S-4497.1

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**SUBSTITUTE SENATE BILL 6118**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**State of Washington 68th Legislature 2024 Regular Session**

**By** Senate Labor & Commerce (originally sponsored by Senators Van De Wege, Braun, Keiser, and Stanford)

AN ACT Relating to a directory for closed system nicotine containers and disposable nicotine vapor products; amending RCW 70.345.010; adding a new section to chapter 70.345 RCW; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  A new section is added to chapter 70.345 RCW to read as follows:

(1) By August 1, 2024, and annually thereafter, every manufacturer of closed system nicotine containers or disposable nicotine vapor products that are sold for retail sale in this state, whether directly or through a distributor, wholesaler, retailer, delivery seller, or similar intermediary or intermediaries, must certify under penalty of perjury on a form and in the manner prescribed by the board, that the manufacturer agrees to comply with this chapter, and that:

(a) The manufacturer has received a marketing authorization or similar order for the closed system nicotine container or disposable nicotine vapor product from the United States food and drug administration pursuant to 21 U.S.C. Sec. 387j; or

(b) The closed system nicotine container or disposable nicotine vapor product was marketed in the United States as of August 8, 2016, the manufacturer submitted a premarket tobacco product application for the closed system nicotine container or disposable nicotine vapor product to the United States food and drug administration pursuant to 21 U.S.C. Sec. 387j on or before September 9, 2020, and the application either remains under review by the United States food and drug administration or a final decision on the application has not otherwise taken effect.

(2) A manufacturer must submit a certification form that separately lists each closed system nicotine container and disposable nicotine vapor product that is sold in this state.

(3) Each annual certification form must be accompanied by:

(a) A copy of the marketing authorization or other order for the closed system nicotine container or disposable nicotine vapor product issued by the United States food and drug administration pursuant to 21 U.S.C. Sec. 387j, or evidence that the premarket tobacco product application for the closed system nicotine container or disposable nicotine vapor product was submitted to the United States food and drug administration, and a final authorization or order has not yet taken effect; and

(b) A payment of $1,000 for each closed system nicotine container or disposable nicotine vapor product the first time a manufacturer submits a certification form for the product and a payment of $250 annually thereafter for each product.

(4) A manufacturer required to submit a certification form pursuant to this section must notify the board within 30 days of any material change to the certification form, including the issuance or denial of a marketing authorization or other order by the United States food and drug administration pursuant to 21 U.S.C. Sec. 387j, or any other order or action by the United States food and drug administration or any court that affects the ability of the closed system nicotine container or disposable nicotine vapor product to be introduced or delivered into interstate commerce for commercial distribution in the United States.

(5) The board must maintain and make available on its public website a directory that lists all closed system nicotine container or disposable nicotine vapor product manufacturers and closed system nicotine containers and disposable nicotine vapor products for which certification forms have been submitted.

(a) The board must make the directory available for inspection on its public website by October 1, 2024.

(b) The board must update the directory as necessary in order to correct mistakes, ensure accuracy, and add or remove closed system nicotine container or disposable nicotine vapor product manufacturers and closed system nicotine containers and disposable nicotine vapor products on at least a monthly basis.

(c) The board must send monthly notifications to each licensed retailer, distributor, and wholesaler, by electronic communication, containing a list of all changes that have been made to the directory in the previous month.

(6) The board must provide manufacturers notice and an opportunity to cure deficiencies before removing manufacturers or products from the directory.

(a) The board may not remove the manufacturer or its products from the directory until at least 15 days after the manufacturer has been given notice of an intended action. Notice must be sufficient and be deemed immediately received by a manufacturer if the notice is sent either electronically or by facsimile to an electronic mail address or facsimile number, as the case may be, provided by the manufacturer in its most recent certification, or to the manufacturer's registered agent for service of process in the state.

(b) The closed system nicotine container or disposable nicotine vapor product manufacturer must have 15 business days from the date of service of the notice of the board's intended action to demonstrate to the board that the nicotine vapor product manufacturer or its closed system nicotine containers or disposable nicotine vapor products should be included in the directory. No separate administrative appeal process is available.

(7) If a product is removed from the directory, each retailer, distributor, and wholesaler must have 30 days from the day such product is removed from the directory to sell the product or remove the product from its inventory and return the product to the manufacturer for disposal. After 30 days following removal from the directory, the closed system nicotine containers or disposable nicotine vapor products of a manufacturer identified in the notice of removal are contraband and are subject to seizure, forfeiture, and destruction, and may not be purchased or sold in the state.

(8)(a) Except as provided in (b) of this subsection, beginning October 1, 2024, or on the date that the board first makes the directory available for inspection on its public website, whichever is later, a person may not sell or offer for retail sale a closed system nicotine container or disposable nicotine vapor product in this state that is not included in the directory, and a closed system nicotine container or disposable nicotine vapor product manufacturer may not sell, either directly or through a distributor or wholesaler, retailer, delivery seller, or similar intermediary or intermediaries, a closed system nicotine container or disposable nicotine vapor product in this state that is not included in the directory.

(b) Each retailer, distributor, and wholesaler shall sell or remove closed system nicotine containers and disposable nicotine vapor products not included in the directory from its inventory by November 30, 2024, or 60 days from the date that the board first makes the directory available for inspection on its public website, whichever is later.

(c) After 60 days following publication of the directory, a closed system nicotine container or disposable nicotine vapor product not listed in the directory and intended for retail sale in the state is subject to seizure, forfeiture, and destruction, and may not be purchased or sold for retail sale in the state. The cost of such seizure, forfeiture, and destruction is borne by the person from whom the products are confiscated, except that no products may be seized from a consumer who has made a bona fide purchase of such product. The board may store and dispose of the seized products as appropriate, in accordance with federal, state, and local laws pertaining to storage and disposal of such products.

(9) The following penalties apply to violations of this section:

(a) In addition to or in lieu of any other civil or criminal remedy provided by law, the board may impose a civil penalty on a retailer, delivery seller, distributor, or wholesaler who sells at retail or offers for sale at retail a closed system nicotine container or disposable nicotine vapor product in this state that is not included in the directory. The civil penalty is $1,000 per day for each product offered for sale in violation of this section until the offending product is removed from the market or until the offending product is properly listed on the directory.

(b) In addition to or in lieu of any other civil or criminal remedy provided by law, the board may impose restrictions on the license of a retailer, delivery seller, distributor, or wholesaler who sells or offers for sale a closed system nicotine container or disposable nicotine vapor product in this state that is not included in the directory, as follows:

(i) For a second violation within a period of two years, the licensee's license also must be suspended for a period of 30 days.

(ii) For a third violation within a period of two years, the licensee's license also must be suspended for a period of 90 days.

(iii) For a fourth violation within a period of two years, the licensee's license must be revoked.

(c) In addition to or in lieu of any other civil or criminal remedy provided by law, the board may impose a civil penalty on a closed system nicotine container or disposable nicotine vapor product manufacturer whose closed system nicotine containers or disposable nicotine vapor products are not listed in the directory and are sold in this state, whether directly or through a distributor or wholesaler, retailer, or similar intermediary or intermediaries. The civil penalty is $1,000 per day for each product offered for sale in violation of this section until the offending product is removed from the market, or until the offending product is properly listed on the directory. In addition, a manufacturer that knowingly makes a false representation in any of the information required by the certification forms required under this title is guilty of a misdemeanor for each false representation.

(10) Closed system nicotine containers and disposable nicotine vapor products offered for sale in violation of this section are considered contraband and may be seized and disposed of by an enforcement officer of the board. The cost of such seizure and disposal are borne by the person from whom the products are confiscated, and not by the board.

(11) The attorney general, acting in the name of the state, may seek recovery of the penalty in a civil action in superior court.

(12) The attorney general may seek an injunction in superior court to restrain a threatened or actual violation of this section and to compel compliance with this section.

(13) A second or subsequent violation of this section is not reasonable in relation to the development and preservation of business and is an unfair and deceptive act or practice and an unfair method of competition in the conduct of trade or commerce in violation of RCW 19.86.020. Standing to bring an action to enforce RCW 19.86.020 for violation of this section lies solely with the attorney general. Remedies provided by chapter 19.86 RCW are cumulative and not exclusive.

(14)(a) In any action brought under this section, the state is entitled to recover, in addition to other relief, the costs of investigation, expert witness fees, costs of the action, and reasonable attorneys' fees.

(b) If a court determines that a person has violated this section, the court must order any gross receipts or other benefit from the violation to be disgorged and paid to the state treasurer for deposit in the general fund.

(15) Unless otherwise expressly provided, the penalties or remedies, or both, under this section are in addition to any other penalties and remedies available under any other law of this state.

(16) Each retailer, distributor, and wholesaler that sells or distributes closed system nicotine containers or disposable nicotine vapor products in this state must be subject to at least two unannounced compliance checks annually for purposes of enforcing this section. Unannounced follow-up compliance checks of all noncompliant retailers, distributors, and wholesalers must be conducted within 30 days after any violation of this section. The board must publish the results of all compliance checks at least annually and must make the results available to the public on request. The requirements of this subsection do not apply to an Indian tribal organization, Indian retailer, or Indian distributor, as those terms are defined in RCW 82.25.105.

(17)(a) Any nonresident or foreign manufacturer that has not registered to do business in the state as a foreign corporation or business entity must, as a condition precedent to having its products included or retained in the directory, appoint and continually engage without interruption the services of an agent in this state to act as agent for the service of process on whom all process, and any action or proceeding against it concerning or arising out of the enforcement of this section, may be served in any manner authorized by law. The service must constitute legal and valid service of process on the manufacturer. The manufacturer must provide the name, address, phone number, and proof of the appointment and availability of the agent to the satisfaction of the board.

(b) The manufacturer must provide notice to the board 30 calendar days prior to termination of the authority of an agent and must further provide proof to the satisfaction of the board of the appointment of a new agent no less than five calendar days prior to the termination of an existing agent appointment. In the event an agent terminates an agency appointment, the manufacturer must notify the board of the termination within five calendar days and include proof to the satisfaction of the board of the appointment of a new agent.

(c) Any manufacturer whose closed system nicotine containers or disposable nicotine vapor products are sold in this state, who has not appointed and engaged an agent as required in this section, must be deemed to have appointed the secretary of state as the agent and may be proceeded against in courts of this state by service of process upon the secretary of state. However, the appointment of the secretary of state as agent must not satisfy the condition precedent for having the products of the manufacturer included or retained in the directory.

(18) The board may adopt by rule requirements necessary to implement this section.

(19) Starting January 31, 2025, and annually thereafter, the board must provide a report to the legislature regarding the status of the directory, manufacturers and products included in the directory, revenue and expenditures related to administration of this section, and enforcement activities undertaken pursuant to this section.

(20) All fees collected and funds collected by the board from the imposition of monetary penalties pursuant to this section must be deposited into the general fund and must be used by the board for implementation of this section.

**Sec.**  RCW 70.345.010 and 2022 c 16 s 135 are each amended to read as follows:

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Board" means the Washington state liquor and cannabis board.

(2) "Business" means any trade, occupation, activity, or enterprise engaged in for the purpose of selling or distributing vapor products in this state.

(3) "Child care facility" has the same meaning as provided in RCW 70A.320.020.

(4) "Closed system nicotine container" means a sealed, prefilled, and disposable container of nicotine in a solution or other form in which such container is inserted directly into an electronic cigarette, electronic nicotine delivery system, or other similar product, if the nicotine in the container is inaccessible through customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion or other contact by children.

(5) "Delivery sale" means any sale of a vapor product to a purchaser in this state where either:

(a) The purchaser submits the order for such sale by means of a telephonic or other method of voice transmission, the mails or any other delivery service, or the internet or other online service; or

(b) The vapor product is delivered by use of the mails or of a delivery service. The foregoing sales of vapor products constitute a delivery sale regardless of whether the seller is located within or without this state. "Delivery sale" does not include a sale of any vapor product not for personal consumption to a retailer.

(6) "Delivery seller" means a person who makes delivery sales.

(7) "Disposable nicotine vapor product" means a vapor product consisting of a power source and a solution or other substance containing nicotine in a single unit that is sealed by the manufacturer, not intended to be opened by the consumer, and intended to be disposed of after the solution or other substance has been depleted.

(8) "Distributor" has the same meaning as in RCW 82.25.005.

((~~(8)~~)) (9) "Liquid nicotine container" means a package from which nicotine in a solution or other form is accessible through normal and foreseeable use by a consumer and that is used to hold soluble nicotine in any concentration. "Liquid nicotine container" does not include closed system nicotine containers.

((~~(9)~~)) (10) "Manufacturer" means a person who manufactures and sells vapor products.

((~~(10)~~)) (11) "Person" means any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, the state and its departments and institutions, political subdivision of the state of Washington, corporation, limited liability company, association, society, any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise.

((~~(11)~~)) (12) "Place of business" means any place where vapor products are sold or where vapor products are manufactured, stored, or kept for the purpose of sale.

((~~(12)~~)) (13) "Playground" means any public improved area designed, equipped, and set aside for play of six or more children which is not intended for use as an athletic playing field or athletic court, including but not limited to any play equipment, surfacing, fencing, signs, internal pathways, internal land forms, vegetation, and related structures.

((~~(13)~~)) (14) "Retail outlet" means each place of business from which vapor products are sold to consumers.

((~~(14)~~)) (15) "Retailer" means any person engaged in the business of selling vapor products to ultimate consumers.

((~~(15)~~)) (16)(a) "Sale" means any transfer, exchange, or barter, in any manner or by any means whatsoever, for a consideration, and includes and means all sales made by any person.

(b) The term "sale" includes a gift by a person engaged in the business of selling vapor products, for advertising, promoting, or as a means of evading the provisions of this chapter.

((~~(16)~~)) (17) "School" has the same meaning as provided in RCW 70A.320.020.

((~~(17)~~)) (18) "Self-service display" means a display that contains vapor products and is located in an area that is openly accessible to customers and from which customers can readily access such products without the assistance of a salesperson. A display case that holds vapor products behind locked doors does not constitute a self-service display.

((~~(18)~~)) (19) "Vapor product" means any noncombustible product that may contain nicotine and 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 or aerosol from a solution or other substance.

(a) "Vapor product" includes any electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product or device and any vapor cartridge or other container that may contain 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.

(b) "Vapor product" does not include any product that meets the definition of cannabis, useable cannabis, cannabis concentrates, cannabis-infused products, cigarette, or tobacco products.

(c) For purposes of this subsection ((~~(18)~~)) (19), "cannabis," "useable cannabis," "cannabis concentrates," and "cannabis-infused products" have the same meaning as provided in RCW 69.50.101.

**--- END ---**