

15104488D

## HOUSE BILL NO. 2036

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice  
on January 28, 2015)

(Patron Prior to Substitute—Delegate DeSteph)

A BILL to amend and reenact § 18.2-371.2 of the Code of Virginia and to amend the Code of Virginia by adding in Title 3.2 a chapter numbered 42.1, consisting of sections numbered 3.2-4220 and 3.2-4221, relating to purchase, etc., of tobacco products by minors; vapor products; liquid nicotine packaging; civil penalty.

Be it enacted by the General Assembly of Virginia:

1. That § 18.2-371.2 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Title 3.2 a chapter numbered 42.1, consisting of sections numbered 3.2-4220 and 3.2-4221, as follows:

CHAPTER 42.1.  
LIQUID NICOTINE.

§ 3.2-4220. Definitions.

As used in this chapter, unless the context requires another meaning:

"Child-resistant packaging" means packaging that is designed or constructed to meet the child-resistant effectiveness standards set forth in 16 C.F.R. § 1700.15(b)(1) when tested in accordance with the protocols described in 16 C.F.R. § 1700.20 as in effect on July 1, 2015.

"Labeling" means all labels and other written, printed, or graphic matter on any liquid nicotine container.

"Liquid nicotine" means a liquid or other substance containing nicotine in any concentration that is sold, marketed, or intended for use in a vapor product.

"Liquid nicotine container" means a bottle or other container holding liquid nicotine in any concentration but does not include a cartridge containing liquid nicotine if such cartridge is prefilled and sealed by the manufacturer of such cartridge and is not intended to be opened by the consumer.

"Vapor product" has the same meaning as in § 18.2-371.2.

§ 3.2-4221. Sale or distribution of liquid nicotine container; prohibition; regulations; civil penalty.

A. No person shall sell or distribute or offer for sale or distribution a liquid nicotine container in the Commonwealth on or after October 1, 2015, unless such liquid nicotine container:

1. Satisfies the child-resistant packaging standards prescribed by the Board pursuant to subsection B; and

2. Includes a warning label that indicates that the container should be kept out of the reach of children that satisfies labeling requirements prescribed by the Board pursuant to subsection B.

B. The Board shall adopt regulations establishing:

1. Standards for child-resistant packaging for a liquid nicotine container; and

2. Labeling requirements for warning labels for a liquid nicotine container, including prescribing the size and location of such warning labels.

C. The Board shall adopt initial regulations pursuant to subsection B no later than September 1, 2015. Such initial regulations shall be exempt from the requirements of Article 2 (§ 2.2-4006 et seq.) of the Administrative Process Act; however, the Board shall provide the Registrar of Regulations with a Notice of Intended Regulatory Action that describes the subject matter and intent of the planned regulation and allow at least 30 days for public comment, to include an online public comment forum on the Virginia Regulatory Town Hall, after publication of the Notice of Intended Regulatory Action. Any amendments to such initial regulations or subsequent regulations adopted pursuant to subsection B shall comply with the requirements of Article 2 of the Administrative Process Act.

D. Any person who sells or distributes or offers for sale or distribution a liquid nicotine container in the Commonwealth on or after October 1, 2015, that he knows or has reason to know does not satisfy the child-resistant packaging standards and labeling requirements required by this section is subject to a civil penalty not to exceed \$100 for a first violation, \$200 for a second violation, and \$500 for a third or subsequent violation. However, no person shall be subject to a civil penalty under this subsection who relies in good faith on any information provided by the manufacturer of a liquid nicotine container that such container meets the requirements of this section. Any attorney for the Commonwealth of the county or city in which an alleged violation occurred may bring an action to recover the civil penalty, which shall be paid into the state treasury. Any law-enforcement officer may issue a summons for a violation of this section.

E. The provisions of this chapter do not apply to any manufacturer or wholesaler of liquid nicotine containers who sells or distributes a liquid nicotine container, provided that any such liquid nicotine

60 container sold or distributed is intended for use outside of the Commonwealth.

61 F. The provisions of subdivision A 1 shall be null, void, and of no force and effect upon the effective  
62 date of either enacted federal legislation or final regulations issued by the U.S. Food and Drug  
63 Administration or by any other federal agency where such legislation or regulations mandate  
64 child-resistant packaging for liquid nicotine containers.

65 G. The provisions of subdivision A 2 shall be null, void, and of no force and effect upon the effective  
66 date of final regulations issued by the U.S. Food and Drug Administration or by any other federal  
67 agency where such regulations mandate labeling requirements for liquid nicotine containers.

68 **§ 18.2-371.2. Prohibiting purchase or possession of tobacco products, nicotine vapor products,**  
69 **and alternative nicotine products by minors or sale of tobacco products, nicotine vapor products,**  
70 **and alternative nicotine products to minors.**

71 A. No person shall sell to, distribute to, purchase for, or knowingly permit the purchase by any  
72 person less than 18 years of age, knowing or having reason to believe that such person is less than 18  
73 years of age, any tobacco product, nicotine vapor product, or alternative nicotine product.

74 Tobacco products may be sold from a vending machine only if the machine is (i) posted with a  
75 notice, in a conspicuous manner and place, indicating that the purchase or possession of tobacco  
76 products by minors is unlawful and (ii) located in a place which is not open to the general public and is  
77 not generally accessible to minors. An establishment which prohibits the presence of minors unless  
78 accompanied by an adult is not open to the general public.

79 B. No person less than 18 years of age shall attempt to purchase, purchase, or possess any tobacco  
80 product, nicotine vapor product, or alternative nicotine product. The provisions of this subsection shall  
81 not be applicable to the possession of tobacco products, nicotine vapor products, or alternative nicotine  
82 products by a person less than 18 years of age making a delivery of tobacco products, nicotine vapor  
83 products, or alternative nicotine products in pursuance of his employment. This subsection shall not  
84 apply to purchase, attempt to purchase, or possession by a law-enforcement officer or his agent when  
85 the same is necessary in the performance of his duties.

86 C. No person shall sell a tobacco product, nicotine vapor product, or alternative nicotine product to  
87 any individual who does not demonstrate, by producing a driver's license or similar photo identification  
88 issued by a government agency, that the individual is at least 18 years of age. Such identification is not  
89 required from an individual whom the person has reason to believe is at least 18 years of age or who  
90 the person knows is at least 18 years of age. Proof that the person demanded, was shown, and  
91 reasonably relied upon a photo identification stating that the individual was at least 18 years of age shall  
92 be a defense to any action brought under this subsection. In determining whether a person had reason to  
93 believe an individual is at least 18 years of age, the trier of fact may consider, but is not limited to,  
94 proof of the general appearance, facial characteristics, behavior, and manner of the individual.

95 This subsection shall not apply to mail order or Internet sales, provided that the person offering the  
96 tobacco product, nicotine vapor product, or alternative nicotine product for sale through mail order or  
97 the Internet (i) prior to the sale of the tobacco product, nicotine vapor product, or alternative nicotine  
98 product verifies that the purchaser is at least 18 years of age through a commercially available database  
99 that is regularly used by businesses or governmental entities for the purpose of age and identity  
100 verification and (ii) uses a method of mailing, shipping, or delivery that requires the purchaser's  
101 signature of a person at least 18 years of age before the tobacco product, nicotine vapor product, or  
102 alternative nicotine product will be released to the purchaser.

103 D. A violation of subsection A or C by an individual or by a separate retail establishment that  
104 involves a nicotine vapor product, alternative nicotine product, or tobacco product other than a bidi is  
105 punishable by a civil penalty not to exceed \$100 for a first violation, a civil penalty not to exceed \$200  
106 for a second violation, and a civil penalty not to exceed \$500 for a third or subsequent violation.

107 A violation of subsection A or C by an individual or by a separate retail establishment that involves  
108 the sale, distribution, or purchase of a bidi is punishable by a civil penalty in the amount of \$500 for a  
109 first violation, a civil penalty in the amount of \$1,000 for a second violation, and a civil penalty in the  
110 amount of \$2,500 for a third or subsequent violation. Where a defendant retail establishment offers  
111 proof that it has trained its employees concerning the requirements of this section, the court shall  
112 suspend all of the penalties imposed hereunder. However, where the court finds that a retail  
113 establishment has failed to so train its employees, the court may impose a civil penalty not to exceed  
114 \$1,000 in lieu of any penalties imposed hereunder for a violation of subsection A or C involving a  
115 nicotine vapor product, alternative nicotine product, or tobacco product other than a bidi.

116 A violation of subsection B is punishable by a civil penalty not to exceed \$100 for a first violation  
117 and a civil penalty not to exceed \$250 for a second or subsequent violation. A court may, as an  
118 alternative to the civil penalty, and upon motion of the defendant, prescribe the performance of up to 20  
119 hours of community service for a first violation of subsection B and up to 40 hours of community  
120 service for a second or subsequent violation. If the defendant fails or refuses to complete the community  
121 service as prescribed, the court may impose the civil penalty. Upon a violation of subsection B, the

judge may enter an order pursuant to subdivision A 9 of § 16.1-278.8.

Any attorney for the Commonwealth of the county or city in which an alleged violation occurred may bring an action to recover the civil penalty, which shall be paid into the state treasury. Any law-enforcement officer may issue a summons for a violation of subsection A, B, or C.

E. 1. Cigarettes shall be sold only in sealed packages provided by the manufacturer, with the required health warning. The proprietor of every retail establishment that offers for sale any tobacco product, nicotine vapor product, or alternative nicotine product shall post in a conspicuous manner and place a sign or signs indicating that the sale of tobacco products, nicotine vapor products, or alternative nicotine products to any person under 18 years of age is prohibited by law. Any attorney for the county, city, or town in which an alleged violation of this subsection occurred may enforce this subsection by civil action to recover a civil penalty not to exceed \$50. The civil penalty shall be paid into the local treasury. No filing fee or other fee or cost shall be charged to the county, city, or town which instituted the action.

2. For the purpose of compliance with regulations of the Substance Abuse and Mental Health Services Administration published at 61 Federal Register 1492, the Department of Agriculture and Consumer Services may promulgate regulations which allow the Department to undertake the activities necessary to comply with such regulations.

3. Any attorney for the county, city, or town in which an alleged violation of this subsection occurred may enforce this subsection by civil action to recover a civil penalty not to exceed \$100. The civil penalty shall be paid into the local treasury. No filing fee or other fee or cost shall be charged to the county, city, or town which instituted the action.

F. Nothing in this section shall be construed to create a private cause of action.

G. Agents of the Virginia Alcoholic Beverage Control Board designated pursuant to § 4.1-105 may issue a summons for any violation of this section.

H. As used in this section:

"Alternative nicotine product" means any noncombustible product containing nicotine that is intended for human consumption, whether chewed, absorbed, dissolved, or ingested by any other means. "Alternative nicotine product" does not include any nicotine vapor product, tobacco product, or product regulated as a drug or device by the U.S. Food and Drug Administration (FDA) under Chapter V (21 U.S.C. § 351 et seq.) of the Federal Food, Drug, and Cosmetic Act.

"Bidi" means a product containing tobacco that is wrapped in temburni leaf (*diospyros melanoxylon*) or tendu leaf (*diospyros exculpra*), or any other product that is offered to, or purchased by, consumers as a bidi or beedie.

"Nicotine vapor product" means any noncombustible product containing nicotine that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, that can be used to produce vapor from nicotine in a solution or other form. "Nicotine vapor product" includes any electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and any cartridge or other container of nicotine in a solution or other form that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device. "Nicotine vapor product" does not include any product regulated by the FDA under Chapter V (21 U.S.C. § 351 et seq.) of the Federal Food, Drug, and Cosmetic Act.

"Tobacco product" means any product made of tobacco and includes cigarettes, cigars, smokeless tobacco, pipe tobacco, bidis, and wrappings. "Tobacco product" does not include any nicotine vapor product, alternative nicotine product, or product that is regulated by the FDA under Chapter V (21 U.S.C. § 351 et seq.) of the Federal Food, Drug, and Cosmetic Act.

"Wrappings" includes papers made or sold for covering or rolling tobacco or other materials for smoking in a manner similar to a cigarette or cigar.