

Non-Smokers' Rights Association

Recommended Amendments to Bill S-5, *An Act to amend the Tobacco Act and the Non-smokers' Health Act and to make consequential amendments to other Acts*

Tobacco Products

1. Simplify the process to amend tobacco regulations under the Act

Remove the current requirement in s.42.1 of the Act that proposed regulations be tabled in the House of Commons and be submitted to the Health Committee for potential approval.

Rationale: Very few other federal statutes contain such a provision, and Bill S-5 contains no similar requirement for the amending of vaping product regulations. This provision can slow regulatory action considerably, when the process for introducing new or amending existing regulations under the *Tobacco Act* already takes at least 18 months. The additional requirement that draft regulations be laid before the House adds at minimum an additional two months to the timeline for regulatory review and many more months during Parliamentary recesses and election periods. Health Canada needs to be able to respond with speed in dealing with the tobacco epidemic, in particular given the current rapid pace of change in the tobacco market, with the development and launch of a wide range of new tobacco products. As one example, the current timeline for government-mandated warnings to be required on the new heated tobacco product, iQOS, introduced last year by Rothmans, Benson & Hedges is 2021 or 2022. This means that as a result of the existing cumbersome process for amending regulations, iQOS will be on the market for 4-5 years with no Health Canada warning!

2. Expand the definition of tobacco product in the *Tobacco Act* to close loopholes

Amend definition of “tobacco product” to cover herbal shisha and “papers, tubes and filters” regardless of what product they are used with, by amending clause 3(1) of S-5, pp 1-2 (section 2 of TA), as follows:

“tobacco product” means, with the exception of cannabis, any substance whose primary purpose is to be burned or heated to produce vapours, gases, or smoke intended for inhalation, and includes but is not limited to a product made in whole or in part of tobacco, including tobacco leaves and any extract of tobacco leaves, non-tobacco herbal shisha, and other plant material or oils. It also includes papers, tubes and filters and any other devices of that nature that are put to one’s mouth to inhale any substance that may or may not contain nicotine, and any other product or class of product considered to be tobacco under a government regulation.” (Adapted from Quebec Bill 44 and the Ottawa Water Pipes in Public Places and Workplaces Bylaw)

Rationale: The changes to the definition of “tobacco product” would close existing gaps and help ‘future-proof’ the legislation. There is a need to regulate non-tobacco herbal products intended for waterpipe smoking, with respect to advertising/promotion, packaging and labelling, sales to minors, flavours, and other measures. The use of what is ostensibly ‘herbal’ (i.e., non-tobacco) shisha has been an increasing problem over the past decade, whereby hookah lounges, bars, and restaurants have

circumvented smoking bans by claiming the shisha being used contains no tobacco. Enforcement operations have demonstrated that in the vast majority of cases, the preparations did in fact contain tobacco.

The amendment also includes language that is broad enough to cover innovative new products that, for example, do not contain tobacco but also do not fit the definition of vaping product. The amendment ensures that a narrow definition ("used for the smoking of tobacco products") does not serve as a loophole to circumvent tobacco control measures, such as a ban on flavourings in papers, tubes, and filters.

3. Ban the use of waterpipes and heated tobacco products where smoking is banned

Amend definition of "smoke" in NSHA to cover the use of waterpipes and new products, including heated products, etc.

Amend clause 81 of S-5, p 47 (section 82(2) of NSHA), as follows:

"'smoke' means, with the exception of cannabis, to smoke, inhale or exhale smoke from, burn, carry, hold or otherwise have control over a lit or heated tobacco or vaping product or other device that burns or heats tobacco or another substance that is intended to be smoked or inhaled" (Adapted from the NS Smoke-Free Places Act).

Rationale: Bill S-5 amends the *Non-Smokers' Health Act* to include a ban on vaping in places where smoking is banned under the Act. Given the much broader range of products now available than when the NSHA was passed and the variety of products under development, it is an opportune time to ensure that workers remain assured of clean indoor air in the workplace, by banning the use of a wide range of smoking-related products, including heated tobacco products and waterpipes.

4. Make all information disclosed by companies to the Health Minister also available to the public, unless prohibited by the regulations, i.e., reverse the onus regarding public disclosure of company information provided to the government

Amend clause 9 of S-5, p 6 (section 6.1 of TA), as follows:

"Every manufacturer shall make available to the public, in the prescribed form and manner and within the prescribed time, unless otherwise exempted by the regulations, information that is supplied to the Minister about tobacco products and their emissions, as well as information about expenditures and activities related directly or indirectly to influencing public health policy related to tobacco, including any funding provided to third parties."

Amend clause 11(6) of S-5, p 7 (subsection 7(d.02) of TA), as follows:

"(d.02) prescribing exempting, for the purposes of section 6.2, information that the Minister must make available to the public"

Rationale: This amendment would provide greater public access to industry information, in keeping with Canada's obligation as a Party to the Framework Convention on Tobacco Control to ensure that industry information provided to governments is transparent and accurate. Furthermore, the amendment would provide much greater transparency regarding industry efforts to influence tobacco control policies by

requiring disclosure not only of activities and expenditures related directly to their own lobbying efforts but also of all funding provided to other organizations regardless of its nature and intent, whether a charitable donation or a membership fee in an association that seeks to influence government policies, some of which are of interest to tobacco companies.

5. Expand regulatory authority to help future-proof the legislation

Establish regulatory authority to require health warnings on certain tobacco products, such as cigarettes and heat-not-burn products, and on waterpipes

Amend clause 20(1) of S-5, p 13 (section 15(1) of TA), by replacing line 34 with the following:

“No manufacturer or retailer shall sell a tobacco product or a waterpipe unless the product and the package containing it displays ...”

Amend clause 22 of S-5, p 15 (subsection 17(a) of TA), by adding the following to line 26:

“(a) respecting the information that must appear on tobacco products and tobacco product packages”

Rationale: Bill S-5 provides regulatory authority to require warnings directly on vaping products. Given the much greater health risks from use of tobacco products, similar regulatory authority should also apply to tobacco products. Warnings on cigarettes themselves and on “other instruments, such as those used for waterpipe smoking” are recommended in Guidelines to implement Article 11 (tobacco packaging and labelling) under the WHO Framework Convention on Tobacco Control. Moreover, the advent of innovative new tobacco products, such as the iQOS heat-not-burn system, justifies securing this regulatory authority as a means of helping to ensure that the law is responsive to future developments. Recent research in New Zealand provides further support for the idea of requiring warnings on cigarettes; the research shows that cigarette sticks with health warnings or in unattractive colours enhance the effects of the health warnings on packaging and make smoking less appealing. Waterpipe use has been growing in popularity among youth and young adults in Canada. Because it is often done in social settings as part of a group, waterpipe smokers often do not see the package containing the waterpipe (tobacco) product that bears a health warning.

Tobacco and Vaping Products

6. Prohibit all lifestyle advertising of tobacco products and vaping products

Delete the exceptions that permit lifestyle advertising of vaping products in places off limits to minors and in publications addressed and sent to a named adult

Amend clause 36 of S-5, p 21 (section 30 of TA), by deleting (2)(a) and(2)(b) of 30.2, as follows:

“30.2(2) Subject to the regulations, a person may promote a vaping product, a vaping product related brand element or a thing that displays a vaping product-related brand element by means of lifestyle advertising that is in

(a) a publication that is addressed and sent to an adult who is identified by name; or

(b) places where young persons are not permitted by law.”

Rationale: This amendment would remove the provision that allows vaping product lifestyle advertising in bars and casinos and in publications sent to a named adult. Nicotine is an addictive drug; it should not be promoted to non-smokers and should not be associated with fashion, glamour, status, femininity, etc. This is especially the case in bars and casinos, where the consumption of alcoholic beverages may mean that individuals have reduced inhibitions.

Prohibit lifestyle advertising of tobacco products directed at growers, manufacturers, distributors and retailers

Repeal the provision that says restrictions on promotion are not applicable to promotions directed at growers, manufacturers, distributors, and retailers.

Amend clause 23(2) of S-5, p 16 (18(2)(c) of TA) by adding subclause (2.1), as follows:

“(2.1) Paragraph 18(2)(c) is repealed: a promotion by a tobacco grower or a manufacturer that is directed at tobacco growers, manufacturers, persons who distribute tobacco products or retailers but not, either directly or indirectly, at consumers.”

Prohibit lifestyle advertising of vaping products directed at manufacturers, distributors, and retailers and create regulatory authority to further control promotion within the vaping products trade

Amend clause 23(3) of S-5, p 16, (section 18 of TA), as follows:

“18(3)(c) With the exception of the ban on lifestyle advertising, and subject to this Act or the regulations, a promotion by a manufacturer that is directed at manufacturers, persons who distribute vaping products or retailers but not, either directly or indirectly, at consumers.”

Rationale: At present, promotions within the tobacco trade are completely exempt from the restrictions on advertising and promotion in the *Tobacco Act*, and lifestyle advertising is being used in trade publications. Bill S-5 contains a mechanism to require companies to report on promotions within the tobacco trade, but there is no mechanism to regulate such promotions. Lifestyle advertising undermines plain packaging by perpetuating brand imagery. Moreover, lifestyle advertising of a product that kills half its long-term users cannot be justified on any grounds. Likewise, lifestyle advertising of a highly addictive product (vaping products with nicotine) whose long-term risks to health have yet to be determined and quantified cannot be justified.

7. Prohibit brand stretching related to tobacco and vaping products

Prohibit tobacco branding on any product or service, including tobacco accessories, whether or not the product or service is appealing to children or associated with a way of life

Remove the exemption that allows tobacco brand elements to be used on a “thing/service” provided the thing/service is not associated with young persons, appealing to young persons, or associated with a way of life; and remove the exemption for a tobacco-branded accessory

Amend clause 34 of S-5, pp 19-20 (section 27 of TA), as follows:

“No person shall furnish or promote a tobacco product if any of its brand elements is displayed on a thing, other than a tobacco product or an accessory, or is used with a service, and (a) the thing or service is associated with young persons;

(b) there are reasonable grounds to believe that the thing or service could be appealing to young persons; or

(c) the thing or service is associated with a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.”

As a consequence, repeal subsection 26(1) of TA, as follows:

“Subject to the regulations, a manufacturer or retailer may sell an accessory that displays a tobacco product-related brand element.”

As a consequence, repeal section 28 of TA, as follows

“28(1) Subject to the regulations, a person may sell a tobacco product, or advertise a tobacco product in accordance with section 22, if any of its brand elements is displayed on a thing, other than a tobacco product or an accessory, or is used with a service, and the thing or service does not fall within the criteria described in paragraphs 27(a) to (c).

(2) Subject to the regulations, a person may promote a thing, other than a tobacco product or an accessory, that displays a tobacco product-related brand element, or a service that uses a tobacco product-related brand element, if the thing or service does not fall within the criteria described in paragraphs 27(a) to (c).”

Rationale: The tobacco industry is increasingly putting branded accessories in prominent displays on the checkout counter and behind the cash in retail outlets. Displays of branded lighters, matches, and other tobacco accessories in close proximity to the now-covered powerwalls of tobacco products serve to promote tobacco sales through product association. Branded accessories would also undermine tobacco plain packaging by maintaining and reinforcing brand imagery. This amendment would extend the partial restrictions on brand stretching to a complete ban, fulfilling Canada's legal obligation under the FCTC to implement a comprehensive ban on tobacco promotion and enhancing the effectiveness of plain packaging.

Prohibit vaping product branding on non-vaping products and services, whether or not they are appealing to children or associated with a way of life

Amend clause 40 of S-5, p 26 (section 30 of TA), by adding a new subsection 30.72:

“Trademarks on non-vaping products and services

30.72(1) No manufacturer or importer of vaping products shall

(a) apply a vaping product trademark, in any form in which it appears on packages of the product that are sold in Canada, to any product or service other than a vaping product or a package or container in which a vaping product is sold or shipped, or

(b) use the trademark for the purpose of advertising any product other than a vaping product or any service, activity or event.

Sale of non-vaping products and services

(2) No person shall sell or offer for sale or expose for sale any product or service, other than a vaping product or a package or container in which a vaping product is sold or shipped, that bears a trademark of a vaping product in any form in which it appears on packages of the vaping product that are sold in Canada.”

Rationale: This amendment would ban all brand-stretching of vaping products, such that vaping product brand names and logos would be prohibited on all consumer products (e.g., phone cases, t-shirts, caps, etc.) and services, except those directly related to vaping products. The goal of the legislation is to provide legal access to a less harmful nicotine alternative for adult smokers, while ensuring that youth

and non-smokers do not become enticed to develop a nicotine addiction. There is no justification for vaping product brand stretching in this regard, particularly given that brand stretching can be a powerful form of lifestyle advertising.

Vaping Products

8. Limit vaping product advertising to only information and brand preference advertising

Amend clause 36 of S-5, p 21 (section 30 of TA), by adding the following after line 25:

“Advertising

30.21 No person shall advertise a vaping product or a vaping product-related brand element unless the advertising is limited to information advertising or brand preference advertising.”

Rationale: Although Bill S-5 bans lifestyle advertising (except in places off limits to minors), there is no provision in the Bill that clarifies that only information and brand preference advertising are permitted. This amendment makes it explicit.

9. Strengthen restrictions on vaping product advertising and promotion, including the permitted locations for such advertising and promotion

As a minimum, provide safeguards to reduce the likelihood that vaping product promotions via telecommunications are accessed by young people, by amending clause 36, Division 2 (page 21), *Advertising appealing to young persons*, by adding 30.1(a), as follows:

30.1(a) – For greater certainty

No person shall promote a vaping product or a vaping product-related brand element by means of a telecommunication unless the person responsible for the content of the promotion has taken reasonable steps to ensure that the promotion cannot be accessed by a young person.

Rationale: Bill S-5 currently contains no restrictions on permitted locations of promotions, and the restrictions in the Bill on the promotion of vaping products are far weaker than those in the *Tobacco Act* for tobacco products. One of the stated purposes of the Bill is to protect young people and non-smokers from inducement to use vaping products. The current liberal promotional framework for vaping products undermines this goal.

In addition, *Bill C-45, The Cannabis Act*, provides greater restrictions on promotions via telecommunications to protect youth than does Bill S-5, despite significant parallels between cannabis products and vaping products with nicotine—both are addictive, both need to be kept out of the hands of youth, and both are currently illegal unless designated for medical/therapeutic purposes. Moreover, the target market for vaping products containing nicotine (adults who smoke) is much narrower than that for recreational cannabis (adults), justifying tighter restrictions on permitted promotion for vaping products than for cannabis products. Thus, in the interest of safeguarding youth, the restrictions on promotion in Bill S-5 should, as a minimum, be as stringent as those in Bill C-45.