218th New JErsey Legislature

senate health, human services and senior citizens Committee

HoN. joseph vitale—Chair

Testimony

Sal Risalvato

Executive Director

New Jersey Gasoline-Convenience-Automotive Association

S-4223, S-4224, S-3265

Seeking Amendments

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Committee room 4

Trenton, NJ 08625

**Testimony of Sal Risalvato**

Chairman Vitale, members of the Committee, my name is Sal Risalvato, Executive Director of the New Jersey Gasoline, Convenience Store, Automotive Association (NJGCA), here representing nearly a thousand independent small businesses in this state, including several hundred convenience store owners..

We and our members look forward to being a part of the solution to this crisis. In light of the current situation, we are not opposed to many of the regulations being called for in these pieces of legislation, however there a few provisions which we feel should be amended in order to make for a more effective regulatory system.

**S-4224/A-5922**

**Section 3:1a(2) prohibits the sale of a vaping liquid with a nicotine content of more than two percent.**

This provision in practice will act as a near total ban of vaping products in the state, particularly if it were to go into effect just 4 months after the bill were to become law, as the language now calls for. This is because the nicotine concentration found in virtually all of the different major cartridge systems are between 3% and 5%. The biggest hurdle to creating 2% or lower concentration products is not whether or not the manufacturers would be willing to create new product lines just for New Jersey, it is actually the FDA’s requirements for the regulation of these products.

Starting in May of next year (right around the time this bill will be taking effect), no vaping product will be able to be sold in the United States unless its manufacturer has submitted the exact specifications of the product to the FDA so that it can undergo a “Premarket Tobacco Application” (PMTA). Companies have also not been legally allowed to bring any new vaping products to the market since August 2016, when the FDA “deemed” vaping products to be subject to the FDA’s jurisdiction under the Tobacco Control Act of 2009. Products already on the market at that time have been given until May 2020 to either submit a full PMTA or withdraw from the market. The process of having the FDA review the application can take a full year, and can end with the products being rejected. Last month Reynolds submitted an application for one of its Vuse models that was 150,000 pages long. Once a product has been approved, any change (including lowering the nicotine concentration) must go through another review for approval before it can be brought to market. This means that if manufacturers acted immediately to work on bringing products with 2% or less nicotine content to market, it would take years for the product to be approved for sale by the FDA.

We believe that the best course of action for the New Jersey Legislature at this time would be to set the nicotine cap at 5%, and revisit what the level should be in future legislation, once the FDA has taken further action.

**A-5923/S-4224**

**Section 5, Establishing a new 20% tax on electronic smoking devices at the point of sale**

We oppose the increase in the tax on cartridges in Section 7 (from 10¢ per milliliter to 20¢) and the additional $500 annual license fee required by Section 3, and the creation of a new tax on the devices themselves. Of particular concern though is the structure of the new tax on devices, which is set at 20% of the retail price and must be collected by the retailer and remitted to the State. Under current law, and under the other provisions of this bill, our membership are only legally allow to sell cartridge based systems, and the tax on those cartridges is collected at the wholesale level. This was a deliberate decision in the design of that tax law 18 months ago and has worked effectively to ensure compliance since it has gone into effect. History has shown in virtually all tax excise tax structures that the smaller the number of businesses which must directly pay the Division of Taxation, the better the compliance rate is. Under the current language of the bill, “basic vapor businesses” would have to file a separate tax return just for the taxes collected on the devices themselves. For one of our members who shared some of his sales data, it could amount to a monthly return of just about $150, with many smaller stores no doubt owing much less than even that. If there is to be a tax on the device itself, it must be collected at the wholesale level, as it will be for cartridge liquids.

**Section 21, Municipal licensing fees and non-preemption**

We are opposed to allowing municipalities to enact or continue ordinances which charge an additional fee beyond what the State will require. Some municipalities have passed ordinances requiring a license fee to sell vapor products, however most of those were passed because the State had not required vapor businesses to be licensed. Both this bill and the legislation passed this past June have fixed that issue, so municipal licensing should no longer be necessary. If local governments are to be allowed to enact these fees, then at the very least there should be a cap equal to what the State licensing fee is, as a handful of local governments have passed ordinances calling for an annual fee significantly larger than the $500 set for the State fee earlier in this bill, so large that some businesses may not be able to afford it at all based on the sales they make.

This section also states that nothing in this bill shall preempt an existing ordinance. Of the municipalities which have passed local licensing fees, their revenues are often not dedicated to funding compliance inspections and would not be if the ordinance is not preempted by this bill. Fundamentally, we believe our state should be one marketplace, not an economy subdivided 565 different ways, giving some small businesses a competitive disadvantage relative to a competitor who could be within walking distance, just because they are on the other side of an invisible municipal boundary. Once State law has set up a comprehensive and effective policy on this issue, as this package of legislation aims to do, it should be the standard for the entire state.

**Section 16:e, Discretion for Director of Taxation to change the tax rates**

This section gives the Director of the Division of Taxation the power to “assess, determine, revise and readjust the taxes imposed by” this bill. We believe this is too much discretion to give to the executive branch at the expense of the legislative branch, which has carefully considered the level and structure of these tax rates over the last two years.

**Section 19:c, 60 day implementation for standardized tracking feature**

Once the Director of Taxation has created a working database and tracking system, we believe that requiring all products to be sold with that feature on them within 60 days is too soon. Since the tracking feature has to be added by the manufacturer at the time when the product is manufactured, there will be a significant amount of existing stock in the marketplace which cannot have the feature added since they are long past the manufacture date. Extending this date from 60 days to at least 6 months.

**Section 4:b, 4 years of recordkeeping**

This section requires all vapor businesses keep records for 4 years, primarily so the Division of Taxation can ensure that proper taxes were paid. Since at basic vapor businesses the taxes will be paid by the wholesaler or distributor, requiring the retailer to keep records for this length of time is unnecessary and should be lowered.

**A-3178/S-3265**

The definition used for “characterizing flavor” in the bill as introduced is so broad that it does not allow for literally any flavor of product, including tobacco flavor. The Governor’s Task Force on this issue did not call for a ban on tobacco flavored products. There are no products on the market sold as having “no flavor”, and it is difficult to imagine what that could mean. Furthermore, according to some preliminary research we have done, the fundamental components of vaping liquid are said to have a mildly sweet taste to them, so even if a non-flavored product could be brought to market it may be less effective for accomplishing the sponsors’ goals. Explicitly excluding tobacco and menthol flavor from the definition of characterizing flavor would also help ensure that the only users of vaping products are ex-smokers.

We also believe language should be added that would exempt a product which in the future has been cleared by the FDA through the previously discussed PMTA process. In order for a product to clear that process, the FDA will have to determine that the product is less harmful than conventional cigarettes and that it is not appealing to youth. If it has met those standards it should be allowed for sale in New Jersey, as it will be almost everywhere else in the country. When the city of San Francisco passed a ban on the sale of vapor products, they included language exempting products cleared by the FDA.

Finally, the effective date should be changed to match the effective date for the other two pieces of legislation in the package. An immediate ban will not give retailers enough time to even learn that the change has gone into effect before they are immediately in violation of the law.

**S-4223**

By not including a separate definition for “basic vapor business”, as is done by the Assembly companion bill, the current language of this bill would ban all non-vape stores from selling any form of vapor product whatsoever.

Keeping a retail business open and people employed is one of the greatest challenges there is in this economy, and the State should not target one class of retailer for the benefit of another, especially when there is no evidence for it.

An academic study published in 2018 by the *American Journal of Health Promotion* titled “How Do Adolescents Get Their E-Cigarettes and Other Electronic Vaping Devices?” found that only 31% of youths purchased their vaping products directly from a retail source of any kind. 36% purchased them from another person and 19% were given them by another person. Of those who did make a direct retail purchase, the most common source was the internet (32%). Vape shops were listed by 22% and other tobacco shops were listed by 16%. Convenience stores, gas stations, groceries stores, and liquor stores combined to represent only 8% of underage purchases. Furthermore the FDA’s Population Assessment of Tobacco and Health (PATH) 2016 study found that 86% of youths using e-cigarettes did not purchase them from any physical store, and of those that did buy them from a store 76% got it from a vape shop.

The other provisions of these bill will also serve to reduce whatever remaining illegal sales there are, particularly the new mandate that all retailers use an electronic identification verification system. With this requirement, the ID checking laws for vapor products will actually be stricter than for liquor stores, which will not have the new mandate for electronic checkers. These systems are not cheap, but we accept that they are a necessary investment for all of our retailers selling not just vapor products, but all tobacco products. We are confident that the doubling of fines for violations, and the stepped up enforcement from both State and municipal authorities, will all combine to effectively eliminate any remaining underage sales in physical in-state retailers, as any retailer sloppy enough to allow it will soon lose their license and likely be out of business completely.

We are available to discuss these changes in more detail at any time. Thank you for your consideration.