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## Commerce & Gaming Committee

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### HB 1932

**Brief Description:** Concerning vapor products.

**Sponsors:** Representatives Pollet, Jinkins, Tarleton, Stanford, Appleton and Valdez.

#### Brief Summary of Bill

- Establishes a vapor products stewardship program to require producers of vapor products, including marijuana vapor products, to finance the collection, transportation, recycling, and disposal of vapor products sold for use in Washington.
- Requires vapor products retailers and certain marijuana retailers to accommodate stewardship organizations and make opportunities available for the collection of unwanted vapor products to the general public during all business hours.
- Grants the Department of Ecology (Ecology) rule-making and enforcement authority to administer the stewardship program, establishes civil penalties, and authorizes an administrative fee on vapor products retailers and certain marijuana retailers.
- Prohibits the sale of flavored vapor products, and flavored marijuana vapor products, beginning January 2020, and regulates vapor product advertising.
- Grants the Department of Health authority to develop vapor product labeling requirements, including disclosures of ingredients and potential harmful effects.

**Hearing Date:** 2/12/19

**Staff:** Peter Clodfelter (786-7127).

#### **Background:**

##### Vapor Products.

*Vapor Products Generally.* A 2016 state law regulates the distribution, delivery, sale, and use of vapor products in Washington state. Licenses are issued to qualified applicants by the Liquor and Cannabis Board (LCB). "Vapor product" is defined to include any noncombustible product that may contain nicotine and that employs a heating element, power source, electronic circuit, or

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other electronic, chemical, or mechanical means, regardless of shape or size, that can be used to produce vapor or aerosol from a solution or other substance. "Vapor product" under the 2016 law does not include any product that is a marijuana product, a cigarette, or tobacco product. The 2016 law created a vapor product retailer's license (\$175), a vapor product distributor's license (\$150), and a vapor product delivery sale license (\$250). For retailers who prevent entry to people under age 18, vapor products may be displayed and sold in an unsecured display accessible without employee intervention and from self-service displays.

*Delivery Sales.* Delivery sales of vapor products include purchases made over the phone, mail, or Internet, to consumers. A licensee may not accept a purchase or order form an person without first obtaining the full name, birth date, and residential address of the person and verifying the information through an independently operated third-party database or aggregate of databases regularly used by government and business for age and identity verification and authentication. A delivery sale licensee must accept payment only through a credit or debit card issued in the purchaser's name. Additional requirements apply to delivery sales.

*Product Tastings.* Vapor product tastings may be conducted only at a licensed retailer who restricts entry to people age 18 and over. Under Washington State law products tasted must not contain nicotine or the customer must explicitly consent to a tasting of a vapor product containing nicotine. However, under federal rules vapor products with nicotine may not be tasted. If the customer uses a vapor device owned by the retailer, a disposable mouthpiece tip must be attached to the product used by the customer or the device must be disposed of after each tasting.

*Coupons for Free Products.* Coupons may be used to receive a discount on a vapor product as part of an in-person transaction or delivery sale. Otherwise, no person may give vapor products to a person for free by coupon, unless the product was provided as a contingency of the same purchase or a prior purchase as part of an in-person transaction or delivery sale.

*Penalty for Purchase by Minor.* A person under age 18 who purchases or attempts to purchase, possess, or obtain vapor products commits a class 3 civil infraction and must pay the fine (up to \$50 plus plus statutory assessments), participate in up to four hours of community service, or both. The court may also require participation in a smoking cessation program.

*Penalties for Sales to Minors.* A retailer or delivery seller violating the prohibition on selling a vapor product to a minor is subject to a monetary penalty of \$200 for the first violation within a three-year window. A second violation within a three-year window is \$600. A third violation within a three-year window is \$2,000 and license suspension for six months. A fourth violation within a three-year window is \$3,000 and license suspension for 12 months. A fifth or subsequent violation within a three-year window results in license revocation with no possibility of reinstatement for a period of five years.

*Use of Vapor Products in Public.* The use of vapor products is prohibited in the following indoor areas: (1) inside a child care facility (with exception for home-based facilities when children are not present); (2) schools; (3) within 500 feet of schools; (4) school buses; and (5) elevators. However, the use of vapor products is permitted for tasting and sampling in indoor areas of retail outlets. Regarding outdoor areas, the use of vapor products is prohibited in the following areas: (1) real property under the control of a child care facility (with exception for home-based

facilities when children are not present); (2) real property under the control of a school and upon which the school is located; and (3) playgrounds, during the hours between sunrise and sunset, when one or more persons under 12 years of age are present.

*Product Compliance Tests.* The LCB may work with local county health departments or districts and local law enforcement agencies to conduct random, unannounced inspections to ensure compliance. There is also a process for the LCB to work in consultation with the DOH and local health jurisdictions to analyze a vapor product substance or sample, and when a product contains an ingredient or substance present in quantities injurious to human health or posing a significant risk to public health, the LCB may suspend the business's license unless the licensee agrees to remove the product from sales.

*Preemption.* Local governments may not adopt or enforce requirements for the licensure and regulation of vapor product promotions and sales at retail. No local government may impose fees or license requirements on retail outlets for possessing or selling vapor products, other than general business taxes or license fees not primarily levied on vapor products. Additionally, no local government may regulate the use of vapor products in outdoor public places, unless the public place is an area where children congregate, such as schools, playgrounds, and parks. Local governments may regulate the use of vapor products in indoor public places.

#### Marijuana Regulation.

Under a separate legal and regulatory framework than for vapor products, the LCB also regulates the production, processing, and retail sale of marijuana and marijuana products. From licensed retail outlets, marijuana retailers may sell limited amounts of useable marijuana, marijuana-infused products, and marijuana concentrates to adults age 21 and over, and to certain qualifying patients under age 21 in certain circumstances. Marijuana products sold are intended for human consumption, and some marijuana products may be intended for consumption through vaporization.

#### **Summary of Bill:**

##### Vapor Products Stewardship Program.

*Stewardship Plans.* Beginning January 1, 2022, a producer of vapor products may not sell, offer for sale, or distribute for use, vapor products in Washington unless the producer is participating in a stewardship organization with a plan approved by the Department of Ecology (Ecology). Stewardship plans must also include the following elements:

- contact information and a list of participating brands and producers under the program;
- a description of how producers will fully finance the collection, transportation, recycling, and disposal of vapor products sold for use in Washington state;
- provision for the collection, transportation, recycling, and disposal of vapor products and their component parts;
- a description of the methods used to collect, transport, and recycle or dispose of all vapor products and their constituent parts collected by the stewardship organization;
- a plan for education and outreach by the stewardship organization to licensed vapor products retailers regarding their obligations under the act;
- a plan for education and outreach by the stewardship organization to vapor product consumers regarding the opportunities provided by the stewardship organization for the end-of-life management of vapor products, subject to restrictions and Ecology approval;

- performance goals for the collection and recycling of vapor products and their parts; and
- a description of how the stewardship organization will comply with the vapor product-disposal requirements.

Producer financing of the program must include higher program financing charges for production of vapor products without reusable or recyclable batteries or vapor product casings that are capable of being separated or deconstructed. Consumers may not be charged a fee at the point of sale or collection of vapor products, and the stewardship organization must provide all collection, transportation, recycling, and disposal services free of charge to consumers.

*Disposal Requirements.* Beginning at the point of collection for transport from a retail outlet that served as a collection location for disposed vapor products, the stewardship organization must manage and dispose of the constituent components of vapor products. Reclamation of battery constituents is required. All battery constituents that are capable of being reused or recycled, regardless of economic consideration, must be reused or recycled. However, each stewardship organization may petition Ecology for approval to dispose of types or components of batteries that are not capable of being reused or recycled, and Ecology must approve such as petition upon a determination that reuse or recycling is infeasible. Additionally, solutions and substances containing nicotine, marijuana products intended for vaporization or aerosolization, and other active vapor product ingredients capable of being dispensed by the vapor product must be managed and disposed of as hazardous waste consistent with existing hazardous waste management requirements in state law. For vapor product casings, the constituent parts of which are capable of being deconstructed or separated, in total or in part, into uniform plastic or metal pieces, the stewardship organization must arrange for the reuse or recycling of these parts. For vapor product casings that are not capable of being deconstructed or separated into constituent parts, the stewardship organization must manage and dispose of vapor product casings as hazardous waste.

*Rulemaking Authority and Civil Penalties.* Ecology is granted rulemaking authority to implement and administer the new stewardship program requirements. Rules must specify information that each stewardship organization must submit to Ecology. Ecology may impose a civil penalty of \$1,000 per violation per day on any person who violates the new requirements, or \$10,000 per violation per day on any person who intentionally, knowingly, or negligently violates the new requirements. Civil penalties may be appealed to the Pollution Control Hearings Board.

*Annual Report.* Beginning April 1, 2021, each approved stewardship organization must submit an annual report to Ecology and the Department of Health that includes, at minimum the following: (1) the number of vapor products sold at each retail outlet during the previous calendar year; (2) the number of vapor products collected at each retail outlet during the previous calendar year; (3) the names and amounts of vapor products handled by each entity involved in the transport, recycling, or disposal of collected vapor products during the previous calendar year; and (4) documentation of the stewardship organization's compliance with the plan approved by Ecology and with the other program requirement requirements.

*Retail Outlet Requirements.* Each vapor product retail outlet and each retail outlet operating under a marijuana retailer license that offers or sells marijuana products intended for vaporization or aerosolization must provide, at no charge, reasonable accommodation to each

stewardship organization implementing an approved plan for the collection of vapor products. Each retail outlet must make opportunities available for the collection of unwanted vapor products available to the general public during all hours the retail outlet is open for business. A person operating a vapor products retail outlet in violation of the new requirements is subject to a class C felony. A marijuana retail outlet that sells marijuana products intended for vaporization or aerosolization and that does not comply with the new requirements is subject to penalties established under LCB rules.

*Vapor Product Stewardship Account.* The Vapor Product Stewardship Account (Account) is created in the custody of the state Treasurer. All fees collected from retail outlets under the program must be deposited in the Account. Expenditures from the account may be used only for administering the stewardship program, and the Account is non-appropriated.

*National Program.* Instead of preparing a stewardship plan under the new state program, a producer may participate in a national program for the convenient, safe, and environmentally sound takeback and recycling of vapor products and their components and materials, if the national program is substantially equivalent to the intent of the state program. Ecology may determine substantial equivalence if it determines that the national program adequately addresses and fulfills each of the mandatory elements of a stewardship plan and includes an enforcement mechanism reasonably calculated to ensure a producer's compliance with the national program.

*Administrative Fee for Certain Marijuana Retailers.* By November 1, 2021, and each November 1st thereafter, the LCB must set an administrative fee, applicable during the following calendar year, for all vapor products retailers and for marijuana retailers who offer or sell any marijuana product intended for vaporization or aerosolization. The amount of the fee must be sufficient to cover the anticipated direct and indirect costs to the LCB and Ecology in administering and enforcing the program's requirements. The LCB must set the amount of the fee by dividing the total state agency administrative costs by each retail outlet's pro rata share of vapor product sales in the most recent preceding calendar year, based on the information collected when stewardship organizations submit information to Ecology, or the best available information. The LCB and Ecology must enter a memorandum of agreement to divide the administrative fee to cover each agency's expected costs related to enforcing the new requirements.

*Stewardship Program Definitions.* "Vapor product," for purposes of the stewardship program, is defined as any noncombustible product including, but not limited to, vapor products as defined in the 2016 vapor products law, that employ a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, to produce vapor or aerosol from a solution or other substance including, but not limited to, solutions or other substances that may contain nicotine or marijuana products.

A vapor products "producer" is defined as a person that meets one of various criteria, including:

- the person manufactures or has manufactured, or assembles or has assembled, a vapor product for sale in or into this Washington state;
- the person is a marijuana processor licensed by the LCB who processes marijuana into marijuana products intended for consumption through vaporization or aerosolization;
- the person has or had legal ownership of the brand, brand name, or cobrand of a vapor product that is sold in, into, or distributed for use in Washington state;

- the person imports or has imported vapor products by a producer if the producer has no physical presence in the United States; or
- the person elects to assume the responsibility and register in lieu of a producer.

#### Flavored Vapor Products.

*Licensed Vapor Products Retailers.* Beginning January 1, 2020, a licensed vapor products retailer or distributor may not sell, offer, or possess with the intent to sell or offer for sale flavored vapor products. However, this provision is inoperative if the federal government expressly preempts a ban on flavored vapor products or if a court of competent jurisdiction finds that the federal government occupies the field in this area of regulation. The LCB may, in conjunction with local law enforcement, conduct random and inspections of a retailer to investigate whether flavored vapor products are offered for sale, and may seize any flavored vapor products found. "Flavored vapor product" is defined as any vapor product that imparts a characterizing flavor other than a tobacco flavor. Characterizing flavors include, but are not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice.

*Licensed Marijuana Retailers.* Beginning January 1, 2020, a licensed marijuana retailer may not sell, offer for sale, or possess with the intent to sell or offer for sale any flavored marijuana product intended for consumption through vaporization or aerosolization. "Flavored marijuana product" means any marijuana product intended for consumption through vaporization or aerosolization that imparts a characterizing flavor other than a marijuana flavor. Characterizing flavors include, but are not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb, or spice.

#### Vapor Products Licensee Advertising and Promotion.

A vapor products licensee may not take any action to target youth in the advertising, promotion, or marketing of vapor products, or take any action the primary purpose of which is to initiate, maintain, or increase the incidence of youth use of vapor products, including third-party product placement in any media aimed at youth. Additionally, a vapor products licensee may not use objects such as toys or inflatables, movie or cartoon characters, or any other depiction or image likely to be appealing to youth, where such objects, images, or depictions indicate an intent to cause youth to become interested in the purchase or consumption of vapor products.

#### Vapor Product Labeling.

The Department of Health is granted authority to adopt rules regarding labels on vapor products including, but not limited to, identifying potential harmful effects, indicating the legal age to use the product, warning to keep the product away from children, and disclosure of ingredients in vapor products.

**Appropriation:** None.

**Fiscal Note:** Requested on February 6, 2019.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed, except for the vapor product stewardship program requirements in Section 3 that become effective January 1, 2022, and the requirements related to flavored vapor products in Section 15 and flavored marijuana products in Section 16, which become effective January 1, 2020.