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Testimony of James S. Calvin, President  
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*Submitted to*

**NYS SENATE FINANCE COMMITTEE**

Hon. Liz Krueger, Chair

*and*

**NYS ASSEMBLY COMMITTEE ON WAYS AND MEANS**

Hon. Helene Weinstein, Chair

*concerning*

**Tobacco Retailing Issues in the FY 2020 Executive Budget**  
February 2019

NYACS is a statewide trade organization representing the interests of more than 8,500 neighborhood mini-marts statewide, most of which are registered with New York State as retail tobacco dealers.

NYACS was one of the first organizations to be approved by the New York State Department of Health as a provider of certified tobacco sales training to retail personnel. I have personally trained over 7,500 clerks, cashiers and managers in the proper techniques for preventing underage tobacco sales.

We appreciate the opportunity to comment on tobacco and vaping product retailing provisions of the Executive Budget (Part UU of S.1509/A.2009) and their impacts on convenience stores.

### **Vaping Product Supplemental Tax**

Part UU would impose a supplemental sales tax on vaping products equal to 20 percent of the retail price. This is unadvisable on two fronts.

First, every other tobacco-specific tax in New York State is prepaid at the wholesale distributor level and then passed through to the retailer and ultimately the consumer. No rationale is given for making an exception here, because none exists.

Applying the tax at the retail point of sale invites unscrupulous business owners to play games. Those who both manufacture their own products and sell them at retail would be able to limit their tax liability by adjusting their base price downward.

Second, a 20 percent tax would be steep enough to trigger a black market for "tax free" e-cigarettes as pervasive and detrimental as that for cigarettes. Part UU makes no provisions for ensuring that New Yorkers cannot defeat the tax by obtaining e-cigarettes online, from border states, Native American smoke shops, and the black market.

The Executive Budget projects \$19 million a year in new revenue from this new tax. Yet in the next breath, it acknowledges having "no reliable information on the number of e-cigarette retailers" in New York that would be collecting it. Nor does it forecast to what extent taxable sales would be lost to illegal trade resulting from excessive taxation.

**The Better Alternative:** Last year, the Governor proposed a vaping products excise tax of 10 cents per fluid milliliter of nicotine liquid. He stated then that it “would equalize the tax treatment of tobacco products and the equivalent products used in e-cigarettes.” We believe this modest tax, prepaid at the wholesale distributor level for the sake of uniformity, would be fairer, simpler to administer, and unlikely to cause the illegal trade activity that continues to thwart public health, legitimate trade, and tax collection with cigarettes.

### **Vaping Product Retail Registration**

Part UU would, for the first time, require vape shops that exclusively sell e-cigarettes and vaping products to register with the state Department of Taxation and Finance as vaping product dealers at a fee of \$300 per year. If it stopped there, it would be fine.

But it goes on to require that if you’re a convenience store that sells both tobacco products *and* vaping products under an existing retail tobacco dealer registration that costs \$300 a year, you would now need to split it, and register annually as both a tobacco dealer (\$300) and a vaping products dealer (another \$300). This isn’t necessary, especially when our State is endeavoring to streamline the permit process for small business.

Instead of creating a redundant license, we urge the Legislature to just close the vape shop loophole. In 2017, the Senate and Assembly acted to do so by overwhelmingly passing bipartisan legislation supported by NYACS (S.2542a/A.4377a) requiring e-cigarette retailers who were not already registered as tobacco dealers to register with the state and undergo the same underage sale enforcement that tobacco dealers do. It was vetoed, however, leaving those establishments unmonitored to this day. To achieve parity, closing this loophole is all that’s needed.

### **Vaping Product Underage Enforcement**

Part UU calls for penalties for underage sale of e-cigarettes and vaping products that are excessively punitive, including fines ranging from \$5,000 to \$35,000.

Right now, these penalties are, and should remain, the same as for tobacco – a \$300 to \$1,500 fine per occurrence plus tobacco and lottery license suspension for repeat offenses. This penalty structure has been sufficient deterrence to cut the rate of underage sales across New York from 19 percent in 1998 to 4.2 percent in 2016.

Again, the problem isn’t that existing penalties are lenient, but rather that an entire channel of trade is exempt from them, in that stand-alone vape shops do not have to register with the state and thus escape health department enforcement to detect and penalize underage sales. Closing this vape shop loophole as described above is the answer.

### **Flavored E-Cigarette Ban**

Part UU would authorize the state Health Commissioner to promulgate regulations restricting the sale of flavored e-cigarettes and liquid nicotine. We urge you to reject this proposal.

The U.S. Food and Drug Administration has formally exercised its congressional authority to begin regulating these products. Its October 2018 ultimatum to manufacturers has already resulted in the removal of some flavored e-cigarettes from store shelves in New York and nationally, and more changes in the marketplace are expected.

A state-level ban on selling flavored e-cigarettes wouldn’t make them go away. The product remains in high demand, and would still be readily accessible from border states, tribal smoke shops, online vendors, and street dealers, all beyond the reach of New York State restrictions. Thus, the choice is not between having flavored e-cigarettes available or not available, but between having them sold in a regulated, taxed, age-verified environment like our stores, or in an arena that resembles the Wild West.

## **Tobacco Product Display Ban**

Part UU would prohibit convenience stores from displaying the legal tobacco products they are licensed to sell to age-verified customers. Stores would have to hide them from view, instead providing adult customers with a tobacco product “menu.” This would have far-reaching implications for licensed convenience stores and illegal trade.

**A display ban is unnecessary to prevent underage sales.** Display does not equate to youth access. Statewide, our industry has achieved a nearly 96 percent compliance rate on health department undercover inspections involving youth attempting to buy tobacco <sup>1</sup>, and we are striving to keep improving that score.

**A display ban will backfire.** Adult smokers who no longer see their product in our stores would easily find it beyond the reach of New York State licensing, regulation, and taxation – border states, tribal enterprises, online vendors, and bootleggers. Combined, these alternative sources already account for 57 percent of New York’s cigarette trade <sup>2</sup>, according to the Tax Foundation. Our customer counts and non-tobacco sales would suffer.

**A display ban is unwarranted.** The notion that the mere sight of tobacco products displayed on a store wall or shelf compels young people to start smoking is preposterous. Does the beer display in a supermarket compel underage drinking? Does the condom rack at the pharmacy compel teenagers to have premarital sex? Does the lottery ticket display in a convenience store compel minors to start gambling?

**A display ban will create double standards.** In Central New York, Western New York, Northern New York, the Southern Tier, and Long Island, licensed convenience stores face unfair “tax-free” competition from Native American enterprises that ignore tobacco regulations imposed by state and local governments. This would be another one. Their non-Indian customers would continue to see tobacco displays.

**A display ban will be impractical.** If age-verified customers have to review and order from a tobacco products menu, and clerks have to retrieve their order from a cabinet or other storage area, it will slow down transaction times, turning convenience stores into inconvenience stores.

**A display ban will not yield the intended result.** According to independent research by Patrick Basham of London’s Institute of Economic Affairs, data on Canada’s tobacco display ban “do not support the claim that a display ban was effective in ‘cutting smoking’ either by young people or adults. Instead, they show that display bans are associated with increased prevalence for both young people and adults in Canada and no decline in consumption.”<sup>3</sup> Basham goes on to say that “Rather than leading to a reduction in tobacco consumption, the venue of tobacco purchase and the nature of tobacco products merely shifts from a legal retailer selling legitimate products, to an illegal seller of untaxed and often counterfeit cigarettes. Hence, we learn from Canada that a competitive result of banning displays is a distorted tobacco market that reduces the number of legal tobacco retailers and in so doing drives smokers to the tobacco black market.”<sup>3</sup>

**Exemptions to the display ban are based on myth.** Any “place of business to which admission is restricted solely to persons twenty-one years of age or older” would be exempt from the display ban. Thus, “tobacco only” stores and vape shops would be permitted to maintain tobacco displays, based on a myth that they never let any minor enter their premises. In reality, their underage tobacco sale enforcement record is no better and no worse than that of convenience stores. To wit, the list of New York locations that sold tobacco to minors during the 12-month period ending March 31, 2016 (the most recent data posted), includes several dozen “adult only” shops in Astoria, Brentwood, Brooklyn, Cairo, Catskill, Corona, Cortlandt Manor, Delhi, Elmsford, Fishkill, Fresh Meadows, Garnersville, Greenburgh, Hicksville, Hyde Park, Lagrangeville, Lake Placid, Latham, Lindenhurst, Middle Island, Manhattan, Mohawk, New Windsor, Niagara Falls, Oceanside, Plattsburgh, Poughkeepsie, Rochester, Rome, Schenectady, Selden, Spring Valley, Wappingers Falls, West Coxsackie, and Yonkers. <sup>4</sup>

## **Coupons and Discounts**

Part UU would prohibit tobacco and vaping product price reduction instruments, defined as “any coupon, voucher, rebate, card, paper, note, form, statement, ticket, image, or other issue, whether paper, digital, or any other form, used for commercial purposes to receive an article, product, service, or accommodation without charge or at a discounted price.”

As desirable as this may sound on paper, in the marketplace it would have the unintended consequence of enhancing illegal trade. Coupons and other discounts are the only tools available to licensed convenience stores to keep their prices anywhere near competitive with “tax free” Native American smoke shops and bootleggers, who already enjoy a cigarette price advantage of at least \$5 per pack while ignoring all state and local tobacco regulations.

## **Higher Purchase Age**

Should you decide to elevate the tobacco purchase age to 21 statewide, don’t think for a minute that it will inhibit the ability of teenagers to obtain tobacco and vaping products from older relatives and friends. Research in New York City has shown that, regrettably, it doesn’t work, because teenagers are still able to obtain tobacco products through social sources.<sup>5</sup>

## **Pharmacy Ban**

Part UU would permanently ban New York pharmacies from selling tobacco products. Although convenience stores do not operate pharmacies, we caution that a significant percentage of smokers displaced when their usual retail outlet can no longer sell tobacco merely shift their tobacco purchases to unlicensed, unregulated, untaxed sources, defeating the public health policy objective.

## **Thank You**

Thank you for the opportunity to comment. NYACS would be pleased to act as a resource for legislators and staff as these issues are more thoroughly examined in the coming weeks.

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<sup>1</sup> *Youth Access Tobacco Enforcement Program Annual Report, 4/1/15-3/31/16, New York State Department of Health, Page 14*  
[https://www.health.ny.gov/prevention/tobacco\\_control/docs/tobacco\\_enforcement\\_annual\\_report\\_2015-2016.pdf](https://www.health.ny.gov/prevention/tobacco_control/docs/tobacco_enforcement_annual_report_2015-2016.pdf)

<sup>2</sup> “Cigarette Taxes and Cigarette Smuggling by State, 2015,” *The Tax Foundation*  
<https://files.taxfoundation.org/20171106130335/Tax-Foundation-FF565.pdf>

<sup>3</sup> “Canada’s Ruinous Tobacco Display Ban: Economic and Public Health Lessons,” *Patrick Basham, Institute of Economic Affairs, London, July 2010*  
<https://iea.org.uk/wp-content/uploads/2016/07/upldbook517pdf.pdf>

<sup>4</sup> *Youth Access Tobacco Enforcement Program Annual Report, 4/1/15-3/31/16, New York State Department of Health, Appendix 2*  
[https://www.health.ny.gov/prevention/tobacco\\_control/docs/tobacco\\_enforcement\\_annual\\_report\\_2015-2016.pdf](https://www.health.ny.gov/prevention/tobacco_control/docs/tobacco_enforcement_annual_report_2015-2016.pdf)

<sup>5</sup> “Impact of New York City’s 2014 Increased Minimum Legal Purchase Age on Youth Tobacco Use,” *American Journal of Public Health, May 2018*  
<https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2018.304340>