

# **WEST VIRGINIA LEGISLATURE**

## **2025 REGULAR SESSION**

### **Introduced**

## **House Bill 2883**

By Delegates W. Clark, Funkhouser, Pritt, Stephens,  
Shamblin, Ferrell, Chiarelli, and Hite

[Introduced February 24, 2025; referred to the  
Committee on Health and Human Resources then the  
Judiciary]

A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article designated §16-9H-1 and §16-9H-2, relating to the creation of an ENDS product directory; regulating the distribution and sale of ENDS products sold for retail sale; requiring manufacturers to apply for market authorization from the United States Food and Drug Administration prior to the sale of ENDS products; providing manufacturers notice and the opportunity to be heard before removal from the directory; prohibiting the sale in this state of ENDS products not listed on the directory; requiring unannounced compliance checks for retailers and wholesalers of ENDS products; prescribing fines and penalties; requiring foreign manufacturers to designate an agent for service of process; designating the Secretary of State as an agent for service of process for resident manufacturers; and providing enforcement and rulemaking authority to the Alcohol Beverage Control Administration Commissioner.

*Be it enacted by the Legislature of West Virginia:*

<b>ARTICLE</b>	<b>9H.</b>	<b>ENDS</b>	<b>Product</b>	<b>Usage</b>	<b>Restrictions.</b>
<b>§16-9H-1.</b>					<b>Definitions.</b>

For purposes of this article only:

"ENDS product":

(1) Means any non-combustible product that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, to produce vapor from nicotine in a solution;

(2) Includes a consumable nicotine liquid solution suitable for use in an ENDS product, whether sold with the product or separately; and

(3) Does not include any product regulated as a drug or device under Chapter V of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. §§ 351 et seq.).

"Commissioner" means the Alcohol Beverage Control Administration Commissioner.

"FDA" means "United States Food and Drug Administration".

"Timely filed premarket tobacco product application" means an application pursuant to 21 U.S.C. § 387j for an ENDS product containing nicotine derived from tobacco marketed in the United States as of August 8, 2016, that was submitted to the FDA on or before September 9, 2020, and accepted for filing.

**§16-9H-2. ENDS Product Certification and Directory.**

(a) By August 1, 2025, and annually thereafter, every manufacturer of an ENDS product that is sold for retail sale in West Virginia, whether directly or through an importer, wholesaler, distributor, retailer, or similar intermediary or intermediaries, shall execute and deliver to the commissioner a certification, under penalty of perjury on a form and in a manner prescribed by the commissioner, that the manufacturer is compliant with this chapter and that, for each ENDS product sold for retail sale in West Virginia:

(1) The manufacturer has received a marketing granted order for the ENDS product from the FDA pursuant to 21 U.S.C. § 387j;

(2) The manufacturer submitted a timely filed premarket tobacco product application for the ENDS product to the FDA pursuant to 21 U.S.C. § 387j, and the application either remains under review by the FDA or has received a denial order that has been and remains stayed by the FDA or court order, rescinded by the FDA, or vacated by a court; or

(3) The manufacturer is not required to submit an additional marketing granted order or premarket tobacco product application for the ENDS product because the ENDS product merely reflects changes to the name, brand style, or packaging of an ENDS product that is covered under paragraph (1) or (2).

(b) The certification form shall separately list each brand name, category (e.g., e-liquid, power unit, device, e-liquid cartridge, e-liquid pod, disposable), product name, and flavor for each ENDS product that is sold in West Virginia.

(c) Each annual certification form shall be accompanied by:

(1) A copy of (i) the marketing granted order issued by the FDA pursuant to 21 U.S.C. Section 387j; (ii) a copy of the acceptance letter issued by the FDA pursuant to 21 U.S.C. § 387j for a timely filed premarket tobacco product application; or (iii) a document issued by FDA or by a court confirming that the premarket tobacco product application has received a denial order that has been and remains stayed by FDA or court order, rescinded by FDA, or vacated by a court; and

(2) A payment of \$100 for each ENDS product each time a manufacturer submits an annual certification form for that ENDS product.

(d) The information submitted by the manufacturer pursuant to subsection (c)(1) of this section shall be considered confidential commercial or financial information for purposes of §29B-1-1 to §29B-1-7. The manufacturer may redact certain confidential commercial or financial information provided under subsection (c)(1). The commissioner may not disclose this information except as required or authorized by law.

(e) A manufacturer required to submit a certification form pursuant to this section shall notify the commissioner within 30 calendar days of any material change to the certification form, including the issuance or denial of a marketing authorization or other order by the FDA pursuant to 21 U.S.C. § 387j, or any other order or action by the FDA or any court that affects the ability of the ENDS product to be introduced or delivered into interstate commerce for commercial distribution in the United States.

(f) Starting October 1, 2025, the commissioner shall maintain and make publicly available on the commissioner's official website a directory that lists all ENDS product manufacturers and ENDS products (including brand names, categories e.g. e-liquid, e-liquid cartridge, e-liquid pod, disposable), product names, and flavors for which certification forms have been submitted and approved by the commissioner and shall update the directory at least monthly to ensure accuracy. The commissioner shall establish a process to provide licensed retailers, distributors, and wholesalers notice of the initial publication of the directory and changes made to the directory in the prior month.

47           (g) No manufacturer or such manufacturer's ENDS products shall be included or retained  
48 in the directory if the commissioner determines that any of the following apply:

49           (1) The manufacturer failed to provide a complete and accurate certification as required by  
50 subsection (a);

51           (2) The manufacturer submitted a certification that does not comply with the requirements  
52 of subsections (b) and (c); or

53           (3) The manufacturer failed to include with its certification the payment required by  
54 subsection (c)(2).

55           (4) The manufacturer sold ENDS products in West Virginia required to be certified under  
56 this act during a period when either the manufacturer or the ENDS product had not been certified  
57 and listed on the directory; or

58           (5) The information provided by the manufacturer in its certification is determined by the  
59 commissioner to contain false information or contains material misrepresentations or omissions.

60           (h) The commissioner shall provide manufacturers notice and an opportunity to cure  
61 deficiencies before removing manufacturers or ENDS products from the directory.

62           (1) The commissioner may not remove the manufacturer or its products from the directory  
63 until at least 30 business days after the manufacturer has been given notice of an intended action  
64 setting forth the reasons therefor. Notice shall be sufficient and be deemed immediately received  
65 by a manufacturer if the notice is sent either electronically or by facsimile to an electronic mail  
66 address or facsimile number, as the case may be, provided by the manufacturer in its most recent  
67 certification filed under subsections (b) and (c) of this section.

68           (2) The ENDS product manufacturer shall have 15 business days from the date of service  
69 of the notice of the commissioner's intended action to cure the deficiencies or otherwise establish  
70 that the ENDS product manufacturer or its ENDS products should be included in the directory.

71           (3) Retailers shall have 30 calendar days following the removal of a manufacturer or its  
72 ENDS products from the directory to sell such ENDS products that were in the retailer's inventory  
73 as of the date of removal.

74           (4) After 30 calendar days following removal from the directory, the ENDS product of a  
75 manufacturer identified in the notice of removal and intended for sale in West Virginia are subject  
76 to seizure, forfeiture, and destruction by the commissioner, Department of Revenue, the Attorney  
77 General's office, or any state or local law enforcement agency in the state, and may not be  
78 purchased or sold for retail sale in the West Virginia. The cost of such seizure, forfeiture, and  
79 destruction shall be borne by the person from whom the ENDS products are confiscated, except  
80 that no ENDS products may be seized from a consumer who has made a bona fide purchase of  
81 such ENDS products. The commissioner, the Department of Revenue, the Attorney General's  
82 office, or any state or local law enforcement agency in the state may store and dispose of the  
83 seized ENDS products as appropriate, in accordance with federal, state, and local laws pertaining  
84 to storage and disposal of such ENDS products.

85           (i)(1) Except as provided in paragraphs (2) and (3) of this subsection, beginning October 1,  
86 2025, or on the date that the commissioner first makes the directory available for public inspection  
87 on its official website, whichever is later, ENDS products not included in the directory, may not be  
88 sold for retail sale in West Virginia, either directly or through an importer, distributor, wholesaler,  
89 retailer, or similar intermediary or intermediaries.

90           (2) Each retailer shall have 60 calendar days from the date that the commissioner first  
91 makes the directory available for inspection on its public website to sell ENDS products that were  
92 in its inventory and not included in the directory or remove those ENDS products from inventory.

93           (3) Each distributor or wholesaler shall have 60 calendar days from the date that the  
94 commissioner first makes the directory available for inspection on its public website to remove  
95 those ENDS products intended for sale in the state from its inventory.

(4) After 60 calendar days following publication of the directory, ENDS products not listed in the directory and intended for sale in West Virginia are subject to seizure, forfeiture, and destruction by the commissioner, the Department of Revenue, the Attorney General's office, or any state or local law enforcement agency in the state, and may not be purchased or sold for retail sale in the West Virginia. The cost of such seizure, forfeiture, and destruction shall be borne by the person from whom the ENDS products are confiscated, except that no ENDS products may be seized from a consumer who has made a bona fide purchase of such ENDS products. The commissioner, the Department of Revenue, the Attorney General's office, or any state or local law enforcement agency in the state may store and dispose of the seized ENDS products as appropriate, in accordance with federal, state, and local laws pertaining to storage and disposal of such ENDS products.

(j) The following penalties shall apply to violations of this section:

(1) A retailer, distributor, wholesaler, or importer who sells or offers for sale an ENDS product for retail sale in West Virginia that is not included in the directory shall be subject to a civil penalty of up to \$500 for each individual ENDS product offered for sale in violation of this section until the offending ENDS product is removed from the market or until the offending ENDS product is properly listed on the directory.

(i) For a second violation of this type within a 12-month period, the civil penalty shall be at least \$750 but not more than \$1,000 per ENDS product.

(ii) For a third violation of this type within a 12-month period, the civil penalty shall be at least \$1,000 but not more than \$1,500 per ENDS product.

(2) A manufacturer whose ENDS products are not listed in the directory and who causes the products that are not listed to be sold for retail sale in West Virginia, whether directly or through an importer, distributor, wholesaler, retailer, or similar intermediary or intermediaries, is subject to a civil penalty of \$10,000 for each individual ENDS product offered for sale in violation of this section until the offending ENDS product is removed from the market or until the offending ENDS

product is properly listed on the directory. In addition, any manufacturer that falsely represents any information required by a certification form shall be guilty of a misdemeanor for each false representation.

(3) In an action to enforce this article, the state shall be entitled to recover costs, including the costs of investigation, expert witness fees and reasonable attorney fees.

(4) A repeated violation of this section shall constitute a deceptive trade practice under §46A-6-104.

(k) Agent for service of process.

(1) A manufacturer not registered to do business in the state shall, as a condition precedent to having its name or its ENDS products listed and retained in the directory, appoint and continually engage without interruption a registered agent in this state for service of process on whom all process and any action or proceeding arising out of the enforcement of this section may be served. The manufacturer shall provide to the commissioner the name, address, and telephone number of its agent for service of process and shall provide any other information relating to its agent as may be requested by the commissioner.

(2) A manufacturer located outside of the United States shall, as an additional condition precedent to having its ENDS products listed or retained in the directory, cause each of its importers of any of its ENDS products to be sold in West Virginia to appoint, and continually engage without interruption, the services of an agent in the state in accordance with the provisions of this section. All obligations of a manufacturer imposed by this section with respect to appointment of its agent shall also apply to the importers with respect to appointment of their agents.

(3) A manufacturer shall provide written notice to the commissioner 30 calendar days prior to the termination of the authority of an agent appointed pursuant to paragraphs (1) and (2) of this subsection. No less than five calendar days prior to the termination of an existing agent appointment, a manufacturer shall provide to the commissioner the name, address, and telephone



number of its newly appointed agent for service of process and shall provide any other information relating to the new appointment as may be requested by the commissioner. In the event an agent terminates an agency appointment, the manufacturer shall notify the commissioner of the termination within five calendar days and shall include proof to the satisfaction of the commissioner of the appointment of a new agent.

(l) Each retailer, distributor, and wholesaler that sells or distributes ENDS products in this state shall be subject to at least two unannounced compliance checks annually for purposes of enforcing this section. Unannounced follow-up compliance checks of all noncompliant retailers, distributors, and wholesalers shall be conducted within 30 calendar days after any violation of this article. The compliance checks described in this subsection shall be performed by the commissioner or its designees, the Department of Revenue, the Attorney General's office, or any state or local law enforcement agency in the state. To the extent that a compliance check is not performed by the commissioner or its designees, but is performed by the Department of Revenue, the Attorney General, or state and local law enforcement, the results of such compliance checks shall be provided to the commissioner. The commissioner shall publish the results of all compliance checks at least annually and shall make the results available to the public on request.

(m) The commissioner may promulgate rules necessary to effect the purposes of this section.

(n) All fees and penalties collected by the commissioner pursuant to this section shall be used for administration and enforcement of this section.

(o) Starting January 31, 2026, and annually thereafter, the commissioner shall provide a report to the legislature regarding the status of the directory, manufacturers and ENDS products included in the directory, revenue and expenditures related to administration of this section, and enforcement activities undertaken pursuant to this section.

NOTE: The purpose of this bill is to create an ENDS product directory and regulating the distribution and sale of ENDS products sold for retail sale.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.