

IN THE COURT OF APPEALS OF THE STATE OF OREGON

**VAPOR TECHNOLOGY
ASSOCIATION,**

and

**VAPE CRUSADERS PREMIUM
E-LIQUID, LLC,**

and

SMOKELESS SOLUTIONS, LLC,

Petitioners,

vs.

**OREGON HEALTH
AUTHORITY,**

Respondent.

CA No. _____

PETITION FOR JUDICIAL REVIEW

1.

Pursuant to ORS 183.400, Vapor Technology Association, Smokeless Solutions, LLC, and Vape Crusaders Premium E-Liquid, LLC seek judicial review of OHA Rule 333-015-1000 (the “Vaping Prohibition”) adopted by the Oregon Health Authority on October 11, 2019, and filed with the Oregon Secretary of State that same day. The Prohibition went into effect on October 15, 2019.

2.

The parties to this review are:

Vapor Technology Association
1201 Pennsylvania Ave. NW, Suite 530
Washington, D.C. 20004

Smokeless Solutions, LLC
1058 W Harvard Ave.
Roseburg OR 97471

Vape Crusaders Premium E-Liquid, LLC
1058 W Harvard Ave.
Roseburg OR 97471

Oregon Health Authority
500 Summer Street, NE, E-20
Salem, OR 97301-1097

3.

Vapor Technology Association, Smokeless Solutions, and Vape Crusaders
are represented by

ANGELI LAW GROUP LLC
David H. Angeli, OSB No. 020244
Kristen Tranetzki, OSB No. 115730
Tyler P. Francis, OSB No. 162915
121 SW Morrison St., Suite 400
Portland, OR 97204
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WILLIAMS & CONNOLLY LLP
Joseph M. Terry (*pro hac vice forthcoming*)
David Riskin (*pro hac vice forthcoming*)
725 12th St. NW
Washington, DC 20005
202-434-5000
jterry@wc.com
driskin@wc.com

The Oregon Health Authority is represented by:

Ellen F. Rosenblum, OSB No. 753239
Attorney General of the State of Oregon
Office of the Solicitor General
400 Justice Building
1162 Court Street, N.E.
Salem, OR 97301-4096
503-378-6002
ellen.f.rosenblum@doj.state.or.us

4.

Vapor Technology Association, Smokeless Solutions, and Vape Crusaders seek judicial review of the Vaping Prohibition, as filed with the Secretary of State on October 11, 2019 (a copy of which is attached as Exhibit 1). The Prohibition bars retailers from selling or offering for sale flavored nicotine vaping products to consumers in Oregon. In so doing, the Prohibition substantially affects, and irreparably harms, the interest of Vapor Technology Association, its members (including Smokeless Solutions and Vape Crusaders), and the public.

5.

Vapor Technology Association is a national trade association of nicotine-vapor-products manufacturers and sellers, which includes members in Oregon that the Vaping Prohibition harms. Smokeless Solutions and Vape Crusaders are Oregon limited-liability companies that manufacture and sell flavored nicotine vaping products. As a result of the Vaping Prohibition, Smokeless Solutions and Vape Crusaders (and businesses like them throughout Oregon) face extinction. Vapor Technology Association, Smokeless Solutions, and Vape Crusaders are “persons” under ORS 183.310(8) (associations) and ORS 63.002(1) (limited-liability companies). ORS 183.400(1) authorizes “any person” to petition the Court of Appeals to determine “[t]he validity of any rule.” None of Vapor Technology Association, Smokeless Solutions, or Vape Crusaders is a party to an order or contested case in which the validity of the Vaping Prohibition may be determined by a court.

6.

Petitioners are not willing to stipulate that the agency record may be shortened.

7.

Petitioners are entitled to their attorneys’ fees and costs pursuant to ORS 183.497.

DATED: October 16th, 2019

ANGELI LAW GROUP LLC

/s David H. Angeli

DAVID H. ANGELI, OSB No. 020244

KRISTEN TRANETZKI, OSB No. 115730

TYLER P. FRANCIS, OSB No. 162519

WILLIAMS & CONNOLLY LLP

Joseph M. Terry

(pro hac vice forthcoming)

David Riskin

(pro hac vice forthcoming)

*Attorneys for Petitioners Vapor Technology
Association, Smokeless Solutions, LLC and
Vape Crusaders Premium E-Liquid, LLC*

CERTIFICATE OF FILING

I certify that on October 16th, 2019, I filed the original of this
PETITION FOR JUDICIAL REVIEW via the Appellate Courts' eFiling
System.

ANGELI LAW GROUP LLC

/s David H. Angeli

DAVID H. ANGELI, OSB No. 020244

KRISTEN TRANETZKI, OSB No. 115730

TYLER P. FRANCIS, OSB No. 162519

CERTIFICATE OF SERVICE

I certify that on October 16th, 2019, I served a true copy of this

PETITION FOR JUDICIAL REVIEW on the following parties:

Ellen F. Rosenblum, OSB No. 753239
Attorney General of the State of Oregon
Office of the Solicitor General
400 Justice Building
1162 Court Street, N.E.
Salem, OR 97301-4096
503-378-6002
ellen.f.rosenblum@doj.state.or.us

Oregon Health Authority
500 Summer Street, NE, E-20
Salem, OR 97301-1097

via the U.S. Postal Service, certified or registered mail, return receipt requested.

ANGELI LAW GROUP LLC

/s David H. Angeli

DAVID H. ANGELI, OSB No. 020244
KRISTEN TRANETZKI, OSB No. 115730
TYLER P. FRANCIS, OSB No. 162519

Exhibit 1

OFFICE OF THE SECRETARY OF STATE
BEV CLARNO
SECRETARY OF STATE

A. RICHARD VIAL
DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION
STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

PH 21-2019

CHAPTER 333
OREGON HEALTH AUTHORITY
PUBLIC HEALTH DIVISION

FILED

10/11/2019 10:01 AM
ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Implementation of Governor's Executive Order to Address Vaping Crisis and Ban Flavored Vaping Products

EFFECTIVE DATE: 10/15/2019 THROUGH 04/11/2020

AGENCY APPROVED DATE: 10/10/2019

CONTACT: Public Health Division 800 NE Oregon St. Suite 930
971-673-0984 Portland, OR 97232
publichealth.rules@state.or.us

Filed By:
Brittany Hall
Rules Coordinator

NEED FOR THE RULE(S):

The Oregon Health Authority (Authority) is adopting temporary administrative rules in accordance with the Governor's Executive Order No. 19-09 (EO 19-09) banning the sale of flavored nicotine and medical cannabinoid vaping products for 180 days. In addition, the temporary rules specify penalties for violations of the temporary rules.

JUSTIFICATION OF TEMPORARY FILING:

It is imperative that the Authority take actions necessary to protect the health and safety of Oregonians, especially Oregon's youth, as directed by the Governor in Executive Order 19-09. Despite Oregon laws that prohibit sales of inhalant delivery systems to youth under 21 years of age, flavored nicotine vaping products have contributed to a significant increase in youth vaping. Data released by the U.S. Centers for Disease Control and Prevention (CDC) and the U.S. Food and Drug Administration (FDA) last year show a rapid increase in youth e-cigarette use, with one in five youth using e-cigarettes in 2018—an "epidemic" that requires "historic action", according to the U.S. Surgeon General and the FDA. Nationally there is an ongoing vaping public health crisis, with an alarming outbreak in recent months of lung injuries among previously healthy individuals who have used vaping products. According to the CDC, as of October 10, 2019, there have been more than 1,200 vaping-related lung injury cases and 26 deaths nationally, with nine vaping-related injuries and two deaths in Oregon. The Authority has issued a public health advisory, warning all Oregonians not to use vaping products or e-cigarettes, but it is imperative for the State to take evidencebased action immediately to protect Oregonians, especially Oregon's youth, from the harms associated with vaping products.

No specific types of e-cigarettes, vaping devices, or liquids have been conclusively identified as a cause of the illnesses at this time; the FDA is testing vaping products from cases around the United States to determine which specific products or ingredients may be the cause. Until a cause has been identified, the Authority must act promptly, in accordance with the Governor's Executive Order, to protect Oregonians, and failure to act promptly will result in serious prejudice to the public interest, particularly Oregon's youth.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Executive Order 19-09 (access at: https://drive.google.com/file/d/1U_EFAy1MUYGkWuU_sL0XF7SP1fIyjIiH/view)

RULES:

333-007-0480, 333-008-4000, 333-015-1000

AMEND: 333-007-0480

RULE SUMMARY: Amend OAR 333-007-0480: The Authority is amending this rule to broaden its authority for product testing requirements consistent with EO 19-09 directives.

CHANGES TO RULE:

333-007-0480

Audit and Random Testing ¶

(1) The Authority may require a registrant to submit samples identified by the Authority to a laboratory of the ~~registrant~~ Authority's choosing to be tested in order to determine whether a registrant is in compliance with OAR 333-007-0300 through 333-007-0500 or any other rule of the Authority.¶

(2) A laboratory doing audit testing under section (1) of this rule must comply with these rules unless otherwise authorized by the Authority.¶

(3) The Authority may, at any time, require a registrant to permit the sampling of or submit a sample of a marijuana item to the Authority for testing. Such testing may include testing for:¶

(a) Any microbiological contaminant.¶

(b) Heavy metals.¶

(c) Other solvents, pesticides, adulterants, additives or contaminants that may pose a risk to public health and safety, or are prohibited by law.¶

(4) The Authority may require any testing ordered under sections (1) and (3) of this rule to be paid for by the registrant.¶

(5) The Authority may obtain a marijuana item from a registrant at any time and have it tested to ensure compliance with these rules and OAR chapter 333, division 8, or to protect the public health and safety.

Statutory/Other Authority: ORS 475B.555, EO 19-09

Statutes/Other Implemented: ORS 475B.555, EO 19-09

ADOPT: 333-008-4000

RULE SUMMARY: Adopt OAR 333-008-4000: In this rule, the Authority defines terms relevant to the ban on flavored cannabinoid vaping products, with the exception of cannabis-flavored products, and lays out penalties for violation, including registration suspension, revocation or imposition of civil penalties. New definitions include the definition of "flavor," "cannabinoid vapor product," and "non-marijuana terpene."

CHANGES TO RULE:

333-008-4000

Prohibition on Cannabinoid Flavored Vaping Products

(1) Definitions. For purposes of this rule:¶

(a) "Cannabinoid vapor product" means a cannabinoid product intended for human inhalation using an inhalant delivery system.¶

(b) "Flavor" means an artificial or naturally-occurring substance that contains a taste or smell, other than the taste or smell of cannabis, that is distinguishable by an ordinary individual either prior to or during the inhalation of the product, including, but not limited to, any taste or smell relating to chocolate, coffee, cocoa, menthol, mint, wintergreen, vanilla, honey, coconut, licorice, nuts, fruit, or any candy, dessert, alcoholic or non-alcoholic beverage, herb, or spice, or any concept flavor.¶

(c) "Inhalant delivery system" has the same meaning given that term in ORS 431A.175(1)(a). ¶

(d) "Non-marijuana terpene" means a terpene or terpenoid derived from a source other than marijuana. ¶

(e) "Sell" or "sale" means to transfer, deliver, exchange, redeem, or barter, in any manner or by any means whatsoever, for consideration, including but not limited to providing a cannabinoid vapor product containing a flavor as a gift or promotional item in combination with the sale of any other product or item, through any means.¶

(2) Prohibition. Notwithstanding any other rule in OAR chapter 333, division 8, on and after October 15, 2019:¶

(a) A registered medical marijuana dispensary may not sell or offer for sale, to a patient or designated primary caregiver, any cannabinoid vaping product containing a flavor or a non-marijuana terpene. ¶

(b) A registered medical marijuana processing site may not:¶

(A) Make a cannabinoid vapor product that contains a flavor.¶

(B) Transfer a cannabinoid vapor product that contains a flavor to a patient or designated primary caregiver.¶

(3) For purposes of determining whether a cannabinoid vapor product contains a flavor or non-marijuana terpene, a public statement or claim, whether express or implied, made or disseminated by the registrant or registrants responsible for the manufacture of a cannabinoid vaping product, or by any person authorized or permitted by the manufacturer to make or disseminate a public statement concerning such products, that a product has or produces a taste or smell other than a taste or smell of cannabis will be considered by the Authority to constitute presumptive evidence that the cannabinoid vapor product contains a flavor or non-marijuana terpene.¶

(4) Penalties. If a registrant violates this rule the Authority may suspend, revoke, or impose civil penalties pursuant to ORS 475B.858 or 475B.925 and any rules adopted thereunder. Prior to taking an enforcement action the Authority will issue a warning letter to the registrant notifying the registrant of the violation and how to come into compliance.

Statutory/Other Authority: ORS 475B.840, 475B.849, 475B.858, 475B.949, EO 19-09

Statutes/Other Implemented: ORS 475B.840, 475B.858, EO 19-09

ADOPT: 333-015-1000

RULE SUMMARY: Adopt OAR 333-015-1000: In this rule, the Authority defines terms relevant to the ban on flavored vaping products, specific to nicotine products, and lays out a civil penalty for violating the prohibition on sales of flavored vaping products, with the exception of tobacco-flavored products. New definitions include, but are not limited to, the definition of "flavor," "retailer" and "vapor product."

CHANGES TO RULE:

333-015-1000

Prohibition on Flavored Vaping Products

(1) Definitions. For purposes of this rule:¶

(a) "Consumer" means a person who purchases, acquires, owns, holds or uses a vapor product other than for the purpose of resale.¶

(b) "Flavor" means an artificial or naturally-occurring substance that contains a taste or smell, other than the taste or smell of tobacco, that is distinguishable by an ordinary individual either prior to or during the inhalation of the product, including, but not limited to, any taste or smell relating to chocolate, coffee, cocoa, menthol, mint, wintergreen, vanilla, honey, coconut, licorice, nuts, fruit, any candy, dessert, alcoholic or non-alcoholic beverage, herb, or spice, or any concept flavor. ¶

(c) "Inhalant delivery system" has the same meaning given that term in ORS 431A.175(1)(a).¶

(d) "Retailer": ¶

(A) Means any person who sells or offers for sale vapor products containing a flavor to consumers.¶

(B) Does not mean a person licensed by the Oregon Liquor Control Commission under ORS 475B.105.¶

(e) "Sell" or "sale" means to transfer, deliver, exchange, redeem, or barter, in any manner or by any means whatsoever, for consideration, including but not limited to providing a vapor product containing a flavor as a gift or promotional item in combination with the sale of any other product or item, through any means, including but not limited to remote offerings such as sales outlets, catalogs or the Internet. ¶

(f) "Vapor product" means a product intended for human inhalation using an inhalant delivery system that contains any substance.¶

(2) Prohibition. On and after October 15, 2019, a retailer may not sell or offer for sale a vapor product containing a flavor, to a consumer in Oregon. ¶

(3) For purposes of determining whether a vapor product contains a flavor, a public statement or claim, whether express or implied, made or disseminated by a retailer or a person responsible for the manufacture of a vaping product, or by any person authorized or permitted by the manufacturer or retailer to make or disseminate a public statement concerning such products, that a product has or produces a taste or smell other than a taste or smell of tobacco will be considered by the Authority to constitute presumptive evidence that the vapor product contains a flavor.¶

(4) Penalties. If a retailer violates this rule the Authority may impose a civil penalty of up to \$500 per day per violation pursuant to ORS 431A.010, in accordance with ORS 183.745. Prior to issuing a civil penalty the Authority will issue a warning letter to a retailer notifying the retailer of the violation and how to come into compliance.

Statutory/Other Authority: ORS 183.360, 413.042, 431.110, 431.141, 431A.010, EO 19-09

Statutes/Other Implemented: ORS 183.360, 413.042, 431.110, 431.141, 431A.010, EO 19-09