

1 AN ACT relating to vapor products and making an appropriation therefor.

2 *Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

3 ➔SECTION 1. A NEW SECTION OF KRS CHAPTER 438 IS CREATED TO
4 READ AS FOLLOWS:

5 *(1) As used in Sections 1 and 2 of this Act:*

6 *(a) "Department" means the Department of Alcoholic Beverage Control;*

7 *(b) "Distributor" has the same meaning as in KRS 138.130;*

8 *(c) "FDA" means United States Food and Drug Administration;*

9 *(d) "Manufacturer" has the same meaning as in KRS 138.130;*

10 *(e) "Premarket tobacco product application" means an application that was:*

11 *1. Timely-filed pursuant to 21 U.S.C. sec. 387j for a vapor product*
12 *containing nicotine derived from tobacco marketed in the United*
13 *States as of August 8, 2016;*

14 *2. Submitted to the FDA on or before September 9, 2020; and*

15 *3. Accepted for filing;*

16 *(f) "Retailer" means any person who sells vapor products to consumers for any*
17 *purpose other than resale; and*

18 *(g) "Third party" means an importer, distributor, wholesaler, retailer, or*
19 *similar intermediary or intermediaries;*

20 *(2) On or after January 1, 2025, sales of any vapor products shall be unlawful if the*
21 *vapor products or vapor product manufacturers are not listed in the directory*
22 *created in this section.*

23 *(3) By October 1, 2024, and annually thereafter, every manufacturer of vapor*
24 *products that are sold for retail in this state, whether directly or through a third*
25 *party, shall certify under penalty of perjury on a form and in the manner*
26 *prescribed by the department, that the manufacturer:*

27 *(a) Sells vapor products in this state;*

- 1 (b) Lists the following information:
- 2 1. Brand name;
- 3 2. Product category, including e-liquid, power unit, device, e-liquid
- 4 cartridge, e-liquid pod, or disposable;
- 5 3. Product name; and
- 6 4. Flavor, including each product's specific name;
- 7 (c) 1. Has received a marketing authorization for the vapor product from the
- 8 FDA pursuant to 21 U.S.C. sec. 387j; or
- 9 2. Submitted a premarket tobacco product application for the vapor
- 10 product and the application:
- 11 a. Has been accepted by the FDA;
- 12 b. Remains under review by the FDA;
- 13 c. Has received a denial order that has been and remains:
- 14 i. Stayed by the FDA or court order;
- 15 ii. Rescinded by the FDA; or
- 16 iii. Vacated by a court; and
- 17 (d) Agrees to comply with this chapter.
- 18 (4) Each annual certification form described in subsection (3) of this section shall
- 19 also be accompanied by:
- 20 (a) 1. A copy of the marketing authorization described in subsection (3)(c)1.
- 21 of this section; or
- 22 2. A copy of the acceptance letter, the denial order, or any other
- 23 document described in subsection (3)(c)2. of this section; and
- 24 (b) 1. An enforcement fee of two thousand (\$2,000) for each vapor product
- 25 when it is initially listed on the annual form submitted by the
- 26 manufacturer and sold in this state; and
- 27 2. An enforcement fee of one thousand dollars (\$1,000) for each product

1 subsequently relisted on the annual certification form and sold in this
2 state.

3 (5) The information submitted by the manufacturer pursuant to subsection (4)(a) of
4 this section shall be considered confidential information for the purposes of KRS
5 61.870 to 61.884. The department may redact certain confidential commercial or
6 financial information provided under subsection (4)(a) of this section. The
7 department shall not disclose the information except as required or authorized by
8 law.

9 (6) A manufacturer shall notify the department of a material change to its
10 certification form and provide a copy of documents supporting the change within
11 thirty (30) days of the change, including but not limited to:

12 (a) The issuance or denial of a marketing authorization, an order or any other
13 document as described in subsection (3)(c) of this section; or

14 (b) Any order or action by the FDA or a court that affects the ability of a vapor
15 product to be introduced into interstate commerce for commercial
16 distribution in the United States.

17 (7) The department shall maintain and make available a directory that lists all:

18 (a) Vapor product manufacturers; and

19 (b) Vapor products, by brand name, product category, product name, and
20 flavor, for which certification forms have been submitted as described in
21 subsection (3) of this section.

22 (8) The department shall:

23 (a) Make the directory available for inspection on the department's public
24 website by January 1, 2025;

25 (b) Establish a process to provide licensed retailers, distributors, and
26 wholesalers notice of the initial publication of the directory and report
27 changes made to the directory from the prior month; and

1 (c) Update the directory monthly to:

2 1. Correct mistakes;

3 2. Ensure accuracy; and

4 3. Reflect additions or removals of the vapor product manufacturers,
5 vapor products, or other information listed in subsection (3)(c) of this
6 section.

7 (9) No manufacturer or vapor product shall be included or retained in the directory
8 if the department determines that the manufacturer:

9 (a) Failed to provide a complete and accurate certification as required by
10 subsection (3) of this section;

11 (b) Submitted a certification that does not comply with subsections (4) and (6)
12 of this section;

13 (c) Failed to include the payment required by subsection (4)(b) of this section;
14 or

15 (d) Provided, in the certification form, false information, material
16 misrepresentations, or material omissions.

17 (10) (a) The manufacturer shall have fifteen (15) business days from the date of
18 service of the notice of the department's determination in subsection (9) of
19 this section to establish that the manufacturer or its products should be
20 included in the directory. Using information provided by the manufacturer
21 in its most recent certification form, notice shall be considered sufficient
22 and immediately received by a manufacturer if the notice is sent
23 electronically to an email account.

24 (b) The department shall not remove the manufacturer or its products from the
25 directory until at least thirty (30) days after the manufacturer has been
26 given notice of the department's determination and the reasons for that
27 determination.

1 (c) A determination by the department not to include or to remove from the
2 directory a manufacturer or a product shall be subject to review by the filing
3 of a civil action for prospective declaratory or injunctive relief.

4 (11) Within twenty-one (21) days of the date a product is removed from the directory:

5 (a) Each retailer, distributor, and wholesaler shall eliminate the product from
6 its inventory and return the product to the manufacturer for disposal; and

7 (b) The vapor products of a manufacturer identified in the notice of removal
8 are contraband and are subject to penalties under subsection (14) of this
9 section and seizure, forfeiture, and destruction under subsection (13)(b) of
10 this section.

11 (12) Beginning January 1, 2025:

12 (a) A person shall not sell; and

13 (b) A manufacturer may not sell, directly or through third party;
14 a vapor product in this state that is not included in the directory.

15 (13) (a) By March 1, 2025 and within sixty (60) days after the directory is modified
16 thereafter:

17 1. Each retailer shall sell or otherwise remove vapor products from its
18 inventory that are not included in the directory; and

19 2. Each distributor or wholesaler shall remove vapor products intended
20 for sale in the state from its inventory.

21 (b) Vapor products not listed in the directory that remain in inventory and
22 intended for sale in this state:

23 1. Are subject to seizure, forfeiture, and destruction:

24 a. The cost of seizure, forfeiture, and destruction from the retailer,
25 distributor, or wholesaler shall be borne by the person from
26 whom the products are confiscated; and

27 b. No products may be seized from a consumer who has made a

- 1 bona fide purchase of the product;
2 2. May not be purchased or sold for retail sale in this state except as
3 provided in this subsection; and
4 3. Once seized, the vapor products may be stored and disposed by the
5 department in accordance with federal, state, and local laws
6 pertaining to storage and disposal of the products.

7 (14) The following penalties shall apply to violations of this section:

- 8 (a) 1. A wholesaler, distributor, or retailer who sells or offers for sale a
9 vapor product in this state that is not included in the directory shall be
10 subject to a civil penalty of five hundred dollars (\$500) per day for
11 each product offered for sale in violation of this section until the
12 offending product is removed from inventory or until the offending
13 product is properly listed on the directory.
14 2. For a second violation within a twelve (12) month period, the license
15 of the licensee issued pursuant to KRS 138.195 shall be suspended for
16 at least fourteen (14) days.
17 3. For a third violation within a twelve (12) month period, the license of
18 the licensee issued pursuant to KRS 138.195 shall be suspended for at
19 least sixty (60) days.
20 4. For a fourth or subsequent violation within a twelve (12) month
21 period, the license of the licensee issued pursuant to KRS 138.195
22 shall be suspended for at least one (1) year;
23 (b) A manufacturer whose vapor products are not listed in the directory and are
24 sold in this state, directly or through a third party, is subject to a civil
25 penalty of five hundred dollars (\$500) per day for each product offered for
26 sale in violation of this section until the offending product is:
27 1. Removed from the market; or

- 1 2. Until the offending product is properly listed on the directory; and
- 2 (c) 1. Any manufacturer that falsely represents information required by the
- 3 certification form required by subsection (3) of this Section shall be
- 4 guilty of a Class B misdemeanor for each false representation.
- 5 2. A repeat violation of this paragraph shall constitute an unlawful act
- 6 under KRS 367.170 and shall be subject to any remedies or penalties
- 7 available for a violation of that section under KRS Chapter 367.
- 8 (15) The department shall have authority to enforce compliance with Sections 1 and 2
- 9 of this Act and may promulgate administrative regulations in accordance with
- 10 KRS Chapter 13A necessary to affect the purposes of this section.
- 11 (16) (a) The department may examine the books, papers, and records of any
- 12 distributor, wholesaler, or retailer in this state.
- 13 (b) The department may inspect and examine the documents, the business
- 14 premises, and any furniture or fixtures contained in or upon the premises in
- 15 order to determine if vapor products are held or possessed in violation of
- 16 this section.
- 17 (c) The department shall conduct unannounced follow-up examinations of
- 18 noncompliant distributors, wholesalers, and retailers within thirty (30) days
- 19 after any violation of this section.
- 20 (d) Each wholesaler, distributor, or retailer that sells or distributes vapor
- 21 products in this state shall be subject to at least two (2) unannounced
- 22 compliance checks by the department annually for purposes of enforcing
- 23 this section.
- 24 (e) The department shall publish the results of all examinations annually and
- 25 shall make the results available to the public on request.
- 26 (17) (a) Any vapor product offered for sale in violation of this section is declared to
- 27 be a contraband good and may be seized by the department, the

1 department's agents, or by law enforcement if directed by the department to
2 do so, without a warrant.

3 (b) The cost of seizure, forfeiture, and destruction shall be borne by the
4 business or person from whom the products are confiscated.

5 (18) (a) Any nonresident manufacturer of vapor products that has not registered to
6 do business in this state as a foreign corporation or business entity shall
7 appoint and continually engage the services of an agent in this state.

8 (b) The agent shall act as agent for the service of process on whom all process
9 may be served as authorized by law. The service of process to the agent shall
10 constitute legal and valid service of process on the manufacturer.

11 (c) The manufacturer shall provide to the department:

12 1. The name, address, telephone number, and proof of the appointment
13 and availability of an agent;

14 2. Notice of termination of an agent thirty (30) calendar days or more
15 prior to the termination;

16 3. Proof of the appointment of a new agent no less than five (5) calendar
17 days prior to the termination of an existing agent appointment; and

18 4. Notice within five (5) calendar days if an agent terminates the
19 appointment with the manufacturer, and proof of the appointment of a
20 new agent.

21 (d) Any manufacturer whose vapor products are sold in this state that has not
22 appointed and engaged the services of an agent as required by this section
23 shall be deemed to have appointed the Secretary of State as its agent for
24 service of process. The appointment of the Secretary of State as agent shall
25 not satisfy the condition precedent required in paragraphs (a), (b), and (c)
26 of this subsection to be included or retained in the directory.

27 (19) Starting June 1, 2025, and annually thereafter, the department shall provide a

1 report to the Legislative Research Commission for referral to the Interim Joint
 2 Committee on Licensing and Occupations regarding:

3 (a) The status of the directory;

4 (b) Manufacturers and products included in the directory;

5 (c) Revenue and expenditures related to administration of this section; and

6 (d) Enforcement activities undertaken pursuant to this section.

7 (20) All fees and penalties collected by the department pursuant to this section shall be
 8 used for administration and enforcement of this section.

9 ➔SECTION 2. A NEW SECTION OF KRS CHAPTER 438 IS CREATED TO
 10 READ AS FOLLOWS:

11 (1) A person shall not advertise, distribute, market, offer for sale, or sell a vapor
 12 product by using, in a trademark of the product or in the product's advertising,
 13 branding, design, marketing, or packaging:

14 (a) The terms:

15 1. "Cake";

16 2. "Candy";

17 3. "Cupcake";

18 4. "Pastry";

19 5. "Pie";

20 6. Any variation of one (1) or more of these terms; or

21 7. Any other term that references a type or brand of the items listed in
 22 this paragraph, whether it includes the terms listed in subparagraphs 1
 23 through 6, of this paragraph in its name or any of its slogans; and

24 (b) By using, in a trademark of the product or in the product's advertising,
 25 branding, design, marketing, packaging, or trade dress, a depiction or
 26 signifier of:

27 1. A food, or a brand of food, marketed to minors, including but not

- 1 limited to:
- 2 a. A cereal;
- 3 b. A cookie, ice cream, sherbet, sorbet, or other dessert; or
- 4 c. A juice box or soft drink;
- 5 2. A character, personality, or symbol known to appeal to minors,
- 6 including but not limited to:
- 7 a. A celebrity;
- 8 b. A character in a comic book, movie, television show, or video
- 9 game; or
- 10 c. A unicorn or any other mythical creature; or
- 11 3. School supplies primarily used by minors, including but not limited to:
- 12 a. Erasers;
- 13 b. Highlighters;
- 14 c. Ink pens; or
- 15 d. Pencils.
- 16 (2) A person that violates subsection (1) of this section is guilty of a misdemeanor
- 17 punishable by a fine as follows:
- 18 (a) For a first violation, not more than one hundred dollars (\$100);
- 19 (b) For a second violation, not more than five hundred dollars (\$500); and
- 20 (c) For a third or subsequent violation, not more than two thousand five
- 21 hundred dollars (\$2,500).
- 22 (3) Any vapor product advertised, distributed, marketed, offered for sale, or sold in
- 23 violation of subsection (1) of this section is declared to be contraband and may be
- 24 seized by the department or a local authority in coordination with the department,
- 25 without a warrant. The cost of such seizure, forfeiture, and destruction shall be
- 26 borne by the person from whom the products are confiscated.
- 27 (4) Compliance checks conducted pursuant to Sections 1 and 2 shall be performed to

1 ensure a person's compliance with these sections.

2 ➔SECTION 3. A NEW SECTION OF KRS CHAPTER 438 IS CREATED TO
3 READ AS FOLLOWS:

4 (1) There is established in the State Treasury a restricted fund to be known as the
5 vapor product and vapor product manufacturer (VPVPM) directory enforcement
6 fund, which shall be administered by the department. The fund shall consist of
7 the fees collected under Section 1 of this Act, the penalties collected under
8 Sections 1 and 2 of this Act, and any moneys collected pursuant to the
9 enforcement actions taken by the department in the course of administering
10 Sections 1 and 2 of this Act.

11 (2) Amounts deposited in the fund shall only be used to defray the costs of the
12 department's monitoring and enforcement responsibilities for VPVPM
13 directories.

14 (3) Notwithstanding KRS 45.229, fund amounts not expended at the close of the
15 fiscal year shall not lapse, but shall be carried forward into the next fiscal year.

16 (4) Any interest earnings of the fund shall become part of the fund and shall not
17 lapse.

18 (5) Moneys deposited in the fund are hereby appropriated for the purposes set forth
19 in this subsection and shall not be appropriated or transferred by the General
20 Assembly for any other purposes.