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Martin
2/22/17

CS FOR SENATE BILL NO. 15()

IN THE LEGISLATURE OF THE STATE OF ALASKA

THIRTIETH LEGISLATURE - FIRST SESSION

BY

**Offered:
Referred:**

Sponsor(s): SENATOR STEVENS

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to possession of an electronic smoking product or a product containing**
2 **nicotine by a minor and to selling or giving a product containing nicotine or an**
3 **electronic smoking product to a minor; relating to business license endorsements to sell**
4 **cigarettes, cigars, tobacco, products containing tobacco, electronic smoking products, or**
5 **products containing nicotine; and relating to citations for certain offenses concerning**
6 **tobacco, products containing nicotine, or electronic smoking products."**

7 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

8 *** Section 1.** AS 11.76.105 is amended to read:

9 **Sec. 11.76.105. Possession of tobacco, electronic smoking products, or**
10 **products containing nicotine by a minor.** (a) A person under 19 years of age may
11 not knowingly possess a cigarette, a cigar, tobacco, [OR] a product containing
12 tobacco, **an electronic smoking product, or a product containing nicotine** in this
13 state. This subsection does not apply to a person who is a prisoner at an adult

correctional facility.

(b) Possession of tobacco, an electronic smoking product, or a product containing nicotine by a minor is a violation.

* **Sec. 2.** AS 11.76.105 is amended by adding a new subsection to read:

(c) In a prosecution under (a) of this section for possession of an electronic smoking product or a product containing nicotine, it is an affirmative defense that the electronic smoking product or product containing nicotine possessed by the person under 19 years of age was intended or expected to be consumed without being combusted, and the electronic smoking product or product containing nicotine

(1) has been approved by the United States Food and Drug Administration for sale as a tobacco use cessation or harm reduction product or for other medical purposes;

(2) was being marketed and sold for the approved purposes; and

(3) was

(A) prescribed by a health care professional;

(B) given to the person by the person's parent or guardian;

(C) provided by a state-approved tobacco cessation program administered by the Department of Health and Social Services; or

(D) provided by a pharmacist to a person 18 years of age or older without a prescription.

* **Sec. 3.** AS 11.76.106(a) is amended to read:

(a) Except as provided under (b) of this section, a person may not sell cigarettes, cigars, tobacco, products [OR A PRODUCT] containing tobacco, electronic smoking products, or products containing nicotine unless the sale occurs in a manner that allows only the sales clerk to control access to the cigarettes, cigars, tobacco, products [OR PRODUCT] containing tobacco, electronic smoking products, or products containing nicotine.

* **Sec. 4.** AS 11.76.106(b) is amended to read:

(b) Subsection (a) does not apply if the sale

(1) is by vending machine as provided under AS 11.76.100(b) or 11.76.109(f);

(2) is a wholesale transaction, the person is licensed as a manufacturer or distributor under AS 43.50.010, and the sale occurs on premises where no retail transactions occur; or

(3) is by a retailer who sells primarily cigarettes, cigars, tobacco, **products** [OR A PRODUCT] containing tobacco, **electronic smoking products, or products containing nicotine** and who restricts access to the premises to only those individuals who are 19 years of age or older.

* **Sec. 5.** AS 11.76.107(a) is amended to read:

(a) A person commits the offense of failure to supervise a [CIGARETTE] vending machine if the person owns premises licensed as a beverage dispensary under AS 04.11.090 or licensed as a club under AS 04.11.110 or licensed as a package store under AS 04.11.150 and with criminal negligence fails to have an employee supervise a vending machine on those premises that dispenses cigarettes, cigars, tobacco, [OR] products containing tobacco, **electronic smoking products, or products containing nicotine** as required by AS 11.76.100(b)(1)(B) **and 11.76.109(f)(1)(B).**

* **Sec. 6.** AS 11.76.109(a) is amended to read:

(a) A person commits the offense of selling or giving **an electronic smoking product or** a product containing nicotine to a minor if the person

(1) negligently sells **an electronic smoking product or** a product containing nicotine to a person under 19 years of age; [OR]

(2) is 19 years of age or older and negligently exchanges or gives **an electronic smoking product or** a product containing nicotine to a person under 19 years of age;

(3) **maintains a vending machine that dispenses electronic smoking products or products containing nicotine; or**

(4) **holds a business license endorsement under AS 43.70.075 and allows a person under 19 years of age to sell an electronic smoking product or a product containing nicotine.**

* **Sec. 7.** AS 11.76.109(b) is amended to read:

(b) The provisions of (a) of this section do not apply to the sale, exchange, or gift to a person under 19 years of age of **an electronic smoking product or** a product

1 containing nicotine that is intended or expected to be consumed without being
2 combusted if the electronic smoking product or product containing nicotine

3 (1) has been approved by the United States Food and Drug
4 Administration for sale as a tobacco use cessation or harm reduction product or for
5 other medical purposes;

6 (2) is being marketed and sold solely for the approved purposes; and

7 (3) is

8 (A) prescribed by a health care professional;

9 (B) given to a person by the person's parent or legal guardian;

10 (C) provided by a state-approved tobacco cessation program
11 administered by the Department of Health and Social Services; or

12 (D) provided by a pharmacist to a person 18 years of age or
13 older without a prescription.

14 * **Sec. 8.** AS 11.76.109(e) is amended to read:

15 (e) Selling or giving an electronic smoking product or a product containing
16 nicotine to a minor is a violation and, upon conviction, is punishable by a fine of not
17 less than \$1,000 [\$300].

18 * **Sec. 9.** AS 11.76.109 is amended by adding new subsections to read:

19 (f) Notwithstanding (a)(3) of this section, a person who maintains a vending
20 machine is not in violation of (a)(3) of this section if the vending machine is located

21 (1) on premises licensed as a beverage dispensary under AS 04.11.090,
22 licensed as a club under AS 04.11.110, or licensed as a package store under
23 AS 04.11.150, and is located

24 (A) as far as practicable from the primary entrance; and

25 (B) in a place that is directly and continually supervised by a
26 person employed on the licensed premises during the hours the vending
27 machine is accessible to the public; or

28 (2) in an employee break room or other controlled area of a private
29 work place that is not generally considered a public place and the room or area
30 contains a posted warning sign at least 11 inches by 8.5 inches indicating that
31 possession of electronic smoking products or products containing nicotine by a person

under 19 years of age without a prescription is prohibited under AS 11.76.109.

(g) The court shall forward a record of each person convicted under this section who holds a business license endorsement under AS 43.70.075, or who is an employee or agent of a person who holds a business license endorsement under AS 43.70.075, to the Department of Commerce, Community, and Economic Development.

* **Sec. 10.** AS 11.81.900(b) is amended by adding a new paragraph to read:

(67) "electronic smoking product" means

(A) an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device that is used to aerosolize and deliver nicotine, a synthetic of nicotine, or another substance that may cause an adverse effect on the person inhaling from the device; and

(B) a component, solution, alternative tobacco product, e-liquid, e-juice, vapor product, flavoring, or other related product of an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device of any size or shape used for, or to assist with, aerosolizing and inhaling chemical substances that may cause an adverse effect on human health.

* **Sec. 11.** AS 43.50.070(a) is amended to read:

(a) The department may suspend, revoke, or refuse to renew a license issued under this chapter (1) for a negligent violation of AS 11.76.100, 11.76.106, 11.76.107, **11.76.109**, or a violation of this chapter or a regulation of the department adopted under this chapter; (2) if a licensee ceases to act in the capacity for which the license was issued; or (3) if a licensee negligently sells tobacco or products containing tobacco to a person who is required to, but does not, hold a license endorsement under AS 43.70.075 or whose license endorsement under AS 43.70.075 has been suspended. A person whose license is suspended or revoked may not sell cigarettes or tobacco products, or permit cigarettes or tobacco products to be sold, during the period of the suspension or revocation on the premises occupied or controlled by that person. A disciplinary proceeding or action is not barred or abated by the expiration, transfer, surrender, renewal, or extension of a license issued under this chapter. The department

shall comply with the provisions of AS 44.62 (Administrative Procedure Act), except that a hearing officer of the department, rather than a hearing officer assigned under AS 44.62.350, may conduct hearings.

* **Sec. 12.** AS 43.50.105(b) is amended to read:

(b) A person who is licensed under this chapter may not ship or cause to be shipped cigarettes to a person in this state unless the person receiving the cigarettes

(1) is licensed under this chapter;

(2) holds a **business license** [TOBACCO] endorsement under AS 43.70.075;

(3) is an operator of a customs bonded warehouse under 19 U.S.C. 1311 or 19 U.S.C. 1555;

(4) is an instrumentality of the federal government or an Indian tribal organization authorized by law to possess cigarettes not taxed under this chapter; or

(5) is an individual 19 years of age or older receiving the cigarettes for personal consumption and the tax imposed on the cigarettes under this chapter has been paid.

* **Sec. 13.** AS 43.70.075(a) is amended to read:

(a) Unless a person has a business license endorsement issued under this section for each location or outlet in a location where the person offers tobacco products, **electronic smoking products, or products containing nicotine** for sale, a person may not sell or allow a vending machine to sell in its location or outlet cigarettes, cigars, tobacco, [OR OTHER] products containing tobacco, **electronic smoking products, or products containing nicotine** as a retailer at that location or outlet. Each endorsement required under this section is in addition to any other license or endorsement required by law. A person may not apply for an endorsement under this section for a location or outlet if an endorsement issued for the same location or outlet is currently suspended or revoked. An endorsement issued for a location or outlet to a person in violation of this subsection is void.

* **Sec. 14.** AS 43.70.075(d) is amended to read:

(d) If a person who holds an endorsement issued under this section, or an agent or an employee of a person who holds an endorsement issued under this section

acting within the scope of the agency or employment, has been convicted of violating AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109, the department shall impose a civil penalty as set out in this subsection. However, following a hearing under (m) of this section, and based on evidence admitted at that hearing concerning questions specified in (m)(4) and (6) of this section, the department may reduce by not more than 10 days a suspension under (1) of this subsection, or by not more than 20 days a suspension under (2) of this subsection, or increase by not more than 10 days a suspension under (1) of this subsection, or by not more than 20 days a suspension under (2) of this subsection. If a hearing is not requested, or if a hearing is requested and the department determines that the evidence admitted does not support increasing or decreasing the suspension, the department shall suspend the endorsement [FOR A PERIOD OF]

(1) for a period of 20 days and impose a civil penalty of \$1,000 [\$300] if the person has not been previously convicted of violating AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109 and is not otherwise subject to the sanctions described in (2) - (4) of this subsection;

(2) for a period of 45 days and impose a civil penalty of \$2,000 [\$500] if, within the 24 months before the date of the department's notice under (m) of this section, the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, was convicted once of violating AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109;

(3) for a period of 90 days and impose a civil penalty of \$4,000 [\$1,000] if, within the 24 months before the date of the department's notice under (m) of this section, the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, was convicted twice of violating AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109, or a provision of this section or a regulation implementing this section adopted under AS 43.70.090; or

(4) indefinitely [ONE YEAR] and impose a civil penalty of \$10,000 [\$2,500] if, within the 24 months before the date of the department's notice under (m) of this section, the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, was convicted three or more

times [THAN TWICE] of violating AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109.

* **Sec. 15.** AS 43.70.075(f) is amended to read:

(f) A person who holds a license endorsement issued under this section shall post on the licensed premises a warning sign as described in this subsection. A warning sign required by this subsection must be at least 8.5 [6] inches by 11 [18] inches and must read [, IN LETTERING AT LEAST 1.25 INCHES HIGH]: "The sale of electronic smoking products or products containing nicotine without a prescription or tobacco products to persons under age 19 is illegal." A person holding an endorsement issued under this section shall display the warning sign in a manner conspicuous to a person purchasing or consuming tobacco products, electronic smoking products, or products containing nicotine on the licensed premises. The department shall make available the [, WITHOUT CHARGE, FURNISH] warning signs required under this section to a person who holds an endorsement issued under this section or a person who requests the sign with the intention of displaying it.

* **Sec. 16.** AS 43.70.075(i) is amended to read:

(i) The commissioner or the commissioner of revenue may seize cigarettes, electronic smoking products, or products containing nicotine that do not comply with this section. After notice and an opportunity for a hearing, the commissioner or the commissioner of revenue shall destroy cigarettes, electronic smoking products, or products containing nicotine seized under this subsection.

* **Sec. 17.** AS 43.70.075(l) is amended to read:

(l) Notwithstanding (a) of this section, a person owning vending machines that offer tobacco products, electronic smoking products, or products containing nicotine for sale need obtain only one business license endorsement under this section even if the person has vending machines in more than one outlet or location in the state. The person who owns a vending machine that offers tobacco products, electronic smoking products, or products containing nicotine for sale and the person who owns the premises where the vending machine is located are both required to obtain a business license endorsement issued under this section. If the endorsement of the person owning the vending machine is suspended or revoked, the person may

not sell cigarettes, cigars, [OR OTHER] products containing tobacco, electronic smoking products, or products containing nicotine during the period of suspension or revocation through the use of vending machines at the location or outlet where the violation occurred. During the period of suspension or revocation, the person owning that vending machine may not use that machine to sell tobacco products, electronic smoking products, or products containing nicotine at another location or outlet.

* **Sec. 18.** AS 43.70.075(m) is amended to read:

(m) The department may initiate suspension of a business license endorsement or the right to obtain a business license endorsement under this section by sending the person subject to the suspension a notice by certified mail, return receipt requested, or by delivering the notice to the person. The notice must contain information that informs the person of the grounds for suspension, the length of any suspension sought, and the person's right to administrative review. A suspension begins 30 days after receipt of notice described in this subsection unless the person delivers a timely written request for a hearing to the department in the manner provided by regulations of the department. If a hearing is requested under this subsection, an administrative law judge of the office of administrative hearings (AS 44.64.010) shall determine the issues by using the preponderance of the evidence test and shall, to the extent they do not conflict with regulations adopted under AS 44.64.060, conduct the hearing in the manner provided by regulations of the department. A hearing under this subsection is limited to the following questions:

(1) was the person holding the business license endorsement, or an agent or employee of the person while acting within the scope of the agency or employment of the person, convicted by plea or judicial finding of violating AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109;

(2) if the department does not allege a conviction of AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109, did the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, violate a provision of (a) or (g) of this section;

(3) within the 24 months before the date of the department's notice under this subsection, was the person, or an agent or employee of the person while

acting within the scope of the agency or employment of the person, convicted of violating AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109 or adjudicated for violating a provision of (a) or (g) of this section;

(4) did the person holding the business license endorsement establish that the person holding the business license endorsement had adopted and enforced an education, a compliance, and a disciplinary program for agents and employees of the person as provided in (t) of this section;

(5) did the person holding the business license endorsement overcome the rebuttable presumption established in (w) of this section;

(6) within five years before the date of the violation that is the subject of the hearing, did the department establish that the person holding the business license endorsement

(A) previously violated (a) or (g) of this section;

(B) previously violated AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109 at a location or outlet in a location for which the person holds a business license endorsement, or had an agent or employee previously violate AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109; this subparagraph does not apply to a prior conviction that served to enhance a suspension period under (d)(2) - (4) of this section; or

(C) engaged at a location owned by the person in other conduct that was or is likely to result in the sale of tobacco, electronic smoking products, or products containing nicotine to a person under 19 years of age in violation of AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109.

* **Sec. 19.** AS 43.70.075(r) is amended to read:

(r) For purposes of this section, the sale of a product containing tobacco, electronic smoking product, or product containing nicotine by an agent or employee of a person who holds or is required to hold a business license endorsement under this section at the location or outlet in a location for which the endorsement was or was required to be issued is rebuttably presumed to have been a sale within the person's scope of agency or employment.

* **Sec. 20.** AS 43.70.075(t) is amended to read:

(t) Based on evidence provided at the hearing under (m)(4) - (6) of this section, the department may reduce the license suspension period under (d) of this section if the person holding the business license endorsement establishes that, before the date of the violation, the person had

(1) adopted and enforced a written policy against selling cigarettes, cigars, tobacco, [OR] products containing tobacco, electronic smoking products, or products containing nicotine to a person under 19 years of age in violation of AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109;

(2) informed the person's agents and employees of the applicable laws and their requirements and conducted training on complying with the laws and requirements;

(3) required each agent and employee of the person to sign a form stating that the agent and employee has been informed of and understands the written policy and the requirements of AS 11.76.100, 11.76.106, [AND] 11.76.107, and 11.76.109;

(4) determined that the agents and employees of the person had sufficient experience and ability to comply with the written policy and requirements of AS 11.76.100, 11.76.106, [AND] 11.76.107, and 11.76.109;

(5) required the agents and employees of the person to verify the age of purchasers of cigarettes, cigars, tobacco, [OR] other products containing tobacco, electronic smoking products, or products containing nicotine by means of a valid government issued photographic identification;

(6) established and enforced disciplinary sanctions for noncompliance with the written policy or the requirements of AS 11.76.100, 11.76.106, [AND] 11.76.107, and 11.76.109; and

(7) monitored the compliance of the agents and employees of the person with the written policy and the requirements of AS 11.76.100, 11.76.106, [AND] 11.76.107, and 11.76.109.

* **Sec. 21.** AS 43.70.075(v) is amended to read:

(v) Notwithstanding (d) of this section, in place of a hearing under (m) of this section, the department and the person holding the business license endorsement may

enter into a memorandum of agreement regarding the imposition of a suspension and civil penalties based on a violation of AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109. The memorandum of agreement must contain a provision that the person holding the business license endorsement admits or does not contest that a violation of AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109 occurred and accepts the imposition of suspension and civil penalty under this section. Based on the memorandum of agreement, the department may reduce the period of suspension. For violations involving AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109, the department may not reduce the period of suspension by more than 10 days under (d)(1) of this section or by more than 20 days under (d)(2) of this section. The department may not agree to a reduction in the period of suspension more than once in a 12-month time period for a location or outlet in a location for which the person holds a business license endorsement.

* **Sec. 22.** AS 43.70.075(w) is amended to read:

(w) For purposes of (m)(5) of this section, a conviction for a violation of AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109 by the agent or employee of the person who holds the business license endorsement is rebuttably presumed to constitute proof of the fact that the agent or employee negligently sold a cigarette, a cigar, or tobacco, [OR] a product containing tobacco, electronic smoking product, or product containing nicotine to a person under 19 years of age. The person who holds the business license endorsement may overcome the presumption by establishing by clear and convincing evidence that the agent or employee did not negligently sell a cigarette, a cigar, or tobacco, [OR] a product containing tobacco, electronic smoking product, or product containing nicotine to a person under 19 years of age in violation of AS 11.76.100, 11.76.106, [OR] 11.76.107, or 11.76.109 as alleged in the citation issued to the agent or employee. The presentation of evidence authorized by this subsection does not constitute a collateral attack on the conviction described in this subsection.

* **Sec. 23.** AS 43.70.075(x) is amended to read:

(x) Notwithstanding (d), (t), or (v) of this section, a period of suspension may not be reduced for a violation of AS 11.76.100(a)(4) or 11.76.109(a)(3).

1 * **Sec. 24.** AS 43.70.105(b) is amended to read:

2 (b) Notwithstanding an exemption provided by (a) of this section, a person
3 who sells cigarettes, cigars, tobacco, [OR OTHER] products containing tobacco,
4 electronic smoking products, or products containing nicotine as a retailer must
5 have a business license under AS 43.70.020 and a business license endorsement
6 required under AS 43.70.075.

7 * **Sec. 25.** AS 43.70.110 is amended by adding new paragraphs to read:

8 (6) "electronic smoking product" has the meaning given in
9 AS 11.76.900;

10 (7) "product containing nicotine" does not include a cigarette, a cigar,
11 tobacco, or a product containing tobacco.

12 * **Sec. 26.** AS 44.29.092 is amended to read:

13 **Sec. 44.29.092. Citation for certain offenses concerning tobacco, products**
14 **containing nicotine, or electronic smoking products.** A peace officer or an agent or
15 employee of the Department of Health and Social Services who is authorized by the
16 commissioner of health and social services to enforce this section may issue a citation
17 for a violation of AS 11.76.100, 11.76.106, [OR] 11.76.107, **or 11.76.109** if there is
18 probable cause to believe a person has violated AS 11.76.100, 11.76.106, [OR]
19 11.76.107, **or 11.76.109.**

20 * **Sec. 27.** The uncodified law of the State of Alaska is amended by adding a new section to
21 read:

22 **APPLICABILITY.** AS 11.76.105, as amended by sec. 1 of this Act, AS 11.76.106(a),
23 as amended by sec. 3 of this Act, AS 11.76.106(b), as amended by sec. 4 of this Act,
24 AS 11.76.107(a), as amended by sec. 5 of this Act, AS 11.76.109(a), as amended by sec. 6 of
25 this Act, AS 11.76.109(b), as amended by sec. 7 of this Act, AS 11.76.109(e), as amended by
26 sec. 8 of this Act, and AS 11.76.109(f), added by sec. 9 of this Act, apply to offenses
27 committed on or after the effective date of this Act.