



VAPOR TECHNOLOGY ASSOCIATION

## FROM THE TRENCHES: VTA WEEKLY UPDATE

May 26, 2017



### BEFORE THE LONG MEMORIAL DAY WEEKEND CATCH UP ON SOME OF WHAT WE HAVE BEEN DOING IN THE PAST 2 MONTHS

VTA is implementing its multi-pronged strategy that involves, among other things, efforts directed at Congress, the Administration, the media, and various state legislatures. Here's a quick overview of just some of the things we've been up to in the past 2 months:

- Met with White House
- Met with HHS
- Delivered legal and policy brief to the Administration
- Conducted dozens of meetings on Capitol Hill
- Published [OpEd in The Hill](#)
- Led Price Letter campaign with other advocacy groups
- Directed grass roots/tops appropriations strategies in 11 states
- Grew Democratic support for Cole-Bishop in targeted states
- Killed 86% wholesale tax and licensure bill in **Utah** with USFA
- Killed 74% excise tax in **Montana** with MSFA
- Re-opened the **Indiana** vapor market to all vapor companies with ISFA
- Restored online sales / pre-empted local vape laws in **Iowa** with IFAST
- Stymied proposed 150% increase in **Louisiana** vapor tax with LAVA
- Neutered an online sales ban in **Maryland** with MVA
- Worked with Board of Equalization on **California** vapor tax with CSFO
- Stripped 69% vapor tax out of **Ohio** House Finance Bill with OHVTA
- Cleared 1st hurdle in eliminating the 40% tax in **Pennsylvania** with PVA
- Introduced responsible vapor licensure bill in **Illinois** with SFACOIL
- Conducted Saving Pennsylvania Vapor webinar
- Conducted webinar with guidance on the new Indiana vapor law we passed
- Conducted post-appropriations Federal Strategy webinar
- Drafted 50+ pieces of testimony for industry witnesses
- Held 50+ strategy calls with state leaders and lobbyists
- Conducted innumerable strategy calls with industry leaders and stakeholders
- Provided public affairs guidance to state leaders on press inquiries & releases



## THE FEDERAL FRONT

### MESSAGE DELIVERED! VTA MEETS WITH THE WHITE HOUSE

On May 5, 2017, in a first-of-its-kind meeting, VTA's team took the vapor industry's case directly to the White House. VTA met with senior leadership of the Domestic Policy Council (DPC), the Administration's health care policy leadership, as well as DPC staff. Leadership was fully engaged in our discussion and very interested in both the negative health and economic implications of the Deeming Regulation. We were impressed by their knowledge of our industry which enabled us to get into the details of why the current Deeming poses such a threat to our industry, why small businesses are being forced to close down, and why manufacturers simply cannot be asked to comply with PMTA requirements.



Also, we were able to explain why the FDA's recently announced 3-month delay (connected to the ongoing litigation) did nothing to protect companies being forced to spend millions of dollars to file paperwork in connection with draft PMTA guidance without knowing whether those applications would be reviewed, much less approved. Finally, we emphasized the importance of implementing a two-year delay so that we can quickly turn to changing the regulatory scheme to implement regulations that properly recognize the uniqueness of vapor products and the role they play in harm reduction. As follow up to our discussion, we have assembled legal, factual, and policy arguments and presented those to the White House in writing. Suffice it to say....message delivered.

### VTA MEETS WITH THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

Prior to the White House meeting, on April 24, 2017, VTA led the vapor industry's first meeting with HHS. Specifically, VTA met with senior leadership at the Department of Health and Human Services. We presented a strong and detailed case for why vape shops and manufacturers all across the country need relief from the current deeming regulation. In addition, we presented some of the significant positive scientific research that was not considered by FDA during the comment period of the deeming. Also, we took the opportunity to personally deliver to HHS senior staff the letter to Health and Human Services Secretary Tom Price which was signed by over 2,000 vapor business owners from all 50 states urging the agency to take immediate action to repeal, halt or dramatically delay the FDA's May 2016 Final "Deeming" Rule. In addition, we followed up by providing HHS leadership with additional information they requested during the meeting.



### NJOY FILES CITIZEN PETITION SEEKING EXTENSION OF PMTA DEADLINES; VTA AND ITS MEMBERS JOIN IN

On May 12, 2017, **NJOY** filed with the FDA a Citizen Petition pursuant to 21 C.F.R. §10.30. NJOY's Citizen Petition requests that the FDA issue a revised guidance document: (1) "extending the compliance periods for the filing of premarket submissions" to 24 months after the FDA issues the requested revised guidance; and (2) "that provides for the continued marketing of a product" for which a PMTA has been filed for the entire period of FDA application review (rather than the 12 months in current guidance). Sixteen companies and trade associations supported the petition, including **VTA** and five of its member companies -- **E-Alternative Solutions, Gaiatrend USA, Mystic Electronic Cigarettes, Nicopure Labs, and Turning Point Brands.**

FDA is required to open a docket to consider the Citizen Petition. That means everyone has an opportunity to comment on the requests made in the Citizen Petition. We are offering two links to make it easy to comment; one for businesses and one for consumers. Please choose the one that is appropriate for you and then follow the instructions.

[\*\*Businesses Comment Here!\*\*](#)  
&  
[\*\*Consumers Comment Here!\*\*](#)

Thank you to **NJOY** for its leadership on this issue!



### **DR. SCOTT GOTTLIEB'S FIRST ADDRESS TO FDA**

On May 15, 2017, FDA Commissioner Dr. Scott Gottlieb made his initial remarks to his agency in his first All Hands Meeting in which he noted the following: "We need to redouble efforts to help more smokers become tobacco-free. And, we need to have the science base to explore the potential to move current smokers - unable or unwilling to quit - to less harmful products, if they can't quit altogether. At all times, we must protect kids from the dangers of tobacco use."

Notwithstanding the fact that the FDA is required to implement science-based policies, Dr. Gottlieb's comments demonstrate his acknowledgment of a science-based approach to harm reduction policies, in stark contrast to what has led to the existing Deeming Regulation. You can read his full comments [here](#).

### **DEEMING REGULATION LITIGATION UPDATE**

Our industry has fully "lawyered-up" and those lawsuits already have consumed significant time and resources of the FDA, such that FDA's lawyers recently had to ask for additional time to respond pending motions resulting in the 90-day delay of all outstanding compliance deadlines. As everyone knows, lawsuits take time. Fortunately, the industry's lawyers have significantly advanced their cases and have grabbed the FDA's attention.



Here is a quick litigation recap: On May 10, 2016, the Deeming Regulation was published. Shortly after, at least five lawsuits were filed by experienced litigation firms with extensive FDA litigation experience. These lawsuits include:

May 10, 2016

*Nicopure Labs, LLC, et al., v. U.S. Food and Drug Administration*  
No. 1:16-CV-0878-ABJ - USDC District of Columbia 2016

May 19, 2016

*Lost Art Liquids, LLC v. U.S. Food and Drug Administration*  
No. 2:16-CV-3468 - USDC Central District of California 2016

June 20, 2016

*Right to Be Smoke Free, et al. v. U.S. Food and Drug Administration*  
No. 1:16-CV-01210 - USDC District of Columbia 2016

July 8, 2016

*Cyclops Vapor 2, LLC, et al. v. U.S. Food and Drug Administration*  
No. 2:16-CV-00556 - USDC Middle District of Alabama 2016

July 15, 2016

*Cigar Association of America, et al., v. U.S. Food and Drug Administration, et al*  
No. 1:16-CV-1460 - USDC District of Columbia 2016

On July 8, 2016, **Nicopure Labs** filed its Motion for Summary Judgment. On July 25, 2016, **Right to Be Smoke Free**, consolidated with the Nicopure case, filed its Motion of Summary Judgment. On August 16, 2016, the FDA filed its responses and Cross-Motion for Summary Judgment. On October 19, 2016, oral arguments were held in the consolidated case and the Court is currently considering its ruling on the competing motions. That ruling could be rendered any day.

On February 1, 2017, the **Cyclops Vapor** plaintiffs filed their Motion for Summary Judgment against the FDA. Interestingly, **in March 2017**, faced with having to respond to Cyclops' Motion, the **FDA's attorneys asked counsel for Cyclops Vapor for an additional 60 days to respond to the Motion because the FDA was *reconsidering its legal position in the litigation altogether***. Cyclops Vapor agreed.

Then, FDA's lawyers asked for more time. Cyclops Vapor opposed the second request on the grounds that vapor companies were being forced to comply with deeming regulation deadlines and could not delay the lawsuit further. So, the government attorneys announced that FDA would be issuing a 3-month deadline extension on all remaining deadlines so that it could reconsider its position in the case: "Due to the recent change in administrations, new leadership personnel at the Department of Health and Human Services seek additional time to more fully consider the issues raised in this case, and Defendants therefore respectfully request a 3-month extension of all pending deadlines." See, [Joint Motion to Amend Scheduling Order](#), May 1, 2017.

In their motion, the FDA also made the represented to the Court that it would "defer enforcement of all future compliance deadlines under the deeming rule for e-cigarette products for 3 months, and that it plans to issue guidance to that effect. Accordingly, Plaintiffs join in this motion." Later that day, the FDA issued its announcement that it was delaying all outstanding compliance deadlines by 90 days, and on May 10, 2017, **the FDA issued its revised guidance document formally extending all outstanding compliance deadlines by an additional 90 days.**

**Make no mistake: these industry lawsuits have the FDA's attention!**



## CONGRESSIONAL ROUND UP

### H.R. 1136: Deeming Regulatory Clarification Act Gains 61 Co-Sponsors

Congressmen Tom Cole (R-OK) and Sanford Bishop's (D-GA) bill that would change the predicate date and implement common sense regulations to further protect youth continues to gain co-sponsors. To date, the bill has gathered 61 co-sponsors, 7 of whom are Democrats. We need to continue to encourage Members of Congress to demonstrate their support for vapor by signing on as a co-sponsor

on this bi-partisan bill. **Businesses:** Please use all the tools on VTA's advocacy website [www.SaveVapor.org](http://www.SaveVapor.org) to send your Congressmen a message. **Consumers:** You can do the same thing by going to **CASAA's** advocacy website at [www.August8th.org](http://www.August8th.org).

### H.R. 2194 - Cigarette Smoking Reduction and Electronic Vapor Alternatives Act of 2017

Congressman Duncan Hunter's (R-CA) bill would impact how vapor products are regulated in the U.S. Congressman Hunter has been a long-time champion for the vapor industry, and we appreciate

his support. While a number of groups and companies, including VTA, have ongoing concerns with the bill, we will continue to work with his office on potential changes.

You can track both H.R. 1136 and H.R. 2194 and their co-sponsors at [www.Congress.gov](http://www.Congress.gov).

## TIME TO CATCH UP ON VTA'S INFORMATIVE WEBINARS. WATCH NOW!

**A New Day for Indiana Vapor!** Matthew Norris and Mike Leppert of the Indiana law firm Krieg DeVault, LLP, Amy Lane of the Indiana Smoke Free Alliance and Jake Butcher of VTA, on how we re-opened the State of Indiana to all vapor companies, what it means for your business, and how to do business in Indiana again. You can also click here to read the [ISFA and VTA Guidance on the new Indiana law](#).

**Saving Pennsylvania Vapor!** Holly Kinser and Beth Brennan of The Kinser Group, Jake Butcher of VTA, and PVA's Board of Directors on the Pennsylvania legislative landscape and how the lobbying team is driving passage of SB 508 and what is needed from Pennsylvania vapor businesses to get involved and finish this fight.

## THE STATE OF THE STATES

VTA State Affairs team is in full swing with its 20 independent state vapor associations; moving the vapor industry forward by defeating anti-vapor legislation while working to create positive vapor policy discussions. Through VTA's coordinated state affairs lobbying program, VTA has worked hand in hand with independent state vapor associations to defeat tax hikes, T21 bills, and other anti-vapor bills. Any vape shops or state associations needing or wanting assistance in fighting back at the state level should reach out to Jake Butcher, VTA's State Affairs Manager, at [jake@ilesq.com](mailto:jake@ilesq.com). Here are some recent success stories:



### **FSFA Stops Proposed Age to Vape Increase**

The **Florida Smoke Free Association** has had another successful legislative session. The Florida session ended with Tobacco 21 bills being defeated in both the Florida House and Senate. VTA is proud to be working with Robert Lovett and the entire FSFA team. However, the fight in Florida is not over. Like several other states, the T21 legislation is just the beginning of the fight to restrict vapor. [Join the](#)

[FSFA fight today!](#)

### **VTA Teams Up with LAVA to Stomp Out 150% Tax Increase**

On Friday, May 12, Louisiana was confronted with a bill posting for a hearing on a 150% tax increase the following Monday. That day, CASAA issued a Call to Action which generated more than 2,300 emails to the committee! On Saturday, at 6:00 p.m., VTA Board member Stacey Hamilton hosted a call with vapor advocates and the **Louisiana Vaping Association (LAVA)** and asked VTA to step up. Jake Butcher, VTA's State Affairs Manager, worked around the clock with LAVA to strategize what needed to be done to defeat the proposed tax increase that would have raised the tax on e-liquids from \$.05 cents to \$.13 cents per milliliter.



VTA worked with LAVA to strategize and draft testimony for the House Ways & Means committee which highlighted the negative impact the tax would have on Louisiana vapor businesses, their employees, and customers. The testimony also told the story of harm reduction and provided

committee members with the truth about the benefits of vapor products. In addition, VTA created a call to action for LAVA to push out which generated another 800 emails being sent between Sunday and Monday morning to Ways and Means Committee members. Thanks to Chris Flowers, LAVA, and all those who worked to defeat the proposed increase in the Louisiana vapor tax.



### **MVA Secures Legislative Victory - Twice in One Bill!**

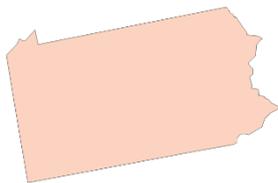
This session, VTA helped the **Maryland Vapor Alliance** get up and running and boy did they take off. MVA negotiated what was a terrible licensing bill into something that was reasonable. But, the real interesting work happened after session. After a poisonous midnight amendment injected an online sales ban into the bill, MVA and its lobbying team **Alexander & Cleaver** and

VTA went to work. In what can only be called an elegant lobbying solution, MVA, VTA and **CASAA** pushed for a gubernatorial veto.

At the same time, MVA began working out a solution in which the legislative leaders announced that inclusion of the online sales ban was a mistake and that they would introduce legislation immediately in 2018 to repeal it. With that understanding, [Maryland Comptroller Peter Franchot announced in this letter](#) that he would NOT to enforce the online sales ban when it takes effect this year. This professional strategy and advocacy completely eliminated the need for costly and time consuming litigation. Congrats to Matt Milby and the MVA Board! If you haven't already, [you need to join MVA](#) to keep Maryland vapor safe.

### **OHVTA Wins the First Round of Ohio Tax Fight; Closing Strong**

The **Ohio Vapor Trade Association** got Governor Kasich's 69% tax removed from the House appropriations bill! However, there is still a possibility that such a tax could be added in the Senate. James Jarvis, Frank Cahall, and the OHVTA Board have been working the halls of the state capitol with their lobbyist Charlotte Hickcox of **ZHF Consulting**. If you are an Ohio vapor business owner, [act now to ask the Senate to remove any vapor tax from consideration in the Ohio budget!](#) So far, more than 500 emails have been sent to the Senate Finance Committee.



### **The Pennsylvania Fight Continues!**

Pennsylvania has begun discussions on the next fiscal year budget, and the **Pennsylvania Vape Association** needs your help. Senator Camera Bartolotta has asked Pennsylvania vapor businesses to participate in the Pennsylvania Vape Association survey which will provide PVA's lobbying team with a sense of the current Pennsylvania market on a per ML basis. [Check out](#)

[Sen. Bartolotta's great Facebook video](#) that she posted advocating for PVA. If you haven't already, [TAKE THE SURVEY](#).

VTA and PVA want to thank all the vape shops that have completed the survey! We also want to thank our members and other manufacturers and wholesalers which stepped up and provided information needed by the lobbying team to advocate for eliminating the 40% wholesale tax. Thanks to **Charlie's Chalk Dust, Cosmic Fog, International Vapor Group, Liquid Soul, NJOY, Space Jam, Vapor Beast** and **Wolfpack Wholesale** for answering the call!

Most importantly, if you own a shop in PA, now is the time to step up and save PA vapor. [You can do so by joining PVA here!](#)

## TSFA Throws a Legislative Shut Out



One of the strongest indicators of success at the state level is the ability to keep any hostile bills from materially advancing, much less passing. This year, the **Tennessee Smoke Free Association** did just that. Congrats to Dimitris Agrafiotis, Erica Bell Vick and the entire lobbying team at **Bass & Berry** for another strong session. To stay up to date and join TSFA

visit <http://tnsmokefree.org>

## NOW IS THE TIME TO JOIN VTA!

As you can see from the foregoing, VTA is set up for success. We have an outstanding Board of Directors comprised of vapor manufacturers and retailers who have deep FDA and industry experience, we have a bi-partisan team of five lobbyists, known as the vapor lobbyists, on Capitol Hill, we have a bi-partisan public affairs team who are essential to messaging, and we have a State Affairs Manager (also a state lobbyist/lawyer) who is in constant touch with state vapor leaders and their lobbyists.

Our members get access to these professionals and lots of meaningful guidance on all the federal and state regulatory and strategic issues affecting our industry. And, if ever you want to get me on the phone, here's the number: 312-498-6060.

In short, if you like what you read in this update and if you want to be a part of securing our industry's future, then join us and the hundreds of other companies we are proud to call VTA Members today! All you need to do is fill out this [VTA Membership Application](#) and return it to me.

To learn more, check us out at [www.vaportechnology.org](http://www.vaportechnology.org) and [www.SaveVapor.org](http://www.SaveVapor.org). And, don't forget to follow us on [Facebook](#) and [Twitter](#).

Finally, if you've made it this far, I want to personally thank you for reading such a long update.

More importantly, on behalf of VTA, we honor and thank all veterans who gave their lives defending our country, as well as those veterans and veteran-owned vapor companies who continue to defend our industry.

A handwritten signature in black ink, appearing to read 'Tony'.

Tony Abboud  
Executive Director  
Vapor Technology Association