SENATE BILL REPORT
SB 5768

As of January 31, 2022

Title: An act relating to protecting public health and safety by enhancing the regulation of vapor products.

Brief Description: Enhancing the regulation of vapor products.

Sponsors: Senators Kuderer, Dhingra, Robinson, Saldaña, Stanford and Wilson, C..

Brief History:
Committee Activity: Health & Long Term Care: 1/31/22.

Brief Summary of Bill

- Allows the Department of Health to restrict the sale of any flavored vapor product if the Secretary of Health determines a flavored vapor product may injure human health or pose a significant risk to public health.
- Requires the State Board of Health to determine the allowable nicotine concentration for any product sold or offered for sale in the state, and the product may not be sold or offered for sale if it exceeds the allowable concentration amount.
- Requires a manufacturer or distributor that sells, offers for sale, or distributes liquid nicotine containers to label the vapor products that meet requirements set by the Department of Health in rule and other requirements.

SENATE COMMITTEE ON HEALTH & LONG TERM CARE

Staff: Julie Tran (786-7283)

Background: "Vapor products" are defined as any noncombustible product containing a

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solution or other consumable substance, regardless of whether it contains nicotine, which employs a mechanical heating element, battery, or electronic circuit that can be used to produce vapor from the solution or other substance. For purposes of taxation, vapor products do not include tobacco cessation products, component ingredients in vapor products, or marijuana or tobacco products. The distributor is responsible for the payment of the tax, but the tax may be imposed on the consumer if it was not previously collected

Federal Regulations. In 2016, the United States Food and Drug Administration (FDA) finalized a ruling extending regulatory authority to cover all tobacco products including electronic nicotine delivery systems (ENDS) that meet the definition of a tobacco product. FDA regulates the manufacture, import, packaging, labeling, advertising, promotion, sale, and distribution of ENDS, including components and parts of ENDS, but excluding accessories. Vapes, vaporizers, vape pens, hookah pens, electronic cigarettes—e-cigarettes or e-cigs, and e-pipes are some of the many terms used to describe ENDS, which are recognized as noncombustible tobacco products.

In 2018, all covered tobacco products must bear the required nicotine addictiveness warning statement on product packages and advertisements. That required warning statement reads as: "WARNING: This product contains nicotine. Nicotine is an addictive chemical." It must appear directly on the package and be clearly visible underneath any cellophane or any other clear wrapping as well as meet other font, text, size, placement, and formatting requirements set by the FDA. A covered tobacco product is any product that is subject to the Federal Food, Drug, and Cosmetic Act but excludes any component or part that is not made or derived from tobacco. Cigars, liquid nicotine, hookah or waterpipe tobacco, and pipe tobacco are considered covered tobacco products, but vaporizers or pipes that are not pre-loaded with tobacco or a tobacco-derived substance is not considered to be covered tobacco products.

In September 2020, the United States District Court for the District of Columbia issued an order vacating the health warning requirements for cigars and pipe tobacco. This order allows cigar and pipe tobacco firms to voluntarily comply with the health warning. The court order did not prohibit the FDA from enforcing the health warning requirements for other product categories such as ENDS products, hookah tobacco, and cigarette tobacco and roll-your-own tobacco products.

On March 27, 2021, Congress amended the Preventing All Cigarettes Trafficking Act to modify the definition of "cigarettes" to include ENDS and define ENDS as including any electronic device that, through an aerosolized solution, delivers nicotine, flavor, or any other substance to the user inhaling from the device or any component, liquid, part, or accessory of a device, without regard to whether the component, liquid, part, or accessory is sold separately from the device.

State Regulations. No person may conduct business as a retailer, distributor, or delivery seller of vapor products in the state without a valid license issued by the Washington State

Liquor and Cannabis Board (LCB). A licensee must allow LCB enforcement officers to make full inspection of any place of business or vehicle where any vapor products are sold, stored, transported, or handled.

No person may conduct delivery sales of vapor products by mail or through the Internet without first obtaining a delivery sales license from LCB. No person may offer a tasting of vapor products unless they are a licensed retailer, the tasting is offered in a licensed premise that is restricted to those 21 years old or older, and the product contains no nicotine unless the customer otherwise consents. No person may offer a coupon for a free vapor product unless it is an incentive to purchase multiple products. Coupons may be offered for discounts on vapor products.

A manufacturer or distributor selling or distributing liquid nicotine containers must label the vapor product with a warning regarding the harmful effects of nicotine; a warning to keep the vapor product away from children; a warning that vaping is illegal for those under the legal age to use the product; and a statement about the amount of nicotine contained in the container. Manufacturers and distributors of closed system nicotine containers must disclose the nicotine content annually to DOH. These regulations expire if the FDA issues rules pertaining to warning requirements. On May 10, 2018, the FDA's final regulations on product labeling requirements became effective but it applies only to vapor products containing nicotine.

If the Secretary of Health (Secretary) or a local health jurisdiction determine a vapor product may injure human health or pose a significant risk to public health, LCB may analyze a product sample, and if the sample is determined to be harmful, LCB may suspend the license of the retailer or delivery sale licensee unless they agree to remove the product from sale. If the retailer or delivery sale licensee does not remove the product from sale, the Secretary or local health officer may file for an injunction in superior court prohibiting the sale or distribution of that specific vapor product substance or solution.

On October 9, 2019, the State Board of Health (SBOH) adopted emergency rules banning the sale of flavored vapor products and requiring retailers to display a sign warning of the risk of lung disease associated with the use of vapor products. This rule expired on February 7, 2020. On November 18, 2019, SBOH adopted emergency rules banning the sale of vapor products containing vitamin E acetate and it was in effect for 120 days. SBOH adopted a second emergency rule to ban vitamin E acetate on March 19, 2020, and the rule expired on July 7, 2020.

Summary of Bill: If the Secretary determines a flavored vapor product may injure human health or pose a significant risk to public health, DOH may restrict the sale of any such flavored vapor product. The Secretary or DOH may take this action without requiring a person in this state to be actually injured or ill.

SBOH must determine in rule the allowable nicotine concentration for any vapor product

sold or offered for sale in the state. SBOH must consider, among other factors whether the level of nicotine in the product may injure human health or pose a significant risk to public health. Those risks include, but are not limited to, addiction increase, underage use, or limited efficacy of nicotine addiction cessation efforts. If the product has nicotine salts or other ingredients that result in nicotine concentrations that exceed a comparative level of nicotine as determined by SBOH in rule, the vapor product may not be sold or offered for sale.

DOH must require a manufacturer or distributor that sells, offers for sale, or distributes liquid nicotine containers to label the vapor product. DOH must adopt any rules necessary to implement labeling requirements, which must be consistent with any regulations and labeling requirements issued by the FDA, or by any other federal agency; and maintain any labeling requirements which are not preempted, or which provided disclosures that are not mandated by federal regulations.

All manufacturers of nicotine containing vapor products must submit to DOH information on the concentration and form of nicotine in the product and all ingredients or product elements which may be inhaled when the product is used by the consumer.

In collaboration with the University of Washington School of Public Health, DOH must publish on the Internet the list of ingredients for each product submitted to DOH and a guide summarizing and linking to research on ingredient toxicity, carcinogenicity, or any other potential harm to human health associated with the product and its ingredients.

"Flavored vapor products" means any vapor product that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary consumer either prior to or during the consumption of a vapor product including, but not limited to, any taste or smell relating to fruit, menthol, mint, wintergreen, chocolate, cocoa, vanilla, or honey, or any candy, dessert, alcoholic beverage, herb, or spice.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.