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HOUSE BILL NO. 2036

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice on February 16, 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; 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 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 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.

§ 3.2-4221. Sale or distribution of liquid nicotine container; prohibition; regulations; civil 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 January 1, 2016, 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, consistent with federal standards, 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. 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 January 1, 2016, that he knows or has reason to know does not satisfy the child-resistant packaging standards and labeling requirements 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 subdivision A 1 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.

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

§ 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

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60 person less than 18 years of age, knowing or having reason to believe that such person is less than 18  
61 years of age, any tobacco product, nicotine vapor product, or alternative nicotine product.

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

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

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

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

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

95 A violation of subsection A or C by an individual or by a separate retail establishment that involves  
96 the sale, distribution, or purchase of a bidi is punishable by a civil penalty in the amount of \$500 for a  
97 first violation, a civil penalty in the amount of \$1,000 for a second violation, and a civil penalty in the  
98 amount of \$2,500 for a third or subsequent violation. Where a defendant retail establishment offers  
99 proof that it has trained its employees concerning the requirements of this section, the court shall  
100 suspend all of the penalties imposed hereunder. However, where the court finds that a retail  
101 establishment has failed to so train its employees, the court may impose a civil penalty not to exceed  
102 \$1,000 in lieu of any penalties imposed hereunder for a violation of subsection A or C involving a  
103 nicotine vapor product, alternative nicotine product, or tobacco product other than a bidi.

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

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

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

122 the action.

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

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

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

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

134 H. As used in this section:

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

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

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

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

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

158 **2. That the Board of Agriculture and Consumer Services shall adopt initial regulations to**  
159 **implement the provisions of this act to be effective no later than December 15, 2015. Such initial**  
160 **regulations shall be exempt from the requirements of Article 2 (§ 2.2-4006 et seq.) of the**  
161 **Administrative Process Act; however, the Board shall publish proposed regulations in the Virginia**  
162 **Register of Regulations and allow at least 30 days for public comment, to include an online public**  
163 **comment forum on the Virginia Regulatory Town Hall, after publication. Any amendments to**  
164 **such initial regulations or subsequent regulations adopted pursuant to § 3.2-4221 as added by this**  
165 **act shall comply with the requirements of Article 2 of the Administrative Process Act.**