



New York State Must Close Flavored E-cigarette Law Loopholes to Ensure 2020 Law Removing These Products from our Communities is Effective

When New York State included language in the final 2020-21 budget to address the epidemic of e-cigarette use among youth, it created enforcement loopholes in the law that have caused challenges to effective enforcement of the law. The SFY 2023-23 Executive Budget and the Senate budget both contain language that would address and fix these loopholes. **Out of the six states that have comprehensive e-cigarette flavor policies, New York has the highest continued retail availability of prohibited products of any of those states. These loopholes enable continued access to and promotion of these products to youth.** County health departments throughout the State, which enforce these laws, are asking that the loopholes be eliminated as soon as possible.

- **FDA PMTA Exemption** – This exemption allows any product that receives a “Pre-Market Tobacco Product Authorization” from the FDA to be sold in NY, even if it has a flavor that would otherwise prohibit its sale. Despite the fact that no flavored e-cigarette products have been granted authorization under PMTA, the NYS exemption has created ambiguity around which flavored products remain legal and which are not legal under the law for retailers, health inspectors and consumers (or their parents). Out of the six states that have implemented comprehensive bans on the sale of flavored e-cigarettes, only New York has this exemption, and it has the highest continued availability of these products in retail outlets.
- **Retail Inspections** – The current law does not require retailers to make their premises available to inspectors, and many retailers have learned they can refuse to let an inspector do their job without any civil penalty. This fix would require licensed tobacco retailers to do so and would make failure to do so a civil penalty.
- **Out-Of-State Sales** – the current law allows retailers to sell their product to out of state purchasers via remote sales, so retailers are claiming that products they stock in their retail establishments are being sold in that way. In the vast majority of these circumstances, no evidence is offered of out of state sales occurring, or even that a method of conducting out of state sales (a website, etc.) exists. The budget language would close that loophole in the current law.
- **Distributors** – the current law allows New York distributors to sell and ship flavored e-cigarettes that cannot be legally sold in New York to stores within the state. The language in the budget would close that loophole.
- **Cooling Sensation Products** – The industry has begun selling “non-menthol menthol” cigarettes and e-cigarettes in states which have banned the sales of flavored tobacco products. These products contain additional additives which produce a flavor that does not taste like tobacco and creates a cooling, anesthetic effect for the user. According to the current definition, these products should already be prohibited, but the new language would clarify that this attempt by the industry to evade the law would not succeed in New York State.