



Electronic Smoking Device Task Force Report

Recommendations Issued
Pursuant to Executive
Order No. 84

Report Issued on October 3, 2019

Judith M. Persichilli, RN, BSN, MA
Task Force Chair
Acting Commissioner
New Jersey Department of Health

TABLE OF CONTENTS

Executive Order No. 84	1
Executive Summary.....	2
Statement of the Problem	5
Electronic Smoking Devices	7
Brief Background: Use & Marketing.....	7
Law and Regulations	10
New Jersey: Licensing and Sales.....	11
Current Law Related to Flavored Cigarettes	13
Current Law Related to Taxation.....	14
Smoke Free Air Act	14
Regulation of Medical Cannabis	15
Regulating Electronic Smoking Devices in Schools.....	15
Menthol.....	15
Compliance, Educational & Cessation Programs.....	17
Stakeholder Input	20
Vaping Supporters.....	21
Public Health Perspective.....	22
Task Force Recommendations.....	23
Ban Sales of Flavored Electronic Smoking Devices and Products.....	23
Increase Penalties for Unauthorized Sales.....	24
Restrict Online Sales.....	24
Increase Compliance Buys.....	24
Prohibit Advertising & Sale of Covert Products	24
Strengthen Point-of-Sale Retailer Practices.....	25
Ensure Uniform Regulation of the Marketplace.....	25
Develop Centralized State Retailer Registry	26
Increase Interagency Collaboration	26
Additional Considerations.....	26

Develop Rapid Response Team	26
Expand Tax on Vaping Products	27
Expand vapefactsnj.com to Become Central Repository	27
Require Retailers to Conduct Electronic Identification Verification	27
Establish Trackable Database for Sale of Electronic Cigarette Devices.....	27
Review Potential Menthol Cigarette Ban	28
Issue Standing Orders for Tobacco Cessation Therapies	28
Banning Electronic Cigarettes with Nicotine Concentrations Above 3%	28
Conclusion.....	29

EXECUTIVE ORDER NO. 84

On September 12, 2019, Governor Murphy issued Executive Order No. 84 (“EO 84”), calling for an Electronic Smoking Device Task Force (“Task Force”) to provide recommendations to the Governor and the Legislature that outline a comprehensive, coordinated strategy to protect New Jerseyans and to educate the public, particularly youth, about the risks of electronic smoking devices. The Task Force is comprised of ten members, including: (i) the Commissioner of Health, as Chair, (ii) the Attorney General, or his designee, (iii) the Treasurer, or her designee, (iv) the Commissioner of Education, or his designee, (v) the Secretary of Higher Education, or her designee, (vi) the Commissioner of Children and Families, or her designee, (vii) the Commissioner of Human Services, or her designee, (viii) the Assistant Commissioner of the Division of Medicinal Marijuana, or his designee, (ix) the Director of the New Jersey Division of Consumer Affairs, or his designee, and (x) a representative from the Office of Tobacco Control, Nutrition and Fitness (Department of Health).

EO 84 directs the Task Force to review the following categories:

- a. Providing warning signs to be posted in retail establishments that sell electronic smoking devices and related products in the State that warn customers of the health risks associated with electronic smoking device use;
- b. Expanding the State’s ability to efficiently and comprehensively investigate, track, and monitor any cases of severe pulmonary disease;
- c. Recommending legislative and regulatory changes needed to protect young people from electronic smoking devices and remove barriers to the execution of a comprehensive strategy to mitigate the hazards of electronic smoking device use;
- d. Developing a statewide public awareness campaign on the risks of electronic smoking device use with a toolkit for educators and educational materials aimed at specific target audiences like parents, coaches, educators, health care professionals, and young people, and identifying appropriate interventions to support individuals at risk or experiencing addiction;
- e. Reviewing and providing feedback on current efforts in the State to address the dangers of electronic smoking device use and considering methods for expansion of those efforts;

- f. Cooperating with local, state, federal, and private or non-profit entities while the multi-state investigation into the hundreds of cases of severe pulmonary disease across the nation that have been associated with electronic smoking device use continues; and
- g. Adopting similar policies with respect to traditional cigarettes or other products that are, or are perceived as, alternatives to electronic smoking devices.

EO 84 also directs the Task Force to issue a report of its findings and recommendations to the Governor and the Legislature by October 3, 2019.

As charged, the Task Force reviewed and discussed the above categories as well as other areas that will be discussed further in this Report; has convened multiple times; held a public hearing on September 24, 2019, at the Department of Health, Health & Agriculture Building in Trenton, New Jersey; received and reviewed written comments from stakeholders; and hereby presents this Report.

EXECUTIVE SUMMARY

Although the sale of vaping products to individuals under 21 years of age is currently prohibited by law in New Jersey, youth access to vape products continues at an alarming rate, according to data reviewed by the Task Force, the current and growing number of cases of severe lung injury, as well as testimony by stakeholders at the public hearing. We can and should do better as a State. Accordingly, the Task Force issues the following recommendations to the Governor and Legislature with the protection of our youth as a driving factor. In doing so, we recognize that there are ongoing efforts related to the vaping health crisis at the federal level and that certain recommendations made herein may be subject to federal laws and regulations.

BAN SALES OF FLAVORED ELECTRONIC SMOKING DEVICES AND PRODUCTS

The Task Force recommends that the Legislature impose a ban on the sale of flavored electronic smoking devices and products, inclusive of menthol. The Task Force recommends that ban apply to the sale of electronic smoking devices and associated products that are advertised to, or do, impart a distinct flavor other than tobacco, such as fruit, clove, mint, menthol or sweets.

INCREASE PENALTIES FOR UNAUTHORIZED SALES

The Task Force recommends that civil penalties be increased for retailers and employees who sell electronic smoking devices, vaping-related products, or other tobacco products, to individuals under 21 years of age.

RESTRICT ONLINE SALES

The Task Force recommends that the Legislature restrict the sale of electronic smoking devices and related products to face-to-face transactions, with limited exceptions.

INCREASE COMPLIANCE BUYS

The Task Force supports the proactive efforts of the Office of Tobacco Control to increase compliance buys through the recruitment of additional resources, which should result in significant increases in compliance buy rates and curb youth access to tobacco products and electronic cigarettes.

PROHIBIT ADVERTISING & SALE OF COVERT PRODUCTS

The Task Force recommends explicitly prohibiting the advertising and sale to New Jersey consumers of products intended to conceal or disguise vaping devices as or within other products, such as clothing, accessories, utensils, or other electronic devices (such as watches). Making the advertising and sale of these items a per se violation of the Consumer Fraud Act would be subject to civil penalties of up to \$10,000 for a first offense and \$20,000 for subsequent offenses. Alternatively, the Legislature could prohibit the sale of such items to individuals under 21 and without age verification required for the purchase of tobacco products.

STRENGTHEN POINT-OF-SALE PRACTICES

The Task Force recommends that the Legislature require electronic smoking device retailers to not only post signs that describe the prohibition on underage sales but also to implement point-of-sale protections such as locking up or otherwise securing electronic smoking devices and products out of reach of consumers. Consideration also should be given to requiring dissemination of information to consumers at the point of sale.

ENSURE UNIFORM REGULATION OF THE MARKETPLACE

The Task Force supports legislation that sets out a more comprehensive regulatory scheme covering all retail outfits that sell electronic smoking devices and products in the State. The Legislature should continue to vest authority for licensing of retailers who sell these products with the Department of Treasury, Division of Taxation and substantially increase licensure fees (currently set at \$50 for vapor businesses). The Division should also consider limiting the types of retailers that may be licensed to sell electronic smoking devices and related products, with

particular focus on limiting licensure to those retailers that restrict entrance to individuals 21 and older.

DEVELOP CENTRALIZED STATE RETAILER REGISTRY

The Task Force recommends creation of a centralized state registry of registered retail establishments, which, in turn, can be used for expanding structured compliance buys, monitoring and enforcement efforts.

INCREASE INTERAGENCY COLLABORATION

The Task Force further recommends continued and enhanced interagency communication and coordination in ongoing efforts to determine the causes of youth usage and health problems associated with electronic smoking devices and products.

ADDITIONAL CONSIDERATIONS

The Task Force recommends further study and consideration in the following areas:

- *Develop a Rapid Response Team*
- *Expand Tax on Vaping Products*
- *Expand vafactsnj.com to Become Central Repository*
- *Require Retailers to Conduct Electronic Identification Verification*
- *Establish Trackable Database for Sale of Electronic Cigarette Devices*
- *Review Potential Menthol Cigarette Ban*
- *Issue Standing Orders for Tobacco Cessation Therapies*
- *Ban Electronic Cigarettes With Nicotine Concentrations Above 3%*

STATEMENT OF THE PROBLEM

Electronic smoking devices¹ pose a threat to public health, particularly the safety and well-being of youth. Use of electronic smoking devices and product by youth has increased significantly over recent years, both nationally and in New Jersey, with youth vaping now outnumbering youth who smoke cigarettes. Electronic smoking devices enjoy a prominent space in the market yet are less regulated than traditional cigarettes, thereby creating the potential for problems such as youth access.

Currently, the Centers for Disease Control and Prevention (“CDC”), the U.S. Food and Drug Administration (“FDA”), state and local health departments, and other clinical and public health partners are investigating a multi-state outbreak of what is being described as a “lung injury” associated with electronic smoking devices, liquids, refill pods and/or cartridges. See “Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping,” Centers for Disease Control and Prevention (“CDC”), available at https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html (last visited on October 2, 2019).

As of September 27, 2019², the CDC is reporting 805 cases of lung injury reported from 46 states and the U.S. Virgin Islands. Twelve deaths have been confirmed in 10 states. See *id.* Nationwide data is being collected and periodically updated by the CDC. So far, the CDC has received sex and age data on 771 patients. About 69% of patients are male. Nearly two thirds (62%) of patients are 18 to 34 years old; with 22% of patients between 18-21. Sixteen percent of patients are under 18 years old. See *id.*

The CDC has received data on substances used in electronic cigarettes or vaping products in the 30 days prior to symptom onset among 514 patients. About 77% reported using THC-containing products; 36% reported exclusive use of THC-containing products. About 57% reported using nicotine-containing products; 16% reported exclusive use of nicotine-containing products. See *id.* The overall trend appears to be that more males than females are impacted by the vaping-related illness. The investigations have not yet identified any specific e-cigarette, vaping product, or substance that is linked to all cases. The CDC does know, however, that all

¹ New Jersey law defines “electronic smoking device” in various ways. Compare, e.g., N.J.S.A. 54:40B-2 with N.J.S.A. 26:3D-57. Moreover, there are a variety of terms used interchangeably in common parlance to refer to electronic smoking devices. Such terms include but are not limited to e-cigarettes, e-cigs, vapes, e-hookahs, vape pens, and electronic nicotine delivery systems (ENDS). Products associated with electronic smoking devices are referred to as devices, liquids, refill pods, and/or cartridges, among other terms. This Report uses terms such as “electronic smoking device,” “vapes” or “e-cigarettes” as general, all-encompassing terms unless otherwise specified.

² CDC provides updates on national vaping numbers every Friday. The above represents the latest information available to the Task Force.

cases involve the use of electronic smoking devices. Most of the cases reported using THC or both THC and nicotine. Some of the cases involve only the reported use of nicotine.

In New Jersey, the Department of Health continues to investigate cases of vaping-associated illnesses. See New Jersey Department of Health, Tobacco Control, “E-Cigarette/Vaping Information for Parents, Teachers, Coaches & Healthcare Providers,” at <https://nj.gov/health/fhs/tobacco/vaping/index.shtml> (last visited on October 2, 2019). As of October 1, 2019, there has been one vaping-related death in New Jersey; 12 confirmed and 2 probable cases (4 females; 10 males); and 32 reports under investigation (7 females; 25 males). The age range of impacted individuals is 15-51 years of age. To date, no cases in New Jersey are known to be associated with any THC-containing vape product sold at any of New Jersey’s medicinal marijuana dispensaries.

Patients being investigated related to vaping-related illnesses have reported symptoms such as coughing, shortness of breath, chest pain, nausea, vomiting, diarrhea, fatigue, fever and abdominal pain. Some patients’ symptoms have developed over days while others report a more protracted onset of several weeks. Information from the CDC indicates that a lung infection does not appear to be causing the symptoms. The CDC’s current recommendation, particularly until more is known about these illnesses, is to stop (or never start) using e-cigarette or vaping products. Youth, young adults, and pregnant women should not use e-cigarette products. As to individuals who do use vaping products, the CDC is recommending not to buy these products “off the street” and not to modify or add any substances that are not intended by the manufacturer. The CDC also recommends to current users that they carefully monitor themselves for symptoms and see a health care provider immediately if experiencing symptoms such as those identified with this outbreak. See “Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping,” CDC, available at https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html. (last visited October 2, 2019).

Adding to the complexity of the ongoing public health investigations, vape cartridges containing THC and any number of unknown ingredients are being sold illegally in increasing numbers. Media reports from various states reflect that thousands of illicit THC vape cartridges are being sold and have been seized by police. Alarming estimates in some media reports speak to the profitability of the illegal trade—for example, one source indicates that a dealer was making \$800,000 to \$2 million per month on the sale of illicit vape cartridges with THC. See “THC cartridges become focus of vaping injuries; Milwaukee dealers making \$2 million a month on sales, police say,” Milwaukee Journal Sentinel, Aug. 29, 2019; see also “About \$3.8 million worth in illegal vaping cartridges were seized in Minnesota,” CNN, (Sept. 24, 2019) available at <https://www.cnn.com/2019/09/24/health/minnesota-vaping-cartridges-seizure/index.html>.

Also troubling is the manufacturing process of street-market THC vape cartridges and the contamination of the products and components throughout the supply chain. See “Journey of a tainted vape cartridge: from China’s labs to your lungs,” by David Downs, Dave Howard, and Bruce Barcott, (September 24, 2019) available at <https://www.leafly.com/news/politics/vape-pen-injury-supply-chain-investigation-leafly> (last visited on October 2, 2019).

In short, the existence of a significant public health threat associated with use of electronic smoking devices cannot be denied—albeit one that is under ongoing investigation and presents as-yet unanswered questions. This threat signals that expanded legislative or regulatory controls as well as enhanced prevention efforts are warranted.

ELECTRONIC SMOKING DEVICES

BRIEF BACKGROUND: USE & MARKETING

Electronic smoking devices produce an aerosol by heating an “e-liquid” that may contain nicotine (the addictive drug in regular cigarettes, cigars, and other tobacco products), flavorings, propylene glycol, vegetable glycerin, and other ingredients. Users inhale this aerosol into their lungs. Bystanders can also breathe in this aerosol when the user exhales into the air. These devices come in many shapes and sizes. Some electronic smoking devices look like regular cigarettes, cigars, or pipes. Some look like USB flash drives, pens, and other everyday items. The two main types of electronic e-cigarettes are open system and closed system, with the primary difference being the delivery of the e-liquid to the heating mechanism. Open systems have tanks which allow for manual filling of e-liquid, and closed systems use pre-filled tanks of e-liquid, which affix directly to the battery or heating mechanism. Further, the mouthpiece on open systems is removable whereas the mouthpiece is built into the pre-filled tank of a closed system.

Electronic smoking devices were introduced into the U.S. market in 2007 and their use has skyrocketed since then. It is estimated that more than 400 different brand names of electronic smoking devices are available on the market. E-liquids are now reportedly available in more than 7,000 unique flavors, including kid-friendly flavors like cherry, bubblegum, and chocolate. The devices gained in popularity under a theory of “lesser of the harms” and are often touted as a smoking cessation tool. Although the FDA has not approved vaping devices as smoking cessation devices, many adult users of vaping devices claim that they would not have been able to quit smoking traditional cigarettes were it not for the vaping alternative.

The CDC and FDA found that during 2011-2015, e-cigarette use rose from 1.5% to 16.0% among high school students. See “Centers for Disease Control and Prevention. Tobacco Use

Among Middle and High School Students - United States, 2011 -2015.” Morbidity and Mortality Weekly Report 2016; 65(14): 361-67. In 2018, youth vaping continued to spike with more than one in five high school students reporting using electronic smoking devices. This marked a 78% increase from the previous year, according to a non-profit public health organization known as the Truth Initiative. See “Why Vaping Is An Important Issue,” Truth Initiative, available at <https://www.truthinitiative.org/our-top-issues/vaping-issue> (last visited October 2, 2019). In addition, a National Drug Council study reported the vaping increase was “the largest ever recorded for any substance in the 44 years” tracking adolescent drug use. See “Adolescent Vaping and Nicotine Use in 2017-2018 – U.S. National Estimates,” (January 10, 2019) available at <https://www.nejm.org/doi/full/10.1056/NEJMc1814130> (last visited October 2, 2019). A 2018 report indicated that 3.62 million middle and high school students are users of e-cigarettes. Cullen KA, Ambrose BK, Gentzke AS, Apelberg BJ, Jamal A, King BA. “Notes from the Field: Increase in use of electronic cigarettes and any tobacco product among middle and high school students — United States,” 2011–2018. MMWR Morbid Mortal Wkly Rep. 2018;67(45):1276–77.

On a positive note, combustible cigarette use among New Jersey high school students has declined steadily since the New Jersey Department of Health began measuring it in 1999. See “Tobacco Control,” available at <https://www.nj.gov/health/fhs/tobacco/vaping/> (last visited on October 2, 2019). In 2012, the Department of Health began measuring youth vaping and, at that time, traditional cigarettes were used at a higher rate than e-cigarettes. See *id.* (citing New Jersey Youth Tobacco Survey). However, the Department then saw a sharp increase in vaping use in 2014, when use of vaping devices surpassed traditional cigarettes among New Jersey high school students. Currently, youth use of vaping in the State continues to exceed use of traditional cigarettes. See *id.*

The concern with youth vaping, in particular, is that young adults are drawn to flavored e-liquid marketed with enticing names like “cotton candy” and “fruit loop” that encourage them to start vaping. According to the Truth Initiative, 43% of young people who have tried electronic smoking devices cigarettes used them because of appealing flavors. Indeed, data indicates that a majority of young adults across the nation prefer flavored electronic cigarettes (71.2% at first use, and 82.2% at “usual” use) to tobacco-flavored e-cigarettes. See “Flavored e-cigarette use: Characterizing youth, young adult, and adult users,” *Preventive Medicine Reports*, November 11, 2016, available at <http://dx.doi.org/10.1016/j.pmedr.2016.11.001> (last visited on September 30, 2019). As one study concludes,

“Our findings are troubling and suggest that, like conventional cigarettes, characterizing flavors could be especially enticing to young people, at onset and with continued use. Eliminating or restricting e-cigarette flavors in [sic] future

could be an essential element of comprehensive tobacco control policies designed to reduce the appeal of tobacco products for young people.” Id.

A 2015 study published in *The Journal of Physiology* posited that exposure to, and use of, nicotine, particularly through unregulated e-cigarettes, “can lead to long-term changes in neural circuitry and behavior” and “primes the behavioral susceptibility to drugs of abuse.” Menglu Yuan, “Nicotine and the adolescent brain,” *The Journal of Physiology*, May 27, 2015, *available at* <https://doi.org/10.1113/JP270492> (last visited on October 2, 2019).

A 2014 report by the FDA found that electronic cigarettes contain varying levels of harmful chemicals such as “nitrosamines, aldehydes, metals, volatile organic compounds, phenolic compounds, and other substances along with nicotine.” Tianrong Cheng, “Chemical evaluation of electronic cigarettes,” WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, Apr. 14, 2014, *available at* http://tobaccocontrol.bmj.com/content/23/suppl_2/ii11 (last visited on October 2, 2019). The study found that “various chemical substances and ultrafine particles known to be toxic, carcinogenic and/or to cause respiratory and heart distress have been identified in e-cigarette aerosols, cartridges, refill liquids and environmental emissions.” *Id.* The aerosol from an electronic smoking device can contain tiny chemical particles from the liquid solution or the device itself (for example, the metals from a heating coil). It follows that the term “vaping” seems to be a misnomer; it is not necessarily only vapor that emits from an electronic smoking device.

Research indicates that some flavored e-cigarettes contain a chemical flavoring called diacetyl, which has been linked to severe lung disease. *See* CDC, “State laws prohibiting sales to minors and indoor use of electronic nicotine delivery systems — United States, November 2014,” *Morbidity and Mortality Weekly Report*, 2014. 63(49);1145-1150. Notably, many of the flavorings used in e-liquids have been approved by the FDA for oral consumption but *not* for inhalation. *See* National Academies of Sciences E, Medicine, “Public Health Consequences of E-Cigarettes,” Washington, DC: The National Academies Press, 2018.

In January 2018, the National Academies of Sciences, Engineering, and Medicine (NASEM) published a report stating that electronic cigarettes contain fewer toxic substances than combustible cigarettes but that the long-term health effects of electronic cigarettes are yet to be determined. The FDA-commissioned report involved a review of over 800 peer-reviewed studies on e-cigarettes. Committee on the Review of Health Effects of Electronic Nicotine Delivery Systems, The National Academies of Sciences, Engineering, Medicine, “Public Health Consequences of E-Cigarettes,” at 26 (2018).

Many vape supporters cite to declarations such as those made by Public Health England (an executive agency sponsored by the Department of Health and Social Care in the United Kingdom) that there are studies indicating that vaping is at least 95% safer than smoking. See “How is vaping 95% safer than smoking?” (July 4, 2019) *available at* <https://www.vapingpost.com/2019/07/04/how-is-vaping-95-safer-than-smoking/> (last visited on October 2, 2019) and Public Health England’s Evidence review of e-cigarettes and heated tobacco products 2018: Executive Summary (March 2, 2018) *available at* <https://www.gov.uk/government/publications/e-cigarettes-and-heated-tobacco-products-evidence-review/evidence-review-of-e-cigarettes-and-heated-tobacco-products-2018-executive-summary> (last visited September 30, 2019). However, the Public Health England report clearly states that more research is needed regarding e-cigarette use and that even though the statement that vaping “is at least 95% less harmful than smoking” is included, that statement “**does not mean e-cigarettes are safe.**” (emphasis added). See Public Health England. The report further added that “[t]he lack of difference in biomarkers between dual users and smokers found so far **underlines the need to encourage and support dual users to stop smoking altogether.**” *Id.* (emphasis added).

Public health advocates are quick to retort that no studies conclude that vaping is safe. Dr. Robert Shmerling, Faculty Editor of Harvard University Health Publishing, posited that “[p]erhaps vaping should be viewed as a “lesser of evils” for current cigarette smokers,” but there is much about the safety of vaping that is unknown. See “Can vaping damage your lungs? What we do (and don’t) know,” (September 4, 2019) *available at* <https://www.health.harvard.edu/blog/can-vaping-damage-your-lungs-what-we-do-and-dont-know-2019090417734> (last visited September 30, 2019). Dr. Shmerling cautions that it took many years to recognize the damage that cigarettes can cause and that we could be on a similar path with vaping. *Id.*

LAW AND REGULATIONS

In 2016, the FDA finalized a rule, frequently called the “Deeming Rule,” that extended its regulatory authority to all tobacco products, including electronic nicotine delivery systems (“ENDS”). 81 Fed. Red 28973 (May 10, 2016). The FDA has the authority to regulate many aspects of ENDS manufacturing, packaging, labeling, sales and promotion, among other things; at the same time, the FDA’s authority in many of these areas explicitly allows for regulation by states and localities, as well.

The adoption of the Deeming Rule kicked off a multi-year process stepping up FDA regulation of many tobacco products, including ENDS. Now, any new or significantly modified tobacco product, including an ENDS, that was not commercially available in February 2007 (and

is not substantially equivalent to such products), will have to receive FDA authorization before the product can be marketed, except that the FDA has allowed a grace or compliance period for many products to be submitted and reviewed. The rule also requires tobacco product manufacturers to register with the FDA and requires submission of lists of the ingredients, as well as “harmful or potentially harmful constituents” of tobacco products, to the agency. The rule also limits what claims ENDS makers and sellers can make about their products’ risks: the rule prohibits tobacco products from being sold or distributed for use to reduce harm or the risk of tobacco-related diseases associated with other tobacco products, unless the FDA specifically authorizes that kind of marketing; this prohibition bars the use of phrases like “light,” “low,” and “mild,” along with claims that the product is less harmful or risky than other tobacco products, without FDA authorization.

In addition, the 2016 rule applied a number of restrictions on the sale of ENDS and other “deemed” tobacco products, such as: (1) prohibiting the sale or distribution of e-cigarettes to people under 18 (both in person and online); (2) requiring age verification by photo ID for purchasers under 27 years old; (3) prohibiting the sale of covered products in vending machines, with certain exceptions; and (4) prohibiting the distribution of free samples.

Some of the prohibitions took effect immediately or are already in effect. These include the requirement to register, provide product and ingredient lists, include warning statements on packaging and in advertising, and the restrictions relating to sales to minors. Other requirements (such as several of the premarket review requirements) have compliance dates that extend into 2021 and 2022. See “Effective and Compliance Dates Applicable to Retailers, Manufacturers, Importers, and Distributors of Newly Deemed Tobacco Products”, FDA (Nov. 2017), *available at* <https://www.fda.gov/media/97951/download> (last visited October 2, 2019).

Recently, the FDA reported considering a ban on the sale of most flavored e-cigarettes—including menthol—in convenience stores, gas stations and other stores across the county. FDA News Release: “Trump Administration Combating Epidemic of Youth E-Cigarette Use with Plan to Clear Market of Unauthorized, Non-Tobacco-Flavored E-Cigarette Products,” FDA, Sept. 11, 2019, *available at* <https://www.fda.gov/news-events/press-announcements/trump-administration-combating-epidemic-youth-e-cigarette-use-plan-clear-market-unauthorized-non> (last visited on October 2, 2019).

NEW JERSEY: LICENSING AND SALES

In New Jersey, vapor businesses must be licensed by the Division of Taxation in the Department of Treasury beginning November 2019. *N.J.S.A.* 54:40B-3.3. The law defines “vapor business” as a “retail business where more than 50 percent of its retail sales are derived from

electronic smoking devices, related accessories, and liquid nicotine, but does not include a retail business that does not sell container e-liquid.” *N.J.S.A.* 54:40B-2. “Container e-liquid” means a “container of liquid nicotine or other liquid where the liquid is marketed, sold, or intended for use in an electronic smoking device, but does not include a prefilled cartridge or other container where the cartridge or container is marketed, sold, or intended for use as, or as a part of, an electronic smoking device.” *Id.* Notably, this license scheme does not capture all retail outfits in the State that sell electronic smoking devices. Points of sale such as gas stations, convenience stores, and pharmacies are not expressly captured under this licensing scheme, either because most of their sales derive from non-vaping products, because they sell primarily pre-filled cartridges or containers, or both.

Notably, some of the restrictions applicable to traditional cigarettes under New Jersey law are also applicable to electronic cigarettes. For example, both the sale of traditional cigarettes and the sale of electronic cigarettes to individuals under 21 years of age is prohibited by law. *N.J.S.A.* 26:3A2-20.1. There are also criminal and civil penalties associated with the sale of tobacco and electronic cigarettes in the State. *See, e.g., N.J.S.A.* 2C:33-13.1 (sale of cigarettes, electronic smoking devices to persons under age 21, petty disorderly persons offense); *N.J.S.A.* 2A:170-51.4 (sale or distribution of tobacco, cigarettes or electronic smoking devices to persons under age 21) and *N.J.S.A.* 2A:170-51.6 (prohibiting sale of cigarettes flavored other than tobacco, clove or menthol); (civil penalty of not less than \$250 for the first violation, not less than \$500 for the second violation, and \$1,000 for the third and each subsequent violation). In addition, violation of a New Jersey law intended to protect the public health and safety may constitute a second-, third-, or fourth-degree crime, depending on the circumstances. *N.J.S.A.* 2C:40-18 (violation of law intended to protect public health and safety; grading).

Aspects of marketing of electronic smoking devices or other nicotine products are subject to regulation under the Office of the Attorney General, Division of Consumer Affairs (DCA). For example, under the Consumer Fraud Act, DCA has authority to enforce against certain deceptive and misleading advertising claims and sales practices at point of sale. *See N.J.S.A.* 56:8-2. DCA recently announced that it is seeking information from multiple businesses as to their marketing and sales of vapes in New Jersey. *See “ICYMI: Attorney General Grewal Demands Information from E-Cigarette Businesses on Marketing, Sales in New Jersey,”* Press Release, Office of the Attorney General, Sept. 12, 2019, *available at* www.nj.gov/governor/news/news/562019/approved/news_archive.shtml.

Online sales of vape products appear to be less regulated in New Jersey than online cigarette sales, though they are subject to other generally applicable requirements, including the Consumer Fraud Act and the ban on sales to minors. For example, the law currently restricts

retail sales of *cigarettes*, but not vape products, to face-to-face sales with limited exceptions. *N.J.S.A. 54:40A-49* (allowing online sales with compliance of Jenkins Act, 15 U.S.C. s.375 *et seq.*, for shipments to this State; verification of State taxes being paid; obtaining age-verification prior to mailing or shipping; cross-checking payment by credit card to purchaser).

CURRENT LAW RELATED TO FLAVORED CIGARETTES

In or about 2009, the FDA banned the sale of flavored cigarettes (with the exception of menthol). 21 U.S.C. 8-87g. Prompting the ban were studies showing that tobacco companies used flavored cigarettes to target youth and young adult smokers; that flavors made it easier for new smokers to start smoking by reducing the harshness of traditional tobacco; and that companies were capitalizing on the misperception that flavored cigarettes were safer than unflavored tobacco products.

New Jersey law also prohibits the sale, offer for sale, or distribution for a commercial purpose a cigarette, or any component part thereof, “which contains a natural or artificial constituent or additive that causes the cigarette or any smoke emanating from that product to have a characterizing flavor “other than tobacco, clove or menthol.” *N.J.S.A. 2A:170-51.6*. The New Jersey statute banning the sale of flavored cigarettes narrowly defines the term cigarette as “(a) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (b) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette” as described in (a). The statutory definition does not include electronic cigarettes.

The Task Force is mindful that a possible ban on flavored electronic cigarettes and other restrictions on vaping has garnered significant attention at the state and federal levels, even prior to the national outbreak of severe lung injuries. At the federal level, the Trump Administration recently announced that the FDA intends to finalize a compliance policy that will address enforcement of the premarket authorization requirements for non-tobacco-flavored e-cigarettes—including mint and menthol—effectively ridding the market of unauthorized, non-tobacco-flavored e-cigarette products. FDA News Release: “Trump Administration Combating Epidemic of Youth E-Cigarette Use with Plan to Clear Market of Unauthorized, Non-Tobacco-Flavored E-Cigarette Products,” FDA, Sept. 11, 2019, *available at* <https://www.fda.gov/news-events/press-announcements/trump-administration-combating-epidemic-youth-e-cigarette-use-plan-clear-market-unauthorized-non> (last visited on October 2, 2019). The Task Force is also aware that federal representatives of New Jersey such as Senator Menendez, Congressman Gottheimer, and Congressman Pallone are calling for federal action to restrict vaping activity such as placing a moratorium on sales and use of all vaping products until it is determined what is

causing serious illness to users; increasing enforcement against deceptive marketing, especially targeted to teens and young people; banning online sales; prohibiting flavors, including menthol; increasing funding for CDC to study the impact of e-cigarettes on young people and to develop campaigns and grants for communities to educate youth and parents about the dangers of e-cigarettes; and taxing vape products at the same level as traditional tobacco products as a financial deterrent to curb usage.

At the state level, the New Jersey Assembly and Senate also have introduced various bills over the years that, among other things, would amend *N.J.S.A. 2A:170-51.6* to include a ban on flavored electronic smoking devices but such a prohibition has not yet been enacted.

CURRENT LAW RELATED TO TAXATION

The sale of vaping products, as with other tobacco products, is taxed at various levels. *N.J.S.A. 54:40B-1 et seq.* (Tobacco and Vapor Products Tax Act).

Cigarettes are subject to a separate but related taxation regime. See *N.J.S.A. 54:40A-1 et seq.* By law, there is a Dedicated Cigarette Revenue Tax Fund, *N.J.S.A. 34:1B-21.20*, and required deposits from the Fund to the Health Care Subsidy Fund. *N.J.S.A. 26:2H-18.58g*. In addition, beginning in State Fiscal Year 2019, an amount equal to one percent of the total revenues collected annually from the "Cigarette Tax Act" (*N.J.S.A. 54:40A-1 et seq.*) and the "Tobacco Products Wholesale Sales and Use Tax Act"³ (*N.J.S.A. 54:40B-1 et seq.*) must be directed to the New Jersey Department of Health to fund and implement evidence-based tobacco control programs that align with CDC Best Practices for Comprehensive Tobacco Control Programs and that include the goals of preventing youth initiation of tobacco usage, reducing exposure to secondhand smoke, and promotion of cessation. *N.J.S.A. 26:2H-18.58g*.

SMOKE FREE AIR ACT

Unlike some other states, New Jersey has extended its indoor smoking ban to include electronic smoking devices. Electronic cigarettes are included in the definition of "smoking" under the Smoke Free Air Act, *N.J.S.A. 26:3D-57*, and thus their use is prohibited to the same degree in areas that smoking is prohibited, including indoor public places, workplaces, elementary and secondary schools, public parks and beaches (*N.J.S.A. 26:3D-58*), with some exceptions (*N.J.S.A. 26:3D-59*), and in certain lodging establishments (*N.J.S.A. 26:3D-60*).

³ P.L. 2019, c. 147, signed into law on June 30, 2019, amends the title of *N.J.S.A. 54:40B-1 et seq.* to the Tobacco and Vapor Products Tax Act effective November 1, 2019.

REGULATION OF MEDICAL CANNABIS

Another form of regulation of electronic smoking devices in New Jersey involves the permitting and oversight of medical cannabis dispensaries. The New Jersey Division of Medicinal Marijuana within the Department of Health regulates cannabis dispensaries, including signage and product requirements. Dispensaries that sell cannabis vape devices currently display the CDC warning to avoid vaping. The Division requires dispensaries to clearly label vape products with all ingredients. *N.J.A.C. 8:64-10.6*. To date, no identified instances of severe lung injury in New Jersey are associated with vaping products sold by the dispensaries in the state.

REGULATING ELECTRONIC SMOKING DEVICES IN SCHOOLS

New Jersey law bans the use of electronic smoking devices in public places and workplaces, including but not limited to public and nonpublic elementary or secondary school buildings, board of education buildings and any area of or on the grounds of any public or nonpublic elementary or secondary school. *N.J.S.A. 26:3D-57, 58*. In addition, instructional programs on tobacco, among other categories, are mandatory in each public school and in each grade kindergarten through 12th grade in a manner adapted to the age and understanding of the pupils. *N.J.S.A. 18A:40A-1 et seq.; N.J.A.C. 6A:16-3*. Each district board of education is required to adopt and implement policies and procedures for the assessment, intervention, referral for evaluation, referral for treatment, as well as other policies for drugs and alcohol. *N.J.A.C. 6A:16-4*. Smoking prohibitions also extend to dormitories, classrooms and buildings in colleges. Anti-smoking policies on campus grounds—or designated smoking areas—are specific to the institutions.

As to messaging and outreach in schools, the Department of Education (“DOE”) utilizes a communication system called the DOE Broadcast to deliver messages directly within the field of education. The Broadcast reaches each school district, charter, and renaissance school in the state. Smoke-free policies, materials and fact sheets continue to be distributed through this system. In addition, the DOE reports that many counties across the state are taking part in activities to address vaping.

MENTHOL

As noted above, menthol is currently carved out from the ban on the sale of flavored cigarettes both under federal and New Jersey law. Menthol is a chemical found naturally in peppermint and other plants. Menthol also can be synthetically produced in laboratories. According to the FDA, almost all cigarettes sold in the United States contain at least some natural or lab-created menthol, though there are generally higher levels of menthol in those products explicitly marketed as “menthol.” See “Smoking & Tobacco Use; Menthol and Cigarettes,” Centers for Disease Control and Prevention, available at

https://www.cdc.gov/tobacco/basic_information/tobacco_industry/menthol-cigarettes/index.html (last visited on October 2, 2019).

Whether any legal ban on the sale of flavored electronic cigarettes should include menthol—and how that will align with sale of traditional menthol combustible cigarettes—is a question that sparks much debate at local, state and national levels. From a public health perspective, it is clear that menthol properties present a threat and do not negate any health risks of smoking. Menthol in cigarettes create a cooling sensation in the throat when inhaling, which, in turn, has the effect of making the smoke feel less harsh and often times leading to a deeper inhale. Menthol cigarettes enjoy a misperception by many that they are less harmful than non-menthol cigarettes and also have been shown to have stronger addictive qualities.

According to the CDC, “menthol cigarettes are not less harmful than other cigarettes and they are likely a greater risk to public health than non-menthol cigarettes.” See “Smoking & Tobacco Use: Menthol and Cigarettes,” Centers for Disease Control and Prevention, *available at* https://www.cdc.gov/tobacco/basic_information/tobacco_industry/menthol-cigarettes/index.html (last visited on October 2, 2019). The CDC also points out that compared to adults who smoke non-menthol cigarettes, adults who smoke menthol cigarettes make more attempts to quit smoking and have a more difficult time quitting. *Id.* In addition, the CDC notes that “some research shows that menthol cigarettes may be more addictive than non-menthol cigarettes.” See “African Americans and Tobacco Use,” Centers for Disease Control and Prevention, *available at* <https://www.cdc.gov/tobacco/disparities/african-americans/index.htm> (last visited on October 2, 2019).

Another significant factor associated with menthol cigarettes is that they have a disparate impact on certain groups. According to studies cited by the CDC, young people and African Americans are more likely to smoke menthol cigarettes than other groups, with nearly 9 out of 10 African American smokers aged 12 and older stating a preference for menthol cigarettes. See “Tobacco Products Scientific Advisory Committee. Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations,” Rockville, MD: US Department of Health and Human Services, FDA, 2011, “Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol Versus Nonmenthol Cigarettes,” FDA, 2013, and “African Americans and Tobacco Use,” CDC. It has been shown that the majority of African Americans who smoke use menthol cigarettes and that menthol cigarettes are linked to a majority of smokers who started smoking as young adults. See *supra* “Smoking & Tobacco Use: Menthol and Cigarettes,” CDC.

According to studies, the tobacco industry has marketed menthol products to young people and African Americans, especially in urban communities; to African American

neighborhoods; in magazines that are popular with African Americans; and at music and other cultural events aimed at African Americans. The industry has also sought support through contributions to historically black colleges and universities (HBCU) and student organizations, elected officials, civic and community organizations, and scholarship programs. *See supra* “African Americans and Tobacco Use,” CDC. Other groups associated with high levels of menthol use include women; the LGBT community; people with low levels of income or education; and adults with mental health conditions. *See id.*; Fallin A, Goodin AJ, King BA. “Menthol cigarette smoking among lesbian, gay, bisexual, and transgender adults.” *American Journal of Preventive Medicine*. 2015. 48(1):93-97 available at [http://www.ajpmonline.org/article/S0749-3797\(14\)00413-9/abstract](http://www.ajpmonline.org/article/S0749-3797(14)00413-9/abstract) (last visited on October 2, 2019).

Some examples of activity relating to banning menthol at the federal level include a final report issued by the Tobacco Products Scientific Advisory Committee of the FDA concluding that “removal of menthol cigarettes from the marketplace would benefit public health in the United States”; an independent scientific review by the FDA concluding “that menthol cigarettes pose a public health risk above that seen with non-menthol cigarettes”; a 2013 Advanced Notice of Proposed Rule Making issued by the FDA seeking public input on the regulatory options regarding menthol cigarettes; and an August 2017 letter to the FDA signed by eight U.S. Senators requesting further action to address the risk of menthol cigarettes. *See* “Menthol Ban Pending Before New Jersey Legislature,” *Tobacco Law Blog*, March 6, 2018, available at www.tobaccolawblog.com/2018/03/menthol-ban-pending-new-jersey-legislature/ (last visited on October 2, 2019).

The Task Force is mindful that a ban on menthol and associated fines or penalties associated with possession may have a disparate impact on certain groups of individuals. Attention must be paid to the potential impacts of a total ban on menthol. Moreover, study findings are instructive as to how education as well as other public health initiatives directed to certain sectors of the population may assist in dispelling myths/misperceptions about menthol use being a safe alternative and thereby decreasing demand for the product.

COMPLIANCE, EDUCATIONAL & CESSATION PROGRAMS

The Task Force reviewed the following compliance programs, public awareness and educational campaigns and additional resources regarding smoking and vaping that are currently underway in the State:

- Office of Tobacco Control: The Office conducts compliance buys through both the FDA Tobacco Inspection Program and Substance Abuse and Mental Health Services Administration’s (SAMHSA) Synar Program related to Tobacco Age of Sale

Enforcement (TASE)⁴. The Office has established the capacity and infrastructure to implement, monitor, and document all phases of this comprehensive compliance program. The Office conducts undercover inspections for retailers that sell tobacco products, electronic cigarettes, as well as hookah and vape shop products throughout the state. Based on information from the FDA Compliance Check Inspections of Tobacco Products database available at https://www.accessdata.fda.gov/scripts/oc/inspections/oc_insp_searching.cfm (last visited on October 2, 2019), New Jersey's Office of Tobacco Control's expanded efforts resulted in a nearly 10% increase in FDA compliance checks performed (4,245 from 9/1/17 through 8/31/18 versus 4,667 from 9/1/18 through 8/31/19). To increase program capacity, the Department is actively recruiting additional active inspectors and student associates to bolster current resources within both federally mandated programs. These resources will be leveraged to conduct analytical studies and trends of compliance data, including the development of geospatial mapping to most effectively conduct these important inspections. Upon addition of these resources, the Office anticipates further significant increases in compliance buy rates in addition to increased process efficiencies, which will curb youth access to tobacco products and electronic cigarettes.

- Office of Tobacco Control: "Don't Get Vaped In" Educational Curriculum: This is a training manual complete with 3 curricula (A Parent, School & Community program; Youth Health class version and a Youth to Youth version), including PowerPoints with corresponding talking points as well as handouts. Participants have access to a Trainer Portal, which is like an electronic toolkit that provides access to the most up to date information and resources. This, in addition to a Comprehensive School Policy Toolkit (see below), assists schools in addressing vaping using evidence-informed strategies and interventions. Over 300 schools have been trained and 3 additional fall trainings are scheduled. Demand for this training is high.
- Office of Tobacco Control: School Tobacco Policy Toolkit: This is a comprehensive, evidence-based policy guide which incorporates and utilizes prevention-oriented best practices. This toolkit promotes viewing school discipline related to student

⁴ For additional information on the synergies between these programs, see "A Strategic Partnership: The Food and Drug Administration's (FDA) Tobacco Retail Compliance Inspection Contracts and the Substance Abuse and Mental Health Services Administration's (SAMHSA) Synar Program," available at <https://www.samhsa.gov/sites/default/files/ucm284343.pdf> (last visited on October 2, 2019).

tobacco use to be built on a more positive, collaborative and holistic framework for understanding how students connect with their school community. It discourages out-of-school suspensions and legal interventions and encourages a student assistance model providing educational and intervention strategies designed to ensure a safe learning environment that is free from the use of tobacco and electronic nicotine delivery systems. There is a Partner Portal for schools to receive all materials in the toolkit as well as additional resources as they become available.

- New Jersey Quit Centers provide direct treatment (face-to-face) services for tobacco dependence in health system organizations where services can be integrated or enhancing preexisting services called Quit Centers. The Quit Centers' priorities are in the following areas for health disparate residents: the low socio-economic status (SES), high smoking prevalence, lung and bronchus cancer incidence, chronic obstructive pulmonary disease in relation to smoking incidence and age-adjusted death rate due to heart disease incidence.
- Through funding from the Office of Tobacco Control, Quit Centers provide residents of New Jersey with the resources to stop or reduce their use of tobacco in the following counties: Atlantic, Cape May, Cumberland/Salem, Hudson, Mercer, Middlesex, Monmouth, Ocean, Essex, Passaic, and Union. Enrolled clients of the Quit Center may qualify for free nicotine replacement therapy (NRT) as part of their treatment plan.
- New Jersey Quitline **1-866-NJ-STOPS (1-866-657-8677)**: Free, multilingual, and confidential telephone counseling with a trained Quit Coach available to state residents, 18 and older, who want to quit smoking/vaping. Free 2-week supply of nicotine replacement patches available to eligible callers. Services are available 24/7, 365 days/year.
- NJQuitline.org: On-line resources provide information about the New Jersey Quitline, self-help materials, the cost of smoking calculator, and an easy "click to quit" registration for the NJ Quitline.
- Moms Quit Connection/MQC for Families: The program offers free in-person and telephone smoking cessation to pregnant and postpartum women, mothers, fathers and caregivers of young children who want to quit smoking and eliminate second hand smoke from their home. Specially trained Quit Coaches provide

ongoing and nonjudgmental support and assist smokers in creating an individualized cessation plan. www.momsguit.com or call **1-888-545-5191**.

- Ask, Advise, Refer (AA&R): Brief Intervention Model Training: The AA&R model is the CDC's best practice intervention to assess and address tobacco use. This training is offered at the practices' site and will assist professionals in quickly and effectively implementing a dialog about tobacco use, including electronic smoking devices, among their patients. An overview of all tobacco products, nicotine addiction, AA&R scripting and cessation resources is included in this one-hour training. Providers will gain information on the integration of the brief intervention model into existing office routine, patient resources, and fax-to-quit referral forms for Moms Quit Connection for Families (MQC), Local Quit Centers and the New Jersey Quitline.
- The Department of Health recently launched a campaign, Incorruptible.us, that informs young people about the dangers of vaping and nicotine. It uses bold graphics and clear language to emphasize that vaping is just a new way to get them addicted to nicotine products. Media include videos, promotional items, social media properties, and a website. The site is informational and interactive, inviting users to share and create anti-vaping memes and messages.
- Office of Tobacco Control: There is a youth outreach program that acts as a peer-based outreach system. Thus far, this program has educated 5,500 individuals (parents, students, teachers, coaches etc.) about the dangers of vaping. The funding for this program allows for 7,000 individuals to be reached per year.
- www.VapeFactsNJ.com is a page on the Department of Health site that provides Parents, Teachers, Coaches, and Healthcare Providers with the most up-to-date information about the dangers of e-cigarettes/vaping.

STAKEHOLDER INPUT

On September 24, 2019, the Department of Health hosted a public hearing for approximately four hours to allow stakeholders and members of the public to share their thoughts, experiences and expertise with the Task Force. The Department also accepted written comments. More than 200 individuals attended the public hearing and the Task Force received input from approximately 250 commenters, in writing and/or in person. Some individuals who attended the public hearing also submitted written comments. Highlights of testimony are

summarized in this Report and a copy of the full transcript from the hearing will be posted on the Department’s website with the report.

The participants who provided comments to the Task Force can largely be classified into three groups: (1) public health advocates/educators; (2) vaping consumers; and (3) industry/vape business owners. Notably, none of these groups took the position that individuals under 21 years of age should be permitted to purchase vape products or to engage in vaping-related activity. Nor did anyone dispute that appropriate controls such as age verification should be in place to prohibit youths from vaping. In addition, no one advocated to deregulate vaping business in New Jersey. In fact, many vape business owners and consumers lauded regulatory controls at the federal and state level to ensure that quality product can be sold to adults who make informed decisions to vape. Another common factor across groups was support for a restriction or ban on sales of vaping products through gas stations and convenience stores, and increasing enforcement against illicit, refillable pods or vape cartridges.

VAPING SUPPORTERS

Supporters of vaping products urged that vaping products have been on the market more than a decade and yet, they say, this is the first time there seems to be a nationwide crisis of sudden-onset lung injuries by youths and adults. They point to illicit, potentially contaminated cartridges as the culprit and not legitimate vaping products. They also raise the notion that individuals being investigated for public health purposes may be hesitant to disclose that they purchased illicit product containing THC. They further claim that legitimate, regulated vape businesses are a “scapegoat” and being “demonized” for the lung injuries caused by illegal THC cartridges.

Vaping consumers overwhelmingly testified that vaping allowed them to stop quitting smoking traditional cigarettes when no other tools or alternatives worked. Many indicated that vaping “saved” and even “transformed” their lives, with some citing that their children are proud of them for quitting smoking and helping others to quit through the use of vaping products. Consumers asked the Task Force, politicians and regulators in New Jersey not to overstep by imposing a flat ban on vaping and failing to recognize the differences between quality vaping products and illicit, unregulated products that are the likely source of lung injuries currently under investigation. Many consumers also reported feeling physically better after successfully quitting use of traditional cigarettes (some for several years) and turning instead to vaping devices. Several consumers predicted that implementing a ban would force individuals to resort to illicit means to purchase product, which, in turn, would put them at greater risk for health problems.

According to testifying and commenting vape consumers, flavored vape products are not just something that is enticing to youth but rather key to adults quitting use of traditional cigarettes. They noted that this is because tobacco-flavored vape products have a poor taste and are an unwelcome reminder of traditional cigarettes. Consumers also argue that banning these products will not stop youth from using them. In addition, they maintain that vape shops are not the problem for youth access. Rather, according to the testimony of many adult consumers, youths can circumvent age-restrictions through online purchases and buying product at gas stations or convenience stores. Some consumers also argued that youths and/or parents should be punished or fined but not adults who have made an informed decision to utilize vape products. They predict that youth will either turn to illicit products or return to smoking traditional cigarettes.

Industry representatives and vape business owners strongly advocated for the continued sale of what they stand behind as quality vaping product. They claim to have been unfairly and incorrectly lumped in with dangerous, unregulated products or illegal vaping cartridges. They do not claim the products are totally safe but rather that they are substantially safer than traditional cigarettes. They caution against a ban that, they predict, will cause thousands of individuals to “go underground” and resort to illicit means, likely resulting in more public health issues. Vape business owners also maintain that flavors are extremely popular with their adult clients and use of flavored devices have helped many quit smoking and improved their health.

The problem, according to vaping business owners, is illicit product purchased online (without age verification), with ingredients that are not registered or monitored by the FDA, and that are deceptively advertised as being “approved” by the CDC or other false statements. The vape business owners pride themselves on educating and helping individuals quit smoking. Vape business owners indicate they closely monitor age through electronic verification of licenses; that the products are for adults only; and that their ingredients are closely monitored by the FDA. Some vape business owners supported increasing fines for selling to underage individuals and even revoking licensing if regulated establishments fail to comply with applicable laws.

PUBLIC HEALTH PERSPECTIVE

Most of those testifying from a public health perspective urged the State to comprehensively ban electronic smoking devices, particularly flavors (including menthol). Many speakers expressed concern over what is being referred to as “a youth access epidemic.” Public health advocates stated that youth are using vaping-related devices at alarming rates; being enticed by flavors and hooked on vaping; being misled by Big Tobacco on electronic cigarettes being a safe alternative to smoking; falling victim to predatory marketing practices; being attracted to the novelty of sleek-looking or stealthy devices; being encouraged along a pathway

to nicotine and other addiction; engaging in underage purchasing online, at gas stations, and at convenience stores; and are purchasing illicit vaping cartridges with unknown and harmful ingredients. The Task Force also heard from industry professionals related to the concerning rise in vaping-related illnesses.

The Task Force heard from educators and students. For example, a chemistry professor discussed ongoing investigation of certain vaping products and offered university resources/testing capabilities to help determine what products or component parts of products (such as silicone in a cartridge) may be causing health-related problems. Various high school students spoke on behalf of themselves and their peers advocating for increased education and prevention efforts to avoid youths using vaping products. A public health lawyer testified that a review of youth tobacco surveys by Rutgers University indicates that New Jersey has more of a youth “Juul problem” (80% of users) than a general youth vaping-related problem; that electronic scanning and tracking devices should be required for vaping purchases; and that the State should ban sales of electronic cigarettes out of gas stations and convenience stores.

TASK FORCE RECOMMENDATIONS

While federal, state and local authorities continue their investigation to determine what product or chemical is causing these severe illnesses, the key recommendations from a public health perspective are clear—people should stop vaping; people should not buy electronic smoking device products “off the street”; and electronic smoking device products should never be used by youth, young adults and pregnant women. More specifically, the Task Force makes the following recommendations.

BAN SALES OF FLAVORED ELECTRONIC SMOKING DEVICES AND PRODUCTS

The Task Force recommends that the Legislature impose a ban on the sale of flavored electronic smoking devices and products, inclusive of menthol. The Task Force recommends that ban apply to the sale of electronic smoking devices and associated products that are advertised to, or do, impart a distinct flavor other than tobacco, such as fruit, clove, mint, menthol or sweets. The Task Force does not recommend that the ban apply to electronic smoking devices manufactured or sold pursuant to the Jake Honig Compassionate Use Medical Cannabis Act but it is recommended that the Department of Health (or the Cannabis Regulatory Commission, when constituted) consider whether a partial or full ban on any vaping product sold by New Jersey medical marijuana dispensaries is warranted. To date, no vaping-related illnesses have been associated with product sold at these dispensaries.

The Task Force further recommends that the Legislature avoid imposing penalties for youth possession of flavored vaping devices or products, as that is likely to pose enforcement challenges and is not an effective way to curb use.

INCREASE PENALTIES FOR UNAUTHORIZED SALES

Monitoring of all retailers who sell electronic smoking devices and products should be increased, and the enforcement regime for underage sales should be strengthened. **The Task Force recommends that civil penalties for retailers and employees who sell electronic smoking devices, vaping-related products, or other tobacco products, to individuals under the age of 21 years of age be increased to provide a stronger deterrent effect.** In addition, existing statutory defenses to penalties for underage sale should be revisited.

RESTRICT ONLINE SALES

The Task Force further recommends that the Legislature restricts the sale of electronic smoking devices and related products to face-to-face transactions, with limited exceptions. The limited exceptions would include but not be limited to obtaining adequate age-verification prior to mailing or shipping, requiring proof of age at the time of delivery, and cross-checking payment by credit card to the actual purchaser.

INCREASE COMPLIANCE BUYS

The Office of Tobacco Control conducts compliance buys through two federal programs by conducting undercover inspections for retailers that sell tobacco products, electronic cigarettes, as well as hookah and vape shop products throughout the state. To increase program capacity, the Department of Health is actively recruiting additional active inspectors and student associates to bolster current resources within both federally mandated programs. **The Task Force supports the proactive efforts of the Office of Tobacco Control to increase compliance buys through the recruitment of additional resources, which should result in significant increases in compliance buy rates and curb youth access to tobacco products and electronic cigarettes.**

PROHIBIT ADVERTISING & SALE OF COVERT PRODUCTS

In addition, **the Task Force recommends explicitly prohibiting the advertising and sale to New Jersey consumers of products intended to conceal or disguise vaping devices as or within other products, such as clothing, accessories, utensils, or other electronic devices (such as watches).**

The prohibition should not include electronic smoking devices and products designed and marketed to look like conventional tobacco products or accessories, such as cigarettes or pipes. **Making the advertising and sale of these items a per se violation of the Consumer Fraud Act would be subject to civil penalties of up to \$10,000 for a first offense and \$20,000 for subsequent offenses. Alternatively, the Legislature could prohibit the sale of such items to individuals under 21 and without age verification required for the purchase of tobacco products.**

STRENGTHEN POINT-OF-SALE RETAILER PRACTICES

The Task Force recommends that the Legislature require electronic smoking device retailers to not only post signs that describe the prohibition on underage sales but also to implement point-of-sale protections such as locking up or otherwise securing electronic smoking devices out of reach of consumers. Consideration also should be given to requiring dissemination of information to consumers at the point of sale. The Department of Health, which currently supplies electronic versions of signage to be downloaded and utilized by tobacco and electronic smoking device retailers, can work in partnership with other agencies to effectuate legislative efforts on this recommendation.

ENSURE UNIFORM REGULATION OF THE MARKETPLACE

The Task Force recognizes that the Department of Treasury, Division of Taxation will begin licensing vapor businesses as of November 2019. *N.J.S.A. 54:40B-3.3*. This licensing scheme is primarily for tax purposes. The law defines “vapor business” as a “retail business where more than 50% of its retail sales are derived from electronic smoking devices, related accessories, and liquid nicotine, but does not include a retail business that does not sell container e-liquid.” *N.J.S.A. 54:40B-2*. This definition of vapor businesses results includes only a segment of the existing marketplace in New Jersey for electronic smoking devices and products.

Accordingly, **the Task Force supports legislation that sets out a more comprehensive regulatory scheme covering all retail outfits that sell electronic smoking devices and products in the State. The Legislature should continue to vest authority for licensing of retailers who sell these products with the Department of Treasury, Division of Taxation and substantially increase licensure fees (currently set at \$50 for vapor businesses). The Legislature should also consider limiting the sale of all electronic smoking devices and related products, including prefilled cartridges and related devices, to only those retailers that restrict entrance to individuals 21 and older.**

DEVELOP CENTRALIZED STATE RETAILER REGISTRY

Requiring licensure by all retailers who sell electronic smoking devices or products also would allow for **the creation of a centralized state registry of registered retail establishments, which, in turn, can be used for expanding structured compliance buys, monitoring and enforcement efforts.**

INCREASE INTERAGENCY COLLABORATION

The Task Force further recommends continued and enhanced interagency communication and coordination in ongoing efforts to determine the causes of youth usage and health problems associated with electronic smoking. Public health information should be shared across agencies to the extent permitted by current or new legislation in order to facilitate such investigations and other actions to address the causes of youth smoking and health problems associated with electronic cigarette usage.

ADDITIONAL CONSIDERATIONS

In addition to the recommendations and action items presented above, the Task Force recommends further study and consideration in the following areas:

DEVELOP RAPID RESPONSE TEAM

Given the challenges posed by the recent multistate outbreak of severe lung injury associated with electronic cigarette use, **the Task Force is recommending the development of a Rapid Response Team in New Jersey that can respond to emergent health and other issues that may require an immediate response.** The current outbreak response is covered by Department of Health professionals who handle communicable diseases; however, the vaping-related severe lung injuries seen through this emerging multistate public health crisis are not communicable in nature. A Rapid Response Team will better equip the State to react to crises and avoid delays or interference with ongoing responses to reportable communicable or infectious disease outbreak investigations and/or the operations of other Executive Branch agencies. The team would be assembled and operate under an incident management system encompassing the broad categories of work (e.g., epidemiology/surveillance; policy/regulatory issues; interagency coordination/operations; communications) and would report directly to the Commissioner of

Health or other Commissioner as designated by the Governor, working in collaboration with federal, state, and local agencies.

EXPAND TAX ON VAPING PRODUCTS

Under current law (P.L. 2019, c. 147), liquid nicotine and “container e-liquid” are taxed differently, and taxable “container e-liquid” products are defined so as to exclude prefilled cartridges or other containers marketed, sold, or intended for use as part of an electronic smoking device. **The Task Force proposes that the Legislature consider amending the statute to expand the definition of taxable “container e-liquid” products to include the currently exempt prefilled cartridges or containers; and/or to impose a value tax on both liquid nicotine and on container e-liquid products, and at a rate that is higher than the current rates for liquid nicotine and container e-liquid, respectively.**

EXPAND VAPEFACTSNJ.COM TO BECOME CENTRAL REPOSITORY

The Department of Health has developed VapeFactsNJ.com to provide parents, educators, coaches, and healthcare providers with the most up-to-date information about the dangers of electronic smoking devices and products, information regarding stealth vaping technology and the use of illicit THC vape cartridges, particularly among youth. **The Task Force recommends the expansion and amplification of this resource as well as the Quitline and other resources mentioned in this Report, utilizing input from sister agencies, law enforcement, local health departments, public health partners, and other stakeholders, and the creation of additional active prevention activities.** The Department of Health would be the lead coordinating agency for this initiative. It is imperative to break down the information silos between groups so that accurate information can be readily shared, and myths can be dispelled. These resources would be produced in a culturally competent manner and provide clear and succinct information.

REQUIRE RETAILERS TO CONDUCT ELECTRONIC IDENTIFICATION VERIFICATION

The Task Force recommends that the Legislature consider whether all retailers of any electronic smoking device, vaping-related product, or tobacco product may be required to conduct electronic verification of consumer identification to ensure compliance with applicable law. This verification process would appear to reduce the ability of underage individuals to make illegal purchases. This recommendation can be monitored through compliance buys conducted at the local and state levels.

ESTABLISH TRACKABLE DATABASE FOR SALE OF ELECTRONIC CIGARETTE DEVICES

The Task Force recommends that the Legislature consider whether manufacturers and/or retailers that sell electronic smoking devices or vaping-related products may be required to maintain a trackable database for the sale of such products. This database would electronically

capture consumer identification information, with identifying product information, including but not limited to, batch, lot or serial numbers to ensure product integrity and compliance with applicable laws. In the event of health-related or product integrity issues, it would be possible to track the specific product(s) utilized by those consumers who have suffered injury from an electronic cigarette device.

REVIEW POTENTIAL MENTHOL CIGARETTE BAN

While the primary charge of the Task Force relates to the dangers of electronic smoking devices and related products, this Report discusses the devastating health impacts of combustible menthol cigarettes, particularly in communities of color. **The Task Force proposes that the Legislature consider whether a permanent ban on the sale of menthol cigarettes is warranted.**

ISSUE STANDING ORDERS FOR TOBACCO CESSATION THERAPIES

To ensure expanded access to tobacco cessation resources, **the Task Force proposes a review of the feasibility of enacting legislation that would authorize medical professionals and/or other appropriate entities to issue a standing order for New Jersey pharmacies to furnish tobacco cessation products that are approved by the FDA and that require a prescription.** While additional information is needed, this practice is already in place in several states.

BANNING ELECTRONIC CIGARETTES WITH NICOTINE CONCENTRATIONS ABOVE 3%

The Task Force recommends that the Legislature consider capping at 3% the nicotine concentration of electronic cigarette pods or cartridges sold in New Jersey. Some electronic cigarette manufacturers produce electronic cigarette pods that contain 5% nicotine by volume per pod, which is roughly equivalent to the nicotine content in an entire pack of cigarettes. Some higher-nicotine products are manufactured using nicotine salts and flavors, which may produce a less “harsh” sensation or otherwise be more palatable at higher concentrations.

CONCLUSION

The Task Force would like to thank Governor Murphy and the Legislature for their commitment to this cause and for marshaling state agencies/resources in the interest of preserving the health of New Jersey residents. The Task Force also extends its appreciation to all stakeholders, industry associations, educators, business owners, consumers and members of the public for their thoughtful comments and written submissions at the public hearing held on September 24, 2019. The Task Force commends high school student participants at the hearing for their mature and passionate presentations. Participation and engagement on this important public health issue is critical as the State and Nation move forward both as to public health and regulatory approaches to use of electronic smoking devices and products.