

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 to 3 of this Act:

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

7 (b) "Distributor" means any person within this state in possession of vapor
8 products for resale within this state;

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

10 (d) "Manufacturer" means any person who manufactures or produces vapor
11 products within or without this state;

12 (e) "Person" means the same as in KRS 139.010;

13 (f) "Premarket tobacco product application" means an application that was:

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

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

18 3. Accepted for filing;

19 (g) "Retailer" means any person who sells vapor products to consumers for any
20 purpose other than resale;

21 (h) "Sub-jobber" means any person who purchases vapor products from a
22 resident wholesaler, nonresident wholesaler, or unclassified acquirer
23 licensed under KRS 138.195 and makes them available to retailers for
24 resale. No person shall make vapor products available to retailers for resale
25 unless the person certifies and establishes to the satisfaction of the
26 department that firm arrangements have been made to regularly supply at
27 least five (5) retail locations with vapor products for resale in the regular

1 course of business; and

2 (i) "Third party" means a sub-jobber, distributor, wholesaler, retailer, online
3 retailer, or similar intermediary or intermediaries;

4 (2) On or after January 1, 2025, sales of any vapor products shall be unlawful if the
5 vapor products or vapor product manufacturers are not listed in the directory
6 created in subsection (7) of this section.

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

11 (a) Sells vapor products in this state;

12 (b) Lists the following information:

13 1. Brand name;

14 2. Product category, including e-liquid, power unit, device, e-liquid
15 cartridge, e-liquid pod, or disposable;

16 3. Product name; and

17 4. Flavor, including each product's specific name;

18 (c) 1. Has received a marketing authorization for the vapor product from the
19 FDA pursuant to 21 U.S.C. sec. 387j; or

20 2. Submitted a premarket tobacco product application for the vapor
21 product and the application:

22 a. Has been accepted by the FDA;

23 b. Remains under review by the FDA;

24 c. Has received a denial order that has been and remains:

25 i. Stayed by the FDA or court order;

26 ii. Rescinded by the FDA; or

27 iii. Vacated by a court; and

1 (d) Agrees to comply with this chapter.

2 (4) Each annual certification form described in subsection (3) of this section shall
3 also be accompanied by:

4 (a) 1. A copy of the marketing authorization described in subsection (3)(c)1.
5 of this section; or

6 2. A copy of the acceptance letter, the denial order, or any other
7 document described in subsection (3)(c)2. of this section; and

8 (b) 1. An enforcement fee of two thousand dollars (\$2,000) for each vapor
9 product when it is initially listed on the annual form submitted by the
10 manufacturer and sold in this state; and

11 2. An enforcement fee of one thousand dollars (\$1,000) for each product
12 subsequently relisted on the annual certification form and sold in this
13 state.

14 (5) The information submitted by the manufacturer pursuant to subsection (4)(a) of
15 this section shall be considered confidential information for the purposes of KRS
16 61.870 to 61.884. The department may redact certain confidential commercial or
17 financial information provided under subsection (4)(a) of this section. The
18 department shall not disclose the information except as required or authorized by
19 law.

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

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

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

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

2 (a) Vapor product manufacturers; and

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

6 (8) The department shall:

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

9 (b) Establish a process to provide retailers, distributors, and wholesalers notice
10 of the initial publication of the directory and report changes made to the
11 directory from the prior month; and

12 (c) Update the directory monthly to:

13 1. Correct mistakes;

14 2. Ensure accuracy; and

15 3. Reflect additions or removals of the vapor product manufacturers,
16 vapor products, or other information listed in subsection (3)(c) of this
17 section.

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

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

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

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

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

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

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

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

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

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

18 (b) The vapor products of a manufacturer identified in the notice of removal
19 are contraband and are subject to penalties under subsection (14) of this
20 section and seizure, forfeiture, and destruction under subsection (13)(b) of
21 this section.

22 (12) Beginning January 1, 2025:

23 (a) A person shall not sell; and

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

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

- 1 1. Each retailer shall sell or otherwise remove vapor products from its
2 inventory that are not included in the directory; and
- 3 2. Each distributor or wholesaler shall remove vapor products intended
4 for sale in the state from its inventory.
- 5 **(b) Vapor products not listed in the directory that remain in inventory and**
6 **intended for sale in this state:**
- 7 1. Are subject to seizure, forfeiture, and destruction:
- 8 a. The cost of seizure, forfeiture, and destruction from the retailer,
9 distributor, or wholesaler shall be borne by the person from
10 whom the products are confiscated; and
- 11 b. No products may be seized from a consumer who has made a
12 bona fide purchase of the product;
- 13 2. May not be purchased or sold for retail sale in this state except as
14 provided in this subsection; and
- 15 3. Once seized, the vapor products may be stored and disposed by the
16 department in accordance with federal, state, and local laws
17 pertaining to storage and disposal of the products.
- 18 **(14) The following penalties shall apply to violations of this section:**
- 19 **(a) 1. A manufacturer, wholesaler, distributor, or retailer who sells or offers**
20 **for sale a vapor product in this state that is not included in the**
21 **directory shall be subject to a civil penalty of two hundred fifty dollars**
22 **(\$250) for each product offered for sale in violation of this section**
23 **until the offending product is removed from inventory or until the**
24 **offending product is properly listed on the directory.**
- 25 **2. For a second violation of this section at the same location within a**
26 **twelve (12) month period, the civil penalty shall be five hundred**
27 **dollars (\$500) per product.**

- 1 3. For a third violation of this section at the same location within a
2 twelve (12) month period, the civil penalty shall be one thousand
3 dollars (\$1,000) per product.
- 4 4. For a fourth or subsequent violation of this section at the same
5 location within a twelve (12) month period, the civil penalty shall be
6 one thousand five hundred dollars (\$1,500) per product;
- 7 (b) An affirmative defense for violations of this section by a retailer shall be
8 that the vapor products were purchased from a wholesaler, sub-jobber, or
9 other distributor licensed under KRS Chapter 138;
- 10 (c) Any manufacturer that falsely represents information required by the
11 certification form required by subsection (3) of this section shall be guilty of
12 a Class B misdemeanor for each false representation; and
- 13 (d) A repeat violation of this paragraph shall constitute an unlawful act under
14 KRS 367.170 and shall be subject to any remedies or penalties available for
15 a violation of that section under KRS Chapter 367.
- 16 (15) The department shall have authority to enforce compliance with Sections 1 and 2
17 of this Act and may promulgate administrative regulations in accordance with
18 KRS Chapter 13A necessary to affect the purposes of this section.
- 19 (16) (a) The department may examine the books, papers, and records of any
20 distributor, wholesaler, or retailer in this state.
- 21 (b) The department may inspect and examine the documents, the business
22 premises, and any furniture or fixtures contained in or upon the premises in
23 order to determine if vapor products are held or possessed in violation of
24 this section. The documents may be reviewed at the corporate office or a
25 central location of a person having more than one (1) retail location.
- 26 (c) The department shall conduct unannounced follow-up examinations of
27 noncompliant distributors, wholesalers, and retailers within thirty (30) days

1 after any violation of this section.

2 (d) Each wholesaler, distributor, or retailer that sells or distributes vapor
3 products in this state shall be subject to at least two (2) unannounced
4 compliance checks by the department annually for purposes of enforcing
5 this section.

6 (e) The department shall publish the results of all examinations annually and
7 shall make the summary of results available to the public on request. Unless
8 used by the department in a prosecution or enforcement action, the
9 information collected by the department pursuant to this subsection shall be
10 considered confidential information for the purposes of KRS 61.870 to
11 61.884.

12 (17) (a) Any vapor product offered for sale in violation of this section is declared to
13 be a contraband good and may be seized by the department, the
14 department's agents, or by law enforcement if directed by the department to
15 do so, without a warrant.

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

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

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

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

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

27 2. Notice of termination of an agent thirty (30) calendar days or more

1 prior to the termination;
2 3. Proof of the appointment of a new agent no less than five (5) calendar
3 days prior to the termination of an existing agent appointment; and
4 4. Notice within five (5) calendar days if an agent terminates the
5 appointment with the manufacturer, and proof of the appointment of a
6 new agent.

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

13 (19) Starting June 1, 2025, and annually thereafter, the department shall provide a
14 report to the Legislative Research Commission for referral to the Interim Joint
15 Committee on Licensing and Occupations regarding:

16 (a) The status of the directory;
17 (b) Manufacturers and products included in the directory;
18 (c) Revenue and expenditures related to administration of this section; and
19 (d) Enforcement activities undertaken pursuant to this section.

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

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

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

27 (a) The terms:

1. "Cake";
2. "Candy";
3. "Cupcake";
4. "Pastry";
5. "Pie";
6. Any variation of one (1) or more of these terms; or
7. Any other term that references a type or brand of the items listed in
8. this paragraph, whether it includes the terms listed in subparagraphs
9. 1. to 6. of this paragraph in its name or any of its slogans; and
10. (b) By using, in a trademark of the product or in the product's advertising,
11. branding, design, marketing, packaging, or trade dress, a depiction or
12. signifier of:
 13. 1. A food, or a brand of food, marketed to minors, including but not
14. limited to:
 15. a. A cereal;
 16. b. A cookie, ice cream, sherbet, sorbet, or other dessert; or
 17. c. A juice box or soft drink;
 18. 2. A character, personality, or symbol known to appeal to minors,
19. including but not limited to:
 20. a. A celebrity;
 21. b. A character in a comic book, movie, television show, or video
22. game; or
 23. c. A unicorn or any other mythical creature; or
 24. 3. School supplies primarily used by minors, including but not limited to:
 25. a. Erasers;
 26. b. Highlighters;
 27. c. Ink pens; or

1 d. Pencils.

2 (2) A person that violates subsection (1) of this section is guilty of a misdemeanor
3 punishable by a fine as follows:

4 (a) For a first violation, not more than one hundred dollars (\$100);

5 (b) For a second violation, not more than five hundred dollars (\$500); and

6 (c) For a third or subsequent violation, not more than two thousand five
7 hundred dollars (\$2,500).

8 (3) Any vapor product advertised, distributed, marketed, offered for sale, or sold in
9 violation of subsection (1) of this section is declared to be contraband and may be
10 seized by the department or a local authority in coordination with the department,
11 without a warrant. The cost of such seizure, forfeiture, and destruction shall be
12 borne by the person from whom the products are confiscated.

13 (4) Compliance checks conducted pursuant to Sections 1 and 2 shall be performed to
14 ensure a person's compliance with these sections.

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

17 (1) There is established in the State Treasury a restricted fund to be known as the
18 vapor product and vapor product manufacturer (VPVPM) directory enforcement
19 fund, which shall be administered by the department. The fund shall consist of
20 the fees collected under Section 1 of this Act, the penalties collected under
21 Sections 1 and 2 of this Act, and any moneys collected pursuant to the
22 enforcement actions taken by the department in the course of administering
23 Sections 1 and 2 of this Act.

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

27 (3) Notwithstanding KRS 45.229, fund amounts not expended at the close of the

- 1 fiscal year shall not lapse, but shall be carried forward into the next fiscal year.
- 2 (4) Any interest earnings of the fund shall become part of the fund and shall not
- 3 lapse.
- 4 (5) Moneys deposited in the fund are hereby appropriated for the purposes set forth
- 5 in this subsection and shall not be appropriated or transferred by the General
- 6 Assembly for any other purposes.