this article, a parent or guardian of a person under twenty-one years of age to whom tobacco products, herbal cigarettes or [~~electronic cigarettes~~] **vapor products** are sold or distributed in violation of this article may submit a complaint to an enforcement officer setting forth the name and address of the alleged violator, the date of the alleged violation, the name and address of the complainant and the person under twenty-one years of age, and a brief statement describing the alleged violation. The enforcement officer shall notify the alleged violator by certified or registered mail, return receipt requested, that a complaint has been submitted, and shall set a date, at least fifteen days after the mailing of such notice, for a hearing on the complaint. Such notice shall contain the information submitted by the complainant.

§ 4. Subdivision 1 of section 1399-gg of the public health law, as amended by chapter 513 of the laws of 2004, is amended to read as follows:

1. All tobacco cigarettes **or vapor products** sold or offered for sale by a retail dealer shall be sold or offered for sale in the package, box, carton or other container provided by the manufacturer, importer, or packager which bears all health warnings required by applicable law.

§ 5. The opening paragraph and subdivisions 2 and 3 of section 1399-hh of the public health law, as amended by section 8 of part EE of chapter 56 of the laws of 2020, are amended to read as follows:

The commissioner shall develop, plan and implement a comprehensive program to reduce the prevalence of tobacco [~~use,~~] and vapor product[~~, intended or reasonably expected to be used with or for the consumption~~

~~of nicotine,~~] use~~,~~ particularly among persons less than twenty-one years of age. This program shall include, but not be limited to, support for enforcement of this article.

2. The commissioner shall distribute such monies as are made available for such purpose to enforcement officers and, in so doing, consider the number of licensed vapor products dealers **or sellers** and retail locations registered to sell tobacco products within the jurisdiction of the enforcement officer and the level of proposed activities. **For the purposes of this section, "seller" means a person, sole proprietorship, corporation, limited liability company, partnership or other enterprise that distributes, sells or offers to sell, whether through retail or wholesale, or exchanges or offers to exchange for any form of consideration, cigarettes, tobacco products, or vapor products. This definition is without regard to the quantity of cigarettes, tobacco products, or vapor products distributed, sold, offered for sale, exchanged, or offered for exchange.**

3. Monies made available to enforcement officers pursuant to this section shall only be used for local tobacco and vapor product[~~, intended or reasonably expected to be used with or for the consumption of nicotine,~~] enforcement activities approved by the commissioner.

§ 6. Subdivision 2 of section 1399-ii of the public health law, as amended by section 12 of part EE of chapter 56 of the laws of 2020, is amended to read as follows:

2. The department shall support tobacco and vapor product use prevention and control activities including, but not limited to:

(a) Community programs to prevent and reduce tobacco use through local involvement and partnerships;

(b) School-based programs to prevent and reduce tobacco use and use of vapor products;

(c) Marketing and advertising to discourage tobacco[~~,~~] **and** vapor product [~~and liquid nicotine~~] use**, especially among consumers historically targeted by tobacco and vapor product advertising and manufacturers**;

(d) Nicotine cessation programs for youth and adults;

(e) Special projects to reduce the disparities in smoking prevalence among various populations;

(f) Restriction of youth access to tobacco products and vapor products;

(g) Surveillance of smoking and vaping rates; and

(h) Any other activities determined by the commissioner to be necessary to implement the provisions of this section.

Such programs shall be selected by the commissioner through an application process which takes into account whether a program utilizes methods recognized as effective in reducing [~~nicotine~~] **tobacco or vapor product** use. Eligible applicants may include, but not be limited to, a health care provider, schools, a college or university, a local public health department, a public health organization, a health care provider organization, association or society, municipal corporation, or a professional education organization.

§ 7. Section 1399-ii-1 of the public health law, as added by section 11 of part EE of chapter 56 of the laws of 2020, is amended to read as follows:

§ 1399-ii-1. [~~Electronic cigarette and vaping~~] **Vapor product** prevention, awareness and control program. The commissioner shall, in consultation and collaboration with the commissioner of education, establish and develop [~~an electronic cigarette and vaping~~] **a vapor prod-**

uct prevention, control and awareness program within the department. Such program shall be designed to educate students, parents and school personnel about the health risks associated with vapor product use and control measures to reduce the prevalence of vaping, particularly among persons less than twenty-one years of age. Such program shall include, but not be limited to, the creation of age-appropriate instructional tools and materials that may be used by all schools, and marketing and advertising materials to discourage [~~electronic cigarette~~] vapor product use.

§ 8. Subdivision 6 of section 1399-ll of the public health law, as amended by section 3 of part EE of chapter 56 of the laws of 2020, is amended to read as follows:

6. The attorney general may bring an action to recover the civil penalties provided by subdivision five of this section and for such other relief as may be deemed necessary. In addition, the corporation counsel of any political subdivision that imposes a tax on cigarettes or vapor products [~~intended or reasonably expected to used with or for the consumption of nicotine~~] may bring an action to recover the civil penalties provided by subdivision five of this section and for such other relief as may be deemed necessary with respect to any cigarettes or vapor products [~~intended or reasonably expected to be used with or for the consumption of nicotine~~] shipped, caused to be shipped or transported in violation of this section to any person located within such political subdivision. All civil penalties obtained in any such action shall be retained by the state or political subdivision bringing such action[~~, provided that no person shall be required to pay civil penalties to both the state and a political subdivision with respect to the same violation of this section~~].

§ 9. Section 1399-mm-1 of the public health law, as added by section 1 of part EE of chapter 56 of the laws of 2020, is amended to read as follows:

§ 1399-mm-1. Sale of flavored products prohibited. 1. For the purposes of this section "flavored" shall mean any vapor product [~~intended or reasonably expected to be used with or for the consumption of nicotine,~~] with a [~~distinguishable~~] taste, [~~or~~] aroma, or cooling or numbing sensation, distinguishable by an ordinary customer, other than the taste or aroma of tobacco, imparted either prior to or during consumption of such product or a component part thereof, including but not limited to tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, mint, wintergreen, menthol, herb or spice, or any concept flavor that imparts a taste or aroma that is distinguishable from tobacco flavor but may not relate to any particular known flavor. A vapor product [~~intended or reasonably expected to be used with or for the consumption of nicotine,~~] shall be presumed to be flavored if a product's retailer, manufacturer, or a manufacturer's agent or employee has made a statement or claim, or other action, directed to consumers or the public, whether expressed or implied, that such product or device has a [~~distinguishable~~] taste [~~or~~], aroma, or cooling or numbing sensation, as distinguishable by the ordinary consumer, other than the taste [~~or~~], aroma, or sensation of tobacco.

2. No vapor products dealer, seller or any agent or employee of a vapor products dealer or seller, shall sell or offer for sale [~~at retail in the state~~], or exchange or offer for exchange, for any form of consideration, any flavored vapor product [~~intended or reasonably expected to be used with or for the consumption of nicotine~~], whether through retail or wholesale. For the purposes of this section, seller

means a person, sole proprietorship, corporation, limited liability company, partnership or other enterprise that distributes, sells or offers to sell, whether through retail or wholesale, or exchanges or offers to exchange, for any form of consideration, vapor products. This definition is without regard to the quantity of vapor products distributed, sold, offered for sale, exchanged, or offered for exchange.

3. No vapor products dealer or seller or any agent or employee of a vapor products dealer or seller, acting in the capacity thereof, shall keep in inventory, store, stow, warehouse, process, package, ship, or distribute flavored vapor or tobacco products anywhere in, adjacent to, or accessible to a place of business or premises where vapor products are sold, offered for sale, exchanged, or offered for exchange, for any form of consideration, at retail.

4. Any vapor products dealer or seller, or any agent or employee of a vapor products dealer or seller, who violates the provisions of this section shall be subject to a civil penalty of not more than [~~one~~] three hundred dollars for each individual package of flavored vapor product [~~intended or reasonably expected to be used with or for the consumption of nicotine~~] sold or offered for sale, [~~provided, however, that with respect to a manufacturer, it shall be an affirmative defense to a finding of violation pursuant to this section that such sale~~] or [~~offer of sale, as applicable, occurred without the knowledge, consent, authorization, or involvement, direct~~] exchanged or [~~indirect,~~] offered for exchange, for any form of [~~such manufacturer~~] consideration, whether through retail or wholesale, or kept in inventory, stored, stowed, warehoused, processed, packaged, shipped, or distributed anywhere in, or adjacent to, a place of business where vapor or tobacco products are sold, offered for sale, exchanged, or offered for exchange, for any form of consideration, at retail. Violations of the provisions of this section shall be enforced pursuant to [~~section~~] sections thirteen hundred ninety-nine-ee and thirteen hundred ninety-nine-ff of this article, [~~except~~]; provided, however, that [~~any~~] violations of the provisions of this section may also be enforced by the commissioner; provided, further, however, that any monies obtained in any such enforcement action taken by the commissioner shall be made available to support tobacco and vapor product enforcement programs operating pursuant to section thirteen hundred ninety-nine-hh of this article. Any person may submit a complaint to an enforcement officer that a violation of this section has occurred.

[~~4. The provisions of this section shall not apply to any vapor products dealer, or any agent or employee of a vapor products dealer, who sells or offers for sale, or who possess with intent to sell or offer for sale, any flavored vapor product intended or reasonably expected to be used with or for the consumption of nicotine that the U.S. Food and Drug Administration has authorized to legally market as defined under 21 U.S.C. § 387j and that has received a premarket review approval order under 21 U.S.C. § 387j(c) et seq.~~]

5. Nothing in this section shall be construed to penalize the purchase, use, or possession of a tobacco product or vapor product by any person not engaged as a vapor products dealer, retail dealer, tobacco or vapor seller, or any agent or employee of a vapor products dealer, retail dealer, or tobacco or vapor seller.

§ 10. Paragraph (e) of section 1183 of the tax law, as added by section 1 of part UU of chapter 59 of the laws of 2019, is amended to read as follows:

(e) (1) If a vapor products [~~dealer~~] dealer's certificate or registration is suspended, cancelled or revoked and such vapor products dealer sells vapor products through more than one place of business in this state, the vapor products dealer's certificate of registration issued to that place of business, cart, stand, truck or other merchandising device, where such violation occurred, shall be suspended, revoked or cancelled. Provided, however, upon a vapor products dealer's third suspension, cancellation or revocation within a five-year period for any one or more businesses owned or operated by the vapor products dealer, such suspension, cancellation, or revocation of the vapor products dealer's certificate of registration shall apply to all places of business where he or she sells vapor products in this state.

(2) If a vapor products dealer does not possess a valid certificate of registration, either because it failed to obtain a registration or its registration is suspended or revoked and the commissioner or their designee, pursuant to their authority under this article, attempts to inspect such premises for a violation of this section and such vapor products dealer, including an agent thereof, is found, after notice and opportunity to be heard, to have refused such inspection, such vapor products dealer shall be subject to a penalty of up to four thousand dollars for a first refusal and up to eight thousand dollars for a second or subsequent refusal within three years of a prior refusal.

§ 11. Section 1183 of the tax law is amended by adding two new subdivisions (i) and (j) to read as follows:

(i) At the time of delivering vapor products to any person, each vapor products dealer shall make a true duplicate invoice showing the date of delivery, the number of packages and number of vapor products contained therein, in each shipment of vapor products delivered, and the items and quantity and wholesale price of each item in each shipment of vapor products delivered, and the name of the purchaser to whom delivery is made, and shall retain such duplicate invoices for a period of three years subject to the use and inspection of the commissioner. Each vapor products dealer shall procure and retain invoices showing the number of packages and number of vapor products contained therein, in each shipment of vapor products received by him or her, and the items and quantity and wholesale price of each item in each shipment of vapor products received by him or her, the date thereof, and the name of the shipper, and shall retain such invoices for a period of three years subject to the use and inspection of the commissioner. The commissioner by regulation may provide that whenever vapor products are shipped into the state, the railroad company, express company, trucking company or other public carrier transporting any shipment thereof shall file with the commissioner a copy of the freight bill within ten days after the delivery in the state of each shipment. All vapor products dealers shall maintain and keep for a period of three years such other records of vapor products received, sold or delivered within the state, as may be required by the commissioner. The commissioner is hereby authorized to examine the books, papers, invoices and other records of any person in possession, control or occupancy of any premises where vapor products are placed, stored, sold or offered for sale, and the equipment of any such person pertaining to the sale and delivery of vapor products taxable under this article, as well as the stock of vapor products in any such premises or vehicle. To verify the accuracy of the tax imposed and assessed by this article, each such person is hereby directed and required to give to the commissioner or his or her duly authorized

representatives, the means, facilities and opportunity for such examinations as are herein provided for and required.

(j) If a vapor products dealer, including an agent thereof, refuses to comply with the requirements of this section, its registration may be revoked (i) for a period of one year, (ii) for a second such violation within a period of five years, for up to three years, or (iii) for a third or subsequent violation within a period of seven years, for a period up to ten years. A vapor products dealer's registration shall be considered to be revoked pursuant to this subdivision immediately upon such dealer's receipt of written notice of revocation from the commissioner.

§ 12. Severability. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to have been the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 13. This act shall take effect on the ninetieth day after it shall have become a law.