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**SENATE BILL 5239**

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**State of Washington**

**68th Legislature**

**2023 Regular Session**

**By** Senators Kuderer, Dhingra, Frame, Hunt, Nobles, Robinson, Salomon, Stanford, Valdez, Wellman, and C. Wilson

Read first time 01/10/23. Referred to Committee on Health & Long Term Care.

1 AN ACT Relating to protecting public health and safety by  
2 enhancing the regulation of vapor products and tobacco products;  
3 amending RCW 70.345.010, 70.345.075, and 82.26.010; adding new  
4 sections to chapter 70.345 RCW; and adding a new section to chapter  
5 43.70 RCW.

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

7 **Sec. 1.** RCW 70.345.010 and 2022 c 16 s 135 are each amended to  
8 read as follows:

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

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

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

15 (3) "Child care facility" has the same meaning as provided in RCW  
16 70A.320.020.

17 (4) "Closed system nicotine container" means a sealed, prefilled,  
18 and disposable container of nicotine in a solution or other form in  
19 which such container is inserted directly into an electronic  
20 cigarette, electronic nicotine delivery system, or other similar  
21 product, if the nicotine in the container is inaccessible through

1 customary or reasonably foreseeable handling or use, including  
2 reasonably foreseeable ingestion or other contact by children.

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

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

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

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

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

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

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

27 (~~(9)~~) (10) "Manufacturer" means a person who manufactures and  
28 sells vapor products.

29 (~~(10)~~) (11) "Person" means any individual, receiver,  
30 administrator, executor, assignee, trustee in bankruptcy, trust,  
31 estate, firm, copartnership, joint venture, club, company, joint  
32 stock company, business trust, municipal corporation, the state and  
33 its departments and institutions, political subdivision of the state  
34 of Washington, corporation, limited liability company, association,  
35 society, any group of individuals acting as a unit, whether mutual,  
36 cooperative, fraternal, nonprofit, or otherwise.

37 (~~(11)~~) (12) "Place of business" means any place where vapor  
38 products are sold or where vapor products are manufactured, stored,  
39 or kept for the purpose of sale.

1       (~~(12)~~) (13) "Playground" means any public improved area  
2 designed, equipped, and set aside for play of six or more children  
3 which is not intended for use as an athletic playing field or  
4 athletic court, including but not limited to any play equipment,  
5 surfacing, fencing, signs, internal pathways, internal land forms,  
6 vegetation, and related structures.

7       (~~(13)~~) (14) "Retail outlet" means each place of business from  
8 which vapor products are sold to consumers.

9       (~~(14)~~) (15) "Retailer" means any person engaged in the business  
10 of selling vapor products to ultimate consumers.

11       (~~(15)~~) (16)(a) "Sale" means any transfer, exchange, or barter,  
12 in any manner or by any means whatsoever, for a consideration, and  
13 includes and means all sales made by any person.

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

17       (~~(16)~~) (17) "School" has the same meaning as provided in RCW  
18 70A.320.020.

19       (~~(17)~~) (18) "Self-service display" means a display that  
20 contains vapor products and is located in an area that is openly  
21 accessible to customers and from which customers can readily access  
22 such products without the assistance of a salesperson. A display case  
23 that holds vapor products behind locked doors does not constitute a  
24 self-service display.

25       (~~(18)~~) (19) "Vapor product" means any noncombustible product  
26 that may contain nicotine and that employs a heating element, power  
27 source, electronic circuit, or other electronic, chemical, or  
28 mechanical means, regardless of shape or size, that can be used to  
29 produce vapor or aerosol from a solution or other substance.

30       (a) "Vapor product" includes any electronic cigarette, electronic  
31 cigar, electronic cigarillo, electronic pipe, or similar product or  
32 device and any vapor cartridge or other container that may contain  
33 nicotine in a solution or other form that is intended to be used with  
34 or in an electronic cigarette, electronic cigar, electronic  
35 cigarillo, electronic pipe, or similar product or device.

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

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

4 NEW SECTION. **Sec. 2.** A new section is added to chapter 70.345  
5 RCW to read as follows:

6 (1) Upon a determination by the secretary of health that a  
7 flavored vapor product may be injurious to human health or poses a  
8 significant risk to public health, the department of health may  
9 restrict the sale of any such flavored vapor product.

10 (2) Nothing in this section requires a person in this state to be  
11 actually injured or ill before the secretary of health or department  
12 of health may take action authorized under this section.

13 (3) The department of health may adopt any rules necessary to  
14 implement this section.

15 NEW SECTION. **Sec. 3.** A new section is added to chapter 70.345  
16 RCW to read as follows:

17 (1) The state board of health shall determine in rule the  
18 allowable nicotine concentration for any vapor product sold or  
19 offered for sale in the state. The state board of health shall  
20 consider, among other factors, whether the level of nicotine in the  
21 product may be injurious to human health or pose significant risk to  
22 public health. Those risks include but are not limited to addiction  
23 increase, underage usage, or limited efficacy of nicotine addiction  
24 cessation efforts.

25 (2) A vapor product may not be sold or offered for sale if the  
26 product has nicotine salts or other ingredients that result in  
27 nicotine concentrations that exceed a comparative level of nicotine  
28 as determined by the state board of health in rule.

29 **Sec. 4.** RCW 70.345.075 and 2016 sp.s. c 38 s 13 are each amended  
30 to read as follows:

31 (1) ~~((A))~~ The department of health shall require a manufacturer  
32 or distributor that sells, offers for sale, or distributes liquid  
33 nicotine containers ~~((shall))~~ to label the vapor product ~~((with a:~~  
34 ~~(a) Warning regarding the harmful effects of nicotine; (b) warning to~~  
35 ~~keep the vapor product away from children; (c) warning that vaping is~~  
36 ~~illegal for those under the legal age to use the product; and (d)~~  
37 ~~except as provided in subsection (2) of this section, the amount of~~

1 ~~nicotine in milligrams per milliliter of liquid along with the total~~  
2 ~~volume of the liquid contents of the product expressed in~~  
3 ~~milliliters.~~

4 ~~(2) For closed system nicotine containers as defined in RCW~~  
5 ~~70.345.010, a manufacturer that sells, offers for sale, or~~  
6 ~~distributes vapor products in this state must annually provide the~~  
7 ~~department of health with a disclosure of the nicotine content of~~  
8 ~~such vapor product based on measurement standards to be established~~  
9 ~~by the department of health.~~

10 ~~(3) (a) This section expires on the effective date of the final~~  
11 ~~regulations issued by the United States food and drug administration~~  
12 ~~or by any other federal agency, when such regulations mandate warning~~  
13 ~~or advertisement requirements for vapor products.~~

14 ~~(b) The board must provide notice of the expiration date of this~~  
15 ~~section to affected parties, the chief clerk of the house of~~  
16 ~~representatives, the secretary of the senate, the office of the code~~  
17 ~~reviser, and others as deemed appropriate by the board).~~

18 (2) The department of health may adopt any rules necessary to  
19 implement this section and revise labeling requirements to: (a) Be  
20 consistent with any regulations and labeling requirements issued by  
21 the United States food and drug administration or by any other  
22 federal agency; and (b) maintain any labeling requirements which are  
23 not preempted, or which provided disclosures that are not mandated by  
24 federal regulations.

25 NEW SECTION. Sec. 5. A new section is added to chapter 70.345  
26 RCW to read as follows:

27 (1) All manufacturers of nicotine-containing vapor products shall  
28 disclose to the department of health, using forms and methods to be  
29 determined by the department:

- 30 (a) The concentration and form of nicotine in the product; and  
31 (b) All ingredients or product elements which may be inhaled when  
32 the product is used by the consumer.

33 (2) The department of health, in collaboration with the  
34 University of Washington school of public health, shall publish on  
35 the internet:

- 36 (a) The list of ingredients for each product submitted to the  
37 department pursuant to subsection (1) of this section; and

1 (b) A guide summarizing and linking to research on ingredient  
2 toxicity, carcinogenicity, or any other potential harm to human  
3 health associated with the product and its ingredients.

4 **Sec. 6.** RCW 82.26.010 and 2020 c 139 s 31 are each amended to  
5 read as follows:

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

8 (1) "Actual price" means the total amount of consideration for  
9 which tobacco products are sold, valued in money, whether received in  
10 money or otherwise, including any charges by the seller necessary to  
11 complete the sale such as charges for delivery, freight,  
12 transportation, or handling.

13 (2) "Affiliated" means related in any way by virtue of any form  
14 or amount of common ownership, control, operation, or management.

15 (3) "Board" means the liquor and cannabis board.

16 (4) "Business" means any trade, occupation, activity, or  
17 enterprise engaged in for the purpose of selling or distributing  
18 tobacco products in this state.

19 (5) "Cigar" means a roll for smoking that is of any size or shape  
20 and that is made wholly or in part of tobacco, irrespective of  
21 whether the tobacco is pure or flavored, adulterated or mixed with  
22 any other ingredient, if the roll has a wrapper made wholly or in  
23 greater part of tobacco. "Cigar" does not include a cigarette.

24 (6) "Cigarette" has the same meaning as in RCW 82.24.010.

25 (7) "Department" means the department of revenue.

26 (8) "Distributor" means (a) any person engaged in the business of  
27 selling tobacco products in this state who brings, or causes to be  
28 brought, into this state from without the state any tobacco products  
29 for sale, (b) any person who makes, manufactures, fabricates, or  
30 stores tobacco products in this state for sale in this state, (c) any  
31 person engaged in the business of selling tobacco products without  
32 this state who ships or transports tobacco products to retailers in  
33 this state, to be sold by those retailers, (d) any person engaged in  
34 the business of selling tobacco products in this state who handles  
35 for sale any tobacco products that are within this state but upon  
36 which tax has not been imposed.

37 (9) "Indian country" means the same as defined in chapter 82.24  
38 RCW.

1 (10) "Little cigar" means a cigar that has a cellulose acetate  
2 integrated filter.

3 (11) "Manufacturer" means a person who manufactures and sells  
4 tobacco products.

5 (12) "Manufacturer's representative" means a person hired by a  
6 manufacturer to sell or distribute the manufacturer's tobacco  
7 products, and includes employees and independent contractors.

8 (13) "Moist snuff" means tobacco that is finely cut, ground, or  
9 powdered; is not for smoking; and is intended to be placed in the  
10 oral, but not the nasal, cavity.

11 (14) "Person" means any individual, receiver, administrator,  
12 executor, assignee, trustee in bankruptcy, trust, estate, firm,  
13 copartnership, joint venture, club, company, joint stock company,  
14 business trust, municipal corporation, the state and its departments  
15 and institutions, political subdivision of the state of Washington,  
16 corporation, limited liability company, association, society, any  
17 group of individuals acting as a unit, whether mutual, cooperative,  
18 fraternal, nonprofit, or otherwise. The term excludes any person  
19 immune from state taxation, including the United States or its  
20 instrumentalities, and federally recognized Indian tribes and  
21 enrolled tribal members, conducting business within Indian country.

22 (15) "Place of business" means any place where tobacco products  
23 are sold or where tobacco products are manufactured, stored, or kept  
24 for the purpose of sale, including any vessel, vehicle, airplane,  
25 train, or vending machine.

26 (16) "Retail outlet" means each place of business from which  
27 tobacco products are sold to consumers.

28 (17) "Retailer" means any person engaged in the business of  
29 selling tobacco products to ultimate consumers.

30 (18)(a) "Sale" means any transfer, exchange, or barter, in any  
31 manner or by any means whatsoever, for a consideration, and includes  
32 and means all sales made by any person.

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

36 (19)(a) "Taxable sales price" means:

37 (i) In the case of a taxpayer that is not affiliated with the  
38 manufacturer, distributor, or other person from whom the taxpayer  
39 purchased tobacco products, the actual price for which the taxpayer  
40 purchased the tobacco products;

1 (ii) In the case of a taxpayer that purchases tobacco products  
2 from an affiliated manufacturer, affiliated distributor, or other  
3 affiliated person, and that sells those tobacco products to  
4 unaffiliated distributors, unaffiliated retailers, or ultimate  
5 consumers, the actual price for which that taxpayer sells those  
6 tobacco products to unaffiliated distributors, unaffiliated  
7 retailers, or ultimate consumers;

8 (iii) In the case of a taxpayer that sells tobacco products only  
9 to affiliated distributors or affiliated retailers, the price,  
10 determined as nearly as possible according to the actual price, that  
11 other distributors sell similar tobacco products of like quality and  
12 character to unaffiliated distributors, unaffiliated retailers, or  
13 ultimate consumers;

14 (iv) In the case of a taxpayer that is a manufacturer selling  
15 tobacco products directly to ultimate consumers, the actual price for  
16 which the taxpayer sells those tobacco products to ultimate  
17 consumers;

18 (v) In the case of a taxpayer that has acquired tobacco products  
19 under a sale as defined in subsection (18)(b) of this section, the  
20 price, determined as nearly as possible according to the actual  
21 price, that the taxpayer or other distributors sell the same tobacco  
22 products or similar tobacco products of like quality and character to  
23 unaffiliated distributors, unaffiliated retailers, or ultimate  
24 consumers; or

25 (vi) In any case where (a)(i) through (v) of this subsection do  
26 not apply, the price, determined as nearly as possible according to  
27 the actual price, that the taxpayer or other distributors sell the  
28 same tobacco products or similar tobacco products of like quality and  
29 character to unaffiliated distributors, unaffiliated retailers, or  
30 ultimate consumers.

31 (b) For purposes of (a)(i) and (ii) of this subsection only,  
32 "person" includes both persons as defined in subsection (14) of this  
33 section and any person immune from state taxation, including the  
34 United States or its instrumentalities, and federally recognized  
35 Indian tribes and enrolled tribal members, conducting business within  
36 Indian country.

37 (c) The department may adopt rules regarding the determination of  
38 taxable sales price under this subsection.

39 (20) "Taxpayer" means a person liable for the tax imposed by this  
40 chapter.



1 (21) "Tobacco products" means cigars, cheroots, stogies,  
2 periques, granulated, plug cut, crimp cut, ready rubbed, and other  
3 smoking tobacco, snuff, snuff flour, cavendish, plug and twist  
4 tobacco, fine-cut and other chewing tobaccos, shorts, refuse scraps,  
5 clippings, cuttings and sweepings of tobacco, nontobacco nicotine  
6 products that are not approved by the United States food and drug  
7 administration, and other kinds and forms of tobacco, prepared in  
8 such manner as to be suitable for chewing or smoking in a pipe or  
9 otherwise, or both for chewing and smoking, and any other product,  
10 regardless of form, that contains tobacco and is intended for human  
11 consumption or placement in the oral or nasal cavity or absorption  
12 into the human body by any other means, but does not include  
13 cigarettes as defined in RCW 82.24.010.

14 (22) "Unaffiliated distributor" means a distributor that is not  
15 affiliated with the manufacturer, distributor, or other person from  
16 whom the distributor has purchased tobacco products.

17 (23) "Unaffiliated retailer" means a retailer that is not  
18 affiliated with the manufacturer, distributor, or other person from  
19 whom the retailer has purchased tobacco products.

20 NEW SECTION. **Sec. 7.** A new section is added to chapter 43.70  
21 RCW to read as follows:

22 Upon a determination by the secretary that a characterizing  
23 flavor may be harmful or pose a significant risk to public health,  
24 the secretary may prohibit the characterizing flavor in cigarettes  
25 and other tobacco products, as defined in RCW 82.26.010.

26 For purposes of this section, "characterizing flavor" means a  
27 distinguishable taste or aroma, or both, other than the taste or  
28 aroma of tobacco. Characterizing flavors include, but are not limited  
29 to, tastes or aromas relating to any fruit, chocolate, vanilla,  
30 honey, candy, cocoa, dessert, alcoholic beverage, menthol, mint,  
31 wintergreen, herb, or spice. A tobacco product does not have a  
32 characterizing flavor solely because of the use of additives or  
33 flavorings or the provision of ingredient information. It is the  
34 presence of a distinguishable taste or aroma, or both, that  
35 constitutes a characterizing flavor.

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