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SENATE BILL NO. 1727

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice
on February 6, 2019)

(Patron Prior to Substitute—Senator Norment)

A *BILL to amend and reenact §§ 18.2-246.8, 18.2-246.10, and 18.2-371.2 of the Code of Virginia, relating to purchase, possession, and sale of tobacco products, nicotine vapor products, and alternative nicotine products; minimum age requirements; penalties.*

Be it enacted by the General Assembly of Virginia:

1. That §§ 18.2-246.8, 18.2-246.10, and 18.2-371.2 of the Code of Virginia are amended and reenacted as follows:

§ 18.2-246.8. Age verification requirements.

A. No person shall mail, ship, or otherwise deliver cigarettes in connection with a delivery sale unless prior to the first delivery sale to a consumer such person:

1. Obtains from the prospective consumer a certification that includes (i) a reliable confirmation that the consumer is at least the legal minimum purchase age, and (ii) a statement signed by the prospective consumer in writing that certifies the prospective consumer's address and that the consumer is at least 21 years of age. Such statement shall also confirm (a) that the prospective consumer understands that signing another person's name to such certification is illegal, (b) that the sale of cigarettes to individuals under the legal minimum purchase age is illegal, and (c) that the purchase of cigarettes by individuals under the legal minimum purchase age is illegal under the laws of the Commonwealth;

2. Makes a good faith effort to verify the information contained in the certification provided by the prospective consumer pursuant to subsection A against a commercially available database of valid, government-issued identification that contains the date of birth or age of the individual placing the order, or obtains a photocopy or other image of the valid, government-issued identification stating the date of birth or age of the individual placing the order;

3. Provides to the prospective consumer, via e-mail or other means, a notice that meets the requirements of § 18.2-246.9; and

4. Receives payment for the delivery sale from the prospective consumer by a credit or debit card that has been issued in such consumer's name or by a check drawn on the consumer's account.

B. Persons accepting purchase orders made via the Internet for delivery sales may request that prospective consumers provide their e-mail addresses.

§ 18.2-246.10. Shipping requirements.

Each person who mails, ships, or otherwise delivers cigarettes in connection with a delivery sale:

1. Shall include as part of the shipping documents a clear and conspicuous statement providing as follows: "Cigarettes: Virginia Law Prohibits Shipping to Individuals Under 21, and Requires the Payment of all Applicable Taxes";

2. Shall use a method of mailing, shipping, or delivery that obligates the delivery service or any party making delivery to require (i) the consumer placing the purchase order for the delivery sale, or an adult of legal minimum purchase age, to sign to accept delivery of the shipping container, and (ii) proof, in the form of a valid, government-issued identification bearing a photograph of the individual who signs to accept delivery of the shipping container, demonstrating that he is either the addressee who is of legal minimum purchase age or another adult of legal minimum purchase age. However, proof of the legal minimum purchase age shall be required only if such individual appears to be under 27 years of age; and

3. Shall provide to the delivery service retained for such delivery sale evidence of full compliance with § 18.2-246.12.

§ 18.2-371.2. Prohibiting purchase or possession of tobacco products, nicotine vapor products, and alternative nicotine products by a person under 21 years of age or sale of tobacco products, nicotine vapor products, and alternative nicotine products to persons under 21 years of age.

A. No person shall sell to, distribute to, purchase for, or knowingly permit the purchase by any person less than 21 years of age, knowing or having reason to believe that such person is less than 21 years of age, any tobacco product, nicotine vapor product, or alternative nicotine product.

Tobacco products, nicotine vapor products, and alternative nicotine 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~~ persons under 21 years of age is unlawful and (ii) located in a place ~~which~~ that is not open to the general public and is not generally accessible to ~~minors~~ persons under 21 years of age. An establishment ~~which~~ that prohibits the presence of ~~minors~~ persons under 21 years of age unless accompanied by ~~an adult~~ a person 21 years of age or

60 *older* is not open to the general public.

61 B. No person less than 18 21 years of age shall attempt to purchase, purchase, or possess any
62 tobacco product, nicotine vapor product, or alternative nicotine product. The provisions of this
63 subsection shall not be applicable to the possession of tobacco products, nicotine vapor products, or
64 alternative nicotine products by a person less than 18 21 years of age making a delivery of tobacco
65 products, nicotine vapor products, or alternative nicotine products in pursuance of his employment. This
66 subsection shall not apply to purchase, attempt to purchase, or possession by a law-enforcement officer
67 or his agent when the same is necessary in the performance of his duties.

68 C. No person shall sell a tobacco product, nicotine vapor product, or alternative nicotine product to
69 any individual who does not demonstrate, by producing a driver's license or similar photo identification
70 issued by a government agency, that the individual is at least 18 21 years of age. Such identification is
71 not required from an individual whom the person has reason to believe is at least 18 21 years of age or
72 who the person knows is at least 18 21 years of age. Proof that the person demanded, was shown, and
73 reasonably relied upon a photo identification stating that the individual was at least 18 21 years of age
74 shall be a defense to any action brought under this subsection. In determining whether a person had
75 reason to believe an individual is at least 18 21 years of age, the trier of fact may consider, but is not
76 limited to, proof of the general appearance, facial characteristics, behavior, and manner of the individual.

77 This subsection shall not apply to mail order or Internet sales, provided that the person offering the
78 tobacco product, nicotine vapor product, or alternative nicotine product for sale through mail order or
79 the Internet (i) prior to the sale of the tobacco product, nicotine vapor product, or alternative nicotine
80 product verifies that the purchaser is at least 18 21 years of age through a commercially available
81 database that is regularly used by businesses or governmental entities for the purpose of age and identity
82 verification and (ii) uses a method of mailing, shipping, or delivery that requires the signature of a
83 person at least 18 21 years of age before the tobacco product, nicotine vapor product, or alternative
84 nicotine product will be released to the purchaser.

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

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

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

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

108 E. 1. Cigarettes shall be sold only in sealed packages provided by the manufacturer, with the
109 required health warning. The proprietor of every retail establishment that offers for sale any tobacco
110 product, nicotine vapor product, or alternative nicotine product shall post in a conspicuous manner and
111 place a sign or signs indicating that the sale of tobacco products, nicotine vapor products, or alternative
112 nicotine products to any person under 18 21 years of age is prohibited by law. Any attorney for the
113 county, city, or town in which an alleged violation of this subsection occurred may enforce this
114 subsection by civil action to recover a civil penalty not to exceed \$50. The civil penalty shall be paid
115 into the local treasury. No filing fee or other fee or cost shall be charged to the county, city, or town
116 which instituted the action.

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

121 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 Authority 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.