

Appendix C: 2022 ABC Study Report

Virginia Alcoholic Beverage Control Authority

Chief Executive Officer
Travis G. Hill



Chair
Timothy D. Hugo
Vice Chair
Robert C. Sledd
Board of Directors
William D. Euille
Gregory F. Holland
Mark E. Rubin

October 31, 2023

The Honorable Janet D. Howell
Chair of Senate Finance Committee
P.O. Box 2608
Reston, Virginia 20195-0608
District32@senate.virginia.gov

The Honorable Roxann L. Robinson
Chair of House of Finance
P.O. Box 4627
Midlothian, Virginia 23112
DelRRobinson@house.virginia.gov

The Honorable Barry D. Knight
Chair of Virginia House of Appropriations
201 North 9th Street
Richmond, Virginia 23219
DelBKnight@house.virginia.gov

Dear Chairs Howell, Robinson and Knight:

Please find attached a report by the Virginia Alcoholic Beverage Control Authority regarding an assessment of a licensing scheme for liquid nicotine. This report is prepared pursuant to Chapter 795 of the 2023 Virginia Acts of Assembly.

Please do not hesitate to call if you should have any questions.

Very truly yours,

A handwritten signature in cursive script that reads "Thomas W. Kirby".

Thomas W. Kirby,
Interim CEO and Chief Law Enforcement Officer



REPORT OF THE VIRGINIA ALCOHOLIC BEVERAGE CONTROL AUTHORITY ON THE ASSESSMENT OF A LICENSING SCHEME FOR LIQUID NICOTINE

During the 2023 session of the General Assembly, SB 1350 and HB 2296 were introduced by Senator Ebbin and Delegate Hope respectively. The legislation proposed to establish a licensing scheme for liquid nicotine product retailers. The purpose of the legislation was to reduce underage sales of nicotine vapor products, codify best practices relating to the sale of these products, codify a tax to be imposed, and to bolster enforcement mechanisms necessary to address underage sales and tax compliance.

The legislation as introduced was not enacted. Rather, the original legislation was amended to a Section 1 bill and requested the Secretary of Finance to undertake a study to assess a licensing scheme for liquid nicotine. During the Governor's review of legislation, it was determined that Virginia ABC should undertake the study rather than the Secretary of Finance. During the reconvened session, that amendment was adopted; and during the interim, Virginia ABC convened stakeholders to study the issue.

Virginia ABC solicited participation from the various groups noted in the study legislation, sought out other parties to participate, and invited others to participate that had been brought to our attention by Senator Ebbin.

Approximately 25 individuals representing retailers, public health organizations, tobacco and vaporized nicotine companies and wholesalers generously provided their time and talent to the task. A list of the participating stakeholders is attached as Appendix 1.

STAKEHOLDER PROCESS

Having coordinated a strong and inclusive group of stakeholders, the group commenced their efforts in earnest. The initial meeting of the group was held on July 25, 2023. The agenda for that meeting included several presentations from group members. On behalf of the Virginia Smoke Free Association, which represents interests of Virginia's Nicotine Vapor Products manufacturers, distributors, and retailers, Dylan Bishop presented the history of the issue, tracing the originally introduced legislation, the import of that legislation, and a desire to work with the stakeholder group to modify the original approach in a manner that could be potentially acceptable to all parties. Shannon Quinby, representing the Preventing Tobacco Addiction Foundation / Tobacco 21, voiced their support for a licensing scheme with emphasis on the need to address the purchase of tobacco and liquid nicotine products by underage individuals. The Department of Behavioral Health and Development Services was represented by Colleen Hughes who serves as the SYNAR Coordinator for the Department. Ms. Hughes' focus was likewise on the need to address underage sales and the legal necessity to do so. A final presentation at the initial meeting of the stakeholder group was by the Virginia Foundation for Healthy Youth which likewise supported a licensing scheme with emphasis on the need to curtail underage purchases of the subject products.

In addition to the retailers represented by the Virginia Smoke Free Association, convenience store retailers and others were solicited to also make presentations at the inaugural session but chose not to do so. The convenience store retailers did provide written comments, which are included in this Report at Appendix 6.

Following a discussion of the points made by the various presenters, a discussion was held among the group on the points made and the direction the group would like their study to go from this point. One seemingly key point was how to assess the volume of entities that may be subject to licensing. Who are they; where are they located; what would be the cost of a licensing program, and what state entity could be responsible for managing a licensing program. With those questions posed for the group, the stakeholders moved to scheduling a second meeting.

A second meeting of the group was held on September 20, 2023. At the request of the stakeholders, that meeting focused on costs associated with a licensing program, the interests of the stakeholders in considering a registration program as contrasted with a full licensing system, and the group's interest in addressing underage sales in a meaningful way. (see September 20, 2023, minutes included in Appendix 2.)

While costs of any licensing program are paramount in ultimate decision-making, the opinions of stakeholders varied widely on the issue. Reference was made by some to fiscal impact statements on the original 2023 legislation by some members, while others opined that those costs were low given the growth in the markets. A process for accurately determining costs of a licensing program has proved challenging. Several study efforts about costs for such a program have been undertaken in recent years. Appropriately, those costs seem to rise with market growth and new entrants into the market.

The stakeholder group determined to conclude their discussions following this meeting. Participants were encouraged to provide written comments and recommendations for inclusion in this report. A number of stakeholders chose to do so, and those comments are included in this report as Appendix 3.

PRIOR EFFORTS ON LICENSING TOBACCO/LIQUID NICOTINE RETAILERS

The issue of licensing tobacco retailers has a long history of study in the Commonwealth. An informal ad hoc group led by Delegate Hope met on several occasions to examine the issue of licensing. In 2021, the Department of Taxation, with the assistance of the Department of Behavioral Health and Development Services and the Virginia Alcoholic Beverage Control Authority, undertook an examination of the issue pursuant proposed legislation introduced during the 2021 General Assembly session. (HB 2164) These efforts have not resulted in any consensus approach regarding licensing of tobacco retailers or liquid nicotine retailers. The Department of Taxation study is incorporated in Appendix 4 of this Report.

This initiative by Virginia ABC is no different.

While the stakeholder group was attentive and engaged, a consensus recommendation proved difficult (see the stakeholder comments in Appendix 6). Public health officials, the Virginia Smoke Free Association, Virginia Commonwealth University faculty from various departments and others were strong advocates for a licensing program.

While licensing of retailers was not an area of any agreement or consensus, the topic of addressing underage sales of these products does appear to be an area where some collective progress could be advanced. Throughout the multitude of studies on this topic, one of the primary talking points that appears to have held back any progress on licensing was the cost of such a program. That hurdle may not hold true for the ability of the Commonwealth to address underage sales.

Provided to the study group by public health officials was correspondence from the Office of the Attorney General to Ms. Marty Kilgore, Executive Director of the Virginia Foundation for Healthy Youth. That correspondence sets out the funding to be received by the Commonwealth as a result of settlement with JUUL Labs, Inc. and the Commonwealth. The correspondence notes that “each of the intended uses (of funds) has at its core a concern about protecting Virginia’s vulnerable youth from the lure of ENDS products”. A copy of this correspondence is attached as Appendix 5.

STAKEHOLDER RECOMMENDATIONS

The stakeholder group worked diligently on the issues at hand but like other efforts on this topic, there was no consensus recommendation. Individual stakeholders do make their own recommendations in written materials which can be found in Appendix 3 to this report. There was shared concern among the group regarding potential efforts to address underage sales.

It would seem appropriate that the Department of Behavioral Health and Development Services could continue to work with the Office of the Attorney General and the Department of Taxation to develop an underage purchasing preventive program utilizing unappropriated funds from the Juul settlement.

Appendix 1

List of Stakeholders

Liquid Nicotine Licensing Study Participation List

1. Anne Junia, Powell Junia P.C.
2. Anne Leigh Kerr, Reynolds American
3. John Rainey, Altria
4. Chris Whyte, Vectre Consulting Group
5. Jeff Smith, IV, The Smith Group, Inc.
6. Brett Vassey, VMA
7. Bea Gonzalez, Capitol Results Consulting
8. Dylan Bishop, Smokefree Virginia
9. Carter Hutchinson, Senator Ebbin's Office
10. Nichole Wescott-Hayes
11. Susan Gaston, Gaston Group
12. Chuck Duvall, Lindl Corporation (7-Eleven)
13. Mike O'Connor, Va. Petroleum & Convenience Marketers Association
14. Dylan Bishop, Eckert Seamans Cherin & Mellott, LLC
15. Kelly Fitzgerald, Alliance Group (Representing the American Cancer Society, and American Heart Assn)
16. Shannon Quinby, Tobacco 21, Eastern Regional Director
17. Marge White, VA Foundation for Healthy Youth, Deputy Director
18. Gina Roberts - VDH, Current Acting TCP Program Manager
19. Will Egen - Virginia Commission on Youth, Senior Legal Policy Analyst
20. Colleen Hughes, Virginia Department of Behavioral Health & Developmental Services
21. Jennifer Faison, Virginia Community Service Boards
22. Delegate Patrick A. Hope,
23. Marty Kilgore, Virginia Foundation for Healthy Youth
24. Brennan Smith, Virginia Foundation for Healthy Youth
25. Zach LeMaster, Virginia Asian American Store Owners Association
26. Jennifer Cunningham, JUUL

Appendix 2

Minutes from the July 25, 2023, meeting

Minutes from the September 20, 2023, meeting

**MINUTES OF THE
VIRGINIA ALCOHOLIC BEVERAGE CONTROL AUTHORITY
2023 LIQUID NICOTINE LICENSING STUDY**

**TUESDAY, JULY 25, 2023
VIRGINIA ABC HEADQUARTERS
MECHANICSVILLE, VIRGINIA**

The Liquid Nicotine Licensing Study group met at the Virginia ABC Headquarters in Mechanicsville, Virginia on Tuesday, July 25, 2023.

Study Group Participants:
See appendix 1.

I. Opening Remarks

Mr. Daniel called the meeting to order at 2:01 p.m. The study group was sent a letter dated July 11, 2023, inviting identified individuals to participate in the Virginia ABC study on Senate Bill 1350 and House Bill 2296.

Mr. Daniel informed the group that the scope of this study was manifested in a Section 1 Bill ultimately adopted by the General Assembly as Chapter 761 and the findings will come from the group at large.

II. Case for Licensing – Presentation by Dylan Bishop, Smoke Free Virginia

Mr. Bishop stated that the Virginia Smoke Free Association represents the interests of Virginia's nicotine vapor products, manufactures, distributors, and retailers. The group's focus is on tobacco harm reduction.

Mr. Bishop highlighted from his PowerPoint presentation, that the sale of nicotine vapor products in VA is essentially unregulated. There is no license or registration requirements, data shows that existing penalties for selling to underage persons are not stringent enough, and the tax imposed on liquid nicotine remains uncodified and unenforceable.

Virginia Smoke Free Association worked with Senator Ebbin and Delegate Hope to introduce Senate Bill 1350 and House Bill 2296. Both of the bills sought to use licensing to reduce underage sale/usage of nicotine vapor products; codify best practices relating to the sale of liquid nicotine products; codify and create a more equitable tax framework; bolster enforcement mechanisms and resources relating to underage sales and tax compliance.

Virginia Smoke Free Association would like to see that all manufactures, distributors, and retailers obtain a license to sell nicotine vapor products in or into

VA from Depart of Tax. Require the use of third-party age verification software before each sale. Limit the sale to two vapor products and five bottles/packages of liquid nicotine at a time. Would also like to see stiffer penalties (1st offense: \$1,000 civil penalty; 2nd offense - \$5,000 civil penalty and 30-day suspension of their license; 3rd violations - \$10,000 civil penalty and permanent revocation of license).

Virginia Smoke Free Association believes that Department of Taxation has the data necessary to adequately enforce Virginia's tax on liquid nicotine. The Department of Tax would need to be involved with any licensing as it already "permits" most other tobacco merchants. Also, within any proposed licensing structure, the administering agency would not need to have its own law enforcement, the agency can rely on FDA enforcement data which is updated monthly.

III. Case for Licensing – Presentation by Shannon Quinby, Eastern Regional Director – Preventing Tobacco Addiction Foundation/Tobacco 21

Ms. Quinby gave a brief overview of the Tobacco Free Alliance of Virginia whose goal is to focus on pricing of tobacco products, creating comprehensive tobacco-free environments, and supporting and sharing tobacco prevention and cessation. The group is represented by Virginia Residents, businesses, academic institutions, health care providers, community-based organizations, non-profit groups, state agencies and advocates. Tobacco 21 followed up stating that Tobacco 21 represents the Tobacco Free Alliance of Virginia, and the common goal is to pass tobacco licensing.

Statistics were given stating that in Virginia, 14% of Adults in Virginia who smoke; 19.9% - High school students who vape; \$3.61 billion - Annual health care costs in Virginia directly caused by smoking; \$314 million - Tobacco industry marketing in VA each year; 30% - Proportion of cancer deaths in Virginia attributable to smoking; \$931 - Yearly tax burden per household caused by smoking-related government expenditures.

The group would like to see full tobacco retail licensing, not just for liquid nicotine. The benefit for full licensing is that it improves retailer's accountability; reduces illegal sales to youth; reduces youth initiation and use; funds more enforcement; and protects federal funding.

IV. Presentation by Colleen Hughes, Synar Coordinator Virginia Department of Behavioral Health & Developmental Services.

Ms. Hughes began by stating that in 1996, the Substance Abuse and Mental Health Service Administration, or SAMHSA, issued the Synar regulation. The original age was 18 to purchase tobacco but was later changed to 21 when the Federal Tobacco 21 law took effect. The regulations required states to enact

laws prohibiting the sale of tobacco and nicotine products to anyone under age 21 and to enforcement of laws; conduct annual compliance inspections and to achieve a Retailer Violation Rate of no more than 20%. It was noted that failure to achieve this can result in a penalty of up to 10% of our total Block Grant Allocation, this amount in Virginia would equate to almost \$42 million.

Ms. Hughes noted that Virginia ABC is the enforcement body for both alcohol and tobacco in the state. DBHDS partners with ABC to conduct the annual Synar inspections. The FDA had contracts with ABC through May 2018, currently the contracts are held by a third-party contractor. It was noted that the inspection history prior to May 2018, showed about 50% of retailers were inspected annually between FDA and Synar inspections. Since 2018, only about 10% of retailers are inspected. FDA is doing some underage inspections but not to the level that they were when ABC held the contract.

Statistics were reviewed regarding past enforcement violations rates through Synar Inspections and State-Funded supplemental Inspections.

The Department partnered with preventions units to try and identify every tobacco and nicotine retailer in which they drove every primary and secondary road in their identified area and identified every retailer they could which equated to around 56,416 miles of road driven. This resulted in an initial list of 4,000 retailers but when compared to lists provided by the FDA, Synar, and Dun & Bradstreet, brought the list up to 8200 retailers. Going through the verification process removed about 30% of stores because they did not sell tobacco products, however this search added 2,000 stores that were not included in any list.

V. Assignment for Second Meeting and Closing Remarks.

Mr. Bishop asked if ABC could get a representative from the Department of Taxation to participate in the study.

Ms. Quinby added that within the last few years progress has been made for a retail license program, however, there appears to be issues that include the initial start-up cost of the programs, resistance from the tobacco industry and the costs associated with an annual fee for a license.

Mr. Daniel asked all participants to call or email him with thoughts for agenda items for the next meeting and to brainstorm some suggestions for ultimate recommendations that could be incorporated into a final report to the General Assembly.

The meeting concluded at 3:21 p.m.

**MINUTES OF THE
VIRGINIA ALCOHOLIC BEVERAGE CONTROL AUTHORITY
2023 LIQUID NICOTINE LICENSING STUDY**

**WEDNESDAY, SEPTEMBER 20, 2023
VIRGINIA ABC HEADQUARTERS
MECHANICSVILLE, VIRGINIA**

The Liquid Nicotine Licensing Study group met at the Virginia ABC Headquarters in Mechanicsville, Virginia on Wednesday, September 20, 2023.

Study Group Participants:
See appendix 1.

I. Opening Remarks

Mr. Daniel called the meeting to order at 2:01 p.m. The study group was sent a letter dated September 7, 2023, inviting identified individuals back to participate with agenda items that include the analysis of costs associated with a licensing program both from an administrative perspective as well as an enforcement perspective. Additionally, follow up conversations from the first meeting that includes discussion on a registration program versus a licensing program and strengthening underage enforcement mechanisms.

II. Presentation by Dr. Randy Koch Retired Affiliate Faculty, Virginia Commonwealth University, Department of Psychology

Dr. Koch highlighted from his presentation that the minimum legal age of purchase laws must be accompanied by effective enforcement in order to reduce youth tobacco use; tobacco retail licensing is a critical component of an effective minimum legal age enforcement strategy; and retail licensing in Virginia would provide the resources needed to reduce sales to young buyers and bring down young tobacco users.

It is believed that in an effective tobacco retail licensing program, a license should be required of all tobacco retailers to sell any tobacco products, including e-cigarettes and heated tobacco products; a licensing fee sufficient to fund adequate implementation and enforcement; a license should be renewed annually; a provision that any violation of local, state or federal law is a violation of the license; a requirement that the retailer train their employees as a condition of the license; and a graduated penalty system for violations.

Dr. Koch provided statistics that there are currently 8,286 tobacco/nicotine retailers in Virginia, including 222 reported as “e-cig/vape shops” as of 2019. If Virginia implemented a tobacco retail licensing program with an annual fee of

\$80, it would generate approximately \$662,880. There are currently 39 states that require some form of license to sell tobacco products in which Virginia could use to inform the development of a program.

III. Group Discussion

Mr. Kirby informed the group that he researched prior data and found that there would be approximately 5,000 tobacco outlets in Virginia and that any licensing structure needs to consider what the qualifiers would be for a license, conducting inspections of the location, conducting investigation of complaints and adjudication of any complaints. He stated that if a division was created there could be a staff of about 20 people (approximately 250 licensees per employee). In terms of cost, the first year would cost about \$5 million for start-up and recurring costs would be approximately \$2 million per year. These figures are based off using an existing organization that has procurement, human resources, and technology resources.

Members discussed that in terms of Agents, they were not looking for a specific enforcement arm, but anticipating that the Department of Taxation would take on some of these tasks. When reviewing the fiscal impact statement that accompanied Senator Ebbin's bill, for Fiscal Year 23 the initial cost was \$7.6 million and \$2.4 million for subsequent years. The impact statement also discussed including 24 full-time employment positions.

Mr. Kirby followed up stating that licensing and liasioning are viewed separately. There have been approximately 1,800 tobacco checks performed this year with another 819 scheduled through the rest of the year. Virginia ABC is at the end of available resources as enforcement has approximately 20,000 alcohol licensees. Currently, between alcohol and tobacco there is a compliance rate of 87%. The group followed up asking if other agencies such as Sheriff's Offices, Local or State Police Offices could help with stings in order to limit costs.

Mr. Daniel asked if any adjudication process was included within the original fiscal impact statement and if there was a consideration of additional revenue with civil penalties includes. That number was currently inconclusive as there was no data to support it. Discussion was held that there would need to be an administrative process of the agency until the resources of the agency are exhausted and then could move violations to the local court systems.

Discussion was held regarding a settlement the Office of Attorney General has with Jewel labs where there is a total of \$16.5 million dollars which is paid over the course of seven years and that money has not been appropriated yet. The group identified that this money must be used for tobacco harm reduction and youth diversion. The Attorney General's Office has stated that approval for the use of that money must come from the General Assembly.

IV. Closing Remarks.

Mr. Daniel discussed with the group that a lot of ideas and information was given today but no consensus seemed to have been formed. The group determined to conclude further discussions following this meeting. Mr. Daniel encouraged all participants to provide written comments and recommendations to be included in the final report.

Appendix 3

Initial Presentations

- Dylan Bishop for VSFA Power Point
- Colleen Hughes, Virginia Department of Behavioral Health & Developmental Services
- Dr. Koch, VCU Department of Psychology for Licensing Retail Tobacco Outlets

THE INDUSTRY'S CASE FOR LICENSURE

Dylan D. Bishop, Esq.

July 25, 2023



VIRGINIA SMOKE FREE ASSOCIATION (“VSFA”)

- Represents the interests of *Virginia’s nicotine vapor products manufacturers, distributors, and retailers.*
- Founded in 2015 as a 501(c)(6) industry/trade association.
- Focus: *tobacco harm reduction* through the use and sale of vapor products.
- *“[t]he nicotine in cigarettes is not directly responsible for the cancer, lung disease, and heart disease that kill hundreds of thousands of Americans each year... it’s the other chemical compounds in tobacco, and in the smoke created by setting tobacco on fire, that directly and primarily cause the illness and death, not the nicotine.”*

- Remarks by Scott Gottlieb, M.D., former FDA Commissioner, July 28, 2017.

CURRENT FRAMEWORK

The sale of nicotine vapor products in Virginia is essentially **UNREGULATED**:

- **No retail licensure or registration requirement**
 - Dearth of market data, including # of retailers, location of retailers, and retailers' criminal history
- **Basic prohibition on selling to underage (<21) persons**
 - Penalties not stringent enough to deter underage sales
- **Uncodified, inequitable, and practically unenforceable tax on liquid nicotine**
 - Exists only in the budget
 - Imposed at \$0.066/ml. of liquid nicotine, regardless of nicotine concentration
 - Relies on self-reporting
 - Va. Dept. of Taxation lacks data and resources necessary to adequately audit & enforce

UNDERAGE SALES: PENALTIES

“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, alternative nicotine product, or hemp product intended for smoking.” Va. Code § 18.2-371.2.

- Violations are punishable as follows:
 - \$100 civil penalty for a first violation;
 - \$200 civil penalty for a second violation; and
 - \$500 civil penalty for a third or subsequent violation.
- Note 1: civil penalties are 5x higher for the sale of a bidi (AKA a “loose” cigarette).
- Note 2: *any* law-enforcement officer or Commonwealth’s, county, or city attorney may issue summons for these violations.

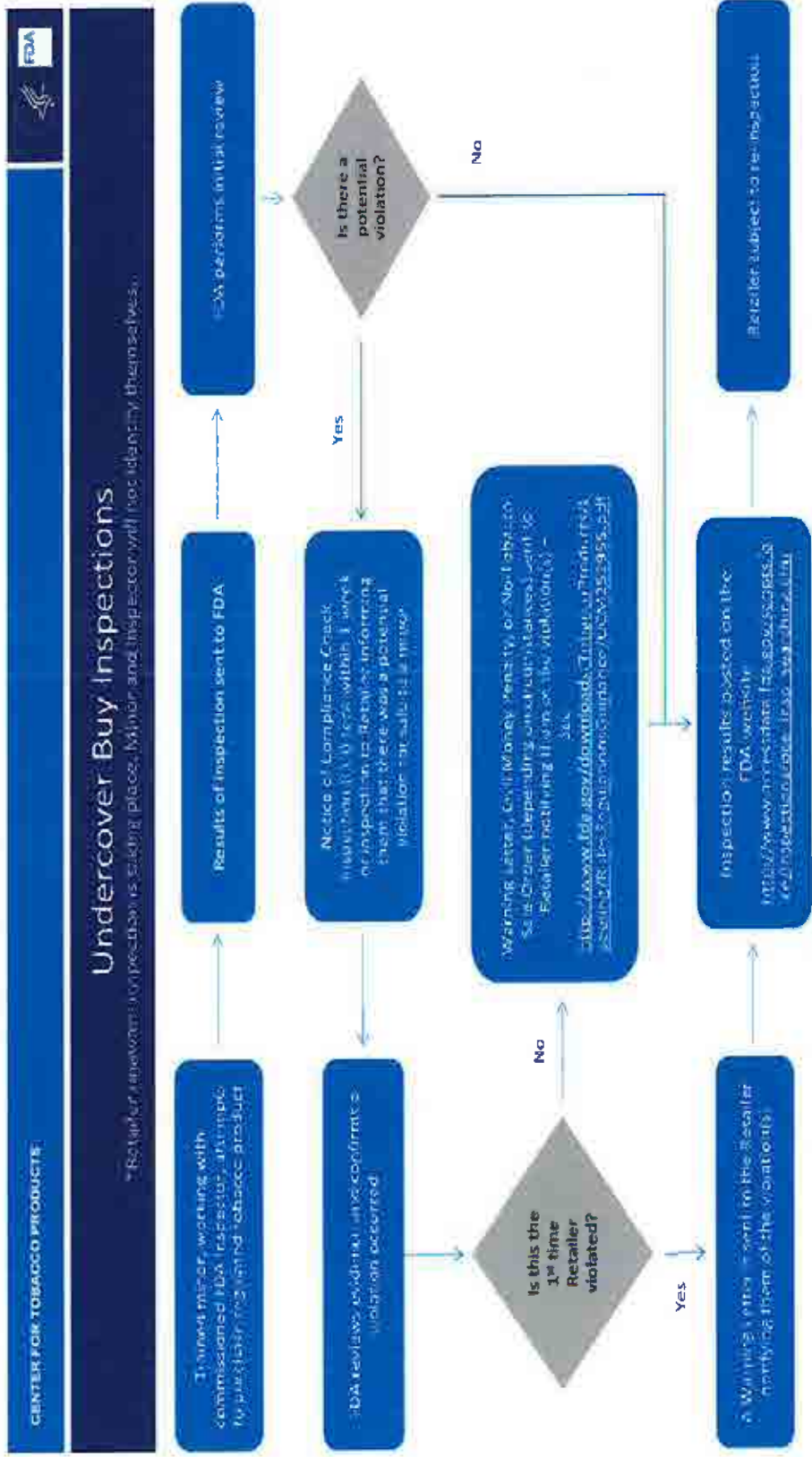
FDA ENFORCEMENT DATA

- Sep. 2016 – Oct. 2022, FDA reported 192 compliance checks resulting in the sales of a *nicotine vapor product* to an underage person in Virginia.
 - 121 (63%) at c-stores
 - Most prevalent offender had 26 illegal underage (14% of all violations)
 - 44 (23%) were specialty vapor/tobacco retailers
 - 20 (10%) were big-box grocery stores
 - 6 (3%) were at pharmacies

- As of June 30, 2023, this number stands at 283 confirmed underage sales.

Source: <https://fimp-ccid.fda.gov/>

FDA UNDERAGE BUY PROTOCOL



Source: <https://www.fda.gov/media/123583/download>

FDA ENFORCEMENT DATA

Compliance Check Inspections of Brick and Mortar Tobacco Product Retailers Through 06/30/2023 - Search Results

You searched for:

State is: VA
 Product Type Purchased by UP is: ENDS / E-liquid

283 record(s) returned

RETAILER NAME	ADDRESS	UP INVOLVED	SALE TO UP	PRODUCT TYPE	BRAND	FLAVOR	INSPECTION DATE	DECISION DATE	INSPECTION OUTCOME	CHARGES	WARNING SOURCE
CGAR AND TOBACCO OUTLET	170 BIRKBEILL COURT SUITE 3 WINCHESTER VA 22803	Yes	Yes	ENDS / E liquid	Other	Ment Tobacco	05/04/2023	06/29/2023	Warning Letter	Charges not yet available	Non-Tobacco derived
SIELL	2615 WASHINGTON BOULEVARD ARLINGTON VA 22201	Yes	Yes	ENDS / E liquid	JUBIL	Menthol	06/04/2023	06/29/2023	Warning Letter	Charges not yet available	Tobacco derived

Source: <https://timp-ccid.fda.gov/>

TAX ON LIQUID NICOTINE

VA Budget Item § 3-5.21(C) taxes liquid nicotine at \$0.066/mL

- Tax structure not in-line with national best practices



Scott Gottlieb, MD  @ScottGottliebMD Sep 20

The open tank vape systems have different patterns of use than cartridge or pod based products. The open tank systems are largely used by adults. Pops are the most widely abused products by kids. Differently situated products can be treated differently.

- Liquid nicotine in open systems is not as concentrated (or addictive), so a volume-based tax disproportionately taxes open systems despite having less nicotine
- Lack of clarity around who is to pay the tax and when
- Va. Dept. of Taxation lacks the data and resources necessary to adequately audit & enforce
 - With no roster of market participants, self-reporting is the only means of enforcement
 - Some distributors/retailers openly flaunt the tax by not self-reporting, leading to competitive disadvantage for those paying the tax

2023 GENERAL ASSEMBLY

- VSFA worked with Sen. Ebbin & Del. Hope to introduce SB1350/HB2296
- Purpose of SB1350/HB2296 was to use licensing to:
 1. Reduce underage sales/usage of nicotine vapor products;
 2. Codify tax & best practices relating to the sale of nicotine vapor products;
 3. Provide more equitable tax framework (may be beyond the scope of current study parameters);
 4. Provide additional clarifications regarding the tax on liquid nicotine (e.g., who pays and when);
 5. Bolster enforcement mechanisms and resources relating to underage sales and tax compliance.
- SB1350/HB2296 was ultimately amended to create this Study Group.

HB 2296 / SB 1350: LICENSURE

Require all manufacturers, distributors, and retailers to obtain a license to sell nicotine vapor products in or into Virginia from Va. Dept. of Taxation

- Manufacturer (5-year permit; \$1,000)
- Distributor (1-year permit; \$500)
- Retailer (1-year permit; \$100/location)
 - JULL settlement funds to help offset
- Applicants must submit to background check(s)
- Applicants must submit financial records and tax filings related to tax on liquid nicotine

HB 2296 / SB 1350: WHY DEPT. OF TAX?

- As the permitting agency, Va. Tax would finally have the data necessary to adequately enforce Virginia's tax on liquid nicotine, i.e., a roster of market participants
- Va. Tax would need to be involved with licensing anyway, as applicants must demonstrate compliance with tax on liquid nicotine
- Va. Tax already "permits" most other tobacco merchants
- Proposed licensing structure would NOT require the administering agency to have its own law enforcement
 - Agency can rely on FDA enforcement data, which is updated monthly
 - Underage sales, etc., can already be prosecuted by **any** law enforcement officer or Commonwealth's Attorney in the Commonwealth

HB2296 / SB1350: YOUTH DIVERSION

- All products containing liquid nicotine must be displayed behind counter or glass, out of reach from children
- Requires use of third-party age-verification software at time of sale
- Marketing and labeling restrictions to avoid appeal to minors
- Limit sales to 2 vapor products (batteries, etc.) and 5 bottles/packages of liquid nicotine at a time to prevent strawman sales
- Stiffer penalties for selling to underage persons:
 - First violation: \$1,000 civil penalty
 - Second violation: \$5,000 civil penalty and 7-day suspension of license
 - Third violation: \$10,000 civil penalty and revocation of license

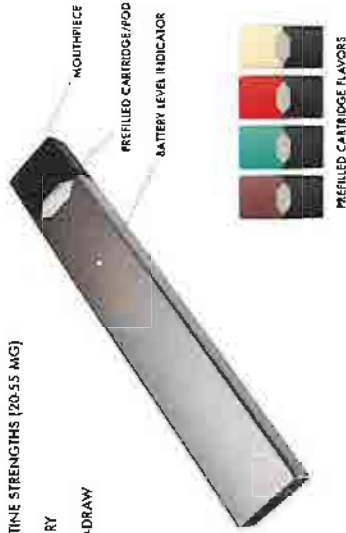
HB2296 / SB1350: LIQUID NICOTINE TAX

“CLOSED” SYSTEMS

- Tax remains the same: \$0.066/mL

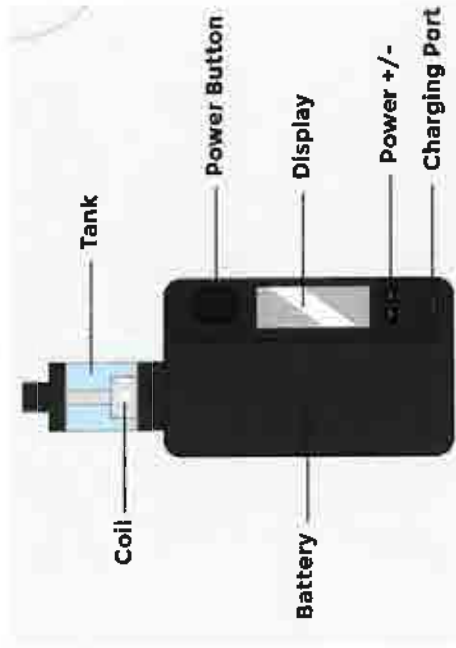
CLOSED POD SYSTEMS

- PREFILLED CARTRIDGES (COMES IN PACKS OF 4 OR 5)
- NICOTINE STRENGTHS (20-35 MG)
- BATTERY
- AUTODRAW



“OPEN” SYSTEMS

- Tax would be a function of wholesale cost
- Comports with wholesale-price-based structure of Virginia’s “Other Tobacco Products Tax”
- National best practice: 29 other states had bifurcated tax on liquid nicotine as of Dec. 2019



QUESTIONS?

Dylan D. Bishop, Esq.

dbishop@eckertseamans.com





Virginia Department of
Behavioral Health &
Developmental Services

Synar Overview

Liquid Nicotine Study

July 25, 2023



wellness:
Broadening Prevention

Colleen Hughes

Synar Coordinator

Office of Behavioral Health Wellness

Synar in Virginia

Prohibiting the sale and distribution of tobacco products to people under 21

The regulation requires that states:

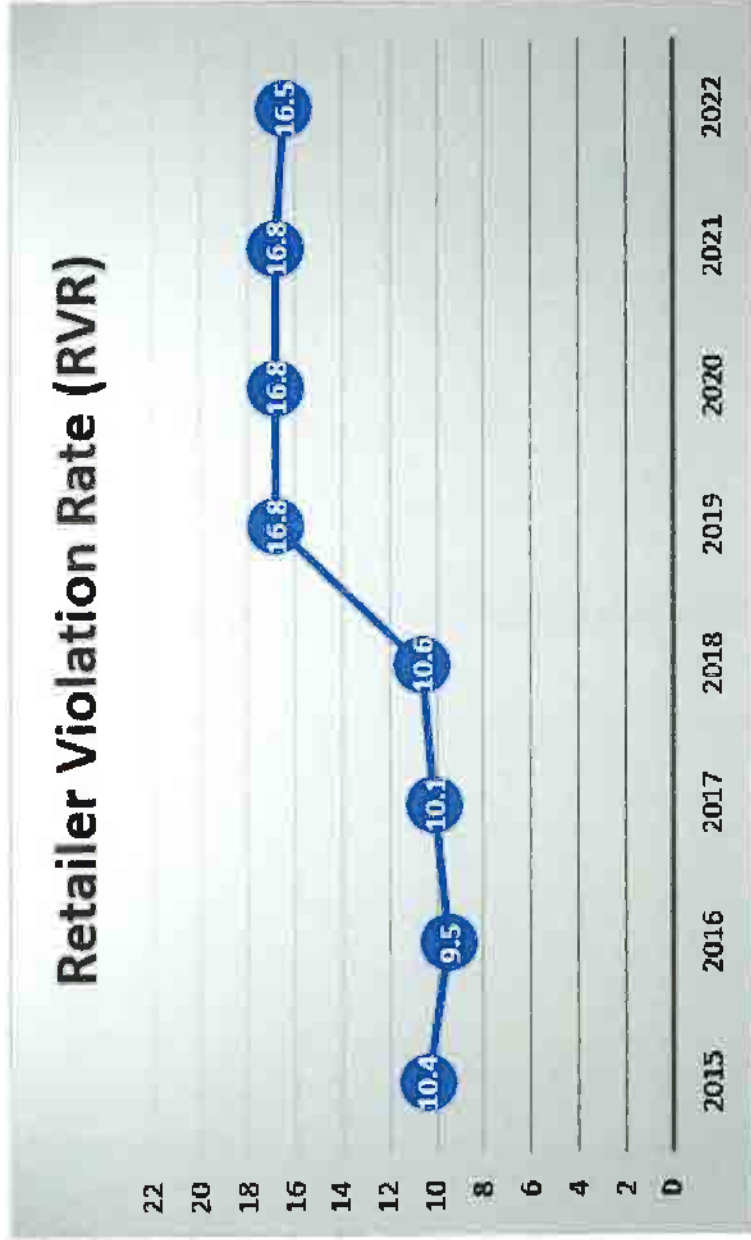
- Enact laws prohibiting any manufacturer, retailer, or distributor of tobacco products from selling or distributing such products to any individual younger than age 21
- Enforce these laws
- Conduct annual, unannounced inspections that provide a valid probability sample of tobacco sales outlets accessible to minors
- Achieve a noncompliance rate (RVR) of no more than 20% (noncompliance penalty of up to 10% of SAPTBG)

Penalty of \$4.2 Million

Enforcement History

- Partner with Virginia ABC to conduct Synar inspections
 - Conducted on an annual basis
 - Results are what determine the State's RVR
- FDA Contract
 - Held by ABC until May 2018
 - Currently held by a third party contractor
- Inspections
 - Prior to May 2018, about 50% of retailers were inspected annually between FDA and Synar inspections
 - Since May 2018, only about 10% of retailers are inspected
 - FDA is doing some underage inspections but not to the level that they were when ABC held the contract.

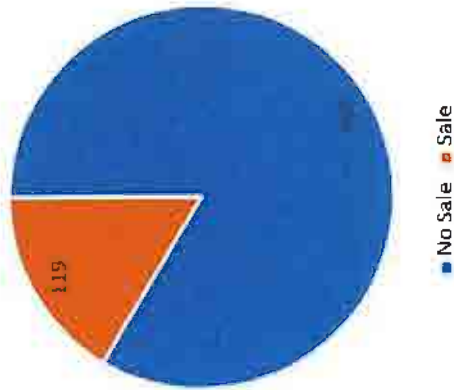
Retailer Violation Rates



*No inspections were conducted in 2020 and 2021 due to the COVID-19 pandemic so the rate is considered to remain at 16.8%

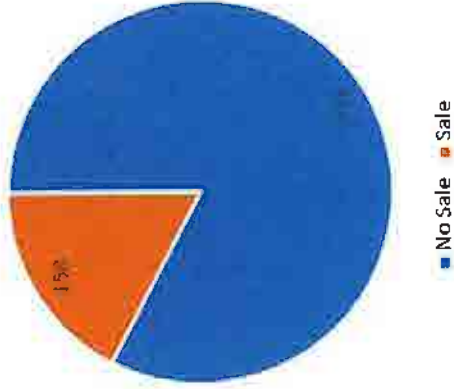
Past Year Enforcement

Synar Inspections



Violation rate of 16.4%

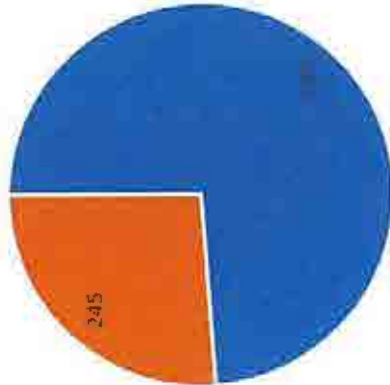
State-Funded Supplemental Inspections



Violation rate of 17.4%

Past Year Enforcement, continued

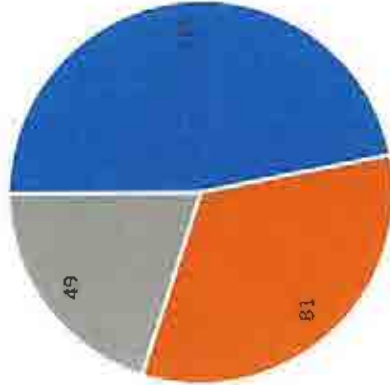
FDA Inspections



■ No Sale ■ Sale

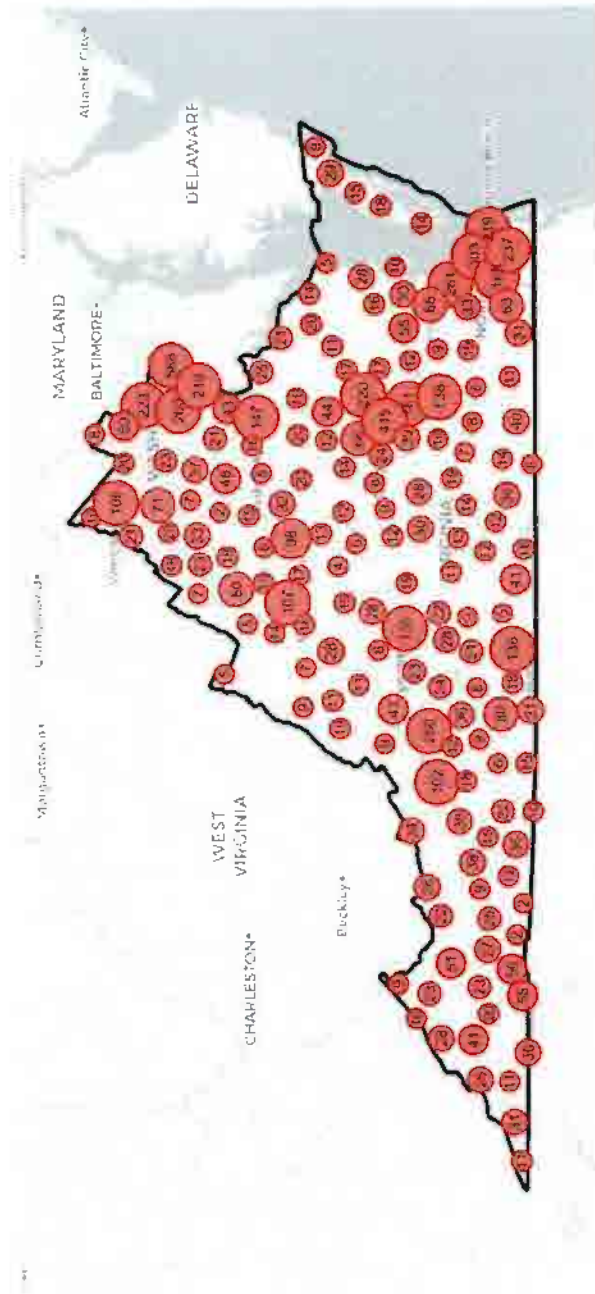


Product Type Involved in Violation



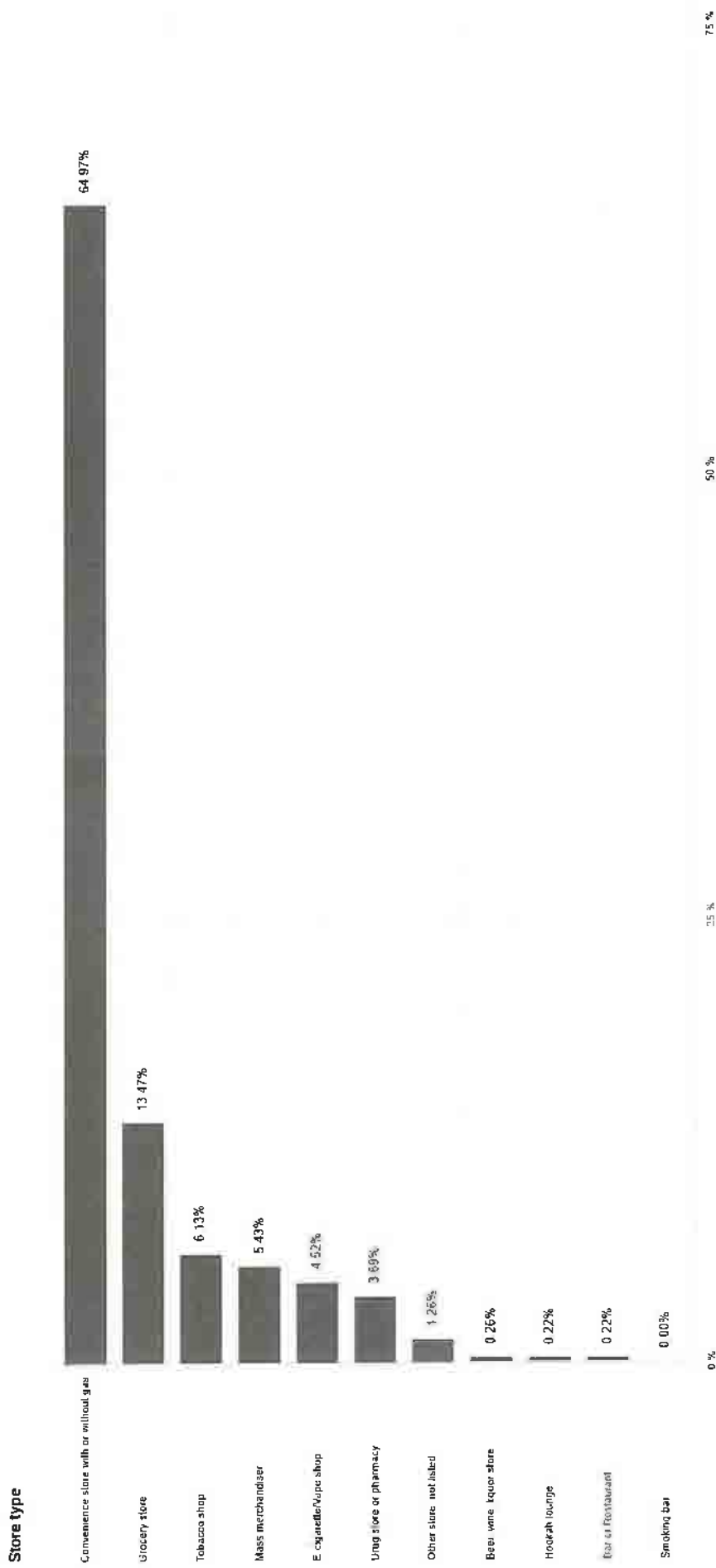
■ ENDS/E-liquid ■ Cigarettes ■ Cigars

Retailer Landscape



7229 Retailers (known)

Current Retail Landscape



Young Adult Survey (YAS)

- The YAS is a statewide survey of young adults ages 18-25 funded by the Department of Behavioral Health and Developmental Services (DBHDS), Office of Behavioral Health and Wellness (OBHW)
- Done in conjunction with the CSBs in 2022
- **Vaping/E-Cigarette Use** was the **number one issue** identified by most young adults, followed by mental health and underage alcohol use.

Lifetime Use Trends

Half of young adults reported having vaped at some point in their life, making it the third most common substance used among young adults. Lifetime use rates for vaping were significantly lower among those under the age of 21.

18-20 Year Olds



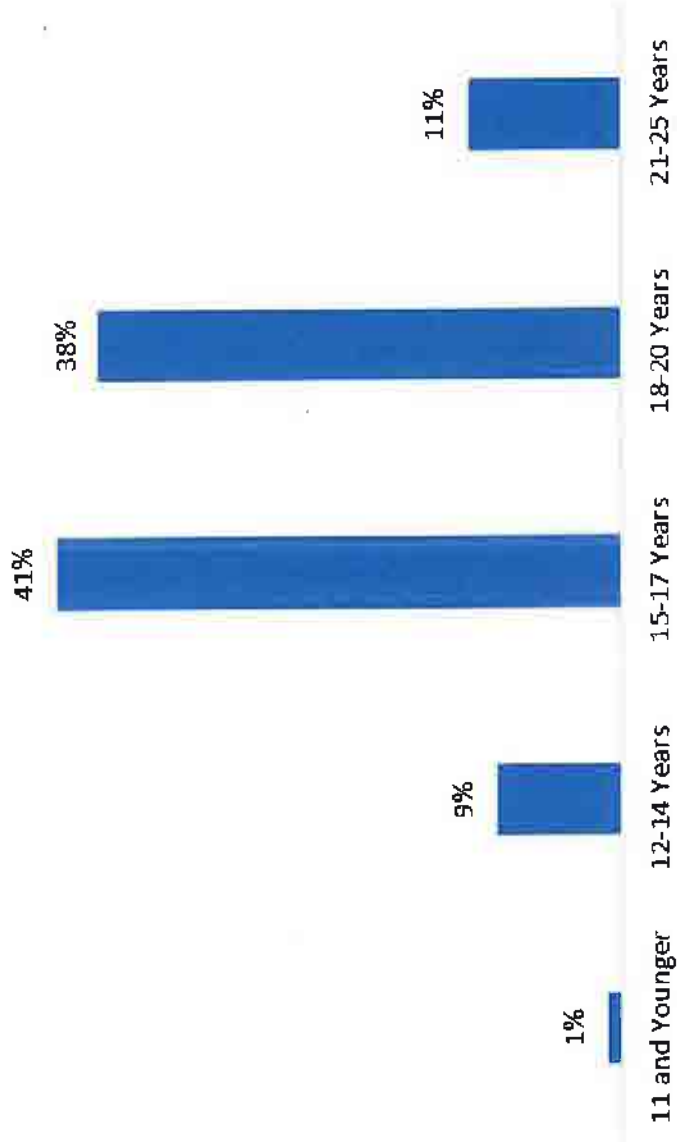
21-25 Year Olds



Significant differences in lifetime use rates were found between **LGBQ+** and non-LGBQ+ young adults (59% vs 48%), as well as between **Students** (47%) and **non-Students** (56%).

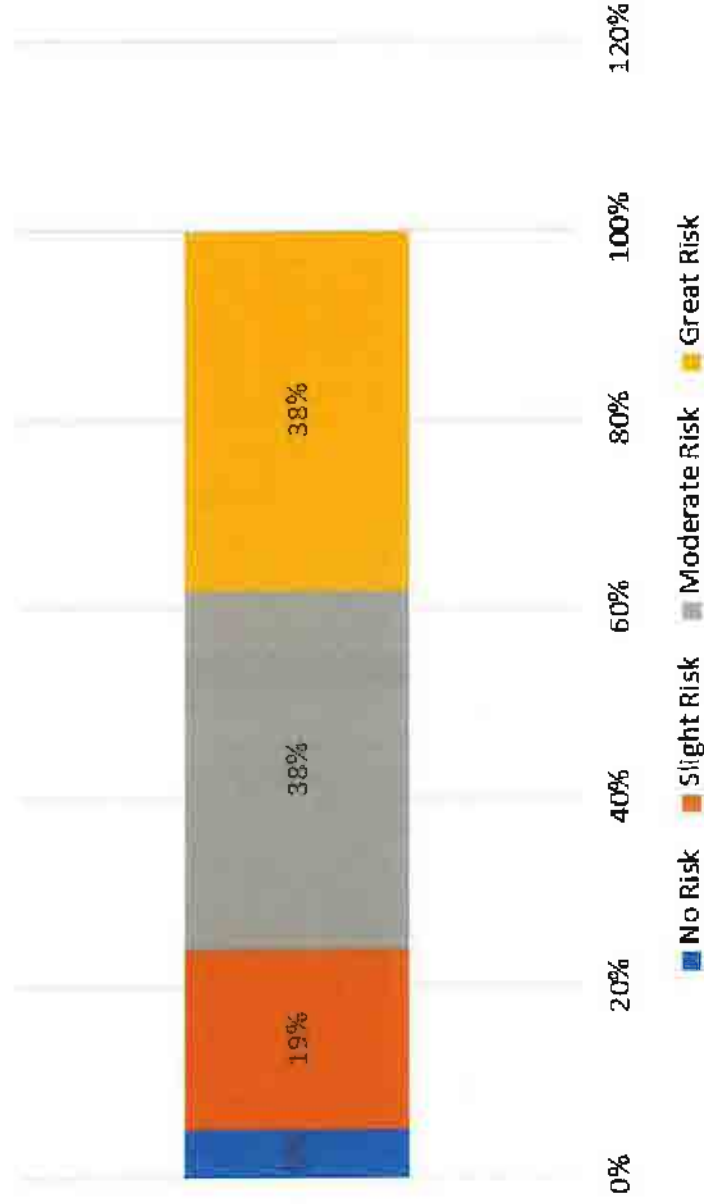
Age at First Use Among Lifetime Users

Half of young adults who have vaped first did so between the ages of 12 and 17.



Risk Perceptions of Vaping

Risk perceptions associated with vaping were similar to those of tobacco use.
Nearly 1 in 4 do not associate significant risk with vaping or e-cigarette use.



Ease of Access

Access to vaping products is significant among young adults. **Nearly 3 in 4 young adults believe that it is very easy or sort of easy to get vapes or e-cigarettes.**

Respondents Ages 18-20

Sort of Easy Very Easy



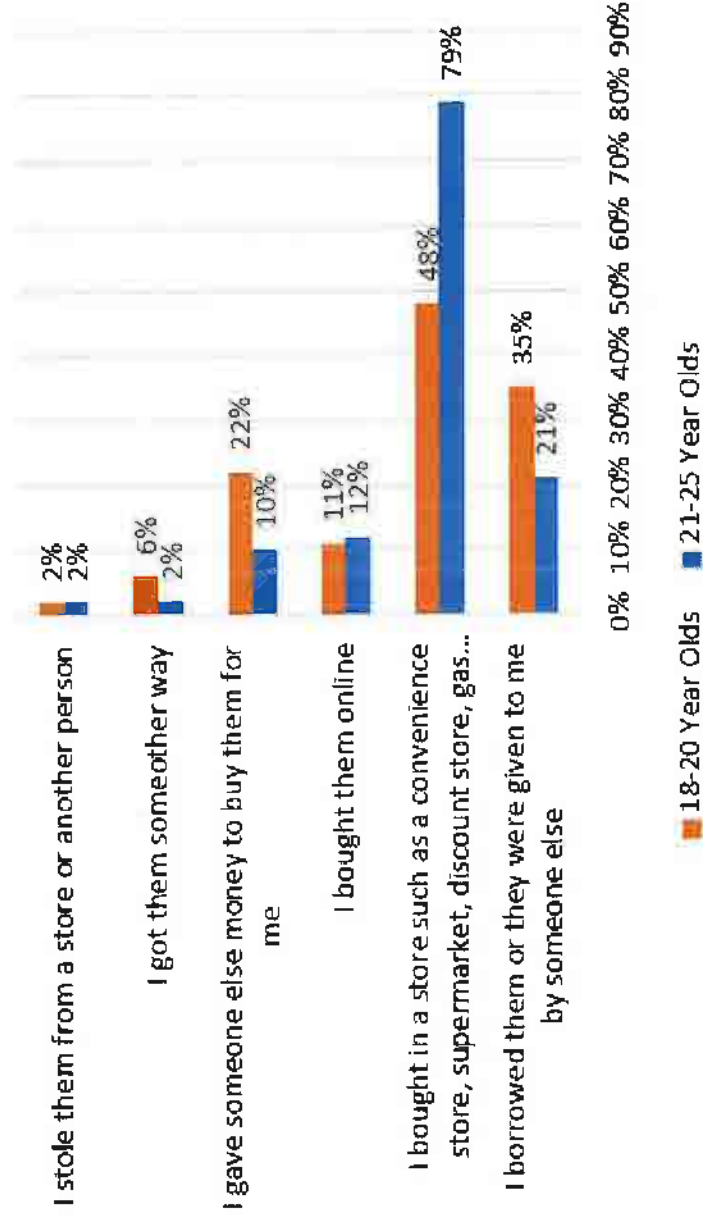
Respondents Ages 21-25

Sort of Easy Very Easy



Peer Access of Vaping Products

Exchange between individuals or peers is a common source of vape/e-cigarettes access. 1 in 3 young adults report that their peers access them by borrowing them from someone or receiving them from someone else. 1 in 5 report that their peers give money to others to buy vapes/e-cigarettes.



Contact Information

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wellness:
Broadening Prevention

Licensing Retail Tobacco Outlets to Reduce Youth Access to Tobacco Products in Virginia

Virginia Commonwealth University, Department of Psychology
November 2019

Key Points

- **Minimum legal age (MLA) of purchase laws must be accompanied by effective enforcement in order to reduce youth tobacco use—current enforcement activities in Virginia are inadequate to prevent youth from using tobacco products**
- **Tobacco retail licensing is a critical component of an effective MLA enforcement strategy for reducing sales of tobacco to minors**
- **Tobacco retail licensing in Virginia would provide the resources needed to reduce sales to youth and further drive down youth tobacco use**

Despite significant decreases in cigarette smoking by youth over the past two decades, the percentage of high school youth who are current smokers remains unacceptably high (8.8%).¹ Perhaps more concerning is the dramatic increase in the percentage of youth who are using e-cigarettes; an increase of 78% among high school youth from 2017 to 2018 (11.7% and 20.8%, respectively).² Given the long-term health consequences of tobacco use and nicotine dependence, more effective strategies to prevent youth tobacco use must be implemented, nationally and in Virginia. One such strategy is to reduce youth access to tobacco products by taking active steps to prevent the sale of these products to young people, as through minimum legal age (MLA) of sale laws. While MLA laws are an important part of efforts to decrease youth tobacco use, past experience demonstrates “that the mere adoption of a law prohibiting the sale of tobacco products to minors is insufficient to prevent the [actual] sale of tobacco to children.”³ MLA laws must be combined with effective enforcement that drives down illegal sales to minors. Further, significant reductions in illegal sales to minors consistently has been found to reduce youth smoking rates, the ultimate goal.³⁻⁶

Tobacco Retail Licensing is a Key Component of MLA Laws

Tobacco retail licensing (TRL) is a key component of an effective enforcement program for state MLA of sale laws.^{6,9} Through TRL, states can require specific actions on the part of retail stores as a condition of selling tobacco products, with failure to do so resulting in a suspension or revocation of the license.^{10,11} There are three major ways in which licensing can influence the implementation and efficacy of MLA laws: 1) licensing will produce a comprehensive list of retail tobacco outlets that can then be targeted in vendor education and enforcement efforts,¹² 2) licensing fees can be used to generate the funds needed to support a comprehensive system of vendor education and enforcement, and 3) incremental monetary fines as well as license suspensions and revocations as penalties for selling tobacco products to minors are a significant deterrent to violating state MLA laws.¹²

Current Environment In Virginia

Virginia recently took a major step to reduce the harms of tobacco use by increasing the MLA to 21 years. However, this occurred at a time when our enforcement efforts related to sales to underage buyers have been severely reduced, resulting in an increased retailer violation rate (RVR). In the most recent year, compliance checks (i.e., “false buys” by underage buyers) were conducted for only

6.4% (less than 600) of retail tobacco outlets, compared to approximately 50% of retailers prior to the loss of the state-wide FDA contract in May 2018.¹³ As a result, Virginia's RVR has greatly increased, thus making tobacco and nicotine products more accessible to youth. Specifically, the RVR for FFY 2019 was 16.8%, a 58.5% increase over FFY 2018.^{14,15} If this rate rises above 20%, the state risks losing approximately \$17 million of Federal Substance Abuse Block Grant dollars.¹⁶ Given the recent change in the MLA to 21 years, Virginia is likely to experience an even greater increase in the RVR unless there is stronger enforcement of existing laws combined with retailer licensing.

How do other States License Retail Tobacco Outlets?

Currently, 39 states require some form of license to sell one or more types of tobacco products. Their experience can be used to inform the development of an effective TRL system in Virginia as part of a comprehensive program to enforce our MLA law. Most states (74%) that license retail tobacco outlets require that the license be renewed on an annual basis. In those states that levy a licensing fee (87% of states where tobacco retail outlets are licensed), the fee is set using a variety of approaches. For example, some states have a fixed fee regardless of the tobacco product being sold, while others have different fees for different products (Alaska, Massachusetts). In other states, licensing fees vary by city population (Alabama) or by retailer's annual gross revenue from total cigarette/tobacco sales within prior year. In addition, the fee can also vary by the type of license application; that is, when it is a renewal license, the fee tends to be lower (Texas, Utah, Maryland).¹⁷ The average annual fee for a one-year retail tobacco license in August 2017 where there was a fixed fee (56% of states that require a license) was \$81.10 per year and ranged from \$5 in Montana and Delaware to \$300 in New York (see Table 1).

Best Practices in Tobacco Retail Licensing

An effective TRL program should include the following: 1) a required license to sell any tobacco product (including e-cigarettes and heated tobacco products) that is applied to all tobacco retailers (including gas stations, convenience stores, larger grocery stores, and pharmacies), 2) a licensing fee sufficient to fund adequate implementation and enforcement of the law, 3) the license must be renewed annually, 4) a provision that any violation of local, state, or federal law is a violation of the license; 5) a requirement that the retailer train their employees as a condition of receiving a license, and 6) a graduated penalty system for violators, including monetary fines, license revocation or suspension.^{6,9,11,18} A summary of state penalties levied against retailers for selling tobacco products to minors is presented in Table 2.

What will be the Impact of Licensing in Virginia?

Currently, there are 8,286 tobacco/nicotine retailers in Virginia, including 222 reported as "e-cig/vape shop".¹⁹ If Virginia were to implement a TRL with an annual licensing fee of \$80 (approximately the current nation-wide average of \$81.10), it would generate \$662,880 that could be used to enhance MLA enforcement and retailer education efforts.²⁰

Conclusion

Virginia is to be congratulated for enacting new legislation increasing the minimum legal age of sale of tobacco products to persons 21 years. However, numerous studies and our own experience in Virginia demonstrates that without strong enforcement efforts, particularly retail compliance checks, tobacco products will increasingly be sold to underage buyers. TRL would greatly enhance our ability to enforce Virginia's new Tobacco 21 law by helping to identify all retail tobacco outlets, providing funds for enforcement and retailer education efforts, and creating strong disincentives for sales to minors through a graduated system of monetary fines and license suspensions/revocations. The funds generated through licensing fees would support the strong enforcement efforts needed to reduce the public health burden of tobacco products in Virginia.

APPENDIX 1

1. Centers for Disease Control and Prevention. *Youth Risk Behavior Survey, 2017*. Available at: <https://nccd.cdc.gov/Youthonline/App/Results.aspx?TT=A&OUT=0&SID=HS&QID=QQ&LID=XX&YID=2017&LID2=&YID2=&COL=S&ROW1=N&ROW2=N&HT=QQ&LCT=LL&FS=S1&FR=R1&FG=G1&FA=A1&FI=I1&FP=P1&FSL=S1&FRL=R1&FGL=G1&FAL=A1&FIL=I1&FPL=P1&PV=&TST=False&C1=&C2=&QP=G&DP=1&VA=CI&CS=Y&SYID=&EYID=&SC=DEFAULT&SO=ASC>. Accessed October 25, 2019.
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15. C. Hughes. personal communication. October 31, 2019.
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20. The annual average licensing fee was calculated based only on those states that have annual fixed licensing fee. That is, it excludes those states where the amount of the licensing fee is based on the size of the city in which the retailer is located or the type of municipality (e.g., city vs village).

Table 1. State TRL Fees

Type of Licensing Fee	Number of States	Number of States with Fixed Fees	Licensing fee		
			Minimum Fee \$*	Maximum Fee \$	Average Fee per Year \$*
Annual license	29	22	5	300	81.10
Multi-year license	5	5	25	180	40.80
License with no fee	5	N/A	N/A	N/A	N/A
Total	39	27	2	265	61.60

*Calculated based on states that have fixed fees

Table 2. State Penalties to Retailers for Sales to Minors

Penalty Type for Retailer	Number of States	First time Violation: Warning Only	Fine/License Suspension or Revocation		
			Multiple Fine Scales Based on Number of Violations	Min (Fine\$/License Suspension)	Max (Fine\$/License Suspension)
Fine only	20	2	12	\$50	\$15,000
No penalty	2	N/A	N/A	N/A	N/A
License revocation only	3	1	3	24 hours	license revoked
Fine with education	2	0	2	\$100	\$500
Fine and license revocation	19	1	18	up to \$50/up to 2 days	up to \$10,000/ license revoked
License revocation with education	2	1	1	N/A	up to 1 year
License revocation and fine with education	2	1	2	\$200/3 mos.	\$1,000/license revoked

Appendix 4

2021 Department of Taxation Report



COMMONWEALTH of VIRGINIA

Department of Taxation

December 1, 2021

The Honorable Luke E. Torian
Chairman, House Appropriations Committee
4222 Fortuna Plaza, Suite 659
Dumfries, VA 22025

Dear Chairman Torian:

House Bill 2164 of the 2021 General Assembly would have prohibited any person from selling any tobacco product at retail without first obtaining a license from the Virginia Alcoholic Beverage Control Authority. The House Appropriations Subcommittee on Transportation and Public Safety voted to table the bill. The Subcommittee also supported a request for the Department of Taxation to conduct a study to assess the feasibility and costs associated with the creation of licensure for tobacco retailers to prevent the selling of tobacco products to underage individuals. By letter, you requested that the Department conduct such a study.

Attached is the report summarizing the findings of the Department of Taxation regarding 2021 House Bill 2164. As this proposal would not have an impact on the administration of taxes, the Department of Behavioral Health and Developmental Services (DBHDS) and the Virginia Alcoholic Beverage Control Authority (ABC) assisted in the study by providing information regarding the scope and potential costs associated with implementation of such a process.

Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig M. Burns".

Craig M. Burns
Tax Commissioner

c: The Honorable Patrick A. Hope
The Honorable K. Joseph Flores, Secretary of Finance
David Reynolds, House Appropriations Committee Staff

Report on Retail Tobacco Licensing

Pursuant to a Request from the Chairman of the House Committee on Appropriations Regarding 2021 House Bill 2164

Final Report

Department of Taxation

December 1, 2021

Table of Contents

Executive Summary	3
Study Mandate	4
Background on Retail Tobacco Licensing	4
Virginia Cigarette and Tobacco Products Taxes	6
Stakeholder Perspectives	9
Findings	10
Appendix A: 2021 House Bill 2164	
Appendix B: Letter from Chairman Torian Requesting Retail Licensing Study	
Appendix C: Comments from the Department of Behavioral Health and Developmental Services	
Appendix D: Comments from Virginia Convenience and Petroleum Marketers Association	
Appendix E: Comments from Virginia Asian American Store Owners Association	
Appendix F: Comments from the American Cancer Society, American Lung Association Preventing Tobacco Addiction Foundation/Tobacco 21, American Heart Association Medical Society of Virginia, and Tobacco Free Alliance of Virginia (TFAV)	
Appendix G: Comments from the Virginia Smoke Free Association	
Appendix H: Report on Retail Tobacco Licensing from Virginia Commonwealth University and George Mason University	
Appendix I: Letter from the Public Health Law Center to the American Heart Association	
Appendix J: Virginia Cigarette Sales Tax Exemption Application (Form ST-10C)	
Appendix K: Fiscal Impact Statement for 2021 House Bill 2164	

Executive Summary

2021 House Bill 2164 would have prohibited any person from selling any tobacco product at retail without first obtaining a license from the Virginia Alcoholic Beverage Control Authority (“ABC”). See Appendix A for the text of 2021 House Bill 2164 and Appendix K for the Fiscal Impact Statement for 2021 House Bill 2164. The House Appropriations Subcommittee on Transportation and Public Safety voted to table the bill. In doing so, the Subcommittee also supported a request for the Department of Taxation (“the Department”) to conduct a study to assess the feasibility and costs associated with the creation of licensure for tobacco retailers to prevent the selling of tobacco products to underage individuals. By letter, the Chairman of the House Committee on Appropriations requested that the Department conduct such a study. See Appendix B.

The Department conducted research on retail tobacco licensing and reached out to stakeholders to solicit their input on the issues involved. Their comments and input were the focus of this study. This report summarizes the comments provided by stakeholders, information obtained from the Virginia Department of Behavioral Health and Developmental Services (“DBHDS”) related to federal funding for tobacco licensing and retail inspections, updated information from ABC related to potential costs associated with implementing a retail licensing program, and the tax-related rules that currently apply to retailers of cigarettes and other tobacco products. Following a summary of this background information, this report provides a summary of findings to assist the General Assembly in considering future action, including information regarding the costs associated with the creation of a licensure program for tobacco retailers based on the assumptions provided by DBHDS and the estimated resource needs provided by ABC.

Study Mandate

2021 House Bill 2164 (Appendix A) would have prohibited any person from selling any tobacco product at retail without first obtaining a license from the Alcoholic Beverage Control Authority (ABC). The House Appropriations Subcommittee on Transportation and Public Safety voted to table the bill. In doing so, the Subcommittee also supported a request for the Department of Taxation (“the Department”) to conduct a study to assess the feasibility and costs associated with the creation of licensure for tobacco retailers to prevent the selling of tobacco products to underage individuals. By letter, Chairman Torian requested that the Department conduct such a study. See Appendix B.

The Department reached out to stakeholders to solicit their input on the issues involved in the licensing of retail tobacco sales. Their comments and input were the focus of the study. This is the final report of the Department.

Background on Retail Tobacco Licensing

Limitations on Sales of Tobacco Products to Youths

Virginia Code § 18.2-371.2 prohibits sales of tobacco products to customers under twenty-one years of age. It provides that a violation by an individual or by a separate retail establishment that involves a nicotine vapor product, alternative nicotine product, hemp product intended for smoking, or tobacco product 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. This law is referred to as “Tobacco 21” or “T21.”

In addition to state-level efforts to limit sales of tobacco products to persons twenty-one years of age and older, federal law also establishes twenty-one as the age to legally buy tobacco products.

Retail Licensing

According to the Virginia Department of Behavioral Health and Development Services (DBHDS), Virginia is one of eight states in the nation that does not require retailers to obtain a license to sell tobacco products. See Appendix C.

Additionally, there is currently no comprehensive list of tobacco and nicotine retailers in Virginia. Since 2016, DBHDS has been collaborating with the Community Services Boards (“CSBs”) to compile a comprehensive list of all tobacco/nicotine retailers. This initially began with staff physically locating each retailer. The list is updated every two years when the CSBs conduct merchant education and store assessment to every identified retailer. New retailers are added to the list, and any changes to existing retailers are noted in the database. The most recent coverage study, conducted in 2018, showed the list accuracy was 87.9 percent. This means DBHDS is missing an estimated 1,000 retailers who are not factored into compliance efforts. DBHDS estimates that currently there are between 7,500 and 8,000 tobacco retailers in Virginia, and that their current list accuracy has decreased to approximately 82 percent. See Appendix C.

Enforcement of Laws Restricting the Sale of Tobacco Products to Youths

There are two federal programs to compensate states for retail tobacco licensing and inspections. The first is the Food and Drug Administration (“FDA”) inspection contracts, which are issued to states to assist with compliance checks. In the past, the Virginia Alcoholic Beverage Control Authority (“ABC”) held the FDA contract for Virginia but Virginia’s last FDA contract with ABC expired in May 2018. Currently, the Commonwealth, like several other states, does not have a contract with the FDA. In such cases the FDA enters into contracts with third parties for inspections in these states. Computer Evidence Specialists, LLC currently holds a contract with the FDA for compliance inspections in Virginia.

Jurisdiction	Contractor	Date of Initial Award	Most Recent Contract Start Date	Most Recent Award Amount	Total Awarded To Date
Virginia	Computer Evidence Specialists, LLC	9/26/2019	9/30/2020	\$806,103	\$1,159,351
Virginia	Virginia Department of Alcoholic Beverage Control (ended 5/31/2018)	8/10/2011	3/1/2017	\$1,152,090	\$7,609,742

Source: fda.gov

DBHDS provided additional data regarding FDA inspections in Virginia. They noted that most violations discovered during these inspections involved cigars and Electronic Nicotine Delivery Systems (“ENDS”). Since the passing of the Federal Tobacco 21 law on December 20, 2019 (through August 30, 2021), there have been 376 total inspections, 111 inspections involving a minor, and 20 violations involving a minor. No inspections were conducted between the expiration of the ABC contract with the FDA and the beginning of the third party contract with the FDA. See chart for more details by reporting period.

Period	Total Inspections	Inspections Involving a Minor	Violations Involving a Minor
7/1/17 - 6/30/18	3,035	2,506	389
7/1/18 - 6/30/19*	0	0	0
7/1/19 - 6/30/20	219	171	21
7/1/20 – 6/30/21	214	4	0
7/1/21 – 8/30/21	19	12	1

The other source of federal funding comes from the Federal Substance Abuse Prevention and Treatment Block Grants, which are provided to states to plan, implement, and evaluate activities that prevent and treat substance abuse. The federal Synar Program requires states, territories,

and the District of Columbia to enact and enforce laws prohibiting the sale or distribution of tobacco products to individuals under age 21 years. To determine compliance with the legislation, the program requires each state to conduct annual, random, unannounced inspections of retail tobacco outlets and to report the findings to the Secretary of the Department of Health and Human Services (DHHS). States that do not comply with the requirements are subject to a penalty of up to 10 percent of their Federal Substance Abuse Prevention and Treatment Block Grants. Since these inspections must be specific to the Synar Program, other inspections, such as the FDA inspections, do not count toward Synar compliance.

For Synar specific inspections, under contract with DBHDS, Virginia ABC conducts underage verification checks on tobacco retailers throughout the Commonwealth to verify compliance with the state age requirements. Special agents, who are sworn officers from Virginia ABC's Bureau of Law Enforcement, accompany underage operatives during attempts to purchase cigarettes at grocery stores, convenience stores, restaurants and other businesses. Virginia ABC selects operatives who look their age, making it easier for clerks and servers to request ID and avoid the sale. Operatives are instructed not to alter their appearance or mannerisms or mislead clerks in any way while attempting to make a purchase. Operatives carry their own valid identification. If the store clerk asks for ID, the operative presents his or her own valid identification. Virginia ABC special agents throughout the state complete approximately 600 Synar tobacco checks a year for DBHDS.

According to DBHDS, inspection levels have decreased since the time when ABC held the FDA contract. During that time, between FDA and Synar checks, approximately 50 percent of retailers were inspected annually. Currently, approximately 10 percent of tobacco products retailers are inspected annually.

DBHDS also indicated that, in Virginia, Synar Retailer Violation Rates (RVRs) have been increasing, from 9.5 percent in 2016 to 16.8 percent in 2019. DBHDS notes that the 2019 compliance checks for Synar were completed prior to Tobacco 21 taking effect. Had they been completed after the change, DBHDS estimates that RVR would likely have been higher.

Synar compliance checks were not conducted in 2020 due to COVID-19. Given that pause, it has been two years since the passage of Tobacco 21 without significant enforcement efforts. Based on the lack of enforcement, DBHDS states that RVR could potentially pass the 20 percent threshold - putting the state at risk of losing SABG money. See Appendix C for additional information from DBHDS related to the enforcement of laws restricting the sale of tobacco products for youths.

Department of Taxation's Role with Tobacco Products

In Virginia, cigarettes are subject to a state cigarette tax administered by the Department. The state tax is paid by wholesalers who are licensed as stamping agents by the Department. Wholesalers pay the tax by purchasing rolls of state revenue stamps from the Department and recover the cost of the stamps when they sell the cigarettes to retailers. The stamps must be affixed to each pack of cigarettes and serve as proof that the tax has been paid. As part of its administration of the tax, the Department's auditors visit cigarette retailers to make sure that the cigarettes in their inventories bear the state revenue stamp. However, as the Department deals

mainly with cigarette distributors and wholesalers, it does not have a comprehensive list of cigarette retailers in Virginia. The Department plays no role in the enforcement of state and federal laws banning the sale of cigarettes to youths.

Additionally, there is a state tax levied upon the privilege of selling or dealing in tobacco products in the Commonwealth. Generally, the tax is imposed at the rate of 10% of the manufacturer's sales price, which is paid by distributors when the products are sold to retailers. There are also rates that apply to specific products based on weight including cigars, smokeless tobacco, snuff, and chewing tobacco. Further, there is a \$0.066 per milliliter wholesale tax on liquid nicotine. As with cigarettes, the Department plays no role in the enforcement of state and federal laws banning the sale of tobacco products to youths.

Retail sales of cigarettes are generally subject to the Retail Sales and Use Tax. In general however, any retail merchant is allowed to purchase items that it intends to resell to its customers exempt from the tax because it will collect the tax from its customers at the time of sale. This general resale exemption does not currently apply to cigarettes because, during the 2017 General Assembly session, legislation was enacted to address the growing loss of sales tax revenues caused by cigarette smugglers posing as legitimate retail merchants in order to purchase large quantities of cigarettes without paying sales tax.

Under current law, retailers purchasing cigarettes for resale are required to pay sales tax unless they have been issued a Form ST-10C Cigarette Retail Sales and Use Tax Exemption Certificate by the Department. See Appendix J for a copy of Form ST-10C. When the Department receives an application for a Form ST-10C Exemption Certificate, staff complete a criminal history background check on the owner, a tax compliance check, and finally a retail site inspection. Compliance audits are conducted both at the stamping agent or wholesale level and at the retail level. As part of a wholesale or stamping agent audit, the Department will verify that the stamping agent is making tax exempt sales only to holders of a valid sales tax exemption certificate. The stamping agent is assessed sales tax if tax exempt sales of cigarettes have been made to a retail dealer that does not hold a Form ST-10C exemption certificate issued by the Department.

Any list of retailers based on Form ST-10C filings is incomplete because it lacks retailers who did not apply for an exemption certificate. Also, the exemption is limited to cigarette retailers and does not cover sellers of other tobacco products, like cigar, pipe and vape shops, that do not also sell cigarettes. The Department may have information about some, but not all, of these retailers, because in some cases they are also considered distributors. A retailer who makes all of its purchases of tobacco products from distributors is not required to register with the Department.

Further, the Form ST-10C exemption certificate process is not retail licensing. It simply allows retailers to purchase cigarettes exempt from sales tax. It does not give them authorization to sell cigarettes. Any person can purchase and sell cigarettes without an exemption certificate. As noted above, the Department plays no role in the enforcement of state and federal laws banning the sale of tobacco products to youths.

Estimated Cost of Inspections

As a part of this study, the Department reached out to ABC for information about their current inspection program and how it would need to change if retail tobacco licensing, as proposed in House Bill 2164, were established. Currently, for purposes of verifying compliance with alcohol laws, ABC does inspections of retailers to verify that they have a manager on duty, that the ownership of the business is correct, and that they have inventory to support their license. These are relatively routine inspections. ABC also conducts a limited number inspections involving underage buyer checks for tobacco, which are more involved and cost between \$140 and \$160 per check. DBHDS reimburses ABC for these age verification checks, which ABC is able to perform with its current resources. ABC indicated, however, that it could not do the 4,000 to 8,000 inspections per year proposed by DBHDS with its current resources. Further, retail stores that sell nicotine vapor products and some tobacco stores that sell tobacco and not alcohol are not currently licensed by ABC, so these stores would need to be identified and inspected.

ABC provided the Department with an updated estimate of costs based on information regarding the number of tobacco products retailers in Virginia provided by DBHDS. These costs are an update to the costs reflected in the Fiscal Impact Statement for 2021 House Bill 2164 (see Appendix K). ABC projects that, if the proposed retail licensing program is implemented in Fiscal Year 2023, ABC would incur costs of \$2,838,833 in Fiscal Year 2023 and \$1,979,433 annually in Fiscal Year 2024 and thereafter. These costs include the staffing costs of hiring an additional 7 license record technicians (\$501,725 annually) and 12 special agents (initial cost of \$1,962,108 in FY 2023 with an ongoing cost of \$1,377,708 annually thereafter). The initial cost for special agents in FY 2023 includes equipment and training costs of \$584,400. In addition, these cost estimates include an initial technology cost of \$375,000 in FY 2023 and ongoing technology costs of \$100,000 annually in FY 2024 and thereafter. See the table below for a summary of these costs.

	FY 2023	FY 2024 (and After)
Special Agents (\$114,809 x 12 Positions)	\$ 1,377,708	\$ 1,377,708
License Records Techs (\$71,675 x 7 Positions)	\$ 501,725	\$ 501,725
Special Agent Training and Equipment (\$48,700 x 12 Positions)	\$ 584,400	-
Technology Costs (\$375,000 Start-up; \$100,000 Ongoing)	\$ 375,000	\$ 100,000
Total	\$ 2,838,833	\$ 1,979,433

Stakeholder Perspectives

This study focused on comments and insights from parties interested in retail tobacco licensing in Virginia. Comments were solicited from stakeholders. Those comments and input, along with research conducted by Department, form the basis of this report. Following is a summary of interested parties' comments.

Position of Organizations that Focus on the Prevention of Underage Smoking and Tobacco Use

Comments for this study were submitted jointly by the American Cancer Society, the American Lung Association, Preventing Tobacco Addiction Foundation/Tobacco 21, the American Heart Association, the Medical Society of Virginia, and Tobacco Free Alliance of Virginia (TFAV). See Appendix F. From their perspective, Tobacco Retail Licensing ("TRL") enables states to monitor tobacco sales, fund compliance efforts, and create effective penalty structures for sales violations. They assert that TRL protects retailers who obey the law by identifying and penalizing those who do not.

These stakeholders stated that a licensing program can fund enforcement through annual license fees that are paid by the retailer. Virginia is one of eight states that does not require tobacco retailers to obtain any form of TRL. As a consequence of this, Virginia risks losing more than \$4 million per year in federal block grants because the federal Synar Amendment requires states to demonstrate a Retailer Violation Rate (RVR) of no higher than 20 percent or risk losing federal funding. In Virginia, there is no required number of inspections in the current law. Further, these organizations expressed that TRL can reduce youth initiation to tobacco, including e-cigarettes, by improving compliance. They stated that 80% of Virginia adults surveyed believe stores should be licensed to sell tobacco, including e-cigarette products.

Convenience Retailers' Position

The Convenience and Petroleum Marketers Association believes that a licensure program would place additional and unnecessary administrative burdens on small businesses that are trying to recover from the COVID-19 pandemic. See Appendix D. Likewise, the Virginia Asian American Store Owners Association (VAASOA), a trade association representing over 8,300 convenience store owners and gas station operators across Virginia posits that Virginia already has penalties and deterrents to prevent tobacco from being sold to minors. VAASOA also asserts that the proposed tobacco license is duplicative of Virginia's ST-10C Cigarette Resale Exemption Certificate process. They believe the process for applying for an ST-10C exemption certificate is thorough and well-monitored because Virginia's current cigarette sales tax exemption process includes submitting detailed information to the state, and the state can revoke the exemption for failing to comply with the law. The VAASOA is also concerned that the proposed 2021 legislation did not consider the transfer of licenses, which could affect the sale of businesses between parties. The VAASOA suggested that other aspects, including how fines are administered and the degree to which retailers should be held responsible for the illegal activities of others, should be further explored and well-defined. See Appendix E.

Retailers contend that the General Assembly has considered retail tobacco licensing proposals on multiple occasions and has declined to take action on this issue. Data on the most recent round of ABC inspections is incomplete because inspections were paused in 2020 due to the COVID-19 pandemic. Convenience retailers stated that the best way to stop underage sales is to restart inspections to find violators and bring them into compliance. See Appendix D.

Vapor Products Retailers' Position

Retailers of vapor products would prefer that, rather than implementing an additional and potentially costly licensing requirement on tobacco retailers, the focus should be on strengthening the Tobacco 21 legislation by increasing the penalties imposed for every violation. In addition, the Virginia Smoke Free Association (VSFA) is concerned about the cost of implementing retail licensing as envisioned in House Bill 2164. During public hearings on the bill, it was suggested that the cost to ABC may exceed \$8 million. VSFA stated that these funds could be used for other priorities. Furthermore, retail vapor products stores indicated that they are still adjusting to the \$0.066/ml wholesale tax on liquid nicotine, which became effective July 1, 2020. See Appendix G.

Findings

After conducting research and reaching out to parties interested in the licensing of tobacco retailers, the Department makes the following findings:

1. Virginia is one of eight states that does not require a license in order to sell cigarettes at retail.
2. Virginia ABC last had a contract with the FDA to conduct tobacco age verification compliance audits in 2018. The FDA contract is now being fulfilled by Computer Evidence Specialists, LLC.
3. Under contract with Virginia DBHDS, Virginia ABC conducts Synar underage compliance checks of tobacco retailers throughout the Commonwealth.
4. Failure to maintain a noncompliance rate for tobacco retailers of less than twenty percent jeopardizes ten percent of the annual Substance Abuse Block Grants. In Virginia, this equates to over \$4 million. Synar Retailer Violation Rates (RVRs) have been increasing recently, from 9.5 percent in 2016 to 16.8 percent in 2019. According to DBHDS, the 2019 compliance checks for Synar were completed prior to Tobacco 21 taking effect. Had they been completed after, the RVR would likely have been higher. Synar compliance checks were not conducted in 2020 due to COVID-19, meaning that two years have passed since the passage of Tobacco 21 without significant enforcement. Given the lack of enforcement, DBHDS states that it is likely the RVR will pass the 20 percent threshold, thereby putting the state at risk of losing SABG money.
5. ABC provided the Department with an updated estimate of costs based on information provided by DBHDS. ABC projects that, if the proposed retail licensing program is implemented in Fiscal Year 2023, ABC would incur costs of \$2,838,833 in Fiscal Year

2023 and \$1,979,433 annually in Fiscal Year 2024 and thereafter. These costs include the staffing costs of hiring an additional 7 license record technicians and 12 special agents, as well as equipment, training, and technology costs.

6. The Department of Taxation audits retailers with regard to their compliance with applicable cigarette tax laws, but not regarding youth tobacco laws.
7. During the application process for a sales and use tax exemption, retailers are subject to a criminal history background check, a tax compliance check, and a retail site inspection. Retailers are not required to obtain an exemption but must pay sales and use tax if not exempt, so not all retailers go through this application process.
8. The Form ST-10C Retail Sales and Use Tax exemption administered by the Department allows retailers to purchase cigarettes exempt from sales tax. It does not give them authorization to sell cigarettes, neither does it restrict retail sales of cigarettes if a retailer does not have an exemption.

Appendix A
2021 SESSION

HOUSE BILL NO. 2164
Offered January 13, 2021
Prefiled January 12, 2021

A BILL to amend and reenact ~~§ 4.1-116, 18.2-371.2, 18.2-391, 22.1-79.5, 22.1-206, 22.1-279.6, and 59.1-293.10~~ of the Code of Virginia and to amend the Code of Virginia by adding in Title 4.1 a chapter numbered 6, consisting of sections numbered ~~4.1-600~~ through ~~4.1-605~~, relating to tobacco retail licensing; penalties.

Patrons-- Hope, Kory and Willett; Senator: Hashmi

Referred to Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That ~~§ 4.1-116, 18.2-371.2, 18.2-391, 22.1-79.5, 22.1-206, 22.1-279.6, and 59.1-293.10~~ of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Title 4.1 a chapter numbered 6, consisting of sections numbered ~~4.1-600~~ through ~~4.1-605~~, as follows:

~~§ 4.1-116.~~ Disposition of moneys collected by Board; creation of Enterprise Fund and Tobacco Retail Administration Subfund; reserve fund.

A. 1. All moneys collected by the Board shall be paid directly and promptly into the state treasury, or shall be deposited to the credit of the State Treasurer in a state depository, without any deductions on account of salaries, fees, costs, charges, expenses, refunds or claims of any description whatever, as required by ~~§ 2.2-1802~~.

2. All moneys so paid into the state treasury, less the net profits determined pursuant to subsection C, shall be set aside as and constitute an Enterprise Fund, subject to appropriation, for the payment of (i) the salaries and remuneration of the members, agents, and employees of the Board and; (ii) all costs and expenses incurred in establishing and maintaining government stores and in the administration of the provisions of this title, including the purchasing, building, leasing and operation of distilleries and the manufacture of alcoholic beverages; and (iii) all direct and indirect costs and expenses incurred in the administration of licenses and enforcement of laws under Chapter 6 (~~§ 4.1-600 et seq.~~), which shall be accounted for from the Tobacco Retail Administration Subfund as provided in subdivision 3.

3. There is hereby created in the state treasury, as a subfund of the Enterprise Fund, a special nonreverting fund to be known as the Tobacco Retail Administration Subfund, referred to in this section as "the Subfund." The Subfund shall be established on the books of the Comptroller. The Subfund shall consist of all funds appropriated to it pursuant to subdivision 2. Interest earned on moneys in the Subfund shall remain in the Subfund and be credited to it. Any moneys remaining in the Subfund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Subfund. Moneys in the Subfund shall be used solely for the purposes of funding the Department's direct and indirect costs of the administration of licenses and enforcement of laws under Chapter 6 (~~§ 4.1-600 et seq.~~), including the administrative costs of reviewing applications, issuing licenses, education and training, and any other requirements of Chapter 6. Expenditures and disbursements from the Subfund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Chief Executive Officer of the Authority.

B. The net profits derived under the provisions of this title shall be transferred by the Comptroller to the general fund of the state treasury quarterly, within fifty days after the close of each quarter or as otherwise provided in the appropriation act. As

allowed by the Governor, the Board may deduct from the net profits quarterly a sum for the creation of a reserve fund not exceeding the sum of \$2.5 million in connection with the administration of this title and to provide for the depreciation on the buildings, plants and equipment owned, held or operated by the Board.

C. The term "net profits" as used in this section means the total of all moneys collected by the Board less all costs, expenses and charges authorized by this section.

**CHAPTER 6.
REGISTRATION AND RESTRICTIONS FOR TOBACCO RETAILERS.**

§ 4.1-600. Definitions.

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

"Electronic smoking device" means the same as such term is defined in § 18.2-371.2.

"Licensee" means a person who has obtained a license from the Authority pursuant to the provisions of this chapter.

"Person" means any natural person.

"Tobacco product" means the same as such term is defined in § 18.2-371.2.

"Tobacco retailer" means any person, partnership, joint venture, society, club, trustee, trust, association, organization, or corporation that owns, operates, or manages any tobacco retail establishment. "Tobacco retailer" does not include nonmanagement employees of a tobacco retail establishment.

"Tobacco retail establishment" means any place of business where tobacco products are available for sale to the general public, including any grocery store, tobacco product shop, kiosk, convenience store, gasoline service station, bar, or restaurant where tobacco products are available for sale to the general public.

§ 4.1-601. Disposition of moneys collected by the Authority.

All moneys collected by the Authority under this chapter shall be paid into the state treasury according to the provisions of §§ 4.1-101.06 and 4.1-116.

§ 4.1-602. License required for sale of tobacco products at retail; civil penalties.

A. No tobacco retailer shall operate a tobacco retail establishment, conduct business as a tobacco retailer, or otherwise sell or offer to sell tobacco products at retail unless such tobacco retailer has obtained a license from the Authority pursuant to this chapter.

B. Any tobacco retailer that violates this section shall be subject to a civil penalty, to be assessed and collected by the Authority, for each violation of \$500 for a first offense and \$1,000 for a second or subsequent offense within a 36-month period. Any tobacco retailer that violates this section shall be ineligible to obtain a license from the Authority pursuant to this chapter for a period of three years from the date of such tobacco retailer's most recent violation.

§ 4.1-603. Application for license; penalty.

A. Any tobacco retailer may apply for a license to operate a tobacco retail establishment and conduct business as a licensee according to forms and procedures prescribed by the Authority. The Authority shall require a separate license for each location or place of business. The application forms shall require the following information:

- 1. The name and address of the applicant; if the applicant is a firm, partnership, or association, the name and address of each of its members; if the applicant is a corporation, the name and address of each of its principal officers;**
- 2. The address of the applicant's principal place of business;**
- 3. The address of the place or places where the business to be licensed is to be conducted; and**
- 4. Any other information as the Authority may require for the purpose of the administration of this chapter.**

B. The application process shall require an applicant to participate in, and provide for its employees, education related to tobacco products as provided in § 4.1-605.

C. 1. Upon receipt of an application in proper form, the Authority shall, unless otherwise provided by this chapter, issue to the applicant a license authorizing the licensee to sell and offer to sell tobacco products at retail. Each license, or a copy thereof, shall be prominently displayed in the place of business covered by the license. No license shall be transferable to any other person.

2. The Authority may deny an application for a license if it determines the applicant has, within five years of its date of application, violated a federal, state, or local law related to the sale of tobacco products.

D. Unless an applicant or licensee maintains a registered agent pursuant to Chapter 9 (§ 13.1-601 et seq.), 10 (§ 13.1-801 et seq.), 12 (§ 13.1-1000 et seq.), or 14 (§ 13.1-1200 et seq.) of Title 13.1 or Chapter 2.1 (§ 50-73.1 et seq.) or 2.2 (§ 50-73.79 et seq.) of Title 50, the applicant or licensee shall be deemed to have appointed the clerk of the State Corporation Commission as the applicant's or licensee's agent for the purpose of service of process relating to any matter or issue involving the applicant or licensee and arising under the provisions of this chapter.

E. Licenses issued pursuant to this section shall be valid for one year from the date of issue unless revoked by the Authority. The Authority may revoke a license if a licensee fails to pay a penalty due under the provisions of this chapter or a tax due under the provisions of Title 58.1.

F. The Authority shall compile and maintain a current list of licensees. The list shall be updated on a semiannual basis and published on the Authority's website.

§ 4.1-604. Revocation of licenses; restrictions on the sale of tobacco products to persons under 21 years of age; penalties.

A. A licensee shall be required to comply with the provisions of this chapter; § 18.2-246.8, 18.2-246.10, and 18.2-371.2; and any other federal, state, or local law related to the sale of tobacco products. If the Authority determines that a licensee has violated any such provision of law, the Authority may revoke its license.

B. 1. If the Authority determines that a licensee violated § 18.2-371.2, the Authority shall impose and the licensee shall be subject to (i) a civil penalty of \$500 for a first offense, (ii) a civil penalty of \$1,000 for a second offense within 36 months, (iii) a civil penalty of \$1,500 and a suspension of the licensee's license for 15 days for a third offense within 36 months, and (iv) a

civil penalty of \$2,000, a revocation of the licensee's license, and a prohibition imposed on such person from applying for a license pursuant to this chapter for a period of three years for a fourth or subsequent offense within 36 months.

2. If the Authority determines that a licensee's agent or employee acting in his capacity as such licensee's agent or employee violated § 18.2-371.2, the Authority shall impose and such agent or employee shall be subject to a civil penalty of \$50 for each offense.

C. Any person on whom the Authority imposes a penalty pursuant to this section shall not be subject to penalty for the same offense under § 18.2-371.2 if such person is a licensee or a licensee's agent or employee acting in his capacity as such licensee's agent or employee.

§ 4.1-605. Required education for licensees and employees.

Any tobacco retailer that applies for a license and any licensee shall be required to attest that it has conducted education and training for its employees related to:

1. The provisions of this chapter;

2. The prohibitions on the sale of tobacco products to persons under age 21 and other restrictions prescribed by § 18.2-246.8, 18.2-246.10, and 18.2-371.2;

3. Forms of identification that are acceptable as proof of age; and

4. The legal penalties that may be incurred for violation of the provisions of law identified in subdivisions 1 and 2.

§ 18.2-371.2. Prohibiting sale or distribution of tobacco products and hemp products intended for smoking to persons under 21 years of age; penalty.

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, alternative nicotine product,~~ or hemp product intended for smoking.

~~Tobacco products, nicotine vapor products, alternative nicotine products, and hemp products intended for smoking may be sold. No person shall sell tobacco products or hemp products intended for smoking 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 such products by persons under 21 years of age is unlawful and (ii) located in a place that is not open to the general public and is not generally accessible to persons under 21 years of age. An establishment that prohibits the presence of persons under 21 years of age unless accompanied by a person 21 years of age or older is not open to the general public.~~

~~B. No person less than 21 years of age shall attempt to purchase, purchase, or possess any tobacco product, nicotine vapor product, alternative nicotine product, or hemp product intended for smoking. The provisions of this subsection shall not be applicable to the possession of tobacco products, nicotine vapor products, alternative nicotine products, or hemp products intended for smoking by a person less than 21 years of age (i) making a delivery of tobacco products, nicotine vapor products, alternative nicotine products, or hemp products intended for smoking in pursuance of his employment or (ii) as part of a scientific study being conducted by an organization for the purpose of medical research to further efforts in cigarette and tobacco use prevention and cessation and tobacco product regulation, provided that such medical research has been approved by an institutional review board pursuant to applicable federal regulations or by a research review committee~~

~~pursuant to Chapter 5.4 (32.1-162.16 et seq.) of Title 32.4. 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-B. No person shall sell a tobacco product, nicotine vapor product, alternative nicotine product, or hemp product intended for smoking 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 21 years of age. Such identification is not required from an individual whom the person has reason to believe is at least 21 years of age or who the person knows is at least 21 years of age. Proof that the person demanded, was shown, and reasonably relied upon a photo identification stating that the individual was at least 21 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 21 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. No such verification shall be required if such individual is at least 30 years of age. It shall not be a defense to a violation of this subsection that a purchaser appeared to be at least 30 years of age. If a buyer misrepresents his age through use of false identification, a licensee, as defined in 4.1-600, or such licensee's agent or employee acting in his capacity as such licensee's agent or employee, may assert as an affirmative defense to a violation of this section that such licensee, agent, or employee reasonably relied on such proof of age, provided that such licensee, agent, or employee carefully checked a driver's license, a passport, or an identification card issued by the Commonwealth or any state of the United States, and such licensee, agent, or employee acted in good faith and in reliance upon the representation that the buyer was at least 21 years of age.~~

~~This subsection shall not apply to mail order or Internet sales, provided that the person offering the tobacco product, nicotine vapor product, alternative nicotine product, or hemp product intended for smoking for sale through mail order or the Internet (i) prior to the sale of the tobacco product, nicotine vapor product, alternative nicotine product, or hemp product intended for smoking verifies that the purchaser is at least 21 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 signature of a person at least 21 years of age before the tobacco product, nicotine vapor product, alternative nicotine product, or hemp product intended for smoking will be released to the purchaser.~~

~~D. The provisions of subsections B and C shall not apply to the sale, giving, or furnishing of any tobacco product, nicotine vapor product, alternative nicotine product, or hemp product intended for smoking to any active-duty military personnel who are 18 years of age or older. An identification card issued by the Armed Forces of the United States shall be accepted as proof of age for this purpose.~~

~~E. 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, hemp product intended for smoking, 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.~~

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

~~A violation of subsection B is punishable by a civil penalty not to exceed \$100 for a first violation and a civil penalty not to exceed \$250 for a second or subsequent violation. A court may, as an alternative to the civil penalty, and upon motion of the~~

~~defendant, prescribe the performance of up to 20 hours of community service for a first violation of subsection B and up to 40 hours of community service for a second or subsequent violation. If the defendant fails or refuses to complete the community 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, or B, ~~or C.~~

~~F-D.~~ 1. Cigarettes and hemp products intended for smoking 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, alternative nicotine product,~~ or hemp product intended for smoking shall post in a conspicuous manner and place a sign or signs indicating that the sale of tobacco products, ~~nicotine vapor products,~~ ~~alternative nicotine products,~~ or hemp products intended for smoking to any person under 21 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.

~~G-E.~~ Nothing in this section shall be construed to create a private cause of action.

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

~~I-G.~~ 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 toburni leaf (diospyros melanoxylon) or tondu leaf (diospyros exculpra), or any other product that is offered to, or purchased by, consumers as a bidi or beedie.~~

~~"Electronic smoking device" means any device that may be used to deliver any aerosolized or vaporized substance to the person inhaling from the device, including an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah. "Electronic smoking device" includes any component, part, or accessory of the device, whether or not sold separately, and also includes any substance intended to be aerosolized or vaporized during the use of the device, whether or not the substance contains nicotine.~~

~~"Electronic smoking device" does not include any battery or battery charger when sold separately. "Electronic smoking device" does not include drugs or devices, as such terms are defined in 21 U.S.C. § 321, or combination products, as such term is~~

used in 21 U.S.C. § 353, if such drugs, devices, or combination products are authorized for sale by the U.S. Food and Drug Administration.

"Hemp product" means the same as that term is defined in § 3.2-4112.

~~"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 (i) any product containing, made of, or derived from tobacco or that contains nicotine that is intended for human consumption or is likely to be consumed, whether smoked, heated, chewed, dissolved, inhaled, absorbed, or ingested by any other means, including a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus; (ii) any electronic smoking device and any substances that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine; and includes cigarettes, cigars, smokeless tobacco, pipe tobacco, bidis, and wrappings (iii) any component, part, or accessory of a product described in clause (i) or (ii), whether or not such component, part, or accessory contains tobacco or nicotine, including filters, rolling papers, blunt or hemp wraps, and pipes. "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 drugs or devices, as such terms are defined in 21 U.S.C. § 321, or combination products, as such term is used in 21 U.S.C. § 353, if such drugs, devices, or combination products are authorized for sale by the U.S. Food and Drug Administration.

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

§ 18.2-391. Unlawful acts; penalties.

A. It shall be unlawful for any person to sell, rent or loan to a juvenile, knowing or having reason to know that such person is a juvenile, or to knowingly display for commercial purpose in a manner whereby juveniles may examine and peruse:

1. Any picture, photography, drawing, sculpture, motion picture in any format or medium, video or computer game, electronic file or message containing an image, or similar visual representation or image of a person or portion of the human body which depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles; or
2. Any book, pamphlet, magazine, printed matter however reproduced, electronic file or message containing words, or sound recording which contains any matter enumerated in subdivision 1 of this subsection, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse and which, taken as a whole, is harmful to juveniles.

However, if a person uses services of an Internet service provider or an electronic mail service provider in committing acts prohibited under this subsection, such Internet service provider or electronic mail service provider shall not be held responsible for violating this subsection.

B. It shall be unlawful for any person knowingly to sell to a juvenile an admission ticket or pass, or knowingly to admit a juvenile to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts

sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles or to exhibit any such motion picture at any such premises which are not designed to prevent viewing from any public way of such motion picture by juveniles not admitted to any such premises.

C. It shall be unlawful for any juvenile falsely to represent to any person mentioned in subsection A or subsection B hereof, or to his agent, that such juvenile is 18 years of age or older, with the intent to procure any material set forth in subsection A, or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection B.

D. It shall be unlawful for any person knowingly to make a false representation to any person mentioned in subsection A or subsection B hereof or to his agent, that he is the parent or guardian of any juvenile, or that any juvenile is 18 years of age, with the intent to procure any material set forth in subsection A, or with the intent to procure such juvenile's admission to any motion picture, show or other presentation, as set forth in subsection B.

E. No person shall sell, rent, or loan any item described in subdivision A 1 or A 2 to any individual who does not demonstrate his age in accordance with the provisions of subsection C of ~~§ 18.2-371.2~~ of § 18.2-371.2.

F. A violation of subsection A, B, C, or D is a Class 1 misdemeanor. A person or separate retail establishment who violates subsection E shall be liable for 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.

§ 22.1-79.5. Policy regarding tobacco products.

Each school board shall develop and implement a policy to prohibit, at any time, the use and distribution of any tobacco product ~~or nicotine vapor product, as these terms are defined in § 18.2-371.2~~, on a school bus, on school property, or at an on-site or off-site school-sponsored activity.

Such policy shall include (i) provisions for its enforcement among students, employees, and visitors, including the enumeration of possible sanctions or disciplinary action consistent with state or federal law, and (ii) referrals to resources to help staff and students overcome tobacco addiction.

Each school board shall work to ensure adequate notice of this policy.

§ 22.1-206. Instruction concerning drugs, alcohol, substance abuse, and tobacco products.

A. Instruction concerning drugs and drug abuse shall be provided by the public schools as prescribed by the Board of Education.

B. Instruction concerning the public safety hazards and dangers of alcohol abuse, underage drinking, and drunk driving shall be provided in the public schools. The Virginia Alcoholic Beverage Control Authority shall provide educational materials to the Department of Education. The Department of Education shall review and shall distribute such materials as are approved to the public schools.

C. The Virginia Foundation for Healthy Youth shall develop and the Department of Education shall distribute to each local school division educational materials concerning the health and safety risks of using tobacco ~~products, nicotine vapor products, and alternative nicotine products, as such terms are defined in § 18.2-371.2~~. Instruction concerning the health and safety risks of using tobacco products, ~~nicotine vapor products, and alternative nicotine products, as such terms are defined in~~

¶ **18.2-371.2**, shall be provided in each public elementary and secondary school in the Commonwealth, consistent with such educational materials.

¶ **22.1-279.6**, Board of Education guidelines and model policies for codes of student conduct; school board regulations.

A. The Board of Education shall establish guidelines and develop model policies for codes of student conduct to aid local school boards in the implementation of such policies. The guidelines and model policies shall include (i) criteria for the removal of a student from a class, the use of suspension, expulsion, and exclusion as disciplinary measures, the grounds for suspension and expulsion and exclusion, and the procedures to be followed in such cases, including proceedings for such suspension, expulsion, and exclusion decisions and all applicable appeals processes; (ii) standards, consistent with state, federal and case laws, for school board policies on alcohol and drugs, gang-related activity, hazing, vandalism, trespassing, threats, search and seizure, disciplining of students with disabilities, intentional injury of others, self-defense, bullying, the use of electronic means for purposes of bullying, harassment, and intimidation, and dissemination of such policies to students, their parents, and school personnel; (iii) standards for in-service training of school personnel in and examples of the appropriate management of student conduct and student offenses in violation of school board policies; (iv) standards for dress or grooming codes; and (v) standards for reducing bias and harassment in the enforcement of any code of student conduct.

In accordance with the most recent enunciation of constitutional principles by the Supreme Court of the United States of America, the Board's standards for school board policies on alcohol and drugs and search and seizure shall include guidance for procedures relating to voluntary and mandatory drug testing in schools, including which groups may be tested, use of test results, confidentiality of test information, privacy considerations, consent to the testing, need to know, and release of the test results to the appropriate school authority.

In the case of suspension and expulsion, the procedures set forth in this article shall be the minimum procedures that the school board may prescribe.

B. School boards shall adopt and revise, as required by ¶ **22.1-253.13:7** and in accordance with the requirements of this section, regulations on codes of student conduct that are consistent with, but may be more stringent than, the guidelines of the Board. School boards shall include in the regulations on codes of student conduct procedures for suspension, expulsion, and exclusion decisions and shall biennially review the model student conduct code to incorporate discipline options and alternatives to preserve a safe, nondisruptive environment for effective teaching and learning.

C. Each school board shall include in its code of student conduct prohibitions against hazing and profane or obscene language or conduct. School boards shall also cite in their codes of student conduct the provisions of ¶ **18.2-56**, which defines and prohibits hazing and imposes a Class 1 misdemeanor penalty for violations, that is, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.

D. Each school board shall include in its code of student conduct policies and procedures that include a prohibition against bullying. Such policies and procedures shall (i) be consistent with the standards for school board policies on bullying and the use of electronic means for purposes of bullying developed by the Board pursuant to subsection A and (ii) direct the principal to notify the parent of any student involved in an alleged incident of bullying of the status of any investigation within five school days of the allegation of bullying.

Such policies and procedures shall not be interpreted to infringe upon the First Amendment rights of students and are not intended to prohibit expression of religious, philosophical, or political views, provided that such expression does not cause an actual, material disruption of the work of the school.

E. A school board may regulate the use or possession of beepers or other portable communications devices and laser pointers by students on school property or attending school functions or activities and establish disciplinary procedures pursuant to this article to which students violating such regulations will be subject.

F. Nothing in this section shall be construed to require any school board to adopt policies requiring or encouraging any drug testing in schools. However, a school board may, in its discretion, require or encourage drug testing in accordance with the Board of Education's guidelines and model student conduct policies required by subsection A and the Board's guidelines for student searches required by § 22.1-279.7.

G. The Board of Education shall establish standards to ensure compliance with the federal Improving America's Schools Act of 1994 (Part F-Gun-Free Schools Act of 1994), as amended, in accordance with § 22.1-277.07.

This subsection shall not be construed to diminish the authority of the Board of Education or to diminish the Governor's authority to coordinate and provide policy direction on official communications between the Commonwealth and the United States government.

H. Each school board shall include in its code of student conduct a prohibition on possessing any tobacco ~~product or nicotine vapor product~~, as ~~these terms are~~ defined in § 18.2-371.2, on a school bus, on school property, or at an on-site or off-site school-sponsored activity.

I. Any school board may include in its code of student conduct a dress or grooming code. Any dress or grooming code included in a school board's code of student conduct or otherwise adopted by a school board shall (i) permit any student to wear any religiously and ethnically specific or significant head covering or hairstyle, including hijabs, yarmulkes, headwraps, braids, locs, and comrows; (ii) maintain gender neutrality by subjecting any student to the same set of rules and standards regardless of gender; (iii) not have a disparate impact on students of a particular gender; (iv) be clear, specific, and objective in defining terms, if used; (v) prohibit any school board employee from enforcing the dress or grooming code by direct physical contact with a student or a student's attire; and (vi) prohibit any school board employee from requiring a student to undress in front of any other individual, including the enforcing school board employee, to comply with the dress or grooming code.

§ 59.1-293.10. 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.

"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 58.1-1021.01.

Appendix B



APPROPRIATIONS COMMITTEE
13TH FLOOR, POCAHONTAS BUILDING
CAPITOL SQUARE
POST OFFICE 406
RICHMOND, VIRGINIA 23218
804-698-1590

COMMONWEALTH OF VIRGINIA
HOUSE OF DELEGATES
RICHMOND

LUKE E. TORIAN, CHAIRMAN
ANNE E. OMAN, STAFF DIRECTOR

March 8, 2021

Dear Commissioner Burns:

During the 2021 Session of the General Assembly, the House Committee on Appropriations Subcommittee on Transportation and Public Safety voted to table:

- **HB 2164 (Hope) Tobacco**; prohibits person from selling product at retail without license from ABC Authority.

In doing so, the Subcommittee also supported a request that you study the issues raised by the bill in order to assess the feasibility and costs associated with the creation of licensure for tobacco retailers to prevent the selling of tobacco products to underage individuals.

In conducting the study, the Subcommittee and patron would request that you consult representatives of the Virginia Alcoholic Beverage Control Authority; Virginia Petroleum and Convenience Marketers Association; the Cigar Association of Virginia; Virginia Smoke Free Association; Tobacco 21; American Cancer Society; and, other appropriate stakeholders you may identify.

As Chairman of the House Committee on Appropriations, I am writing to so request.

Sincerely,

A handwritten signature in black ink that reads "Luke E. Torian".

The Honorable Luke E. Torian

CC:
The Honorable Patrick A. Hope
The Honorable Paul E. Krizek

Appendix C



COMMONWEALTH of VIRGINIA

ALISON G. LAND, FACHE
COMMISSIONER

DEPARTMENT OF
BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES
Post Office Box 1797
Richmond, Virginia 23218-1797

Telephone (804) 786-3921
Fax (804) 371-6638
www.dbhds.virginia.gov

June 29, 2021

TO: Virginia Department of Taxation, Office of Tax Policy

FROM: Alison Land, FACHE - Commissioner, Department of Behavioral Health and Developmental Services

RE: 2021 House Bill 2164 - Retail Tobacco Licensing

Summary of Comments

- Compliance with tobacco laws restricting the sale of tobacco to individuals under 21 is critical to Virginia's receipt of Substance Abuse Block Grant dollars. In Virginia, this equates to over \$4 million in federal funds going to essential community substance use services.
- Currently, there is no comprehensive list of tobacco retailers in Virginia, nor is there enforcement of tobacco regulations. This puts federal substance use dollars in jeopardy.
- A tobacco retail license law, such as HB2164, paired with funding for enforcement of tobacco laws, is critical to maintaining these federal substance use dollars.

Background

In 1992, the Federal Government passed the "Synar Amendment", which requires states to enact and enforce laws prohibiting any manufacturer, retailer, or distributor of tobacco products from selling or distributing such products to any individual younger than age 18.

- With the passing of the both the State and Federal "Tobacco 21" laws, the age of compliance has been increased to 21.
- States must conduct annual, unannounced inspections that provide a valid probability sample of tobacco sales outlets accessible to minors and achieve a noncompliance rate (RVR) of no more than 20%.

- ***Failure to maintain an RVR of less than twenty percent jeopardizes 10% of the annual Substance Abuse Block Grants (SABG) through SAMHSA. In Virginia, this equates to over \$4 million.***

In Virginia, Synar Retailer Violation Rates (RVRs) have been on the increase since 2016 going from 9.5% to 16.8% in 2019.

- It is important to note that the 2019 compliance checks for Synar were completed prior to Tobacco 21 taking effect. Had they been completed after, the RVR would likely have been higher.
- Synar compliance checks, along with FDA, were not conducted in 2020 due to COVID-19 meaning it's been two years since the passage of Tobacco 21 without any enforcement. Given the lack of enforcement, in addition to the economic stressors COVID-19 has placed on retailers, it is likely the RVR will pass the 20% threshold therefore putting the state at risk of losing SABG money.

Virginia is one of only eight states in the nation that does not require retailers to obtain a tobacco retail license, and there is currently no comprehensive list of tobacco and nicotine retailers in Virginia.

- Since 2016, DBHDS has been collaborating with the Community Services Boards (CSBs) to compile a comprehensive list of all tobacco/nicotine retailers. This initially began with staff driving every primary and secondary road in each catchment area to identify every retailer. The process was expensive and time-consuming, not to mention not sustainable on an ongoing basis.
- This list is updated over the course of every two years when the CSBs conduct merchant education and store assessment to every identified retailer. New retailers are added to the list, and any changes to existing retailers are noted in the database.
- Unfortunately, in our last coverage study, conducted in 2018, our list accuracy was only 87.9 percent. This means DBHDS is missing nearly 1,000 retailers who are not factored into compliance efforts.

Potential Impact of HB2164

Comprehensive tobacco retail licensing laws, such as HB2164, are an effective strategy to decrease youth retail access to tobacco and nicotine products and reduce youth initiation of use.

- Evidence shows that strong tobacco retail licensing laws can help reduce sales to underage youth. Across 33 California communities, sales to underage youth dropped by an average of 26 percent after implementation of a strong tobacco retailer licensing law.¹ In Minnesota, a study found that daily smoking among young adolescents dropped by 28 percent in 14 communities

¹ California Department of Health Services Food and Drug Branch Compliance Checks. (2003)

that implemented comprehensive tobacco retailer licensing ordinances, and successful youth purchases dropped from 39 percent to 5 percent.²

- In states with strong tobacco retailer licenses, youth are also less likely to initiate use. In California, for example, youth were 33 percent less likely to have initiated cigarette use and 26 percent less likely to initiate e-cigarette use over the course of 1.5 years compared to localities that had no licensing law or could not cover the costs of enforcement.³ Another study found that in Pennsylvania, youth e-cigarette use dropped significantly following the implementation of licensing for e-cigarette retailers.⁴

Raising the legal age of purchase does not reduce tobacco sales or youth use on its own. They must be enforced in order to be effective. Currently in Virginia, there is no state enforcement program, and federal enforcement does not inspect every retailer.

- With active Synar and FDA programs, roughly 50% of retailers were inspected annually. However, Virginia has not had a comprehensive FDA inspection program since May 2018, and Synar inspections only cover approximately 10 percent of retailers.
- Not every retailer currently receives a compliance check, and many retailers don't get checked for several years, if at all. This makes it difficult to know for certain who is complying with age-of-sale laws and who isn't.

Tobacco retail licensing is recognized as a foundational, comprehensive, regulatory tool that enables states and localities to monitor tobacco sales, fund compliance efforts, and creates effective penalty and suspension structures for repeat violations.

- Most tobacco retail licensing laws include a yearly fee, which generates revenue to help the locality cover the costs of inspection and enforcement of minimum age laws, tax laws, and compliance with the Family Smoking Prevention and Tobacco Control Act.⁵
- They also include stipulations that require adherence to all tobacco laws. And requiring a cost in order to obtain a license can help ensure that monitoring and enforcement costs are sufficiently covered.

² Forster, et al. The effects of community policies to reduce youth access to tobacco. (1998)

³ Astor, et al. Tobacco Retail Licensing and Youth Product Use. (2019)

⁴ Azagba, et al. E-cigarette Retail Licensing Policy and E-cigarette Use Among Adolescents. (2020)

⁵ An overview of the act is available here: <https://www.fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview>



COMMONWEALTH of VIRGINIA

ALISON G. LAND, FACHE
COMMISSIONER

DEPARTMENT OF
BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

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www.dbbds.virginia.gov

September 1, 2021

TO: Virginia Department of Taxation, Office of Tax Policy

FROM: Colleen Hughes, Synar Coordinator, Department of Behavioral Health and Developmental Services

RE: 2021 House Bill 2164 - Retail Tobacco Licensing

FDA Information:

Background: The FDA contract had historically been held by Virginia ABC until May 2018 when the decision was made not to renew it. The contract went unawarded for at least a year before it was awarded to a third party, Computer Evidence Specialists, LLC (CES), in, I believe, late 2019. Since then, the number of inspections have been minimal. When ABC held the contact, we inspected roughly 50% of retailers between FDA and Synar checks. We currently inspect about 10% of tobacco/nicotine retailers.

FDA Inspection Data:

July 1, 2017 – June 30, 2018

3035 total inspections

2506 inspections involving a minor

389 violations involving a minor

July 1, 2018 – June 30, 2019

0 inspections

July 1, 2019 – June 30, 2020

219 total inspections
171 inspections involving a minor
21 violations involving a minor

July 1, 2020 - June 30, 2021

214 total inspections
4 inspections involving a minor
0 violations involving a minor

July 1, 2021 - August 30, 2021

19 total inspections
12 inspections involving a minor
1 violation involving a minor

Since the passing of the Federal Tobacco 21 law on December 20, 2019 (through August 30, 2021)

376 total inspections
111 inspections involving a minor
20 violations involving a minor
5.3% Retailer Violation Rate

***Important to note that the vast majority of violations were for cigars and ENDS**

Additional Synar Information:

Synar Sample - The Synar sample is a simple, statewide, random sample. Some of the variables used to determine the number of retailers to be inspected are the current number of retailers, the previous year's retailer violation rate, and the list accuracy rate based on the most recent coverage study. The sample size for this year's sample was 838 and was based off an outlet frame size of 7520 retailers. The outlet frame size was based off of what we currently have in our Counter Tools database. However, because of a pause in our merchant education/store assessment work, due to a delay in new materials and then COVID, we have not been able to keep our database as current as we would like. We surmise that there are more tobacco/nicotine retailers than what currently reflect in our database. This has unofficially been confirmed based off our most recent coverage study.

Coverage Study – We are required by SAMHSA to conduct a list coverage study on a regular basis to ensure that our retailer list is accurate. The last study, conducted in 2018, revealed an accuracy rate of 87.9%, down from 91.6% in 2013. Because this is below 90%, we are required to conduct this study every 3 years, rather than every 5. This year's (2021) has been conducted and we are awaiting the final calculations. Based on a rudimentary estimate, it looks like the state's list accuracy rate has decreased even further to roughly 82%. It is important to note that if the state's accuracy drops below 80%, we will have to write a corrective action plan.

Retail Violation Rate -- As mentioned previously, the current Retailer Violation Rate is 16.8%. This is based on inspections conducted in 2019, prior to the State's Tobacco 21 law taking effect. Once this rate goes above 20%, the state will incur a penalty of 10% of the total Block Grant (~\$4million). This money will be taken away at the same 80/20 split that it is currently given out. 80% will come from treatment money and 20% will come from prevention money. This is money that the State will be required to replace, so somewhere, the state will need to come up with ~\$4million.

Enforcement – As our state's plan is written, Synar inspections must be separate from all other enforcement activities. This means that FDA inspections cannot be used as compliance checks for Synar and cannot be used to determine the Retailer Violation Rate. If we were to implement an additional enforcement strategy, those inspections would also not be able to be counted toward Synar. However, the more enforcement/compliance checks there are, the lower the Retailer Violation Rate will be because we know that if you are more likely to get caught, you're more likely to obey the law.

Appendix D



Virginia Petroleum and Convenience Marketers Association

1101 Glen Forest Drive, Suite 204, Richmond, VA 23226
(804) 282-1111 www.vpcma.com

BOARD OF DIRECTORS

W. Corey Russell
*Chairman of the Board
Supreme Petroleum - Suffolk*

Mark Anderson
*First Vice Chairman
Anderson Oil - Fredericksburg*

Rick Koontz
*Second Vice Chairman
Holtzman Oil Corp., Mt. Jackson*

Gordon Sutton
*Secretary/Treasurer
Tiger Fuel - Charlottesville*

John Fannon
*Immediate Past Chairman
Fannon Petroleum Services,
Gainesville*

Justin Andress
Woodfin - Richmond

Monty Berhane
Capitol Petroleum - Springfield

Bob Claytor
H.N. Funkhouser, Winchester

Ryan Gray
E.M. Gray & Son, Midford

Ben McClenahan
PAPCO, Virginia Beach

Elizabeth McCormick
*Phillips Energy, Gloucester
Point*

Ron Prewitt
Childers Oil, Big Stone Gap

Stan Terhune
Frederick Northrup, Warsaw

Michael J. O'Connor
President

July 1, 2021

Stephen Klos
Virginia Department of Taxation
Richmond VA 23217
Via electronic mail

Dear Mr. Klos:

Thank you for the opportunity to comment on House bill 2164, legislation considered during the 2021 General Assembly session. Virginia Petroleum and Convenience Marketers Association is a statewide trade association formed in 1948, and is governed by a 13-member Board of Directors, all of whom are Virginia residents.

The Virginia General Assembly has considered and rejected the issue of tobacco licensing on many occasions. In 2020, Virginia considered a bill by Delegate Hope that could have placed untrained individuals in charge of policing tobacco sales in Virginia. We worked with the delegate over the interim to refine the legislation to accomplish his objective of stepped-up inspections conducted by experienced professionals, without the registration fees and other punitive measures contained in the bill.

The advocates for licensing make a strong argument that without oversight and underage buyer programs federal funding for such programs is in jeopardy. They neglect to point out, however, that COVID stopped all in-store inspections. Further, they neglect to state that for the latest round of inspections where we do have data, Virginia's percentage of underage sales was well below the criteria for continued federal funding.

The proponents also fail to acknowledge that since 2019, the world of tobacco retailing in Virginia has changed forever. With the passage of Tobacco 21 legislation that year, the legal age for purchase of tobacco and associated products increased from 18 to 21. VPCMA was pleased to support this legislation. We know from direct conversations with our members and other stakeholders that this legislation has helped lessen the sale of underage sales particularly since persons over 21 have far less interaction with high and middle schoolers.

From the proponents: "VDH, along with American Heart, American Lung, and American Cancer Associations, with support from some

legislators. will be putting in legislation to clean up last year's T21 bill. Included in this cleanup bill are retailer licensing, removal of the military exemption, removal of PL P fine, increase in retailer fines, increase in tobacco tax, and required merchant education and enforcement. T-21 Clean up bill? Hardly."

We also strongly supported bipartisan legislation in the 2017 session that required all sellers of tobacco products to obtain a tobacco exemption certificate and be subject to regulation by the Virginia Department of Taxation. This legislation, now Chapter 58.1-623.2, requires all members to hold a certificate issued by the department and is in fact licensure of all tobacco sellers in Virginia. Instead of recreating a new redundant regulatory mandate and financial burden on our sellers we should all be focused on determining if cigarette exemption certificates are working as envisioned.

We look forward to working with all parties to evaluate the next round of Synar inspections now that the COVID restrictions have been lifted, making locations accessible once again. We believe that those numbers will decrease significantly with the onset of Tobacco 21 in Virginia. If they do not, we would urge continued inspections of violators to assure that they come into compliance. The convenience store industry shares the goal of completely eliminating underage sales. We believe the best avenue to do so is through re-starting compliance checks at the earliest opportunity and then targeting those shown to have made underage sales for further inspection.

Sincerely,



Michael J. O'Connor

Appendix E



July 2, 2021

Commissioner Craig Burns
Virginia Department of Taxation
Post Office Box 27185
Richmond, Virginia 23261 7185

Dear Commissioner Burns,

We are writing in response to a request for comments as part of the stakeholder group to study the feasibility of a licensure program for tobacco retailers. On behalf of our members and small businesses across the Commonwealth, we respectfully oppose the creation of a tobacco license through the Virginia Alcohol Beverage Control Authority.

We are the Virginia Asian American Store Owners Association (VAASOA), a trade association representing over 8,300 convenience store owners and gas station operators across Virginia. We strive to be active members of our community, provide critical services to our customers, and improve our business practices for all who walk through our doors.

We respectfully oppose the creation of a tobacco license program through ABC. A licensure program would place additional unnecessary administrative burdens on small businesses that are already trying desperately to recover from the challenges of the COVID 19 pandemic.

Virginia already has penalties and deterrents to prevent tobacco from being sold to minors, and we do not believe that a tobacco license will necessarily reduce the risk of unintended sales to minors.

VAASOA's convenience store owners are good actors that do not want to sell to minors and are conscious of the risks associated with tobacco products. Stronger penalties, which are included in the legislation, can be added without adding an additional licensure requirement.

VAASOA also believes the proposed tobacco license is duplicative of Virginia's Cigarette Resale Exemption Certificate (ST 10c). The process for applying for an ST 10c exemption certificate is thorough and well monitored. Virginia's current process for obtaining a sales tax exemption for tobacco products includes submitting detailed information to the state, which the state can revoke for failing to comply with the law.

There are a number of issues within the current bill that need to be addressed. For example, the current legislation does not consider the transfer of licenses. This could affect the sale of businesses between parties. Other aspects, including how fines are administered and the degree retailers should be held responsible for the illegal activities of others must be discussed.



If Virginia is going to proceed with consideration of a licensure process, we need a more deliberative stakeholder process that includes in person or virtual discussion and an opportunity to review the bill in detail.

VAASOA looks forwards to contributing to the discussion and reviewing the draft report of the Tax Department.

Sincerely,

Virginia Asian America Store Owners Association

Appendix F

**To: Steve Klos
Office of Tax Policy, Policy Development Division
Virginia Department of Taxation
Richmond, Virginia**

RE: H. 2164 and Tobacco Retail Licensing in Virginia

June 17, 2021 - The undersigned organizations support comprehensive Tobacco Retail Licensing for Virginia and worked with Delegate Patrick Hope on H. 2164 (2021). This information is submitted on behalf of these organizations.

American Cancer Society American Lung Association Preventing Tobacco Addiction Foundation/Tobacco 21

*American Heart Association Medical Society of Virginia
Tobacco Free Alliance of Virginia (TFAV)*

Tobacco Retail Licensing

Tobacco Retail Licensing (“TRL”) is a vital tool that enables states to monitor tobacco sales, fund compliance efforts, and create effective penalty structures for sales violations. Comprehensive TRL laws can reduce youth tobacco initiation and use and ensure all tobacco retailers follow all local, state and federal tobacco laws.¹

The goal of H. 2164 was to establish a Tobacco Retail Licensing program for Virginia that would become the framework for effective enforcement of state and federal age-of-sale (“Tobacco21”) laws, and to enhance retailer penalties to incentivize compliance. Though not specifically addressed in H. 2164, a licensing program can also fund enforcement through annual license fees that are paid by the retailer.

Virginia is one of only eight states that does not require tobacco retailers to obtain any form of Tobacco Retail License.² Without a licensing program, there is no current or comprehensive list of tobacco sellers, including those that sell electronic cigarettes (“e- cigarettes”), making it almost impossible for the Commonwealth to effectively enforce tobacco laws in the retail environment.

Background

Despite progress in reducing tobacco use over the past several decades, 10,300 Virginia adults still die every year from tobacco-related diseases, and 28 percent of cancer deaths in the state are attributable to smoking. Almost 1 in 5 Virginia high school students use e-cigarettes, and 2,300 Virginia kids under 18 become new, daily smokers each year. Annual healthcare costs in Virginia (including Medicaid) are \$3.1 billion.

Every household in Virginia pays \$931 each year for smoking-caused government expenditures.³ Youth who use e-cigarettes (“vape”) are more likely to migrate to traditional (combustible) tobacco and become cigarette smokers or dual users

In an effort to address the youth vaping epidemic and reduce youth use of tobacco, the Virginia General Assembly in January of 2019 passed a Tobacco 21 law. Properly enforced, Tobacco 21 laws can significantly reduce youth tobacco use, resulting in lower healthcare costs and overall incidence of tobacco-related illness and death.⁵

In December 2019, Congress passed, and President Trump signed, federal legislation raising the minimum legal sales age nationwide for all tobacco products, including e-cigarettes, to 21. With enforcement through the U.S. Food and Drug Administration (FDA), the federal law went into effect immediately.⁶

Current Landscape in Virginia and Tobacco 21

- Virginia must begin enforcing the federal tobacco sales age of 21 and risks losing more than \$4 million per year in federal block grants if it does not. The federal legislation retained and revised the 1992 “Synar Amendment,” which requires states to demonstrate a Retailer Violation Rate (RVR) of no higher than 20 percent or they could lose 10 percent (more than \$4 million in Virginia) of annual Substance Abuse Block Grants through the Substance Abuse and Mental Health Services Administration (SAMHSA).⁷
- Virginia’s statewide Tobacco 21 law has not been adequately enforced, and sales to underage youth are unacceptably high. The current RVR in Virginia was almost 17% for the last year data was available in 2019,⁸ and is likely higher now, since retailers are currently not undergoing state (Synar) or federal (FDA) compliance checks in part due to the pandemic.
- Virginia has approximately 8,400 tobacco retailers, which the Virginia Alcoholic Beverage Control Authority (ABC) is authorized to inspect; it issues Class 2 misdemeanor citations for code violations. In 2018, the ABC and FDA were unable to reach consensus on the terms of the Tobacco Retail Compliance Inspection contract. As a result, the ABC did not enter into a contract with the FDA and stopped conducting Synar enforcement inspections. The RVR then rose by 66 percent from 10.1 to 16.8.
- Statewide, there are no required number of inspections in the current law, and since there is no tobacco retail license required, there is no comprehensive or current database of who is selling tobacco and nicotine products at retail.

Quick Facts: Tobacco Retail Licensing

- Minimum legal sales age (MLSA) laws must be accompanied by effective enforcement in order to reduce youth tobacco use. Current enforcement activities in Virginia are inadequate to prevent youth from using tobacco products.⁹
- Best practices for enforcement include conducting unannounced, annual compliance checks for every retailer with follow-up checks for those found in violation.¹⁰
- Tobacco retail licensing fees, paid by the retailer and renewed annually, would provide the resources needed to reduce unlawful sales and drive down youth tobacco use.¹¹
- With the passage of comprehensive tobacco retail licensing laws in New Mexico and Colorado in 2020, Virginia is now one of only eight states in the U.S. without any form of TRL.¹²
- A Tobacco Retail License is a privilege license and is different from the business license or tobacco tax permit that is required in Virginia. A TRL is tied to retailer compliance with all applicable sales, marketing, and display laws and can be suspended or revoked for repeated violations.¹³
- TRL can reduce youth initiation to tobacco, including e-cigarettes, by improving compliance with state and federal MLSA laws and other important tobacco sales regulations.¹⁴
- If Virginia fails to establish a licensing program and begin conducting compliance checks as soon as possible, it risks increasingly higher retailer violation rates.
- TRL protects retailers who obey the law by identifying and penalizing those who do not.
- 80% of Virginia adults surveyed believe stores should be licensed to sell tobacco, including e-cigarette products.¹⁵

As filed, H.B. 2164:

- Required all retailers of tobacco, including e-cigarette products, to obtain a Tobacco Retail License through the Virginia Alcoholic Beverage Control Authority and renew it annually.

- Established a comprehensive list of all tobacco retailers in the state which will streamline enforcement efforts and provide needed data on who is selling tobacco products at retail.
- Established enhanced civil monetary penalties and outlined license suspension and revocation provisions for selling without a license and for violations of MLSA laws by licensees.
- Established a dedicated Tobacco Retail Administration “Sub-fund” into which all fines and fees would be deposited and used for license administration and enforcement. (a)
- Comprehensively defined tobacco products to include e-cigarettes and electronic smoking devices to align with federal definitions.
- Prohibited sales of tobacco products from vending machines.
- Repealed an exemption for members of the military who are under 21 to align with the federal Tobacco 21 law which does not allow this exemption.
- Repealed ineffective and potentially unjust penalties to youth for purchase, use, or possession of tobacco products.¹⁶

a) H. 2164 did not mandate a retail license fee in order to accommodate the General Assembly’s request that legislators file pared-down bills for the 2021 session due to the pandemic. Best practices for funding a Tobacco Retail License program require that retailers pay an annual fee high enough to cover the cost of the program and enforcement. It may be necessary to consider additional options for initial funding of a TRL program that could supplement a retailer fee.

Sources:

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<https://pediatrics.aappublications.org/content/143/2/e20173536>
2. ¹² *The following are the (8) states without any form of Tobacco Retail Licensing: Michigan, Arizona, Kentucky, South Carolina, Oregon, Tennessee, Virginia, and Wyoming. See also: University of Maryland Francis King Carey School of Law Legal Resource Center for Public Health Policy – 50 State Survey of Tobacco Licensing Requirements, January 2020.* [https://www.law.umaryland.edu/media/SOL/pdfs/Programs/Public-Health-Law/50%20State%20Survey%20of%20Tobacco%20Licensing%20Requirements%20FINAL%20\(January%202020\).pdf](https://www.law.umaryland.edu/media/SOL/pdfs/Programs/Public-Health-Law/50%20State%20Survey%20of%20Tobacco%20Licensing%20Requirements%20FINAL%20(January%202020).pdf)
- 3 *Campaign for Tobacco-Free Kids Toll of Tobacco in Virginia* <https://www.tobaccofreekids.org/problem/toll-us/virginia>
- 4 *Association between e-cigarette use and future combustible cigarette use: Evidence from a prospective cohort of youth and young adults, 2017–2019* <https://pubmed.ncbi.nlm.nih.gov/32927247/>
- 5 *Public Health Implications of Raising the Minimum Age of Legal Access to Tobacco Products.* Editors: Richard J. Bonnie, Kathleen Stratton, and Leslie Y. Kwan. Authors: Committee on the Public Health Implications of Raising the Minimum Age for Purchasing Tobacco Products; Board on Population Health and Public Health Practice; Institute of Medicine, Washington (DC); National Academies Press (US); 2015 Jul 23. ISBN-13: 978-0-309-31624-8 ISBN-10: 0-309-31624-3
- 6 *U.S Food and Drug Administration - Newly Signed Legislation Raises Federal Minimum Age of Sale of Tobacco Products to 21* <https://www.fda.gov/tobacco-products/ctp-newsroom/newly-signed-legislation-raises-federal-minimum-age-sale-tobacco-products-21#:~:text=On%20Dec.,cigarettes%E2%80%94to%20anyone%20under%2021.>
- 7 *Substance Abuse and Mental Health Administration, U.S. Department of Health and Human Services. Programmatic Requirements for the Synar Program:* <https://www.samhsa.gov/synar/requirements>. See also: <https://www.samhsa.gov/sites/default/files/synar-guidance-tobacco-21.pdf>
- 8, 9. ¹¹ *Licensing Retail Tobacco Outlets to Reduce Youth Access to Tobacco Products in Virginia. Research conducted by Virginia Commonwealth University, Department of Psychology and George Mason University, Department of Health Administration and Policy, August 2020.*
10. ¹³ *Tobacco Retail Licensing: An Essential Tool to Reduce Youth Usage and Foster Health Equity* <https://tobacco21.org/new-guide-to-best-practices-in-trl/>
- 15 *Virginia Adult Tobacco Survey, Virginia Dept. of Health.* <https://www.vdh.virginia.gov/news/public-relations-contacts/archived-news-releases/2018-news-releases/virginia-health-officials-release-adult-tobacco-use-survey-results/>
- 16 *PUP in Smoke: Why Youth Tobacco Possession and Use Penalties are Ineffective and Inequitable.* <https://www.chongelabsolutions.org/product/pup-smoke>

Appendix G



VIRGINIA SMOKE FREE ASSOCIATION

July 2, 2021

Craig M. Burns, Tax Commissioner
Department of Taxation
Main Street Centre
600 East Main Street, 23rd Floor
Richmond, VA 23219

Re: HB2164

Dear Commissioner Burns:

("VSFA") represents Virginia's vapor products manufacturers, distributors, and retailers. Consequently, VSFA appreciates the opportunity to provide written comments to help the Virginia Department of Taxation ("VA Tax") study and "assess the feasibility and costs associated with the creation of individual licensure for tobacco retailers to prevent the selling of tobacco products to underage individuals," pursuant to HB2164 and its corresponding Chairman's letter.

To fully address the call of the study, we must first ask whether the creation of a licensure requirement for tobacco retailers is necessary to prevent the sale of tobacco products to underage buyers in the first place. While VSFA wholeheartedly agrees with the mission of keeping tobacco products out of the hands of underage persons, requiring tobacco retailers to obtain a license from the Virginia Alcoholic Beverage Control Authority ("ABC") is unnecessary. Rather, Virginia's T21 legislation and enforcement provisions, enacted July 1, 2019, are sufficient.¹

Under Virginia's T21 legislation, it is illegal for any person or retailer to sell a tobacco product to any person under the age of 21.² In fact, T21 requires that before the sale of any tobacco product, the seller must: (1) receive reliable confirmation that the prospective consumer is at least the minimum purchase age and (2) verify that information through a third-party, commercial database.³ The T21 legislation clearly states any law enforcement officer, including ABC agents, may issue a summons for a violation of these provisions.⁴ Hence, Virginia law already prohibits the sale of tobacco products to persons under the age of 21 *and* provides adequate an enforcement mechanism.

¹ See, generally, SB1727 - 2019.

² VA Code §18.2-371.2(A).

³ VA Code §18.2-371.2(C).

⁴ VA Code §18.2-371.2(E) and (H).

Craig M. Burns, Tax Commissioner
July 2, 2021
Page 2

Rather than implementing an additional and potentially costly licensing requirement on tobacco products retailers, VSFA recommends putting some teeth in the T21 legislation by increasing the penalties imposed for every violation. Presently, T21 violations are punishable by a civil penalty not to exceed \$100 for a first violation, \$200 for a second, and \$500 for a third or subsequent violation.⁵ VSFA suggests increasing the punishments imposed on retail establishments to \$1,000 for a first violation, \$2,500 for a second violation, and a \$5,000 civil penalty plus a one-year prohibition on selling tobacco products for a third or subsequent violation. VSFA also recommends that the civil penalties should be allocated to ABC for the enforcement of these T21 provisions rather than the state treasury.

In addition, VSFA is concerned about the cost of implementing HB2164. During public hearings on this bill, it was suggested that the cost to ABC may exceed \$8 million. A fiscal impact statement posted thereafter estimated that the upfront cost would exceed \$1.6 million and ongoing costs would exceed \$800,000/year. The total cost notwithstanding, VSFA is equally concerned about how these costs will be apportioned among the various tobacco products retailers. In the absence of this information, VSFA cannot support what amounts to writing a blank check.

Furthermore, vape shops are still reeling from an 11th hour budget amendment imposing a \$0.07/mL wholesale tax on liquid nicotine, which became effective July 1, 2020. This tax was imposed without a single public hearing, and vape shops were not given the opportunity to testify to its inequities nor the hardships it has caused Virginia's vapor industry.

Accordingly, despite VSFA's commitment to preventing the underage sale of tobacco products and support of T21, it cannot support HB2164. Thank you for your consideration in this regard.

Respectfully

Dylan D. Bishop

cc: Stephen Klos, Policy Analyst
Department of Taxation

Maggie Gowen, President
Virginia Smoke Free Association

⁵ VA Code 18.2-371.2(E)

Appendix H



Despite significant decreases in cigarette smoking by youth over the past two decades, the percentage of Virginia high school youth who are current smokers remains unacceptably high (5.5%).¹ Perhaps more concerning is the dramatic increase in the percentage of youth who are using e-cigarettes; an increase of 69% among high school youth from 2017 to 2019 (11.8% and 19.9%, respectively).²



MLA laws must be combined with effective enforcement that drives down illegal sales to minors.

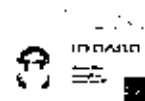
While MLA laws are an important part of efforts to decrease youth tobacco use, past experience demonstrates that the mere adoption of a law prohibiting the sale of tobacco products to minors is insufficient to prevent the [actual] sale of tobacco to children.³

TRL is a Key Component of MLA Laws

- 1) licensing will produce a comprehensive list of retail tobacco outlets that can be used in vendor education and enforcement efforts,⁴
- 2) licensing fees can be used to generate the funds needed to support a comprehensive system of vendor education and enforcement, and
- 3) incremental monetary fines as well as license suspensions and revocations as penalties for selling tobacco products to minors are a significant deterrent to violating state MLA laws.⁵

Current enforcement activities in Virginia are inadequate to prevent youth from using tobacco products.

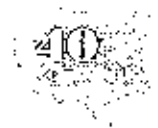
Enforcement efforts related to sales to underage buyers have been severely reduced, resulting in an increased RVR to 16.8% in 2019.⁶ In the most recent year for which data are available, compliance checks (i.e., "false buys" by underage buyers) were conducted for only 6.4% (less than 600) of retail tobacco outlets, compared to approximately 50% of retailers prior to the loss of the state-wide federal Food and Drug Administration contract in May 2018.⁷



If the RVR rises above 20%, the state risks losing approximately \$17 million of federal Substance Abuse Block Grant dollars.⁸

TRL in the U.S.

Currently 40 states and Washington, DC require some form of license to sell one or more types of tobacco products. 78% of states that license retail tobacco outlets require that the license be renewed on an annual basis. The average annual license fee is \$74.63 and ranges from \$5 to \$300.⁹ If Virginia were to implement a TRL with an annual licensing fee of \$75 (approximately the current nation-wide average), it would generate \$574,054 that could be used to enhance MLA enforcement and retailer education efforts.



TRL Best Practices

- 1) require a license to sell any tobacco product (including e-cigarettes and heated tobacco products) for all tobacco retailers,
- 2) assess a licensing fee to adequately fund implementation and enforcement of the law,
- 3) require a license to be renewed annually,
- 4) include a provision that any violation of local, state, or federal law is a violation of the license,
- 5) require retailers to train their employees on the requirements of the Commonwealth's MLA and TRL laws as a condition of receiving a license, and
- 6) include a graduated penalty system for violators, including monetary fines, license revocation, or suspension.^{10,11,12}

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20. The annual average licensing fee was calculated based only on those states that have annual fixed licensing fee. That is, it excludes those states where the amount of the licensing fee is based on the size of the city in which the retailer is located or the type of municipality (e.g., city vs village).

Appendix I



PUBLIC HEALTH LAW CENTER
AMERICAN HEART ASSOCIATION
1000 17th Street, N.W.
Washington, D.C. 20036

January 23, 2020

Chelsi Bennett, J.D.
Virginia Government Relations Director
American Heart Association
4217 Park Place Ct | Glen Allen, VA 23060
Chelsi.Bennett@heart.org

RE: Virginia's cigarette exemption certificate and tobacco retail licensing

Dear Chelsi,

Thank you for your request for legal technical assistance from the Public Health Law Center. As you know, the Center can provide you with this information based on our experience and understanding of commercial tobacco control law and policy across the country. We do not lobby, and we do not ask that any decisionmaker take any particular action based on the information we provide. We are also not licensed to practice law in Virginia, so if you need legal advice, we suggest you contact an attorney familiar with the laws of your jurisdiction. The Center provides information for your own evaluation and review, and we hope that this memorandum is useful to you. If you have any questions after reading it, please reach out to us to discuss it further.

Question Presented

Is the cigarette exemption certificate system established by Va. Code § 58.1-623.2 a tobacco retail licensing regime that promotes public health and monitors tobacco retailer compliance with tobacco control laws?

Short Answer

No. It appears that Va. Code § 58.1-623.2 is, above all else, a tax compliance scheme that has little to do with preventing violations of state or federal prohibitions on selling tobacco products to under-21 consumers. The law itself has no provisions that prevent such sales, nor does it incorporate such prohibitions in the Department of Taxation's (Department) enforcement regime. Even though the certificate can be denied or revoked for some reasons, these reasons have nothing to do with protecting youth from access to tobacco products and appear to be mostly concerned with assuring the regular collection of existing taxes. Additionally, there are no relevant inspections or regular compliance checks mandated by the law, and the certificate program doesn't even include all tobacco product sellers—applying only to certain businesses that sell *cigarettes* at wholesale or retail.

Analysis

Generally speaking, tobacco retail licensing is a system under which jurisdictions (at the state, tribal, or local levels) require a business to obtain a license in order to legally sell tobacco products within the jurisdiction. Licensing is a tool that helps the effective enforcement of substantive laws, such as sales prohibitions of certain tobacco products or minimum legal sales ages. Normally, licensing regimes mandate regular inspections (e.g. to make sure retailers are not selling forbidden products) and age-of-sale compliance checks (e.g. having a 17-year-old purchaser supervised by a police officer attempt to purchase a pack of cigarettes). If a seller is found to be in violation of the jurisdiction's substantive provisions, that person could lose their license—and with it the ability to sell tobacco products—temporarily or permanently. Additionally, some jurisdictions make certain retailers ineligible to obtain a license, often because they are too close to a school or the owner has an established history of violating commercial tobacco control laws. Currently Virginia does not have this type of licensing regime.

In enacting Va. Code § 58.1-623.2, the Virginia General Assembly established a new system for cigarette distributors to avoid paying the taxes applicable to end consumers of cigarettes. The Tax Commissioner is required to establish implementing guidelines under the law,¹ and has done so, in guidelines that do not incorporate age-of-sale restrictions or other tobacco control law.²

Because this law was not designed to prevent illegal sales of tobacco products (so long as taxes were faithfully paid and recorded), the provisions of the law fall short of best practices for tobacco retail licensing. Here are some of the provisions in the statute that do not track with common tobacco retail licensing practices:

Limited scope:

- This law applies only to *cigarette* sellers, leaving open the possibility that other tobacco product sellers will be unaffected by this regime and potentially unknown to the Tax Commissioner. For example, all cigar bars and vape shops would be outside the scope of this law unless they also sold cigarettes.

¹ Va. Code § 58.1-623.2 § 1, <https://law.lis.virginia.gov/vacode/58.1-623.2/>

² See generally, Tax Commissioner Craig M. Burns, Guidelines for the Retail Sales and Use Tax Exemption Certificate for Stamped Cigarettes Purchased for Resale (Aug. 21, 2017), <https://www.tax.virginia.gov/sites/default/files/inline-files/final-cigarette-exemption-guidelines.pdf>

- Nowhere on Va. Code § 58.1-623.2's face or in the legal authorities it cites does this law incorporate the prohibition of sales to underage people,³ Va. Code § 18.2-371.2⁴
- Nowhere in the law is a certificate-holder required to check ID for proof of age or post signs regarding the minimum legal sales age applicable to cigarettes.
- The law allows someone who is 18 or older to hold a certificate⁵ and also allows the holder to allow any employee (of any age) to use the certificate,⁶ so there is no effective age limit on employees who sell tobacco products, and the age limit on holders is three years younger than the legal age to purchase tobacco products.

Limited oversight:

- After a certificate is granted⁷ the statute does not call for any further inspections for five years, and only some certificate-holders would be inspected at that future date.⁸ These inspections only appear to be assessments of the physical characteristics of the site, not the holder's practices in selling cigarettes.⁹
- While the holder of the certificate must list its business addresses,¹⁰ the law only requires a "substantial portion of the sales activity" to be conducted

³ While Virginia's Tobacco 21 law included an exemption for active duty military 18 and older the federal update to the minimum legal sales age in December 2019 closed this loophole, and so for the sake of this memo all underage people would be those under 21. For more information on the change in federal law please consult the Center's recent blog on the topic <https://www.publichealthlawcenter.org/blogs/2020-01-07/new-federal-tobacco-21-law-what-it-means-state-local-and-tribal-governments>.

⁴ Va. Code § 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." <https://law.lis.virginia.gov/vacode/title18/chapter8/section18.2-371.2/>

⁵ Va. Code § 58.1-623.2 § C(1).

⁶ *Id.* §§ H & M.

⁷ In the initial application for a certificate the Department does inspect the premises and does so if the address of a taxpayer's business changes. *See id.* B&G.

⁸ "At the end of the five-year period, the cigarette exemption certificate of a taxpayer who qualifies for the expedited application process set forth in subdivision B 3 shall be automatically renewed and no fee shall be required." *Id.* § J.

⁹ The Department must deny an application if "The physical place of business occupied by the taxpayer, as described in subsection E, is not constructed, arranged, or illuminated so as to allow access to and reasonable observation of any room or area in which cigarettes are to be sold[.]" *Id.* § C(5).

¹⁰ Instead of requiring a different certificate for each location the statute only requires each taxpayer to get one certificate and then use it for multiple locations if that is the taxpayer's business. *See id.* § (F).

there.¹¹ This seems to leave open the possibility that sales will be conducted offsite and potentially at locations that do not have a permanent address.

- Certificates cost only 50 dollars and last for five years.¹² The low fee and infrequent renewal or oversight suggest that this application fee doesn't pay for any administrative burden of ongoing inspection, or compliance checks to assess if there are violations of tobacco control laws.
- Contrary to ordinary practice with tobacco retailer licenses, the law forbids display of the certificate at the place where it is being used.¹³
- This law doesn't address delivery sales or internet sales of cigarettes or other tobacco products from out-of-state retailers or manufacturers to consumers.

No effective punishment for violations of relevant law:

- Grounds for denying issuance of a certificate do not include violations of commercial tobacco control laws. The crimes that could result in a denial appear to be on an exclusive list that includes: all types of fraud; "robbery, extortion, burglary, larceny, embezzlement, gambling, perjury, bribery, treason, racketeering, [and] money laundering;" violations of Virginia cigarette tax laws; and felonies.¹⁴ This list might be appropriate to guard against tax evaders and dangerous individuals, but it leaves out any laws that apply to tobacco retailing.
- Even if a certificate is denied, suspended, or revoked for one of the thirteen grounds listed,¹⁵ the only punishment laid out in the law is a 6 month suspension before the taxpayer can reapply.¹⁶ Denial/suspension/revocation of a certificate is therefore only an effective punishment if the Department is actively vetting and denying new applications all the time, and there is no mention of denying an application with prejudice in the Department's guidance on the law.¹⁷
- Denying, suspending, or revoking a certificate does not stop an offender from selling cigarettes. It only means that the cigarette distributor must pay additional taxes in order to continue selling cigarettes.¹⁸ Even the most odious offender could continue selling cigarettes indefinitely without a certificate if he were willing to pay the applicable taxes.

¹¹ *Id.* § E(1).

¹² *Id.* §§ B(2) & J.

¹³ *Id.* § K.

¹⁴ *Id.* § C (9)&(13).

¹⁵ *See id.* § C.

¹⁶ *Id.* § B (4).

¹⁷ *See*, Tax Commissioner Craig M. Burns, Guidelines for the Retail Sales and Use Tax Exemption Certificate for Stamped Cigarettes Purchased for Resale at 7 (Aug. 21, 2017),

<https://www.tax.virginia.gov/sites/default/files/inline-files/final-cigarette-exemption-guidelines.pdf>

¹⁸ *See* Va. Code § 58.1-623.2 § A.

Conclusion

It is apparent that this statute was not designed to stop the sale of tobacco products to young people, nor to aid in the enforcement of any state or federal commercial tobacco control law other than applicable tax codes. It appears that this tax exception regime was not meant to comprehensively regulate retailers of tobacco products, nor to set out enforcement standards for the Department to follow. Since Virginia doesn't have a tobacco retail licensing statute, and this certificate is not a replacement for that type of regulation, there should be no concern that Va. Code § 58.1-623.2 or the Department's role granting the certificates would be changed by a tobacco retail licensing regime.

For more information on tobacco retail licensing best practices please feel free to consult the Center's [many resources on the topic](#). We would be happy to discuss the details of such a regime further with you if you have any questions.

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Appendix J

Form ST-10C
Application

Commonwealth of Virginia Cigarette Resale Certificate of Exemption Application

Form ST-10C (REV. 03/18)

DO NOT USE THIS FORM TO PURCHASE CIGARETTES TAX EXEMPT

Complete each line that applies to your business. Each location must submit a separate application. Include a \$50.00 non-refundable fee with each application unless your business qualifies for the expedited process explained in the Filing Procedure on the back of this application.

NEW APPLICATION

RENEWAL

CHANGE

1 Federal Employer Identification No. (FEIN) _____

2 Sales Tax Account No. _____

3 Business Telephone No. _____ 4 Contact Phone No. _____

5 Business Name _____

6 Email Address _____

7 Store Location _____
Number and Street or Rural Route City ZIP Code

8 Business Classification Wholesaler Retailer

9 Ownership information (please attach)

Corporations - Name, title, home address, and Social Security Number of each officer

Partnerships - Name, home address, Social Security Number or FEIN of each partner, or tax identification number

Sole Proprietorships - Name, home address, Social Security Number, or tax identification number

LLC - Name, home address, and Social Security Number or FEIN of each member. Social Security Number or tax identification number is required for single member LLCs

LLP - Name, home address, and Social Security Number or FEIN of each partner

10 How long has the owner been a resident of Virginia? _____

If less than 12 months, provide explanation: _____

11 ABC License # (attach copy if applicable) _____

12 Other Tobacco Products (OTP) Distributor's Permit # (attach copy if applicable) _____

Owner Signature _____ Title _____

Print Name _____ Date _____

Provide a list of cigarette and tobacco suppliers and supplier account numbers

Upon verification (to include a site visit) and after a 30-day waiting period, we will issue a unique Form ST-10C to qualified retailers. You can then use Form ST-10C to purchase cigarettes tax exempt.

Va Dept. of Taxation 6201075 Rev 03/18

Instructions for Form ST-10C Application

General: Beginning January 1, 2018, cigarette retailers are required to use Form ST-10C Cigarette Resale Certificate of Exemption to purchase cigarettes tax exempt for resale in Virginia.

Filing Procedure: Cigarette retailers must be registered for Virginia Retail Sales and Use Tax.

Each location intending to purchase cigarettes tax exempt must complete Form ST-10C Application in its entirety. Call the tobacco unit for special instructions if you are applying for 10 or more locations. Enclose \$50.00 non-refundable fee. Make your check payable to the Virginia Department of Taxation and mail the application and payment to **TOBACCO TAX UNIT, Department of Taxation, P.O. Box 715, Richmond, Virginia 23218-0715**.

Expedited Process: Businesses with valid ABC licenses or Other Tobacco Product (OTP) Distributor's permits are exempt from the \$50.00 non-refundable fee. Issuance of exemption certificates to businesses with valid ABC licenses or OTP Distributor's permits will be expedited.

Upon verification (to include a site visit) and after a 30-day waiting period, we will issue a unique Form ST-10C to qualified retailers. You can then use Form ST-10C to purchase cigarettes tax exempt.

Questions: If you have any questions, please call (804) 371-0730 or visit our website at www.tax.virginia.gov.

Penalty for fraudulent purchase of cigarettes

- Any person who purchases **5,000 (25 cartons) cigarettes or fewer** using a forged business license, a business license obtained under false pretenses, a forged or invalid Virginia sales and use tax exemption certificate, a forged or invalid Virginia cigarette exemption certificate, or a Virginia sales and use tax exemption certificate obtained under false pretenses is guilty of a Class 1 misdemeanor for a first offense and a Class 6 felony for a second or subsequent offense.
- Any person who purchases **more than 5,000 (25 cartons) cigarettes** using a forged business license, a business license obtained under false pretenses, a forged or invalid Virginia sales and use tax exemption certificate, a forged or invalid Virginia cigarette exemption certificate, or a Virginia sales and use tax exemption certificate obtained under false pretenses is guilty of a Class 6 felony for a first offense and a Class 5 felony for a second or subsequent offense.
- Any person who violates the provisions of Va. Code § 58-1-1017.3 will be assessed a civil penalty of (i) \$2.50 per pack but no less than \$5,000, for a first offense; (ii) \$5 per pack but no less than \$10,000 for a second offense committed within a 36-month period; and (iii) \$10 per pack but no less than \$50,000 for a third or subsequent offense committed within a 36-month period. The civil penalties will be assessed and collected by the Department of Taxation as other taxes are collected.
- The provisions of Va. Code § 58-1-1017.3 will not preclude prosecution under any other statute.

Sales or leases presumed subject to tax: exemption certificates

- All sales of cigarettes, bearing Virginia revenue stamps in the Commonwealth shall be subject to the tax until the contrary is established.
- The burden of proving that a sale, distribution, lease, or storage of tangible personal property is not taxable is upon the dealer unless he takes from the taxpayer a certificate to the effect that the property is exempt under this chapter.

Obtaining a cigarette exemption certificate

- A Cigarette Resale Certificate of Exemption relieves the person who accepts the certificate from any liability for the payment or collection of the tax, except upon notice from the Tax Commissioner that such certificate is no longer acceptable. A valid Cigarette Resale Certificate of Exemption must be signed by and bear the name and address of the taxpayer, indicate the number of the certificate of registration issued to the taxpayer, and be in the form the Tax Commissioner has prescribed.

Maintaining records

- Every person receiving, storing, selling, handling, or transporting cigarettes in any manner whatsoever, must save all invoices, books, papers, canceled checks, or other documents relating to the purchase, sale, exchange, receipt, or transportation of all cigarettes for a period of three years. All invoices, books, papers, canceled checks, or other memoranda and records will be subject to audit and inspection at all times by any duly authorized representative of the Department of Taxation. Any person who fails or refuses to keep and preserve the records as required in this section will be guilty of a Class 2 misdemeanor. The Department of Taxation may impose a penalty of \$1,000 for each day that the person fails or refuses to allow an audit or inspection of the records.

Appendix K

Department of Planning and Budget

2021 Fiscal Impact Statement

1. **Bill Number:** HB2164

House of Origin Introduced Substitute Engrossed

Second House In Committee Substitute Enrolled

2. **Patron:** Hope

3. **Committee:** House Appropriations

4. **Title:** Tobacco retail licensing

5. **Summary:** The bill establishes a subfund of the Enterprise Fund, to be known as the Tobacco Retail Administration Subfund (Subfund).

The bill provides that all moneys deposited, less net profits, are subject to appropriation, for the payment of (i) the salaries and remuneration of the members, agents, and employees of the Board and; (ii) all costs and expenses incurred in establishing and maintaining government stores and in the administration of the provisions of this title, including the purchasing, building, leasing and operation of distilleries and the manufacture of alcoholic beverages; and (iii) all direct and indirect costs and expenses incurred in the administration of licenses and enforcement of laws under the newly created §§4.1-600 through 4.1-605 (Registration and Restrictions for Tobacco Retailers), which shall be accounted for from the Subfund.

The bill establishes that no tobacco retailer can operate a tobacco retail establishment, conduct business as a tobacco retailer, or otherwise sell or offer to sell tobacco products at retail unless such tobacco retailer has obtained a license from the Authority. Violations may result in a civil penalty of \$500 for a first offense and \$1,000 for a second or subsequent offense within a 36 month period. Any tobacco retailer may apply for a license to operate a tobacco retail establishment and conduct business as a licensee according to forms and procedures prescribed by the Authority. Licensees must display their license in a prominent place within the licensed business.

The bill prohibits any person from selling tobacco products or hemp products intended for smoking from a vending machine. In addition, the bill requires age verification for purchasers less than 30 years of age.

The bill defines "electronic smoking device" and redefines "tobacco product".

6. Budget Amendment Necessary: See Line 8. Nongeneral fund appropriation will be needed.

7. Fiscal Impact Estimates: Preliminary (see Line #8)

8. Fiscal Implications: According to the Virginia Alcoholic Beverage Control Authority (ABC), additional personnel will be needed to enforce the provisions of this bill. Data from ABC's Bureau of Law Enforcement suggest there may be as many as 4,000 new licenses requested from vape shops, tobacco shops and cigar shops as a result of this legislation.

ABC estimates an additional 7 license record technicians (\$342,363) and 12 special agents (initial cost of \$1,320,000, with an ongoing cost of \$819,289) will be required to meet the requirement of this bill. The initial cost for special agents includes equipment and training cost of \$500,711. In addition, information technology costs are expected to be incurred to create a tobacco license within the existing licensing system. Information technology costs are estimated to be \$225,000.

The bill provides that moneys in the Subfund, created by this bill, are to be used solely for the purpose of funding the Authority's direct and indirect costs of administration of licenses and enforcement of laws under Chapter 6 (Registration and Restrictions for Tobacco Retailers). Expenditures and disbursements from the Subfund can be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Chief Executive Officer of the Authority. The Authority will likely incur expenses for personnel and other operating expenses prior to collecting tobacco license revenue. The bill is silent as to how these expenses are to be covered.

According to the State Corporation Commission, the bill is not expected to create a material fiscal impact on agency operations.

9. Specific Agency or Political Subdivisions Affected: Alcoholic Beverage Control Authority, and State Corporation Commission

10. Technical Amendment Necessary: No

11. Other Comments: None

Appendix 5

October 9, 2023, Office of the Attorney General Letter



COMMONWEALTH of VIRGINIA
Office of the Attorney General

Jason S. Miyares
Attorney General

202 North 9th Street
Richmond, Virginia 23219

October 9, 2023

VIA ELECTRONIC MAIL

Ms. Marty H. Kilgore
Executive Director
Mr. Andrew V. Sorrell
Deputy Director
Virginia Foundation for Healthy Youth
701 E. Franklin Street, Suite 500
Richmond, Virginia 23219
Marty.Kilgore@healthyyouthva.org
Andrew.Sorrell@healthyyouthva.org

Re: Intended Uses of Funds Received from Virginia's Settlement
with JUUL Labs, Inc.

Dear Marty and Andy:

Thank you for contacting our Office on behalf of the Virginia Foundation for Healthy Youth ("VFHY") to inquire about the intended purposes for which funds from Virginia's settlement with JUUL Labs, Inc. ("JUUL") may be used.

The JUUL settlement, which was entered as a Consent Judgment by the City of Richmond Circuit Court on December 16, 2022,¹ resolved a years-long investigation of JUUL for its alleged youth-focused advertising of electronic nicotine delivery systems ("ENDS"). As we alleged, JUUL relied on social media campaigns, easily concealable device designs, youth-friendly flavors, and other means to lure Virginia's youth into using its ENDS products.

¹ *Commonwealth v. JUUL Labs, Inc.*, No. CL-225236-01 (City of Richmond Circuit Court).

Paragraph 43 of the JUUL Consent Judgment makes clear the parties' intentions with respect to potential uses of the settlement funds. The funds should be used for:

- a. Programs that provide cessation assistance to Virginia residents who were exposed to ENDS while under the age of 21;
- b. Education or prevention programs that are designed to prevent or reduce use of ENDS by Virginia residents who are under the age of 21;
- c. Research in support of preventing ENDS use by Virginia residents who are under the age of 21 by independent third parties;
- d. Programs or equipment that are designed to abate the impact that ENDS and other nicotine products have had on Virginia students, schools, school districts and to prevent such impact in the future; and
- e. Efforts to mitigate the impact of, including by enforcing Virginia and federal law with respect to, disposable ENDS, synthetic-nicotine products, and companies that have not taken steps similar to those described in this Consent Judgment to limit access to or usage of nicotine and nicotine-synthetic products by Virginia residents who are under the age of 21.

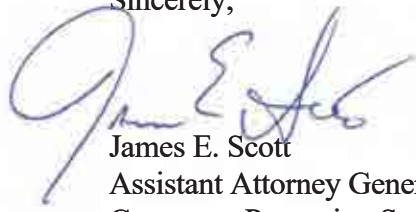
Each of these intended uses has, at its core, a concern about protecting Virginia's vulnerable youth from the lure of ENDS products.

As you all know, the General Assembly passed S.B. 1350 during its 2023 Reconvened Session, which tasked the Virginia Alcoholic Beverage Control Authority with conducting a study to assess a potential regulatory scheme for manufacturers, distributors, and retail dealers of liquid nicotine. Of course, JUUL's ENDS products rely on the use of liquid nicotine to create a nicotine-containing vapor that is inhaled by the user. Thus, a reasoned regulatory scheme containing age restrictions for liquid nicotine sales and addressing youth-focused marketing of liquid nicotine products could be a strong step forward in protecting Virginia's youth from ENDS products.

Accordingly, using a portion of the JUUL settlement funds to enforce regulations governing the manufacture, distribution, and sale of ENDS products in Virginia could align with the purposes identified in ¶ 43(e) of the Consent Judgment. On the other hand, using the JUUL settlement funds to defray the cost of licensing and other fees that such a regulatory scheme may impose on liquid nicotine manufacturers, distributors, and retailers would not align with those purposes. Indeed, such a use of the JUUL settlement funds would support those seeking to profit from the sale of liquid nicotine, where the funds should be used to protect Virginia's vulnerable youth from ENDS products.

Thank you for the opportunity to provide our thoughts.

Sincerely,

A handwritten signature in blue ink, appearing to read "James E. Scott". The signature is stylized and cursive.

James E. Scott
Assistant Attorney General
Consumer Protection Section

Appendix 6

Stakeholder Recommendations

1. October 10, 2023, Letter from VSFA
2. Behavioral Health and Developmental Services
3. Tobacco21 Comments
4. October 6, 2023, letter from VPCMA
5. October 26, 2023, letter from Dylan Bishop
6. October 23, 2023, letter from Senator Ebbin



October 10, 2023

VIA ELECTRONIC MAIL

John W. Daniel II, Esq.
Counsel & Chief Government Affairs Officer
Virginia Alcoholic Beverage Control Authority
john.daniel2@virginiaabc.com

RE: Chapter 761, 2023 Acts of Assembly (SB1350/HB2296) Study Group Assessing a Potential Licensing Scheme for Liquid Nicotine Merchants in Virginia

Dear Mr. Daniel,

Thank you for the opportunity to submit written comments on behalf of the Virginia Smoke Free Association (“VSFA”) to the Study Group assessing a potential licensing scheme for liquid nicotine merchants in Virginia. VSFA represents the interests of Virginia’s tobacco-free retailers, distributors, and manufacturers and was the entity responsible for the introduction of the 2023 legislation, which ultimately led to our present endeavor. We respectfully request that you incorporate the below remarks into the study group’s final report and appreciate your cooperation in this regard.

DRAFT

I. INTRODUCTION

Unlike most states, the sale of nicotine vapor products (“NVPs”) in Virginia is essentially unregulated. There exists no license or registration requirements for retailers; empirical data shows that existing penalties for selling NVPs to underage persons are not stringent enough to deter underage sales; and, the tax imposed on liquid nicotine remains uncoded and practically unenforceable—all of which serve to the disadvantage of the industry’s legitimate actors and jeopardize public safety. Consequently, VSFA requested the introduction of SB1350/HB2296 during the 2023 General Assembly to:

1. Reduce underage sales/use of nicotine vapor products;
2. Codify best practices relating to the sale of liquid nicotine products;
3. Codify the tax imposed by the Commonwealth on liquid nicotine; and,
4. Bolster enforcement mechanisms and resources relating to underage sales and tax compliance.

VSEA remains steadfast in its support of these goals and, to that end, respectfully requests this Study Group recommend the implementation of a licensing framework for the Commonwealth's liquid nicotine merchants. Specifically, VSEA requests this Group endorse the legislative proposal attached hereto as Exhibit 1.

II. CURRENT FRAMEWORK

a. Existing Penalties Not Stringent Enough to Deter Underage Sales

While Va. Code § 18.2-371.2 provides that “[N]o 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, alternative nicotine product, or hemp product intended for smoking,” the penalties are not sufficiently severe to deter underage sales. Violations of this provision are punishable as follows:

- \$100 civil penalty for a first violation;
- \$200 civil penalty for a second violation; and
- \$500 civil penalty for a third or subsequent violation.

There are no concomitant criminal penalties, nor is there any personal liability attributable to the person that actually allows or encourages the underage sale. Rather, the corporate entity is liable for payment of the civil penalty.

Despite these penalties, the prevalence of documented underage sales has *increased* overtime. Between September 2016 and October 2022, the United States Food and Drug Administration (“FDA”) reported 192 compliance checks resulting in the sale of a NVP to an underage person in Virginia, which equates to roughly 32 instances per year or slightly under three per month.¹ In the proceeding eight months, from October 2022 through June 2023, the FDA reported an additional 91 compliance checks resulting in the sale of a NVP to an underage person in Virginia—approximately ten instances per month and a three-fold increase.² Hence, the data is clear: the existing penalties for selling NVPs to underage persons do not adequately deter this conduct. Moreover, without a licensing requirement, there is nothing to prevent a repeat offender from continuing to participate in the retail market.

b. No Retail License or Registration Requirement

¹ See <https://fda.gov>.

² *Ibid.*

Virginia is one of few states that does not yet require NVP retailers to register with, or obtain a license from, a regulatory agency. Policymakers and enforcement agencies lack critically important market data, including the number of retailers, location of retailers, or criminal histories of the retail establishments' proprietors, which leads to myriad issues, as became clear during this Group's discussions. For example, the tax imposed on liquid nicotine relies on businesses to self-report and, as such, is openly flaunted by some market participants. Without accurate data as to the number and location of the Commonwealth's NVP retailers, the Department of Taxation's Tobacco Enforcement Unit lacks the data and resources necessary to adequately audit and enforce tax compliance.

Similarly, without a licensing framework, there is nothing to prohibit an individual with a storied history of selling tobacco products to underage persons, or worse, from participating in the market. The applicants should be thoroughly vetted before they are allowed to participate in the market. Moreover, the controlling agency could use license suspensions and revocations as an additional means to ensure compliance among licensees. A system that simply requires registrations, which are essentially rubber stamped, would lack this critical enforcement instrument. A registration requirement, simply put, would not go far enough.

III. VSFA PROPOSAL

VSFA proposes a licensing framework which requires all manufacturers, distributors, and retailers of NVPs to obtain a license to sell nicotine vapor products in, or into, Virginia from Va. Dept. of Taxation. Applicants would be required to submit to criminal background checks and present financial records to demonstrate tax compliance. Applicants may be denied licensure for certain convictions of moral turpitude, multiple instances of underage sales to minors, or evidence of improper tax avoidance.

VSFA's proposal would also codify industry-wide best practices aimed at reducing the prevalence of underage sales and/or use of NVPs. For example, all products containing liquid nicotine must be displayed behind a counter or glass, out of reach from children. Third-party age-verification software must be utilized before each sale. The proposal also would impose marketing and labeling restrictions to avoid appeal to minors. Sales would be limited to two vapor products (batteries, filters, etc.) and five bottles/packages of liquid nicotine at a time to prevent strawman sales. And, finally, it proposes stiffer penalties for selling to underage persons:

- First violation: \$1,000 civil penalty;
- Second violation: \$5,000 civil penalty and 30-day suspension of license;
- Third violation: \$10,000 civil penalty and permanent revocation of license.

VSEA believes the Virginia Department of Taxation to be the most appropriate agency to administer this licensing program. The agency already “permits” most other tobacco merchants. As the permitting agency, the Department of Taxation would finally have the data necessary to adequately enforce Virginia’s tax on liquid nicotine, i.e., a roster of market participants. The agency would need to be involved with licensing anyway, as applicants must demonstrate compliance with tax on liquid nicotine. And, finally, the proposed licensing structure would not require the administering agency to have its own law enforcement. Instead, the agency could rely on FDA’s publicly available enforcement data, which is updated monthly. Moreover, underage sales, etc., can already be prosecuted by any law enforcement officer or Commonwealth’s Attorney in the Commonwealth. Accordingly, VSEA respectfully requests this Study Group recommend the implementation of a licensing framework for the Commonwealth’s liquid nicotine merchants. Specifically, VSEA requests this Group endorse the legislative proposal attached hereto as Exhibit 1.

Thank you for your consideration.

Respectfully submitted,
Alan D. Discep. Esq.
Virginia Smoke Free Association

DRAFT



COMMONWEALTH of VIRGINIA

NELSON SMITH
COMMISSIONER

DEPARTMENT OF
BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

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VIA ELECTRONIC MAIL

John W. Daniel II, Esq. Counsel/Chief Government Affairs Officer
Virginia Alcoholic Beverage Control Authority
john.daniel@virginiaabc.com

RE: Chapter 761, 2023 Acts of Assembly (SB1350/HB2296) Study Group "Report of the Virginia Alcoholic Beverage Control Authority on the Assessment of a Licensing Scheme for Liquid Nicotine" (Draft)

Dear Mr. Daniel,

Thank you for your work on the draft described above and for your willingness to convene the stakeholder study group this year. I'd like to submit the following comments for your consideration. In response to:

"The Department of Behavioral Health and Developmental Services was represented by Colleen Hughes who serves as the SYNAR Coordinator for the Department. Ms. Hughes focus was likewise on the need to address underage sales and that the appropriate way to address that was likely through a licensing scheme for retailers, or at a minimum a registration program for those retailers."

I'd like to clarify that I presented on:

- What the Synar regulation states and the impact to Virginia if not met.
- Enforcement history including how DBHDS partners with ABC to conduct Synar checks and the history of the FDA contract in Virginia
- Past year of enforcement data – Synar, FDA, and one-time supplemental checks
- Retailer landscape – number of known stores and type of store
- Young Adult Survey data related to vaping – lifetime use trends, age of first use, risk perception, and ease of access which included 48% of 18-20 year old saying they "bought at a store..."

I did not advocate for, or against, a licensing scheme.

Respectfully submitted,

Colleen Hughes
Synar Coordinator, Office of Behavioral Health Wellness
Department of Behavioral Health and Developmental Services



October 26, 2023

VIA ELECTRONIC MAIL

John W. Daniel II, Esq.
Counsel/Chief Government Affairs Officer
Virginia Alcoholic Beverage Control Authority
john.daniel@virginiaabc.com

RE: Chapter 761, 2023 Acts of Assembly (SB1350/HB2296) Study Group
“Report of the Virginia Alcoholic Beverage Control Authority on the Assessment of a Licensing Scheme for Liquid Nicotine” (Draft)

Dear Mr. Daniel,

The Preventing Tobacco Addiction Foundation/Tobacco 21 thanks you for your work on the draft described above and for your willingness to convene the stakeholder study group this year. Contrary to your conclusion that the work group did not find consensus, however, we believe there was indeed consensus and in fact strong support for a licensing program for nicotine retailers, to prevent or curb the sale of these products to underage youth and to assist the state with the monumental task of annual inspections to comply with federal “Synar” requirements. The consensus stakeholders still need time to reach is to determine what retailers should be included in the licensing requirement (nicotine/vape; combustible tobacco; cigar, etc.), as well as specific provisions of a licensing law regarding fees, renewals, compliance checks and penalties. Also whether there should remain in state code those penalties that can be levied on youth under 21 who attempt to purchase, use or possess nicotine or tobacco.

We believe it was clearly demonstrated in multiple presentations that Virginia remains unacceptably out of compliance with state and federal “Tobacco 21” laws, and, as also noted, that 43 other states have already determined tobacco retail licensing is essential to retailer compliance. Therefore, we respectfully request you amend the report to reflect this consensus and stated need for Virginia to enact a licensing program for nicotine/tobacco retailers.

Respectfully submitted,

Shannon Quinby
Eastern Region Director
Preventing Tobacco Addiction Foundation/Tobacco 21



October 6, 2023

VIA EMAIL: John.Daniel@virginiaabc.com

Mr. John W. Daniel, II
Virginia Alcoholic Beverage Control Authority
7450 Freight Way
Mechanicsville, VA 23166
Email

RE: Liquid Nicotine Workgroup

Dear: Mr. Daniel,

We, the retail industry, collectively write you to express our opposition to the creation of a licensing and enforcement scheme dedicated solely to liquid nicotine products. This onerous solution will distress essential small businesses that have grown overly burdened by inflation, labor costs, and retail crime. As an industry, we remain vigilant in conducting thorough identification checks of customers to prevent underage purchases of prohibited products.

Brick-and-mortar retail stores have faced numerous challenges since the pandemic and additional regulation will have a negative impact. Tobacco and adjacent products have a complex tax and regulatory structure in place. Each additional requirement further complicates their operation. This impact is felt disproportionately by small businesses.

During the COVID-19 pandemic, there were no inspections of stores; however, the data on retailer violations remained frozen artificially high. This purported data has created a false narrative. Tobacco retailer compliance rates have historically been comparable to those of alcohol retailers without the extensive investment of financial and human resources by taxpayers. Virginia businesses have significantly fewer violations than states with similar populations and neighboring states.¹

¹ FDA: Compliance Check Inspections of Brick and Mortar Tobacco Product Retailers (September 2016 – August 2023) <https://timp-ccid.fda.gov/>

Underage Sales of E-cigarettes (Similar Population)

State	Population	Violations	E-cigarette Licensing
North Carolina	10,698,973	1461	No
Michigan	10,034,113	1192	No
New Jersey	9,261,699	715	Yes
Virginia	8,683,619	342	No
Washington	7,785,786	957	Yes
Arizona	7,359,197	346	No
Tennessee	7,051,339	526	No

Underage Sales of E-cigarettes (Neighboring States)

State	Violations	E-cigarette Licensing
North Carolina	1461	No
West Virginia	531	No
Tennessee	526	No
Maryland	500	Yes
Kentucky	374	No
Virginia	342	No
Delaware	109	No

Thank you for your thoughtful consideration of our concerns with creating additional regulations. Please do not hesitate to contact our organizations should you have any further questions.

Sincerely,

The Virginia Asian American Store Owners Association

The Virginia Petroleum & Convenience Marketers Association

October 26, 2023

VIA ELECTRONIC MAIL

John W. Daniel II, Esq.
Counsel & Chief Government Affairs Officer
Virginia Alcoholic Beverage Control Authority
john.daniel@virginiaabc.com

RE: Chapter 761, 2023 Acts of Assembly (SB1350/HB2296) Study Group Draft Report

Dear Mr. Daniel,

Thank you for providing the opportunity to submit written comments to the above-mentioned Study Group's draft report on behalf of the Virginia Smoke Free Association ("VSFA"). Based on our review of the draft report, VSFA believes that certain clarifications are in order. Moreover, VSFA respectfully disagrees with the draft report's findings and urges that it be amended to more accurately describe the presentations and comments provided during the July 25 and September 20 meetings, which demonstrated a consensus *for* licensing.

First, the draft report seems to divide the stakeholders in to two distinct camps: "advocates for licensing" and "the retailers and wholesalers." However, we believe this distinction to be a potentially misleading dichotomy, as VSFA is (1) primarily comprised of retailers and wholesalers of nicotine vapor products and (2) a proponent of licensing. In fact, VSFA explicitly described itself as "represent[ing] the interests of Virginia's nicotine vapor products **manufacturers, distributors, and retailers**" during its July 25 presentation to this study group. See *The Industry's Case for Licensure*, presented July 25, 2023, at slide 2; *emphasis added*. VSFA is also the entity that requested the introduction of SB1350 and HB2296 during the 2023 session of the General Assembly, which sought to implement a licensing framework for these retailers, and which ultimately led to this study. Therefore, it cannot in good faith be said that:

- "manufacturers and retailers were solicited to make presentations at the inaugural session but chose not to do so;"
- "[e]qually strong in their advocacy in opposition to licensing scheme [*sic*] were the retailers, the manufacturers, retailers [*sic*] and wholesalers;" and

- “the advocates for licensing and the retailers and wholesalers were unable to find consensus.”

Accordingly, VSFA respectfully requests that these aspects of the draft be stricken from the report or, alternatively, more accurately described.

In reviewing the draft report in its most charitable light, it is likely referencing proponents and opponents of licensing as the two distinct groups. However, even then, there are logical inconsistencies within the draft report’s conclusions.

Opponents to licensing were solicited to make reports at the inaugural session but chose not to do so. In fact, opponents to licensing did not make a single public statement before the work group opposing the licensing framework whatsoever during the entirety of this work group’s meetings. Hence, the draft report’s statement that “[e]qually strong in their advocacy in opposition to licensing scheme [*sic*] were the retailers, the manufacturers, retailers [*sic*] and wholesalers” is wholly unfounded and must be stricken. It was not until the work group concluded its meetings that a singular letter was submitted on behalf of the Virginia Petroleum & Convenience Marketers Association, in conjunction with the Virginia Asian American Store Owners Association, opposing the creation of a licensing and enforcement scheme to regulate the sale of nicotine vapor products.

In the same vein, it can hardly be said that the participants were unable to find consensus. Every single presentation or public statement offered at the work group’s meetings were in support of a licensing framework. Thus, there *was* consensus—in favor of licensing. Therefore, VSFA respectfully disagrees with conclusion presented by the work group’s draft report and urges that it be amended to more accurately describe the presentations and comments provided during the July 25 and September 20 meetings, which demonstrated a consensus *for* licensing. (Of course, the report should properly acknowledge the one letter in opposition as well.)

Finally, the draft report fails to include material information, including the slide deck presented by VSFA in the July 25 meeting, which was requested to be included into the record, as well as any mention of the FDA enforcement data, which demonstrates the instances of underage sales of nicotine vapor products has increased in Virginia three-fold since 2016.

VSFA respectfully disagrees with draft report’s conclusion for the reasons stated above and urges that it be amended accordingly. We would be happy to discuss these comments with you at your earliest convenience.

Respectfully submitted,

/s/ Dylan D. Bishop, Esq.

Virginia Smoke Free Association

SENATE OF VIRGINIA



ADAM P. EBBIN
30th SENATORIAL DISTRICT
PART OF ARLINGTON AND FAIRFAX COUNTIES,
AND PART OF THE CITY OF ALEXANDRIA
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COMMITTEE ASSIGNMENTS:
COMMERCE AND LABOR
FINANCE AND APPROPRIATIONS
GENERAL LAW AND TECHNOLOGY
PRIVILEGES AND ELECTIONS
TRANSPORTATION

October 26, 2023

VIA ELECTRONIC MAIL

John W. Daniel II, Esq.
Counsel/Chief Government Affairs Officer
Virginia Alcoholic Beverage Control Authority

Dear Mr. Daniel:

Thank you for your effort on the workgroup established pursuant to SB1350, which I carried this past legislative session.

The Authority did not request to be inserted into SB1350; rather, Governor Youngkin substituted the Authority in place of one of his Cabinet Officials, the Secretariat of Finance, who was the actual official tasked by the General Assembly to assess a licensing system for manufacturers, distributors, and retail dealers of liquid nicotine, and to make recommendations. Over the course of this past summer, my staff has appreciated the opportunity to attend the meetings of the work group.

In reviewing the draft report from the Authority, I write to express my concerns, shared by other stakeholders of the workgroup, that the wide breadth of support for the licensing of nicotine retailers is severely underrepresented in the draft report.

I understand, as I know you do well, the complexities of representing opinions expressed in legislative workgroups composed of varied stakeholders.

If challenges persist for the Authority in accurately clarifying the quantity, as well as the quality, of the opinions expressed during the meetings of the workgroup, I would recommend including minutes, and summaries, of the meetings of the workgroup in the final report.

Please do not hesitate to contact my office if we can be of assistance.

Sincerely,

A handwritten signature in blue ink that reads "Adam P. Ebbin".

Adam P. Ebbin
Member, Virginia Senate