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New York State Vapor Association Inc. Joint Health and Mental Hygiene Hearing
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Testimony Submitted by Cheryl Richter, Executive Director

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Senators, Assemblymembers and Administrators, thank you for letting us speak today. I'm Cheryl Richter, the executive director of the New York State Vapor Association. The vast majority of our members are the mom and pop shop owners who started their businesses because they quit smoking with vaping and they wanted to bring this life-saving technology to other smokers. We represent the 700 independent vape shops, their almost 3000 employees, their hundreds of thousands of consumers who rely on these products to keep them from smoking, and the small business owners that supply them. We take no funding from Big Tobacco, Big Pharma, or any other large corporation.

A **flavor ban** would ban the sale of 95%¹ of the e-liquids preferred by adult consumers and sold by registered NYS Vapor Product Retailers, **eliminate a life saving industry, decimate hundreds of small businesses, increase unemployment** and add flavored nicotine to an **untaxed**, already flourishing **underground tobacco market, without age verification**.

NY's vapor products market is a Billion dollar industry². It won't just go away because you deem it should. Rather a flavor ban would force regulated, legal, age-restricted products to a black market overnight.

Current State and Federal Laws/Regulations

Before you hand this market over to street dealers, I'd like to explain the regulations that are new, but already in place:

Last year NY passed a few laws that went into effect less than 2 months ago.

- With last year's Budget Bill³, licenses are required for all retailers selling vapor products, separate from tobacco licenses; Fines were raised and penalties are stricter for those who sell to minors, these are steeper than any other industry including tobacco and liquor. (the new "3-strikes you're out rule" was raised to a \$5000 fine the first time; a \$10,000 fine and possible 6-month license suspension the second time; and a \$15,000 or more fine and loss of vapor license). Our members suggested these fines to prevent future sales violations by eliminating bad players. The fear of these fines will also discourage shops that brought on

vaper products for ancillary sales, such as pizza places. However, you cannot suspend a license for a year on the first age compliance failure as is suggested in this bill. One new employee could cost a responsible business owner their livelihood.

- Only arms-length sale of business after loss of license, which we recommended to eliminate repeat offenders.
- 20% retail tax collected upon purchase by the consumer on e-liquid containing or not containing nicotine (funds to go towards enforcement and education to minors)
- Tobacco 21 State-wide was enacted 11/13/20.⁴ When 73.8%⁵ of teens report getting vapor products from social sources (friends and family) state-wide T21 will help curb straw purchases by their 18 year old friends who resell them in schools. As *Catherine Cholakis, Acting NYS Supreme Court Justice, and judge for the industry lawsuit said in her decision “As noted earlier, only a few days ago the minimum age of persons to whom vaping products may legally be sold increased in New York from 18 to 21. The Legislature could opt to await the passage of some period of time to gauge whether this legislation is sufficient in itself to stem the increase in vaping among teenagers.”*⁶
- Inclusion of vaping and e-cigarette education to minors⁷ in State Tobacco Prevention Program.

Federal Regulations of E-Cigarettes

- National Tobacco 21⁸ (effective 12/10/2019)
- Next week, the FDA will begin enforcing the removal from the market of all flavored pod/cartridge-based e-cigarettes⁹ other than tobacco or menthol, which they determined to be the preferred products of youth because of the extremely high nicotine content that cause a nic-buzz the kids like. In addition, next Thursday they will prioritize enforcement against all other ENDS products for which the manufacturer has failed to take (or is failing to take) adequate measures to prevent minors’ access; and any ENDS product that is targeted to minors or whose marketing is likely to promote use of ENDS by minors.
- Additional Federal requirements that have been in effect for years include: Tamper/Child resistant packaging and flow-restricted bottles; warnings on labels including nicotine is addictive, the manufacturer’s address, percentage of nicotine by volume, and all ingredients¹⁰. Plus, all label images and ingredients¹¹ are now uploaded to the FDA’s FURL system to ensure that if an ingredient is found harmful it can be recalled.
- The PMTA (pre-market tobacco application) Process goes into effect in 4 months.¹² E-liquid and hardware manufacturers have until this May to submit their copious lab results and physiological studies. Many manufacturers have been working with the FDA on these applications for years.

The attempt of the NYS DOH to create, in effect, their own PMTA process is redundant and will cost the state of New York billions of dollars and years to get right. Whole buildings have been built at the FDA complex in Maryland and thousands have been hired to handle the process. The process has been in the works for years. We believe that the DOH will have that

information, provided federally, before they could even start their own process. We also believe that their approval of products to market is pre-emptive and the state runs the risk of interstate commerce violations. Instead, the DOH could obtain the applications of market-approved manufacturers.

The opponents of e-cigarettes for harm reduction tell you that adults will just switch to tobacco flavored. Why would any adult choose to use a tobacco flavor when that is their relapse trigger? Flavors are the key to their success. As Judge Cholakis said in her court decision, *“There is no evidence in the record to support the inference that once flavored e-liquids are banned, the consumers of vaping products will simply switch to tobacco, menthol or flavorless e-liquid...”*⁶ By the way, there’s no proof that minors would or wouldn’t either.

So what are the consumer choices after a flavor Ban? They can:

- Buy on the Street creating an immediate rise of the illicit market with no product regulations, no manufacturing standards, no IDing, no licensing, no taxes. Fifty percent of vapers surveys indicated they would resort to the black market to get their flavors if banned.¹³
- Buy online, skirting tax and age verification.
- Dangerous Do-It-Yourself E-liquid which is very easy to make and very easy to get it wrong. E-liquid ingredients are readily available in supermarkets where consumers can get ingredients that are unsafe to inhale, like McCormick’s peppermint oil, and DIYing puts undiluted nicotine in many homes. See diyordievaping.com for instructions. There is only one death related to nicotine and it happened here in NY when a couple was diy-ing, and they left a bottle of undiluted liquid nicotine open and their toddler drank it. More reason why e-liquid needs to continue to be made in ISO labs.
- Consumers will return to smoking. And we know that’s happening because our customers have started to return to our shops and tell us that the lung illnesses, incorrectly reported, scared them from vaping. After the last few months of smoking again, they feel the health ramifications of smoking once again. **The CDC recognized this hazard as well and now has this statement on their front page: “E-cigarettes have the potential to benefit adult smokers who are not pregnant if used as a complete substitute for regular cigarettes and other smoked tobacco products.”**¹⁴

Economic consequences of a flavor ban

56.8% of cigarette sales are black market sales in New York State, the highest in the nation due to price.¹⁵ If flavors are unavailable, at the least, 50% of flavor sales will be black market¹³.

No vape shop would be able to survive a ban. Independent Vape Shops alone are a \$540 million¹⁶ industry in NY. The closing of all those shops represent a loss of \$183 million in revenue, from \$200 million to \$17 million from the new 20% retail tax and sales tax collected currently collected. This is much more than the projected fiscal implication in the bill estimating of the loss of \$25 million in Fiscal Year 2021 and \$33 million in Fiscal Year 2022.

A ban will force the closure of 700¹⁶ independent vape shops, and an estimated 4,400² layoffs of employees with retail, wholesale, e-liquid and component manufacturing jobs. Implications are as follows:

- Bankruptcies will be declared
- Movement out of state
- Leases broken
- Defaults on business loans, mortgages, cars, equipment, etc.

Of the 11,024 FDA stings in NY in 2018, there were 756 failures. 52% were c-stores, 42% were groceries and delis, 3% were tobacco shops and 2% were vape shops. The failure rate of C-stores was 4X that of vape shops. 4.6% vs. 1.8%.^{17, 18}

As a solution to the surety of an immediate black market, we suggest the “Liquor Store Model” as an amendment to a flavor ban, by simply adding, “exemptions for state licensed vapor retailers that are age-restricted for 21 and above. We do not believe that a store that sells candy and soda needs to sell flavored vapor products. These are adult products, and adult vapers need them to avoid relapse. However, importantly, we believe that wherever cigarettes are sold, an adult should have the right to switch to a harm reduction product spontaneously, so allow tobacco and menthol to stay next to the cigarettes but put them behind or under the counter. Prohibit in-store displays, unless in age-restricted shops. Prohibit posters in windows so general traffic can’t see them. The FDA will remove flavored high-nicotine pod systems sold mostly in c-stores and gas stations next week anyway.

Additional comments on Budget Bill:

- Prohibition on vapor products from being shipped to anyone in the state other than a registered vapor products dealer unnecessarily puts a hardship on vapers in rural areas or no nearby shops retail stores with no way to get the product that they depend on to save their lives. Online age verification and signature on delivery would solve this problem without prohibition and even more deception by black market dealers.
- Clarification that the Department has the authority to promulgate regulations that prohibit or restrict the sale or distribution carrier oils; - nicotine e-liquid is water soluble so does not apply. This should be a requirement for THC cart manufacturers.
- Prohibition of the display of tobacco products or electronic cigarettes within stores; should exempt vape shops since they are age restricted

NYSVA’s Suggested Regulations to Curb Youth Access

- **State-approved training for all employees selling vapor products.** E-cigarettes are vastly different than combustible tobacco products. Employees need education on their specific federal and state regulations, appropriate IDing techniques, understanding of nicotine levels, spotting counterfeits, and how to effectively communicate with smokers

- **Physical ID scanners at every point of sale.** Fake IDs are cheap and readily accessible to minors from China, coming in through packaging of shoes, electronics, etc. High quality technology is needed to prevent the sale unless age is verified
- **Age verification software for all online sales** to verify name, age and address
- **Marketing and packaging restrictions:** (No cartoon images of food, animals, children; no animated or non-animated media characters such as superheroes; no IP/trade mark/dress infringement)
- **Restrict tobacco and e-cigarette signage** on store-fronts near schools.
- **Restrict Access:** Allow flavored e-liquid sales in age-restricted retail locations only (as with hard liquor). Allow menthol and tobacco sales where deadly cigarettes are readily available to enable “accidental quitting.”
- **Nicotine Cap:** No more than 3.6% nicotine by volume to be sold in the state. Lowering nicotine contents will be less addictive and will not cause the nicotine “buzz,” which is what is attractive to minors.
- **Legal Consequences** for minors using or possessing tobacco or e-cigarettes.
- **Steep Penalties** for adults who sell or give them to minors to prevent straw purchases, including employees who sell vapor products.

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