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HOUSE BILL NO. 2036

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Governor
on March 27, 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 59.1 a chapter numbered 23.2, consisting of sections numbered 59.1-293.10 and 59.1-293.11, relating to purchase, etc., of tobacco products by minors; liquid nicotine packaging; 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 59.1 a chapter numbered 23.2, consisting of sections numbered 59.1-293.10 and 59.1-293.11, as follows:

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

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

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

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

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

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

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

A violation of subsection A or C by an individual or by a separate retail establishment that involves the sale, distribution, or purchase of a bidi is punishable by a civil penalty in the amount of \$500 for a first violation, a civil penalty in the amount of \$1,000 for a second violation, and a civil penalty in the amount of \$2,500 for a third or subsequent violation. Where a defendant retail establishment offers proof that it has trained its employees concerning the requirements of this section, the court shall suspend all of the penalties imposed hereunder. However, where the court finds that a retail establishment has failed to so train its employees, the court may impose a civil penalty not to exceed

60 \$1,000 in lieu of any penalties imposed hereunder for a violation of subsection A or C involving a
61 nicotine vapor product, alternative nicotine product, or tobacco product other than a bidi.

62 A violation of subsection B is punishable by a civil penalty not to exceed \$100 for a first violation
63 and a civil penalty not to exceed \$250 for a second or subsequent violation. A court may, as an
64 alternative to the civil penalty, and upon motion of the defendant, prescribe the performance of up to 20
65 hours of community service for a first violation of subsection B and up to 40 hours of community
66 service for a second or subsequent violation. If the defendant fails or refuses to complete the community
67 service as prescribed, the court may impose the civil penalty. Upon a violation of subsection B, the
68 judge may enter an order pursuant to subdivision A 9 of § 16.1-278.8.

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

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

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

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

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

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

92 H. As used in this section:

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

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

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

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

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

116 *CHAPTER 23.2.*
117 *LIQUID NICOTINE.*

118 **§ 59.1-293.10. Definitions.**

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

120 "Child-resistant packaging" means packaging that is designed or constructed to meet the
121 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.

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

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

§ 59.1-293.11. Sale or distribution of liquid nicotine container; prohibition; penalty.

A. No person shall sell or distribute at retail or offer for retail sale or distribution a liquid nicotine container in the Commonwealth on or after October 1, 2015, unless such liquid nicotine container meets child-resistant packaging standards.

B. The requirements of subsection A shall not prohibit a wholesaler or retailer from selling its existing inventory of liquid nicotine until January 1, 2016, if the wholesaler or retailer can establish that the inventory was purchased prior to October 1, 2015, in a quantity comparable to that of the inventory purchased during the same period of the prior year.

C. Any person who sells or distributes at retail or offers for retail 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 required by this section is guilty of a Class 4 misdemeanor. However, no person shall be guilty of a violation of this section 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.

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

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